DOI: 10.15691/0719-9112Vol10n2a8

# Technocrats and their Monopoly on Free Competition

## Los tecnócratas y su monopolio sobre la libre competencia

IGNACIO PERALTA FIERRO*

**Abstract**

In this article I will be looking for three things. First, to affirm the political nature of the application of the rules of free competition. Second, and counter to the aforementioned, to challenge the thesis that antitrust is a purely technical discipline, where there is no room for substantive considerations. Third, to draw attention to the risks of accepting the position that a purely technical antitrust regulation is even possible.

**Keywords:** *antitrust; purpose; technocracy; democracy*.

**Resumen**

En este artículo busco tres cosas. Primero, afirmar el carácter político de la aplicación de la normativa de libre competencia. Segundo, y como contrapartida de lo anterior, impugnar la tesis que afirma que el *antitrust* es una disciplina netamente técnica donde no hay cabida para consideraciones sustantivas. Tercero, llamar la atención sobre los riesgos de aceptar la postura de que es si quiera posible un *antitrust* que sea netamente técnico.

**Palabras clave:** *antitrust; finalidad; tecnocracia; democracia*.

## I. THE QUESTION REGARDING THE OBJECTIVE OF FREE COMPETITION AND ITS IMPORTANCE

I want to start by clarifying what I am trying and what I am not trying to demonstrate in this study. First, I will try to show that there are several objectives that may be pursued by the institutionality of free competition, and that choosing one of these is necessary and constitutes a political decision. Regarding what I do

* Universidad de Chile, Santiago, Chile (iperaltaf@gmail.com). ORCID: https://orcid.org/0000-0003-2873-3145. Article received on June 2, 2022 and accepted for publication on August 1, 2022. Translated by Beatriz Larraín.

How to cite this article:
PERALTA FIERRO, Ignacio (2022). "Technocrats and their Monopoly on Free Competition", *Latin American Legal Studies*, Vol. 10 Nº 2, pp. 416-469.

not seek to do, I do not seek to argue in favor of a certain conception of free competition, but rather to show the available options.

As Stucke says, the battle for free competition starts with its goals.[1] This is so for two reasons. First, by the way in which the *per se* rule and the rule of reason are applied. That distinction, which is repeatedly referred to in free competition law, relates to what has to be proven in order to sanction a particular conduct. The *per se* rule applies to generally anti-competitive behaviors that are sanctioned only for their occurrence. In contrast, the rule of reason applies to behaviors that could have both pro-competitive and anti-competitive effects. Thus, in order to sanction behavior that falls under the rule of reason, a certain conduct must fall within the catalog of prohibitions, but it must also be demonstrated that its execution, in balance, is more anti-competitive than competitive.

That said, it is currently claimed that the application of the *per se* rule is extremely restricted,[2] which means that it is the rule of reason that applies most of the time. This brings problems: if we assume that most behaviors are evaluated under the rule of reason, then what does it mean for something to be competitive or anti-competitive, is an inescapable question.[3] In this respect, as Black says, the rule of reason is analogous to the consequentialism of the act, since the legality of the behavior depends on its immediate or presumed consequences.[4] But the consequentialism of the act is highly indeterminate, so a key question is what is the relevant consequence, that is, what is considered anti-competitive.

A second reason why determining the objective of free competition is important, is the indeterminate language that antitrust rules typically have. Thus, the broad mandate and vague language of antitrust rules implies that their application depends on an underlying normative vision.[5]

However, much of our doctrine does not discuss what the purpose of the discipline is, which has led to a kind of deafening silence in the field. There are even those who claim that antitrust is a purely technical discipline, and that it has nothing

[1] STUCKE (2012), p. 558.

[2] GRUNBERG (2020), p. 7. See also GRUNBERG (2017), p. 18 and FIRST & WEBER (2013), p. 2568. I believe that this thesis does not follow from the literal wording (PERALTA (2022)), but from what I will explain below, the prevailing anti-formalism makes this thesis irrelevant.

[3] This has led certain authors like Blair and Sokol to argue regarding the objective of free competition, as only when we answer that question does the rule of reason become applicable. BLAIR & SOKOL (2012).

[4] BLACK (2005), p. 72.

[5] KHAN (2020), p. 1676.

to do with politics. Against this idea, in this study I will defend that antitrust is also a political discipline.

In this regard, it is important to consider the fact that after the reform made by Law 19,911, our law states that its objective is to defend free competition. At first glance, this concept would seem clear enough to deal with the aforementioned problems.

Thus, there are authors who, like Valdés, believe that there is a univocal answer regarding what free competition is, an answer that is obtained from purely semantic considerations, that is, definitional considerations. Valdés seeks to find "an essential real definition of free competition",[6] that is, a definition that "points to that which makes something what it is".[7] The problem is that free competition resists being defined in this way, because as we will see below, there are several functions that can be assigned to the system: history itself refutes the claim to have a univocal definition of free competition. Rather, there are different conceptions of what it means to protect free competition, and the choice of one of them is not something that is guided by semantic or definitional considerations, but by substantive (i.e., political) considerations.

To understand the above we can draw on Rawls' distinction between the concept of justice and its various conceptions. In discussing justice, Rawls assumes that we all share a concept of it, but that we disagree in our conceptions of it because we interpret this concept according to different principles.[8] The same is true in this context. Thus, there is a concept of free competition, which brings together several conceptions, and between these different conceptions there are differences that are due to the political elaboration of this concept.

Along these lines, the general concept of free competition means that the provision of economic goods must be governed by the market, being the intervention of the State one that occurs at discreet moments and that is justified in the common good. As Baker says, we are somewhere in the middle between direct regulation and laissez faire.[9]

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[6] VALDES (2013), p. 125

[7] VALDES (2013), p. 125. Valdés concludes that "free competition as a protected legal good seeks to harmonize the multitude of these freedoms of commercial competition existing in a civil society by way of limiting them to make them operational, and thus order them to the political common good". VALDES (2013), p. 153.

