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The Arbitrator before Competition Law

Antonio Robles Martín-Laborda
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OECD classification: 5.5 Law; 5.2 Economics and business.

Abstract

The article examines the tension between commercial arbitration and competition law. Arbitration rests on party autonomy: the parties choose the arbitrator and define the scope of the mandate in the arbitration agreement. Competition law, by contrast, imposes limits on that autonomy in the name of the economic public order and prohibits conduct such as cartels or abuse of dominance. The arbitrability of competition issues does not depend on whether the rights are disposable, but the presence of public-order rules conditions the conduct of the arbitrator and of the courts reviewing the award, whether in annulment or enforcement proceedings. The study analyzes the problems that coexistence raises: identifying the applicable rule, proving anticompetitive conduct, the scope of judicial review and the effects of an award contrary to the economic public order. The reflection draws on the paper presented at the XXIX ALACDE Annual Congress.

Keywords: Arbitration, competition law, economic public order, arbitral award, judicial review.

Introduction

Commercial arbitration and competition law respond to apparently contradictory logics. Arbitration is grounded in party autonomy: it is the parties themselves who decide to submit their disputes to an arbitrator, chosen by them and bound by the limits agreed in the arbitration agreement. Competition law, by contrast, places limits on that autonomy in the name of the economic public order, prohibiting certain conduct (such as cartels, abuses of dominance or certain vertical restrictions) irrespective of what the parties have agreed.

The arbitrability of competition issues does not depend on the public-order character of the rights over which the parties may dispose. Nevertheless, the presence of rules of economic public order conditions both the work of the arbitrator and that of the courts reviewing the award, whether in annulment or in enforcement proceedings.

1. The Channels for the Application of Competition Law in Arbitration

Within this framework, competition law may be applied in arbitration through two main channels. The first is the plea of nullity. In this case, the arbitrator applies competition law as a defence where one of the parties maintains that the contract, or some of its clauses, is contrary to those rules and therefore void. This type of dispute will usually fall within standard arbitration clauses, which cover any dispute arising under or in connection with the contract. However, the assessment of the infringement may require complex legal and economic analysis, particularly where the case is not an obvious one such as price fixing or market sharing. Given the public-order character of competition law, a further doubt arises as to whether the arbitrator must apply it of his or her own motion or must confine himself or herself to the parties' submissions, which may create tension with the principle of party disposition characteristic of arbitration.

The second channel is the damages action, in which the arbitrator applies competition law in order to decide a claim for compensation for the losses arising from an infringement. Additional difficulties arise here. On the one hand, the damage may be tortious in nature, which raises doubts as to whether it is covered by a standard arbitration clause or requires a specific provision. On the other hand, where there is no final administrative or judicial decision, the arbitrator must also assess the existence of the infringement, now together with the causal

link and the quantification of the damage.

2. Judicial Review of the Award

In any event, even where the arbitrator has failed to apply competition law, or has applied it incorrectly, judicial review is usually limited. As a general rule, the courts do not review the merits of the case and, where they do, it is only to the extent necessary to verify whether the outcome of the award is manifestly contrary to public order. For price-fixing, output-limiting or market-sharing cartels, whose prohibition is practically absolute, that threshold may be sufficient. However, determining whether certain clauses (such as those relating to resale price or those granting an exclusive right) constitute a prohibited vertical restriction or an abuse of dominance (situations in which the nullity of the clause is more frequently invoked than a claim based on its breach) requires a legal and economic analysis that can hardly be undertaken within the framework of that limited review.

Moreover, the arbitrator must not only apply competition law correctly under the law governing the merits, but also take into account the interpretation adopted by the courts of the State in which the award is to be enforced. It is those courts that will decide, ultimately, whether the award is compatible with their own public order, so that an award that disregards or incorrectly applies the competition rules may be denied recognition, especially in cross-border arbitrations in which the seat of arbitration and the enforcing State apply different standards.

3. Conclusions

Several questions therefore remain open. For example: can arbitration be an effective instrument for the private enforcement of competition law without sacrificing party autonomy? How can it be ensured that the arbitrator applies the competition rules correctly, so that the economic public order is respected where judicial review of the award is limited?

My contribution to the XXIX ALACDE Annual Congress, held in Medellín (Colombia) from 2 to 5 June 2026, focused on these problems.

The New Frontier of Law and Economics

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Abstract

The article argues that Law and Economics is at a methodological turning point. Classical microeconomics and rational choice models helped dismantle the dogmatic rigidity of civil law, but they show signs of insufficiency in the face of technological dynamism, hyperconnectivity and the unpredictability of social phenomena. The study explores three fronts. First, understanding law as a complex adaptive system and the rise of network science. Second, moving beyond behavioural paternalism through the design of institutions under radical uncertainty. Third, computational antitrust and the law-as-code paradigm, which shifts regulation towards system design. It argues that these tools do not replace the classical pillars but expand their explanatory capacity, and that a legal system conceived as a network requires models that capture interactions, feedback and learning. It concludes that the discipline must incorporate complexity, experimentation and computational evidence to preserve its normative usefulness.

Keywords: Law and economics, complexity, network science, computational antitrust, regulation.

The Economic Analysis of Law (EAL) stands at the threshold of its most profound transformation since Ronald Coase or Richard Posner laid the foundations of the "discipline". For decades, the Law and Economics ecosystem has operated under a robust and highly successful conceptual framework. Classical microeconomics and rational choice models served to demystify the dogmatic rigidity of civil law, providing jurists and regulators with invaluable tools to measure the efficiency of criminal, contractual or tort liability rules. Later, the irruption of Behavioral Economics expanded this horizon by recognizing that human beings are not infallible utility maximizers, introducing the celebrated architecture of decisions and the subtle state interventions known as nudges.