[8] RAWLS (2006), p. 19.

[9] BAKER (2013), p. 2183.

But while the concept of free competition somewhat delimits the discussion, it does not sufficiently determine the field of action of legal operators. This occurs, because the concept of free competition is too vague in itself to settle a legal problem. As Limbaugh says, the interpretation of antitrust rules is like the interpretation of constitutional provisions, since these rules were designed as a platform whose purpose was to be completed in the process of use and application.[10] And as in the case of fundamental rights, their implementation implies a political vision of their meaning.[11] To settle the interpretative problems mentioned above, we need a specific conception of the concept. But this conception will necessarily be political, since it has to do with the content that we assign to the "common good", by virtue of which, intervention in the market is justified. This political importance was perceived by Robert Bork, who stated that antitrust was not only a set of rules applicable to a sector of the economy, but "an expression of social philosophy, an educational force, and a political symbol of great power".[12]

In this regard, the different existing conceptions are recognized by comparative practice (as we will see below) and also by the Tribunal for the Defense of Free Competition (TDFC), who has said that the protection of free competition implies defending: allocative efficiency,[13] dynamic efficiency,[14] the opportunity to compete, [15] the competitive process,[16] or consumer welfare.[17]

That said, in this article I seek to enunciate the substantive arguments that exist in favor of each of the available conceptions, at the same time that I seek to demonstrate that when choosing one of these conceptions, one proceeds in political terms, fact which has been obscured by a technocratic argumentative practice.

However, I would like to make one last warning. I do not seek to affirm that in this discussion there are political objectives as opposed to economic objectives,

[10] LIMBAUGH (1953), p. 227.

[11] Atria explains this point by applying the distinction between concept and conceptions to fundamental rights in: ATRIA (2005), p. 330-332.

[12] BORK (1965), p. 364.

[13] Judgement of the Tribunal for the Defense of Free Competition (TDFC) N°132-2013 C°9. STDFC N° 92-2009 C° 9. STDFC N°88-2009 C°79, STDFC N°77-2008 C°10.

[14] STDFC N°166 2018 C°133.

[15] STDFC N°105-2010 C°19

[16] STDFC N°165-2018 C°150, STDFC N°102-2010 C°65, STDFC N°87-2009 C°15, Resolution of the TDFC, number 5.

[17] STDFC N°37-2011 number 297. STDFC N°43-2012 number 13.5.

(as Pifotsky[18]), and then defend the latter against economic objectives. This is because economic decisions are also political decisions,[19] at the same time that many political decisions have economic effects. That is why the distinction between political objectives and economic objectives does not hold.

## II. THE HISTORY OF FREE COMPETITION

As for the history of the discipline and the different objectives it has pursued, in our context Mario Ybar makes a clear synthesis. He places its origins in American law, specifically in the Sherman Act. According to Ybar, in this regulatory scheme there was a transposition of *Jeffersonian democratic ideals* into economic reality, which led to the need to erect a society of equal and independent producers as a way to avoid unequal distribution of wealth and the inherent corruption of political power that follows from economic concentration. Therefore, in its origins this regulation sought to protect political and economic freedom from economic concentration, which it did by promoting more atomized markets.[20] Thus, the legislators who enshrined the Sherman Act had the express political goal of preventing economic autocracy.[21]

Modernly, this viewpoint has been defended by Tim Wu, who seeks to demonstrate how *antitrust* laws may be recovered and updated to face the challenge to democracy that consists in the industry having greater influence over the government than the citizens themselves.[22] Thus, Wu's thesis is that controlling private power is indispensable for a functioning democracy.[23]

Regarding this position, the most skeptical reader might believe that this is nothing more than the *ex post* rationalization of populist sentiments present at the time of the creation of antitrust regulations (populist sentiments that are nothing more than an expression of resentment towards big business[24]). Therefore, I think

[18] PIFOTSKY (1979).

[19] Accepting this distinction implies giving in to the technocratic narrative that there are areas of *public policy* totally detached from political decisions.

[20] YBAR (2009), p. 1.

[21] KHAN (2020), p. 1659. Therefore, in defending the law that bears his name, John Sherman advocated this by stating that "if we are not going to accept a King as sovereign, we will not accept a King on the production, transportation and sale of social needs. If we don't submit to an emperor, we shouldn't submit to a trade autocrat either."

[22] WU (2018a), p. 10.

[23] WU (2018a), p. 12.

[24] Thus, González calls this "Small Is beautiful", and believes that it is a populist vision because this resentment of the size of companies and economic concentration "has as a correlate a preference for

it is worth referring to similar concerns that an author who almost everyone would be willing to take seriously also shares: John Rawls. I would like to concentrate on his reasons for defending property-owning democracy, a regime in which underlying institutions seek to disperse wealth and ownership over capital in order to prevent a small group of society from controlling the economy, and indirectly, political life.[25] This is so because Rawls believed that the prevailing economic and social inequalities are currently so great that those with greater wealth control political life and create legislation and social policies that advance their interests.[26] With this type of democracy, Rawls sought to safeguard the just value of political equality and respond to the objection that equal political freedom in a democratic state is only formal.[27]

In that regard, Rawls does not mention the rules of free competition. Rather, his focus is on preventing a small social group from having a monopoly on the means of production, [28] not on preventing a firm from having a monopoly over a certain market (in conceptual terms, there could be a monopoly owned by all citizens). However, if Rawls' goal is to achieve the just value of political freedom, he should also push for economic de-concentration, for a company, however dispersed its property, may still have undue political power. [29] As Pifotsky says, an excessive concentration of economic power leads to anti-democratic political pressures.[30] Taking charge of the above would be consistent with Rawls' attempt to make politics independent of economic power in order to improve the conditions of a deliberative democracy.[31]

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small companies, which would enjoy a right to remain in the market, regardless of their competitive potential". GONZALEZ (2020), p. 3-4. This reductionist view is striking, as this same author admits that the key issue is power, and that "[t]he excess of economic power derived from owning large corporations grants equivalent political power, which is harmful to democracy." GONZALEZ (2020), p. 5.