However, technological dynamism, global hyperconnectivity and the growing unpredictability of contemporary social phenomena alert us to an inescapable reality: traditional tools, while still fundamental pillars, are beginning to show signs of insufficiency in the face of the complexity of the twenty-first century. The avant-garde debate in Law and Economics has reached an indispensable methodological turning point. It is not a matter of abandoning the neoclassical legacy or dismissing the contributions of the behavioral sciences, but of expanding our methodological frontiers in a bold and multidisciplinary manner.

To generate a profound regulatory impact that is not a mere copy of recipes conceived for Anglo-Saxon or European realities, but a design adapted to the deep asymmetries and idiosyncrasies of Latin America, the academic community must evolve. Avant-garde spaces such as the Latin American and Iberian Association of Law and Economics (ALACDE) have become the ideal epicenter for catalysing this metamorphosis. It is in these forums that the urgent invitation arises to explore and integrate three new disruptive methodologies that promise to redefine institutional analysis and public policy design in our region.

1. Law as a Complex Adaptive System (CAS) and the Rise of Network Science

The first major methodological transition entails a paradigm shift in the way we conceive the legal order.

Traditionally, legal dogmatics and regulatory theory have treated the law as a static code; a set of linear mandates where a given conduct A corresponds predictably to a sanction or incentive B. This mechanistic vision is untenable in today's world. The law, in reality, operates as a Complex Adaptive System (CAS).

Under this lens, legal norms are not isolated in watertight compartments; on the contrary, they interact systemically, organically and in a multicausal manner. A seemingly harmless change in the interpretation of contract law or in the rules of private property can "dynamically mutate" the ecosystem of public law, altering the incentives of state administration, reconfiguring regulated markets and producing unforeseen externalities in areas that are disconnected at first sight.

To study a system of this nature, modern EAL must incorporate Network Science and the Theory of Ordered Chaos and others (Scott, 1993). This allows us to map legal orders not as hierarchical and rigid Kelsenian pyramids, but as interconnected networks of nodes (statutes, judgments, contracts, agents) that co-evolve constantly. This methodological approach is not entirely alien to the best tradition of social thought. Friedrich Hayek's evolutionary literature already anticipated brilliantly that the social and legal order is not the result of centralized and omniscient planning, but a "spontaneous order" and self-organized. In the context of Latin American regulatory design, where normative inflation and the overlapping of laws tend to suffocate economic activity, recalling and applying the premise of complexity becomes a critical requirement to avoid institutional failure and the unforeseen consequences of legal reforms.

2. Beyond Behavioural Paternalism: Redesigning Institutions Under Radical Uncertainty

The second methodological frontier requires us to rethink critically the scope and limits of behavioural economics applied to regulatory design. The rise of "choice architecture" promoted the idea that, since individuals suffer from systematic cognitive biases (such as loss aversion, status quo bias or overconfidence), the State must intervene through liberty-preserving "nudges" to correct these "rationality errors".

However, the vanguard of Law and Economics raises a serious objection to this vertical vision of behavioural paternalism. First, it wrongly assumes that the regulator is a neutral agent free of cognitive failures or deviant political incentives. Public decision-makers, judges and legislators are human beings equally exposed to cognitive biases, pressure from interest groups and severe information limitations. Consequently, structuring a vertical regulatory framework based on correcting others' errors may consolidate even greater state distortions.

Second, from a strictly evolutionary and biological perspective, so-called heuristics or biases are not necessarily biological failures of data processing that must be eradicated. On many occasions, they constitute highly efficient tools of cognitive optimization under scenarios of radical uncertainty, where calculating mathematical probabilities is impossible or unfeasible. Consequently, the modern EAL approach is shifting from behavioural paternalism towards the design of modular, flexible and resilient institutions. The objective is no longer to micro-manage individual behaviour from a ministerial desk, but to build robust institutional scaffolding that assumes the fallibility of all actors and possesses the capacity to absorb external perturbations, minimizing transaction costs and fostering the adaptability of economic agents.

3. Computational Antitrust and the Disruptive Paradigm of Law-as-Code

The third and perhaps most urgent methodological frontier lies at the intersection of law, the digital economy and computer engineering: Computational Antitrust and the development of the paradigm known as Law-as-Code.

We live in a data economy of monumental scale, where markets are no longer governed exclusively by physical interactions or traditional human contractual negotiations. Today, price fixing, resource allocation and the consolidation of dominant positions on digital platforms are executed in milliseconds by sophisticated self-learning algorithms and predictive artificial intelligence systems. Faced with this reality, traditional competition law enforcement and consumer protection policies based on ex-post reviews (administrative investigations that take years to resolve) are obsolete and slow in the face of market harm.

The future of EAL examines with deep technical and methodological interest the concept of Law-as-Code, which proposes the integration of legal and regulatory constraints natively within the very algorithmic and architectural design of technology platforms. This implies moving from reactive oversight to ex-ante regulation integrated from the design stage (compliance by design). The deployment of this methodology opens an indispensable doctrinal debate on the ethical, economic and legal limits of this approach: Is it viable and desirable to automate the application of abstract standards such as "good faith" or "economic efficiency" through lines of code? How are due process and judicial discretion safeguarded against the rigidity of software? Trying to regulate tomorrow's digital economy using only the rigid conceptual frameworks of the last century is a sure recipe for economic obsolescence and regulatory paralysis in the region.

4. Conclusions

Economics, technological development and patterns of interaction in civil society are advancing at a vertiginous pace that state bureaucracy can hardly follow. Against this panorama, the methodological challenge for the academic community, decision-makers and professionals in law and economics in Ibero-America is categorical: How will we successfully articulate and integrate network science, complexity models and advanced computational tools to strengthen our institutional analysis in the coming years? This is not a merely theoretical exercise; the economic prosperity, investment attraction and democratic stability of Latin America depend directly on the quality of its institutions and the efficiency of its laws.

The coming year 2027 will mark a historic and inescapable milestone for our global academic community. We will have the honour of addressing these methodological transformations exhaustively in the framework of the celebration of the XXX Anniversary of ALACDE (https://asociacionalacde.org). We formally invite you to be an active part of this frontier debate, participating in the multiple activities, congresses and associative spaces planned throughout all our headquarters and national chapters. The future of Law and Economics is being written today, and the Latin American and Iberian perspective has a leading role to assume in this new global order.

Editorial declaration on technological support: The LanguageTool tool was used exclusively to optimize the drafting, spelling and grammatical style of the manuscript. All the ideas, the argumentative development and the normative and economic analysis are the exclusive authorship of the researcher.

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Algorithmic Transparency in the Judicial Function

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Abstract

The article analyzes the use of generative artificial intelligence in Peru's judicial function and argues that reducing the production costs of judicial decisions can generate negative externalities when the use of those tools remains hidden. Procedural congestion and the search for efficiency explain adoption, but opacity deepens the information asymmetry between the judge, who knows the internal process of the decision, and the parties, who cannot observe it. The study distinguishes information from knowledge, recovers the Aristotelian difference between téchne and phrónesis and examines the concept of proferencia to locate the consciousness of the decision. It also analyzes the learning penalty and automation bias, and compares the Peruvian landscape with the European Union's AI Regulation and the ethical rules of the Costa Rican Judiciary. It concludes that transparency is not a formality but a condition for efficiency not to be obtained at the expense of the legitimacy of the decision.

Keywords: Algorithmic transparency, artificial intelligence, judicial function, information asymmetry, Peru.

Introduction

The system of administration of justice in Peru faces persistent procedural congestion that compromises the effectiveness of judicial protection. In this setting, the emergence of generative artificial intelligence (AI) and natural language processing tools presents itself as an innovation vector capable of reducing the production costs of judicial decisions. Nevertheless, from the perspective of Law and Economics (L&E), this pursuit of operational efficiency through automation entails a moral hazard and generates severe informational asymmetries between the adjudicator and the parties to the proceedings.

When the judge resorts opaquely to generative algorithms for the drafting or reasoning of decisions, the gain in immediate speed may lead to high-impact negative externalities: normative or jurisprudential hallucinations, automation biases and an eventual delegation of human judgment. This article examines the need to establish a regulatory duty of mandatory and explicit declaration when AI is used in the issuance of judgments in Peru. It argues that algorithmic transparency is not a mere formality but an indispensable institutional mechanism for correcting information asymmetries, internalizing verification costs and preserving public trust as a social capital good.

1. Theoretical Framework and Economic-Epistemological Foundations

1.1. Information Asymmetry and Moral Hazard in the Judicial Function

The relationship between society (and the litigating parties) and the Judiciary configures a principal-agent structure. The judge (agent) possesses privileged access to the internal process by which his or her decisions are elaborated, which the parties (principals) cannot observe directly. When the judge uses undeclared external AI tools, the information asymmetry deepens. As the marginal cost of drafting is substantially reduced by generative models, a perverse moral hazard incentive arises: to delegate the substantive review of the evidentiary and jurisprudential material to the software in order to maximize adjudicative output, transferring the cost of detecting possible algorithmic hallucinations to the parties through the appellate route.

1.2. The Aristotelian Distinction between Téchne and Phrónesis in Judicial Decision-Making

Drawing on the typology of knowledge, it is crucial to distinguish between téchne, understood as the technical skill of processing, systematizing and structuring legal texts, and phrónesis, the prudence or practical wisdom required to weigh values, assess evidence in accordance with the rules of sound criticism and determine the meaning of justice in the specific case. Generative AI operates with notable efficiency in the sphere of téchne, reconfiguring and synthesizing static information. It lacks phrónesis, however, an attribute exclusive to the adjudicator. Confusing the capacity for statistical synthesis with human deliberative judgment represents a market failure of legal knowledge.

1.3. The Consciousness of the Decision and the Concept of Proferencia (Broncano)

In social epistemology, a statement acquires the status of legitimate knowledge only when it is deliberately evaluated and endorsed by a conscious mind (the concept of proferencia). The outputs emitted by algorithmic models are not judgments but chains of structured statistical data. If the magistrate incorporates these results into the decision without an explicit process of verification and critical appropriation, a breach of proferencia occurs, depriving the judicial decision of its epistemological legitimacy and its constitutional grounding (Broncano Rodríguez, 1999).

2. Information versus Knowledge in Judicial Activity

To delimit the real contribution of algorithmic technology as against judicial reasoning, it is necessary to differentiate the attributes of information and of knowledge within the evidentiary and reasoning process:

Information: it has a static character, is capable of explicit formulation and is highly duplicable and neutral. It comprises normative inputs, systematized case law and transcripts of minutes or hearings. In this domain, AI drastically reduces search and filtering costs (Nonaka & Takeuchi, 1995).

Judicial knowledge: it has a dynamic, tacit, strongly contextual and prudential character. It requires the joint assessment of evidence, institutional empathy and the assignment of legal consequences under standards of certainty or reasonable doubt.

Uncritical delegation occurs when the information processed by the machine is assumed as an automatic substitute for judicial knowledge. This confusion increases the probability of incurring errors of external and internal justification of the legal premise, resulting in defects of apparent or fabricated reasoning.