[25] RAWLS (2001), p. 139.

[26] RAWLS (2001), p. 148.

[27] RAWLS (2001), p. 139.

[28] AGUAYO (2022), p. 106.

[29] By way of analogy, in a modern democracy we all have the same voting power to elect our representatives, but that does not mean that our representatives may have excessive political power and make wrong decisions. It could be that whoever runs a company, no matter how dispersed it is, has too much power if it is the only player in the market.

[30] PIFOTSKY (1979), p. 1051.

[31] RAWLS (2001), p. 150. This could be inefficient in extreme cases, such as when one is facing natural monopolies, where other solutions could be justified. If anything, there are good reasons to think that concentration is in fact inefficient (ACCORSI, 2021). In addition, progress in the de-

But the initial enshrinement of competition laws did not seek only this. They also sought to strengthen the competitive process, and for everyone to have a fair opportunity to compete in the market. Along these lines, there are those who believe that what should be protected is the competitive process, because this would promote a series of values that are not limited to maximizing consumer welfare or efficiency. As Khan says, competition refers to a process, and efficiency, by contrast, refers to an economic outcome and says nothing about how it is achieved.[32] The assumption of this model is that a competitive structure is important to safeguard the proper development of the economy. As Odudu says, an uncertain environment provides the impetus for *competitive struggle*.[33] The above, because the performance of a market is a function of its institutional constraints, since rules define the opportunities that exist in an economy and changing them leads to a change in the results.[34] Furthermore, this is not because of the illusion that one can perfectly predict market results. Rather, it has to do with regulating the underlying market conditions. As Zäch and Künzler say,

> If competition is a process of discovery, then, by definition, the results of this discovery are not predictable (...) The lesson that follows from this is that the law of free competition should not be designed to evaluate future market outcomes, which cannot be done reliably, but the preconditions of competition must be protected.[35]

concentration of markets does not imply advancing towards total de-concentration where inefficient competitors are protected, but it means moving towards a de-concentration where the political power of companies decreases considerably. In addition, as Rawls says, justice is the first virtue of social institutions, so the rights guaranteed by it are not subject to political haggling or the calculation of social interests. RAWLS (2006), p. 17). This is why it would be irrelevant if a slave system were found to be more efficient. Similarly (and keeping proportions), if it were believed that dispersing property is the only way to achieve full democracy, efficiency considerations would take a back seat. Moreover, as Stucke says, once the basic needs of a person are covered, greater wealth does not have great impact on his or her well-being STUCKE (2012), p. 600.

[32] KHAN (2019), p. 968.

[33] ODUDU (2006), p. 83.

[34] STUCKE (2012), p. 598. Furthermore, advocating for the protection of the competitive process has a major impact on the way the rules are applied because if what is protected is a process, this makes the antitrust regulations close to "the rules of the game, and makes the operators and judges arbitrators who sanction fouls". WU (2018b). p. 2. On the other hand, it is worth noting that under this theory the competitive process is defended as an end in itself, there are also instrumental reasons to defend this. Along these lines there are several authors who seek to improve the competitive process to improve dynamic efficiency, that is, innovation. See: YBAR (2009), p. 5 et seq., WU (2012), and ACCORSI (2021)

[35] ZÄCH & KÜNZLER (2009), p. 279.

On the other hand, and closely linked to the protection of the competitive process is the protection of economic freedom. As Felice and Vatiero say, "it is not enough to protect the individual from the power of government, for government was not the only threat to individual freedom. Powerful economic institutions (i.e., cartels) can also limit or destroy freedoms, especially economic freedom".[36] In this respect, a basic aspect of the ordoliberal view is that an excessively concentrated market allows private actors to restrict the economic freedom of weaker actors, which would imply that they cannot participate in the market on free and equal terms, while powerful actors can act despotically.[37] Thus, the ordoliberals understood economic freedom as freedom of choice for consumers and producers, along with the freedom to compete.[38] And it sought to protect this freedom, because a citizen cannot have full enjoyment of her rights if her autonomy is limited in the economic sphere by the exercise of arbitrary power by other citizens.[39] For an ordoliberal a market works well when it leads to the exclusion of only the most inefficient participants, since everyone has a fair chance:[40] thus, equality of opportunity is guaranteed, but not of result. [41] There is an underlying deontological understanding of competition as a procedure, being the important issue the safeguarding of this procedure. [42] Thus, behind this vision lies the idea that only with the preservation of a market structure characterized by the presence of sufficient competitors is it possible for competition to function as a system of checks and balances where actors constrain their market power reciprocally.[43]

After this detour we can now return to the history of antitrust. After the enshrinement of the Sherman Act, a war of philosophies raged over how to apply its regulations. [44] Thus, from the beginning there were various positions, such as those that sought to protect democracy from economic autocracy, those that sought to protect the competitive process, and those that sought to protect economic

[36] FELICE & VATIERO (2014), p. 151.

[37] DEUTSCHER & MAKRIS (2016), p. 186.

[38] DEUTSCHER & MAKRIS (2016), p. 189.

[39] DEUTSCHER & MAKRIS (2016), p. 189.

[40] DEUTSCHER & MAKRIS (2016), p. 190.

[41] Therefore, criticizing this position by claiming that it seeks to protect inefficient competitors is not a case of the straw man fallacy. See supra, note 30.

[42] DEUTSCHER & MAKRIS (2016), p. 191. The deontological implies here that the competitive process is protected as an end in itself, and not because of the consequences it has (this would be a consequentialist approximation).

[43] DEUTSCHER & MAKRIS (2016), p. 194.

[44] FOX (2013), p. 2157.

freedom. However, as this ideological battle progressed, the institutionality of antitrust moved away from its initial objectives because during the course of the twentieth century (especially from 1970 onwards) it was found that an excessive atomization of the market could be inefficient, which in turn could lead to the interests of consumers and competitors not going hand in hand.[45]

Thus, after a long doctrinal transit, what Lina Khan has called "the paradigm of consumer welfare"[46] was eventually reached, which initially emerged at the eaves of the Chicago School. This change had important consequences, because as a result of its application *antitrust* regulation became considerably more technocratic (the application of regulations was delegated to industrial policy specialists), and their democratic considerations were set aside.[47]

Within the school that privileges consumer welfare there are a number of subdivisions. First are those who inaugurated this trend, the authors of the Chicago School. This school has had profound influence on this debate, influence that started with a group of economists and lawyers that included Aaron Director, Milton Friedman and George Stigler. [48] This school advocated both descriptive and normative changes in free competition. On the one hand, descriptively, the theory involved accepting a new set of assumptions about how companies behave. On the other hand, from a normative perspective, a republican theory of *antitrust* that was concerned with limiting the power of companies was replaced by a neoliberal theory that claimed that the objective of *antitrust* was economic efficiency rather than controlling and dispersing private power.[49] Thus, according to the Chicago School, authorities should limit themselves to sanctioning and repressing those behaviors and transactions that result in a reduction in the quantity of goods and services produced, increasing their final prices.[50] Therefore, in the absence of concrete evidence that a particular behavior leads to economic inefficiency, it was better to let markets operate on their own,[51] even if there might be other considerations that went beyond economic efficiency.

[45] YBAR (2009) p. 2.

[46] KHAN (2019) p. 968.

[47] CRANE (2007) p. 2

[48] KHAN (2020) p. 1661.

[49] KHAN (2020) p. 1665.

[50] YBAR (2009) p. 4.

[51] YBAR (2009) p. 4.

This position, has two foundations: (1) suspicion regarding how effective the interference of the State is in the economy; and (2) trust in markets as a resource allocation mechanism.[52] Thus, the Chicago School defended that economic methodology was the only legitimate one and "promoted a false equivalence between the economic sciences and a state of *laissez faire*."[53]

The rise of the welfare *antitrust* is crucial, because while some of the descriptive claims of the Chicago School were challenged, its normative commitments to the defense of economic efficiency as the ultimate goal of free competition, [54] and its exclusion from Republican concerns, were largely accepted. Therefore, for a long time we could say that "most of the problems of *antitrust* are about the means to achieve this end, not about the end to be pursued". [55]

This shift is particularly important to us because this was the American doctrine that was imported into our context through reforms that were imposed during the civic-military dictatorship. As Patricio Bernedo recounts, the content of our current legislation "had previously been outlined by the Chicago Boys, in El Ladrillo".[56] This explains why in our legislation the republican or democratic function of antitrust is discussed very little, as the ideological basis of our current institutionality is one that is based on denying this dimension. Thus, our doctrine has accepted without further discussion many presuppositions of the dominant doctrine in the United States. And the problem, as Montt says, is that

"There are significant risks in being copycats of the Americans. The main risk is to inadvertently import political and philosophical elements present in some of the dominant forms of *law & economics*, such as the Chicago school. That is, under

[52] YBAR (2009), p. 4. See also Katz (2020), p. 435. This led members of this school to argue that strict rules should be relaxed or reversed. KHAN (2020), p. 1667.

[53] ORBACH (2019), p. 1457.

[54] KHAN (2020), p. 1670. All in all, as Ybar notes, there is no clarity within this vision regarding the beneficiaries of the efficiency to be promoted. Some believe that efficiency should promote the increase of consumer surplus, and others believe that authorities should be indifferent to who (businesses or consumers) appropriates such surpluses. YBAR (2009), p. 4.

[55] CRANE (2007), p. 59. Also: VAHEESAN (2019), p. 1. All in all, as Fox sarcastically states, this is not the goal of *antitrust*, unless, of course, ninety years of history are left out. FOX (2013), p. 2159.

[56] BERNEDO (2013), p. 64. This legislation was crucial to the dictatorship, as "The fight against monopolies was understood as a central aspect to achieve, among other objectives, so when implementing price liberalization, producers could no longer make use of their monopolistic positions and, therefore, effectively lowered the prices of their products". BERNEDO (2013), p. 65.

the guise of copying some of the basic methodologies (...) the political and ideological virus can sneak in."[57]

I believe that this has happened in our context, because we have uncritically adopted certain postulates of the American doctrinal discussion even though they respond to another legal culture, and they bring in certain normative presuppositions that are at least questionable. Thus, the risk identified by Montt has materialized in an unjustified importation of the political premises of the US discussion, and this has led to a disfigurement of the Chilean discussion regarding free competition, which dogmatically excludes certain relevant considerations.

However, the defenders of Republican antitrust have now regained some strength. Among these defenders we can find Lina Khan, who affirms that the defense of consumer welfare as the objective to be pursued by regulation implies a grotesque distortion of antitrust laws that not only supplants its objective, but also stamps in the law a value that is, in many ways, tremendously antithetical to the objective of the competition.[58] According to Khan, this leads to an "intellectual movement that fundamentally rewrote antitrust regulations – redefining its purpose, its orientation, and the values that underlie it".[59] Thus, this author reminds us that underlying *antitrust* regulations there was previously a strong prophylactic orientation against the concentration of private economic power while unconstrained monopoly power threatened basic freedoms, and precluded true democracy.[60]

In his historical account, Ybar makes little reference to theses such as Khans', who states that a form of free competition should be returned to its original values. [61] To this thesis, which he only outlines, he replies that this cannot be the case because objectives not linked to consumer welfare can only be pursued to the extent that they do not contradict the welfare of consumers. Thus, he concludes that "however legitimate and even positive the adoption of this type of policy may be, they should not be imposed in the context of the institution of free competition to the extent that they are incompatible with the welfare of consumers".[62]

[57] MONTT (2004), p. 75.