3. The Learning Penalty Phenomenon and Judicial Automation Bias

In the literature on behavioral economics and human-machine interaction, the excessive transfer of analytical tasks to automated systems produces two deleterious effects:

Automation bias: the systematic tendency of operators to over-rely on the recommendations of automated systems, omitting independent contrast or verification (American Bar Association, 2024).

Learning penalty: recent empirical evidence on technology adoption shows that the passive externalization of cognitive processes can generate atrophy of complex analytical skills. A study by Strömberg et al. (2026) on secondary school students in China found that unrestricted access to generative AI tools for school tasks was

associated with a reduction in learning performance as measured by examinations, an effect the authors call the "learning penalty".

Translated to the judiciary, dependence on AI-generated drafts without strict control undermines the judge's ability to detect subtle inconsistencies or algorithmic biases. In economic terms, the immediate gain in speed is offset by a sustained degradation in the quality of judicial human capital.

4. Transaction Costs, Regulatory Risk and Comparative Framework

From Coase's (1960) approach, the reduction of the internal operating costs of the judicial office through AI is not efficient if it transfers higher transaction costs to the parties or to the system as a whole (review costs, appeals for nullity, delays arising from new trials and loss of institutional credibility).

4.1. Current Peruvian Landscape

The Peruvian legal order has Law No. 31814 (2023) and its Regulation, approved by Supreme Decree No. 115-2025-PCM, published on September 9, 2025. That framework adopts a risk-based classification. The Judiciary has promoted official assistance tools such as Amauta.Pro, a virtual assistant based on AI developed by the Superior Court of Justice of Lima Norte to optimize the issuance of decisions in cases of violence against women and vulnerable groups. Curia has also been implemented, a generative AI assistant that analyzes judicial files and identifies applicable rules, conceived as a support tool that does not replace jurisdictional work.

Despite these advances, a specific regulatory gap persists regarding the judge's individual duty to declare in the text of the decision whether he or she used open or non-institutional generative AI tools in preparing the ruling.

4.2. Comparative Landscape

European Union: Regulation (EU) 2024/1689 (AI Act) classifies in Annex III, point 8(a), AI systems intended to be used by judicial authorities for the interpretation of facts and law as high-risk, imposing rigorous obligations of transparency, traceability and effective human oversight.

Costa Rica: Circular No. 31-2026 of the Judiciary, issued on February 20, 2026, establishes ethical rules and guidelines for the use of generative artificial intelligence by judicial officers. It provides that AI is a support tool that never replaces human judgment and that final responsibility rests exclusively with the judicial officer who signs the decision.

Colombia: Judgment T-323 of 2024 of the Constitutional Court examined the use of generative AI in the reasoning of a judgment and concluded that its use does not violate due process provided that it does not replace the judge in decision-making and that human oversight exists. In implementation of that ruling, Agreement PCSJA24-12243 of the Superior Council of the Judiciary, dated December 16, 2024, adopted guidelines for the respectful, responsible, safe and ethical use of AI in the Judicial Branch, applicable to magistrates, judges and judicial employees.

5. Toward Judicial Technological Sovereignty: Transparency and Logical Curation

Faced with the dilemma between blind automation and the atrophy of jurisprudential judgment, the principle of technological sovereignty in the judiciary becomes imperative. This postulate requires that digital tools remain subordinate to the constitutional guarantees of a reasoned decision (Article 139.5 of the Political Constitution of

Peru), independence (Article 139.2) and the right of defense (Article 139.14).

The magistrate must evolve from a plain-text drafter into a curator of logic and formal verifier of the decision. The mandatory declaration of AI use in judgments acts as the signaling mechanism that internalizes functional responsibility.

Proposed Regulatory Guidelines (De Lege Ferenda)

Explicit inclusion of a use clause: every judgment must include a standardized section indicating whether generative AI was used (specifying the system, version and scope of processing).

Inescapable duty of direct verification: formal obligation of the judge to check every jurisprudential, normative and doctrinal citation against official databases.

Prohibition of sensitive data in open environments: strict incompatibility between the introduction of personal or confidential data from proceedings (Law No. 29733) and the use of non-institutional commercial language models.

Disciplinary classification: omission of the declaration of use or delegation of substantive reasoning should be treated as a breach of the duties of the judicial function.

Conclusions

Efficient incentives: The mandatory declaration of AI use in judgments aligns the adjudicator's incentives with constitutional guarantees, discouraging passive delegation and mitigating the risk of algorithmic hallucinations.

Reduction of transaction costs: Algorithmic transparency reduces the asymmetry of procedural information, allowing the parties to exercise efficiently their right of defense and appeal without resorting to costly ex post expert evidence for detection.

Preservation of phrónesis: The administration of justice requires the inalienable exercise of prudential and conscious judgment by the human magistrate. Technology must act exclusively as a tool of analytical support (téchne) subordinate to the control and responsibility of the judicial officer.

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Generative Artificial Intelligence in Legal Practice

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Abstract

The article analyzes the impact of generative artificial intelligence on legal practice, starting from a finding: 74% of the sector's billable tasks are susceptible to automation, according to Clio. The central question is whether that efficiency translates into knowledge or only into massive data traffic. The study rests on four pillars: AI as an extension of human reasoning, the Aristotelian distinction between téchne and phrónesis, the knowledge model of Nonaka and Takeuchi and consciousness as the legitimizing ground of knowledge. It examines the learning penalty and cognitive offloading, that is, the loss of learning and the transfer of cognitive load to the machine, and warns about the risk of delegating professional judgement. Drawing on transaction costs and the comparative landscape, it proposes a regulatory framework and a notion of technological sovereignty in which the lawyer acts as a curator of logic rather than an operator of tools.

Keywords: Generative artificial intelligence, legal practice, learning, professional ethics, regulation.