[58] KHAN (2018), p. 968.

[59] KHAN (2018), p. 964.

[60] KHAN (2018), p. 966.

[61] However Ybar wrote this text in a context where there was still a strong consensus as to what the purpose of antitrust laws were.

[62] YBAR (2009), p. 4

Importantly, Ybar does not present arguments as to why there should be such an order of priority between consumer welfare and other objectives. Instead of going straight into that discussion, he merely narrates how this transformation occurred. Thus, he mentions that:

> many voices argued that the excessive atomicity of the market prevented the obtaining of profitable efficiencies for consumers (...) the interests of consumers and competitors were not necessarily aligned (...) in cases where there was conflict, the different laws inevitably had to choose. Mostly the different institutions opted in favor of consumers.[63]

The problem is that Ybar's firm commitment to a vision of free competition that protects consumer welfare, which is the premise of all his subsequent analysis, is not supported by arguments, or the law, and takes certain doctrinal turns for granted.[64] In the first of the two phrases just mentioned, Ybar takes for granted, that is, he does not substantiate his claim, that the welfare of the consumer takes precedence over other types of considerations. On the other hand, in the second of the phrases cited the author limits himself to recounting the doctrinal changes, without saying whether they were adequate changes. What he says constitutes a factual finding, not an argument.

From Ybar's account, it seems that we would be facing something like "the end of history" of free competition. But as Crane says, it is naïve to think that technocracy represents the final and idyllic moment of antitrust.[65] The above, because if certain conditions of political controversy are met, a new political conflict over *antitrust* rules and their implementation would be inevitable.[66] At least in the U.S. these conditions of political controversy are already present, and if we follow the trend that has reigned so far in antitrust law, that is that everything that affects the U.S. eventually affects Chile, it is likely that a new political conflict will open up over *antitrust* rules (in a sense, this article is an attempt to push that discussion).

The point here is not to argue for a certain understanding of free competition starting from the legislative intent of the U.S. Congress (much of the problem lies in giving too much importance to the latter). The important thing is

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[63] YBAR (2009), p. 2.

[64] In a similar way we can see González, who in his defense of consumer welfare limits himself to affirming that "although not explicitly mentioned in the laws, it has been agreed upon that the ultimate goal of free competition is consumer welfare." GONZALEZ (2020), p. 3.

[65] CRANE (2007), p. 68.

[66] CRANE (2007), p. 69.

that the way of arguing that Ybar and other Chilean scholars adopt is characterized by the fact that their universe of relevant considerations only contains economic efficiency and the consensus reached by certain authors in a foreign jurisdiction. In this regard, as Andrés Rosler says, "it would give the impression that we have returned to the time of the Digest, in which the opinion of certain authors was simply law in force".[67]

## III. Technical Antitrust as an Ideological Artifact

Although historically there has been great discussion regarding the purpose of free competition, today Chilean doctrine is content with saying that the objective sought is social welfare or efficiency, either understood as total welfare or as a surplus of consumers.[68] And this is stated without reference to the law and ignoring the other objectives that free competition could have. In the U.S., referring to the defense of consumer welfare, Oldham denounces that the doctrine seems to have chosen from the ether of public policies a principle (however economically efficient it may be) that has no relation to the accepted canon of legal interpretation.[69] Something similar seems to have happened in Chile.

Thus, in our country it is stated that "there are areas of law that should focus only on efficiency, such as, for example, free competition",[70] and that "what is beyond doubt is that competition policy must be designed and implemented based on the knowledge provided by the economy".[71] Values aside from efficiency "must be sought through direct regulation, that is, administrative intervention, and not *contaminating* competition law and policy with considerations of distributive justice".[72] Therefore, "if what is sought are ends other than efficiency (...) these must be regulated directly".[73] As González says, "although not explicitly mentioned in the laws, it has been agreed upon that the ultimate goal of free competition is consumer welfare".[74]

[67] Rosler (2020), p. 15.

[68] Grunberg & Montt (2017), pp. 307-308.

[69] Oldham (2006), p. 26.

[70] Montt (2004), p. 78.

[71] Grunberg & Montt (2017), p. 308.

[72] Grunberg & Montt (2017), p. 309. Emphasis added.

[73] Montt (2010), p. 11.

[74] Gonzalez (2020), p. 3.

It is curious to note that, like Ybar, these authors assume that what is pursued is related to some form of economic efficiency. Thus, we can apply to Chile what Lina Khan says about US doctrine: "there is strong agreement within the antitrust community that beyond debates on specific doctrinal *tests* or particular standards of proof, *antitrust* law is, in general, on the right track".[75] As Posner, one of the leading members of the Chicago School, would say, among the antitrust schools "there are differences, but they are increasingly more technical than ideological".[76]

In this respect, I believe that these positions operate under an efficiency paradigm. With this denomination I seek to build on what Lina Khan has called the paradigm of consumer welfare, with two important caveats. First, I seek to specify what a paradigm consists of (based on Thomas Kuhn), and second, I seek to expand the content of the currently hegemonic paradigm in free competition, which will lead me to talk about the efficiency paradigm rather than the paradigm of consumer welfare (with this I seek to include within the paradigm those who defend various types of economic efficiency (be this assignative, productive or dynamic) to the exclusion of any other type of consideration).

In this regard, by paradigm we must understand, following Kuhn, accepted examples of current scientific practice – including laws, theories, applications and instruments – that provide models that serve as the basis for particular scientific research projects.[77] These models have a crucial facilitating task, because thanks to them normal science is possible, which seeks to force nature within the conceptual boxes they provide.[78]

Thus, we can describe the technical paradigm of antitrust as only being sensitive to economic considerations of efficiency, where the only thing that matters is that the rules of free competition lead to the market as a whole meeting the standards dictated by some type of efficiency (be it productive, allocative or dynamic). Thus, as Hovenkamp says, we are facing a form of antitrust that seeks technical rules designed to define and implement defensible economic objectives,[79] the important thing being the objective and economic effects of antitrust.[80] Thus, technical antitrust refers to a set of antitrust rules that begin with a picture of a set

[75] KHAN (2020), p. 1665.

[76] POSNER (1979), p. 948.

[77] KUHN (1962), p. 10.

[78] KUHN (1962), p. 5.

[79] HOVENKAMP (2018b), p. 583

[80] HOVENKAMP (2018b), p. 584.

of the best social circumstances achievable through free competition laws and then relies on evidence and experts to develop an approach that gives them effect. But this is problematic because, as Katz says, under a technocratic view of antitrust, questions of legality have to be decided exclusively on the basis of a supposedly objective economic analysis that admits no consideration or perspective outside those of economists and experts in the field.[81] That is, all the republican considerations seen above are excluded, since these are not even themed.

Before proceeding further, I believe that two possible objections must be addressed. First, that as a general rule those who use the efficiency paradigm do not affirm everything that I am attributing to them (i.e.: they do not make their assumptions explicit), and second, that there is some level of disagreement among those who participate in the paradigm of the purpose of free competition.

Regarding the former, following Kuhn, we must realize that when a paradigm becomes hegemonic, whoever operates under it can take it for granted and no longer needs, in his great works, to try to build his discipline from scratch, start from first principles and justify the use of each concept:[82] thus, the task of normal science is to solve a puzzle for whose mere existence the validity of the paradigm must be assumed.[83] Thus, that those who operate under this paradigm make their suppositions explicit is not necessary. As Kuhn says, scientists can agree on the identification of a paradigm without agreeing on, or without even attempting a complete interpretation or rationalization of it.[84]

Regarding the latter, among those who support the efficiency paradigm there is disagreement about the type of economic efficiency that should be pursued. But this is not problematic, because among the different models that are applied within the same paradigm there is what Wittgenstein called a family resemblance, a network of intersecting similarities that overlap.[85] As Crane says, "schools of thought tend to be Protestant rather than Catholic, with no central authority delimiting the orthodoxy of heresy".[86]

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[81] KATZ (2020), p. 413

[82] KUHN (1962), pp. 19-20.

[83] KUHN (1962), p. 80.

[84] KUHN (1962), p. 44.

[85] KUHN (1962), p. 45. This takes care of Hovenkamp's complaint that what is normally denounced as the consumer welfare paradigm includes several definitions of what such well-being includes and the methods for measuring it. HOVENKAMP (2018b), pp. 589 et seq.

[86] CRANE (2012), p. 44

That said, let's go back to technical antitrust. As we have seen, at the comparative level we can find Hovenkamp defending it. In this sense, this author says that antitrust demonstrates,

> why the American constitutional system is a republic and not a direct democracy. This entails two things. First, the Constitution imposes limits on how far the public can go in threatening property, contracts, and freedom rights, as well as the extent to which citizens have rights to rational and reasonable decision-making. Second, the main role of citizens is to elect rulers, instructing them to act wisely when creating and managing technical rules (...) Since the appointment of Alexander Hamilton as the person in charge of the finances of the new government, our constitutional republic has depended on experts to make the decisions.[87]

I will concentrate on two things. First, Hovenkamp does not deny that the current objective of the antitrust regulation is one that emerged belatedly, one that "comes mainly from the Harvard and Chicago schools that, starting in different places, began to converge during the sixties and seventies".[88] That is, he does not deny that the purpose of the rules was originally different. Instead, he celebrates the transition from that state to the current state. This is striking, since it means admitting that the turn in terms of the purpose of free competition comes from certain doctrinal changes that bear no relation to legislative changes. The problem is obvious: since political considerations motivated Congress to create antitrust laws, adhering to such considerations is not only legitimate, but ignoring such considerations or pretending they do not exist is illegitimate.[89]

Moreover, it is important that a paradigm makes the scientific community immune or insensitive to those important social problems that are not reducible to its puzzles, since these cannot be represented in terms of the concepts and tools provided by the paradigm. [90] And for this simplification to be possible, it is essential that certain considerations be excluded. The "important social problem" (in Kuhn's terms) to which those who follow this paradigm have become immune, is that law has a procedural foundation that goes back to being an expression of the sovereign

[87] HOVENKAMP (2018b), p. 596.

[88] HOVENKAMP (2018b), p. 598.

[89] KATZ (2020), p. 446.

[90] KUHN (1962), p. 37. As Easterbrook says defending the Chicago school "the purpose of every model is to eliminate complications, to make unmanageable problems manageable, to make things simple enough (...) without simplification we don't know what to look for." EASTERBROOK (1986), p. 1706.

will, not to its functionality. I will return to this below, for our doctrine tends to be, like American doctrine, one that pays little attention to the letter of the law, which has problematic consequences.