Introduction

The contemporary legal sector is undergoing an unprecedented efficiency crisis. According to records from the consulting firm Clio (2024), 74% of billable tasks in the legal sector are susceptible to automation by means of artificial intelligence tools. This disruptive potential raises a fundamental question for the Economic Analysis of Law (EAL): whether the efficiency gained in document processing translates into greater analytical capacity for the legal practitioner or, on the contrary, encourages a progressive and uncritical delegation of professional judgement. In this scenario, generative artificial intelligence transcends its status as a merely peripheral tool to become a structural vector that profoundly alters the architecture of information management in law.

The emergence of language models capable of synthesizing and producing complex legal content makes it necessary to examine rigorously whether automation genuinely facilitates the construction of knowledge or whether it merely accelerates the massive traffic of data. This article analyzes the impact of generative AI on professional responsibility, critical judgement and the quality of legal knowledge. Its central thesis is that, in the absence of a firm framework of technological sovereignty, the pursuit of immediate efficiency may precipitate the degradation of professional judgement, transferring essential functions of the legal profession to algorithmic systems devoid of intentionality, consciousness and moral responsibility.

1. Theoretical Framework and Epistemological Foundations

Understanding the impact of artificial intelligence on legal practice requires anchoring the analysis in four epistemological and institutional pillars that make it possible to gauge the distance between automated processing and genuine legal reasoning.

1.1. AI as an Extension of Human Reasoning

From the anthropological and media perspective formulated by McLuhan (1964), every technology operates as an extension of some physical or cognitive faculty of the human being. This conceptual framework allows generative artificial intelligence to be interpreted as an extension of legal reasoning, and not as its autonomous replacement.

If the tool fully performs this function of extension, its legitimate purpose consists in amplifying the lawyer's deliberative capacity, optimizing the time devoted to strategy and complex argumentation. However, when this relationship is inverted and technology completely displaces the deliberative faculty it was meant to extend, the critical risk of excessive cognitive offloading arises.

1.2. The Construction of Knowledge according to Aristotle: Téchne versus Phrónesis

On the basis of Rivera Berrío's (2006) reading of Aristotelian realism, the construction of knowledge originates in sensory perception and culminates in intellectual abstraction through the operations of the active and passive intellect. In the field of legal praxis, it is imperative to draw an essential conceptual distinction between téchne, understood as technical and productive knowledge applicable to the standardized drafting of memoranda, contracts or repetitive pleadings, and phrónesis (practical wisdom or political and moral prudence). Whereas generative algorithms display a high level of competence in the automated reproduction of téchne by means of syntactic patterns, they entirely lack phrónesis, which is the exclusive attribute of the lawyer for administering justice and weighing principles in the specific case.

1.3. The SECI Model of Nonaka and Takeuchi in Law

Organizational knowledge evolves through a continuous spiral comprising four phases: Socialization, Externalization, Combination and Internalization (Nonaka & Takeuchi, 1995). Generative artificial intelligence operates with unprecedented power in the Combination phase, collecting, filtering and reorganizing massive volumes of explicit data. However, the systemic risk for professional practice lies in the systematic omission of Internalization. When the lawyer fully externalizes synthesis and argumentation, the internalization of knowledge through direct cognitive effort is forgone, breaking the virtuous spiral of learning and atrophying expert skill.

1.4. Consciousness as the Legitimizing Ground of Knowledge (Broncano)

In the field of social epistemology, Fernando Broncano (1999) introduces the concept of 'proference' to explain that a statement or communicative act acquires the status of legitimate knowledge only when it is deliberately evaluated and endorsed by a conscious mind, and not as a result of a mere mechanical transmission of information between parties. Applying this criterion to contemporary legal technology, algorithmic outputs are strictly chains of structured data, lacking the intentionality and consciousness required for a legitimate proference. Without the active intervention of a conscious mind that weighs reasons and decides rigorously, AI responses are nothing more than statistical artifacts.

2. Information versus Knowledge in Legal Practice

The convergence between Aristotelian postulates, the SECI model and the theory of proference warns against a recurrent misunderstanding: assuming that every algorithmic output has the nature of legal knowledge. In order to delimit the tool's scope of action relative to human judgement, it is necessary to compare the informational and cognitive attributes described in the specialized literature:

• Information: Static and explicit in character, objective in nature, highly duplicable, and disseminated massively and impersonally. • Knowledge: Dynamic and tacit in character, strongly subjective, requiring an active process of recreation, and transmitted primarily through direct experience and collegial deliberation.

Consequently, generative AI operates exclusively on the plane of static and explicit information. Legal

knowledge proper is dynamic, tacit and subjective, and is consolidated only through professional experience, debate and dialectical confrontation.

3. The Phenomenon of the 'Learning Penalty' and Cognitive Offloading

The massive transfer of cognitive functions to automated systems has brought to light a critical secondary effect known as the 'learning penalty'. Recent empirical research on large-scale technology adoption (Strömberg et al., 2026) shows that, although intensive AI use immediately raises scores on routine tasks and reduces execution times, in the medium term it generates a significant deterioration in autonomous evaluation capacities and in performance on complex, high-stakes assessments. This phenomenon is concentrated among users who adopt a pattern of passive externalization.

Transposed to the legal profession, this mechanism operates through a 'comprehension debt'. The professional who delegates legal reasoning to the machine gradually loses the ability to 'hunt for errors' or to detect normative and jurisprudential hallucinations. The short-term efficiency gain thus sacrifices long-term critical rigour, turning the lawyer into a mere operator subordinated to the logic of the machine.

4. Regulatory Risk, Transaction Costs and the Comparative Landscape

From the perspective of the Economic Analysis of Law, the reduction in operating costs promised by generative AI may prove illusory if it generates deferred transaction costs, such as disciplinary sanctions, civil liability for negligence or reputational harm, that are not internalized ex ante in the adoption decision. In addition, international regulatory heterogeneity generates marked uncertainty in cross-border practice.