Second, Hovenkamp calls his defense of consumer welfare a defense of technical *antitrust*. He constantly makes a contrast between technical *antitrust*, which defends the paradigm of consumer welfare, and the political or populist *antitrust*,[91] which challenges that standard.[92] However, if one analyzes the nature of the debate, one notices that these labels do not make sense: a decision concerning the objective being pursued is a substantive matter, or, to put it in terms that Hovenkamp uses contemptuously, something political. This is why Montt's assertion (seen above) that the objective of antitrust rules is to implement economic knowledge is unsupported, since economic knowledge is empirical knowledge and therefore is inert in practical terms, that is, it says nothing about what should be done, it is descriptive knowledge, not prescriptive knowledge (as Baker says arguing about what the goal of free competition is, economic thinking does not give a correct answer, it only shows costs and benefits[93]). As First and Spencer say, the role of the technocrat in a society like ours is to execute these fundamental decisions, not to make them.[94]

One way to explain this is considering Habermas's distinction between three uses of practical reason. Thus, he distinguishes between an instrumental, moral and ethical use of practical reason. The first refers to what the best means to achieve certain ends are,[95] the second to how to solve our disagreements about how to lead our lives together,[96] and the third to how to live a good life.[97] I am interested in the first two uses. The first use, the instrumental one, is related to the importance of the technique, that is, to what is the most effective way to achieve certain objectives. The second use relates to the determination of what is the objective that should be pursued by a community. The debate on the purpose of free competition, as it relates to our disagreements about how to lead our lives together, implies making use of moral practical reason. On the other hand, and only once this debate is settled, does the technical reason come into play, which refers to how to implement

[91] It is striking that Hovenkamp use the terms "political" and "populist" interchangeably. This does nothing more than demonstrate his devaluation of political action.

[92] HOVENKAMP (2018b), pp. 584, 620, 623.

[93] BAKER (2013), p. 2178.

[94] FIRST and WEBER (2013), p. 2572

[95] HABERMAS (2000), p. 111

[96] HABERMAS (2000), p. 114

[97] HABERMAS (2000), p. 113

such an objective.[98] Therefore, and contrary to what Hovenkamp says, it is not a technical matter to debate what the objective pursued by free competition should be. In Habermas's terms, this is a matter that must be resolved according to the moral use of practical reason, which is quite close to the politics he so disdains.

Thus, the debate regarding what the objective pursued by free competition should be is not a technical matter, but Hovenkamp hides the inescapably normative basis of his position and passes it off as a necessary assumption. As Vaheesan says, since the goal of antitrust is related to political judgments and values, seeking an "apolitical antitrust" theory is under its best light futile, and under its worst light a cynical attempt to hide political decisions.[99] Rather than proceeding cynically, it would be better to make the disagreement explicit and openly have the corresponding political discussion.[100]

In addition, regarding the fact that what is sought is social welfare or efficiency, and that this is affirmed without legal support, I believe it is also an instance of what Mañalich has called principialism. Mañalich refers to a form of doctrinal analysis that assumes that it is possible to identify a set of principles on whose satisfaction the adoption and implementation of decisions concerning the definition, control and repression of behaviors can claim legitimacy.[101] According to Mañalich, in order to disguise the above, principialism strives to disassociate the identification of its principles from the supposedly vulgar pre-understandings and conceptions extended throughout society as a whole, while presenting its principles as the result of the reflection carried out by the legal *intelligentsia* in the context of a legal culture sufficiently autonomous to not only contradict, but also to impose itself legitimately against such a popular belief system when this system was considered incorrect by legal professionals.[102] Returning to the previous jargon, this has to do with the fact that, in the eyes of the scientist operating within a certain paradigm,

[98] Katz shows that at least for a while even members of the Chicago School admitted the political character of the discipline. However, they then walked away from this stance without giving an explanation. KATZ (2020), p. 433.

[99] VAHEESAN (2018), p. 989.

[100] As Marina Lao says, "it would be preferable to make explicit the discussion on the different normative visions on *antitrust* and discuss what values matter and why they should matter on their own terms rather than using the economy as a kind of proxy for that normative discussion.". LAO (2014); pp. 653-654.

[101] MAÑALICH (2018), p. 60.

[102] MAÑALICH (2018), p. 63.

the problems that the paradigm admits are the only problems that will be considered scientific.[103]

Returning to principialism, it "seems to hide, in the form of an ideological artifice, the politically controversial character of the postulates that this principialism presents as axioms".[104] The technical paradigm of *antitrust* is a kind of principialism, since it assumes that there are certain principles (such as efficiency, which is not mentioned at all by our free competition legislation) that must necessarily inform the application of the law.

Of course, it is possible that, at the end of the day, the foundation of free competition lies in economic efficiency, but whoever affirms it must support it, and cannot only rest on what theorists who study a system that is not ours have said.[105]

## IV. Democracy and Free Competition

Another important point is that principialism is not only wrong to pass off as necessary what is contingent (that is, it is not only ideologized), but it is also undemocratic. In this sense, Mañalich denounces that "[t]he very claim that criminal policy should be subject to a certain normative rationality, defined by principles that are treated as pre-political premises, is not compatible with the contingency and immanence defining the democratic political game".[106] In this regard, as we saw, towards the end of his defense of the technical antitrust, Hovenkamp emphasizes that it is the business of the rulers, as experts, to define, create and administer technical rules. But as we saw, what the purpose of antitrust is, is not a technical matter. For this reason, Hovenkamp's thesis would lead us to affirm that there is a group of experts whose wisdom would allow him to define what is the objective that free competition should pursue. This evidently leads to

[103] KUHN (1962), p. 37. This explains the fixation of Hovenkamp that only experts participate in the discussion of *antitrust* (in fact, he refers to the cultists of the technical *antitrust* as "the cognoscenti of the *antitrust*"). HOVENKAMP, (2019), p. 593. Therefore, those who do not question the bases of the paradigm within which it operates, will see everything that fits within it as something technical, and everything that operates outside it as knowledge that is not scientifically validated (or knowledge that is not technical and therefore is irrational and populist). As Orbach says, the technical paradigm of *antitrust* accuses his contradictors of being populists as a strategy to shield itself from criticism (ORBACH (2017), p. 3), which is ironic, because precisely what characterizes the populist is his anti-intellectualism (ORBACH (2017), p. 8.) (and for this reason Orbach associates the Chicago School with a conservative form of populism (ORBACH (2017), p. 19).

[104] MAÑALICH (2018), p. 62.

[105] A good framework for conducting this debate is offered in ZÄCH & KÜNZLER (2009), pp. 284 et seq.