Whereas the European Union has consolidated a strict regulatory framework through Regulation (EU) 2024/1689 (whose obligations for high-risk systems are scheduled for the end of 2027 and whose sanctioning regimes provide for severe fines of up to 35 million euros or 7% of global turnover) (European Parliament and Council of the European Union, 2024), and Chile is advancing towards the full implementation of its Law 21.719 on the Protection of Personal Data with a highly rigorous sanctioning regime (Law No. 21.719, 2024), other Latin American jurisdictions such as Peru opt for models based on risk management (Supreme Decree No. 115-2025-PCM, 2025), and nations such as Colombia and Ecuador operate with a lower density of binding regulation. This asynchrony shifts the definition of professional diligence to ex post judicial judgement, as illustrated by precedents such as Mata v. Avianca, Inc. (2023), where the submission of AI-generated citations without verification resulted in drastic sanctions for the litigants.

5. Towards Technological Sovereignty: The Lawyer as Curator of Logic

Faced with the dilemma between blind efficiency and intellectual atrophy, the concept of technological sovereignty (Ortega y Gasset, 1939/1982; Mitcham, 1994) postulates that technology must be subordinated to the moral and cultural ends of the human being. AI must be conceived as an amplifier of judgement, requiring the jurist to evolve from purely manual drafting towards the role of 'systems designer' and curator of logic. The contemporary professional must establish rigorous feedback loops in which the machine assists in preliminary processing, but human validation remains the irreducible axis of control and responsibility.

6. Conclusions

Generative artificial intelligence offers an indispensable means of overcoming the traditional operational inefficiency of the legal sector; however, this competitive advantage is sterile if it is built on the renunciation of

phrónesis and critical judgement. The phenomenon of the 'learning penalty' and cognitive offloading demonstrate that professional sovereignty is preserved only through active epistemic vigilance, in which individual consciousness and rigorous deliberation continue to be the irreplaceable foundation of justice and of the legal order.

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Dark Patterns in Consumer Law under Behavioural Economics

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OECD classification: 5.5 Law; 5.2 Economics and business.

Abstract

The article analyzes dark patterns from behavioural economics and assesses the effectiveness of the regulatory framework that addresses them. Classical economic analysis assumed rational agents and built consumer law on that premise: information asymmetry is corrected by disclosing information. E-commerce and user-experience design show that firms also compete through the architecture of the decision, using interfaces that induce choices consumers would not have made under conditions of full freedom. The study examines the duality between intuitive and deliberative processing, the insufficiency of the information paradigm and the notion of behavioural asymmetry, and proposes an economic-legal taxonomy of the most frequent patterns and the biases they exploit. It compares prohibitive regulation, represented by the European Digital Services Act and the FTC's Click to Cancel rule, with self-regulation, and draws lessons for Latin America.

Keywords: Dark patterns, behavioural economics, consumer law, cognitive biases, digital regulation.

Introduction

The guiding principle of classical economic analysis of law assumes the existence of rational agents (Homo Economicus) endowed with stable preferences, the capacity for full processing of information and the ability to maximise their utility under budget constraints. Much of the traditional doctrine of consumer law was built on this premise: information asymmetry is corrected by the mere disclosure of information.

However, the mass deployment of e-commerce and user-experience (UX) design has exposed the limitations of the classical model. Digital firms compete not only on quality and price but also on the architecture of decision through which they present their products. Hence the emergence of dark patterns: interfaces deliberately designed to induce consumers to make decisions they would not have made under conditions of free choice and full deliberation.

The article analyses the effectiveness and limits of the regulatory framework against dark patterns in the light of behavioural economics, with a taxonomy of the most recurrent patterns and an assessment of the debate between prohibitive regulation and self-regulation, in order to draw public policy lessons for Latin America.

1. Foundations of Behavioural Economics: The Architecture of Decision and Bounded Rationality

The starting point is an empirical finding consolidated by cognitive psychology since the 1970s. The individual who decides in a digital environment is far removed from Homo Economicus: they do not calculate expected utilities with complete information, nor do they hold invariable preferences; rather, they operate under a bounded rationality that leads them to employ heuristics and to generate systematic and predictable biases.

1.1. The duality of cognitive processing (System 1 vs. System 2)

The architecture of the human mind, on Kahneman's formulation, operates through two differentiated systems:

System 1 (fast, automatic and emotional): it operates involuntarily and without conscious effort; it responds to immediate visual stimuli, contrasting colours, countdown timers or pop-up notifications.

System 2 (slow, deliberative and analytical): it requires cognitive effort, time and concentrated attention; it is activated when consumers analyse interest rates, read terms and conditions or compare unit prices across competitors.

The legal relevance of this duality lies in the fact that e-commerce platforms are not neutral with respect to which cognitive system they activate: they are designed to force the decision towards System 1, blocking or raising the cost of access to System 2. They achieve this through two converging mechanisms: the artificial restriction of time (timers, scarcity alerts, notifications that interrupt deliberation) and information overload (options that are difficult to compare, costs fragmented throughout the purchase flow, a multiplication of steps that depletes attention).

The economic consequence of this architecture is far from minor. Scholarship has conceptualised the hypernudge, which, unlike Thaler and Sunstein's classic nudge, displays three features that aggravate the asymmetry: deliberate opacity, exploitative personalisation and asymmetric outcomes that systematically benefit the platform.

The digital supplier not only knows the product better than the consumer, as in classical information asymmetry; it also possesses deep, probabilistic knowledge of the user's own psyche (their fears, their desires, their attention patterns) of which the individual is unaware even in relation to themselves. Transparency, in these conditions, is structurally inadequate: the problem does not lie in the concealment of information about the object of the contract, but in the exploitation of information about the contracting subject.

A concrete example illustrates how this exploitation operates. In October 2025, the District Court of Amsterdam ruled that the configuration of the recommendation systems of Facebook and Instagram constituted a dark pattern under Article 25 of the Digital Services Act. The problem was not only that the option for recommendations not based on profiling was difficult to find, but that it was automatically reset every time the user navigated through the application or reopened it. The court characterised it as a generator of choice fatigue: anyone wishing to exercise a deliberate option must repeat it until exhaustion leads them to yield to the default option. Ego depletion is not a side effect of the design, but its operational objective.

For Thaler and Sunstein, the architecture of choice is inevitable and can be oriented towards the welfare of the decision-maker without eliminating alternatives.

The dark pattern inverts this logic: it uses the same capacity to configure the decisional environment, but orients the design towards the benefit of the platform rather than that of the user, through the exploitation of cognitive vulnerabilities that the person cannot detect or counteract on their own. The difference is not one of degree but of direction: the legitimate nudge and the dark pattern share the same behavioural substrate, but they diverge in the criterion of loyalty that should govern the architecture.

1.2. The insufficiency of the information paradigm and the emergence of behavioural asymmetry

The foregoing conclusion has direct consequences for the framework in force. Traditional consumer law assumed that information asymmetry is corrected by disclosing information: if consumers know the terms, costs and conditions, they decide rationally. But when the interface is designed so that they do not process that information and access to System 2 remains blocked, the duty to inform becomes a formality that legitimises an induced

decision.

What is at stake is no longer merely an information asymmetry, since the supplier knows more about the product, but a structural behavioural asymmetry: the supplier knows and exploits the consumer's decision patterns with a precision that the consumer cannot replicate.

As Ramos-Zaga (2026) argues, under these conditions transparency is not only insufficient but structurally inadequate. A change of regulatory paradigm is therefore required: from the duty to inform to the duty to design loyally.

2. Taxonomy of Dark Patterns and Cognitive Biases Exploited

Dark patterns are not mere oversights in software design; they are deliberate strategies for extracting economic rents. The most recurrent patterns and the economic dynamics of their operation are classified below:

3. Economic Impact: Prohibitive Regulation vs. Self-Regulation

From the perspective of the economic analysis of law, dark patterns constitute a market failure: the manipulation of the architecture of choice prevents prices and transactions from reflecting the consumer's true willingness to pay, generating inefficiencies in the allocation of resources.

The current regulatory debate is polarised between direct State intervention through stipulated prohibitions and self-regulation based on reputational incentives.

3.1. Prohibitive Regulation (the EU Digital Services Act and the FTC Click to Cancel Rule)

Prohibitive regulation establishes mandatory (ex ante) rules that define and proscribe manipulative interface architectures.

Efficiency and Positive Impact:

Reduction of inefficient rent extraction: It eliminates the sunk costs and captive revenues arising from unwanted automatic renewals.

Levelling of the playing field: It corrects the problem of the "race to the bottom", in which ethical firms lose market share to competitors that adopt aggressive designs.

Maximisation of net welfare: It ensures that transactions in the digital market respond to real preferences and not to perceptual distortions.

Operational Costs and Externalities:

Compliance costs: Massive restructuring of code flows and digital infrastructure, disproportionately affecting SMEs and startups.

Risk of over-regulation and rigidity: The difficulty of drawing a clear boundary between legitimate commercial recommendation (cross-selling) and a dark pattern may curb useful innovation in the user interface.

3.2. Self-Regulation and Market Incentives

The self-regulation approach relies on the creation of sectoral codes of conduct, usability audits and the value of

brand reputation as corrective vectors.

Efficiency and Positive Impact:

Flexibility and innovation: Agile adaptation of visual design to users' changing preferences, without legislative slowness.

Lower administrative costs: It dispenses with large State apparatuses for the oversight and inspection of computer code.

Failures of Self-Regulation:

Behavioural tragedy of the commons: short-term financial incentives (lifetime value, conversion rate) tend to prevail over long-term reputational costs.

Concentration and competitive failure: in concentrated or oligopolistic digital markets consumers lack real alternatives with ethical designs; in the absence of substitutes, reputation-based competition loses effectiveness.

Conclusions

The traditional model of the rational consumer has exhausted its prescriptive capacity in the face of digital manipulation. The duty to inform presupposes that asymmetry is corrected by disclosing data about the product, but when the interface blocks access to System 2 through time restrictions or information overload, that disclosure becomes a formality that legitimises induced decisions.

Self-regulation has proved insufficient as a sole mechanism: short-term incentives prevail over deferred reputational costs and, in concentrated markets, consumers lack real alternatives. The behavioural tragedy of the commons explains why no platform has an individual incentive to refrain if the others continue to exploit attention. The region must therefore move towards a hybrid framework, with prohibitions focused on the distortions of greatest impact (barriers to cancellation, hidden costs, confirmshaming) and spaces of flexibility for legitimate functional innovation.

That framework must incorporate a verifiable standard of procedural symmetry: it is not enough for cancellation to require the same number of steps as contracting; the user's choice must persist over time. Procedural symmetry is an obligation of verifiable result, not only of means.

In conclusion, public supervision must be transformed. Consumer protection agencies in Latin America cannot limit themselves to documentary and contractual review, because the object of the manipulation no longer lies in the contract but in the interface. Interface audits are required, involving experts in cognitive psychology and data science, together with a reversal of the burden of proof: once a pattern with manipulative potential is detected, it will fall to the platform to show that the design does not exploit cognitive vulnerabilities. Digital manipulation is not a defect that can be corrected through information, nor an excess that the market can correct through self-regulation; it is a behavioural market failure that demands an institutional response that is focused, verifiable and evidentially viable.