[106] MAÑALICH (2018), p. 62.

the consolidation of a technocratic antitrust regime. And as Hobbes says, "when men who judge themselves wiser than all others invoke true reason as judge, they actually pretend that things should be decided by their own reason and not that of other men".[107] In other words, technocracy denies political deliberation.

That experts are in charge of defining what are the best means to achieve a goal is perfectly reasonable: scientific knowledge of economics is indispensable for an area such as free competition. However, it is not reasonable for a group of experts to be the ones that determine what the purposes of the law are, because in the case of free competition this does not make a better law, but rather a different law. Defining the objective pursued by institutionality is a decision that belongs to a body with democratic legitimacy (such as the legislative power or the administration), not to a group of experts.

It is important to highlight this. Much of the discussion about the purpose of free competition goes on without any support in the law and without even considering any other purpose that the regulations could pursue beyond economic efficiency. That is, we are facing here a consensus whose only support is the convergence of the opinions of practitioners, which is not based on either the law or arguments.

In connection with the latter, it is important that, as we saw above, the currently hegemonic position in the US is one that is based on ignoring the literal tenor and legislative intent. In this regard, at the comparative level, the Courts assert such things as that "the general presumption that legislative changes should be left to Congress has less force with regards to the Sherman Act,[108] or that "the language of § 1 of the Sherman Act ... cannot mean what it says" (verbatim "the language of § 1 of the Sherman Act ... cannot mean what it says").[109] This explains that "courts frequently recognize that [antitrust] statutory texts have a clear meaning and then refuse to follow it",[110] that "courts have manifested a systematic tendency to interpret the substantive statutes of antitrust contrary to their text, their legislative history, and often their spirit",[111] and even more, that "throughout the more than 130-year history of *antitrust*, the courts have deviated from the legislative text and purpose in only one direction: to ignore the literal tenor in order to favor

[107] HOBBES (1996), p. 33.

[108] MELAMED & PETIT (2019), p. 744.

[109] CRANE (2021a), p. 1251.

[110] CRANE (2021a), p. 1207

[111] CRANE (2021a), p. 1245

the interests of industry and to go against the populist sentiment that disbelieves in industrial greatness".[112]

Returning to the idea of paradigm, these include certain considerations to the exclusion of others, since a paradigm implies attempts to force nature into the preformed and relatively inflexible boxes it provides, so those that do not fit inside the boxes simply do not exist.[113] In particular, what the technical paradigm cannot account for is that law is an expression of sovereign will, so it is not a distinctive feature of it to be reasonable or efficient.[114]

These arguments are already criticized in the US. Thus, there are authors who criticize that "with respect to antitrust, the academic community seems to be happy to turn a blind eye to the Courts creating law, not having the obligation to justify this practice".[115] The problem is that the separation of powers partly depends on social conventions, which is why courts must be careful not to usurp legislative power when deciding what the content of the law is.[116] That is, the separation of powers depends on the legal culture minimally respecting the wording. But this does not happen in cases where de-formalization is the general rule, as in U.S. competition law. In this regard, and in the context of the discussion on possible reforms to US *antitrust* law, Crane warns us that the anti-text pattern of the Courts,

> and their perennial insistence that *antitrust* statutes are delegations of common law powers rather than express mandates ...provide a warning to legislation: the dynamics of *antitrust* legislation, its *enforcement* and its application occur against the background of a dispute over power, industrial size and efficiency that has silenced the common importance of wording. Writing clearer statutes will not necessarily lead to an end of these habits.[117]

Crane claims his thesis is descriptive, not prescriptive.[118] I will allow myself to be prescriptive. An anti-text pattern implies nothing less than the

[112] CRANE (2021a), p. 1212.

[113] KUHN (1962), p. 24

[114] As Pardow states, "the technocratic vocation is reflected in the way of arguing: the justification of these standards is made on the basis of economic growth or efficiency, rather than democratic legitimacy, social justice or other traditional reasons in the discussion of public policies". PARDOW (2018), p. 196.

[115] OLDHAM (2006), p. 31.

[116] MACCORMICK (2007), p. 43.

[117] CRANE (2021a), p. 1252.

[118] CRANE (2021a), p. 1250.

insubordination of the Courts to those who have the legitimate power to create norms: the administration or the legislative power. The legitimacy of rules comes from their procedural validity, not their reasonableness. Thus, the anti-democratic character of technical antitrust is sustained in that "antitrust decision-making is increasingly free of political pressures and has been delegated to specialists",[119] and that the discipline is "captured by lawyers and economists who advance their self-referential objectives free of political and economic control".[120] That is, a discipline closer to technocracy than to democracy has been consolidated.

It is important to emphasize again that our scholarship backs its position on the purpose of free competition without any support in the law. The above, because in general an understanding that devalues the literal tenor underlies it. As we have seen, that the objective of our regulations is to maximize some type of economic efficiency is something that is affirmed without support in the literal wording. And in general, in free competition the literal wording of the law has less weight. In this regard, and by contrasting the legal reasoning mode of the TDFC with that of the Supreme Court, Tapia and Montt have concluded that the Supreme Court "imposes its statutory interpretations on the functionalist interpretations ('more policy oriented') of the TDFC",[121] which is because it distrusts the TDFC "and its excessive economic analysis (to the detriment of the classic legal syllogisms)".[122]

That is, unfortunately the entity mainly responsible for applying the rules of free competition has adopted a deformalized vision of the law with its consequent risks. That said, it remains to be seen whether given a substantial change in legislation, our legal culture will be willing to acknowledge receipt or follow the democratically insensitive and self-referential course of the American courts and scholarship.

[119] Crane (2007), p. 5.

[120] First & Weber (2013), p. 2544.

[121] Tapia & Montt (2012), p. 149.

[122] Tapia & Montt (2012), p. 155.

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