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Reflections on the Regional Minimum Wage and Labour Informality in Colombia

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Abstract

The article analyzes labour informality in Colombia, which according to DANE affects 56% of the labour force, with a sharp gap between urban areas and 83.4% in rural areas. It argues that the rigidity of a single minimum wage, set without regard to regional productivity differences and accompanied by high non-wage costs, widens the distance between pay and productivity and pushes workers and microenterprises into the informal sector. The study reviews the literature and the policies implemented, incorporates a gender perspective and evaluates alternatives through a weighted matrix. On that basis it proposes a flexible Regional Minimum Wage, with operating rules and concertation institutions, and contrasts it with comparative experience. It concludes that homogeneous policies across the territory explain much of the failure and that regional adaptation can reduce informality without giving up worker protection.

Keywords: Minimum wage, labour informality, public policy, regionalization, Colombia.

Labour informality constitutes a structural socio-economic, legal and political problem in Latin America, especially in the Andean Community. In the Colombian case, according to the National Administrative Department of Statistics (DANE, 2023), informality affects 56% of the labour force at the national level: it reaches 42.9% in urban areas and rises alarmingly to 83.4% in rural areas.

The economic literature explains that the rigidity of national minimum wages, which are usually set without regard to regional variations in GDP productivity, generates severe distortions. When combined with high non-wage costs and inflexible regulations, a single minimum wage widens the gap between pay and productivity, pushing workers and microenterprises into the informal sector (David et al., 2020; Messina and Silva, 2019).

This paper examines labour informality in Colombia from two cross-cutting aspects: its marked gender disparities and the differential impact by region. It argues that traditional public policies have been insufficient because of their homogeneous vision of the territory and advocates the implementation of a flexible Regional Minimum Wage, adapted to local productivity.

1. State of the Literature and Background of Public Policy in Colombia

The literature review shows extensive attention to the determinants of informality and the vulnerability of women in the labour market (Bolívar Restrepo, 2019; Badel & Peña, 2010).

1.1. Public Policies Implemented

Since 2007, Colombia has tested multiple regulatory frameworks and formalization programmes. Notable among them are CONPES Document 3484 (2007), which set guidelines for MSMEs through credit, training and technology; and Law 1429 of 2010, which distinguished between subsistence informality and informality with capacity for accumulation, granting progressive payment of income tax and parafiscal contributions, which reduced informality by 5.4 percentage points in eight years (Salcedo-Pérez et al., 2020). Subsequently, the "Colombia Se Formaliza" strategy (2012) and the National Network for Labour Formalization (2014) were

promoted.

For its part, the 2012 Tax Reform (Law 1607) reduced payroll contributions from 29.5% to 16%, replacing them with a tax on profits (CREE), reducing urban informality from 56% to 52% and rural informality from 68% to 64% (Fernández & Villar, 2016). Finally, CONPES 3956 (2019) directed formalization towards a single window and progressive regulation according to business size. Despite these efforts, 73% of microenterprises still lack a commercial registration (DNP, 2019). This figure reveals the real limit of the policies implemented: the simplification of procedures and tax incentives are insufficient if the cost of maintaining formal employment remains prohibitive in light of the local productive reality. In other words, earlier reforms eased the "bureaucracy" of becoming formal, but did not resolve the "economic equation" of remaining in formality. If the national minimum wage exceeds the marginal productivity of a worker in peripheral regions, the microenterprise will be forced to choose between bankruptcy or informality, regardless of how easy the registration procedure may be.

1.2. Labour Informality and the Gender Perspective

Labour informality in Colombia disproportionately affects women: 48.7% of employed women are informal compared with 44.2% of men (DANE, 2019). In urban settings, the ILO estimates that 62% of informal employment is carried out by women.

The causal factors include:

Double work burden and unpaid care: Gender stereotypes assign unpaid domestic tasks to women. Employed women work 8.2 fewer hours per week in paid employment but 15.3 more hours in household tasks (Tribin-Uribe et al., 2019). In 2017, they contributed 78.4% of the country's total domestic work hours. Because official accounting classifies housewives as "economically inactive", the real level of female precariousness remains invisible in standard indicators.

Wage gap and "glass ceiling": Even among professional women (such as those belonging to the millennial generation), persistent income barriers and inequity in promotions exist (García et al., 2022).

Unintended effects of regulatory protection: Increases in benefits such as mandatory maternity leave have inadvertently led to discrimination against young women (18-30 years), pushing them into informal or self-employment in order to make their schedules more flexible (Tribin-Uribe et al., 2019).

2. Evaluation of Policy Alternatives

In order to respond simultaneously to territorial productivity gaps and to the gender distortions that make women's work precarious in the regions, three avenues of reform are evaluated below under a system of weighted criteria:

Reduction of non-wage labour costs: Reduce the extra-labour burden (which in Colombia is around 27%, one of the highest in the region).

Simplified tax regime for SMEs: Tax redesign that reduces the tax rate and the direct tax cost.

Flexibility of the Regional Minimum Wage: Territorial differentiation of the wage floor based on regional productivity.

2.1. Weighted Evaluation Matrix

When the options are subjected to a weighted evaluation system (with criteria such as effectiveness 25%, fiscal

impact 20%, political viability 15%, growth/employment 15%, social equity 10%, among others), the results indicate:

Reduction of non-wage costs: 5.35 / 10

Simplified taxation for SMEs: 6.55 / 10

Regional Minimum Wage: 6.95 / 10

Figure 1. Criteria for evaluating policy alternatives. Own elaboration.

Thus, regional wage flexibility emerges as the technically most sustainable alternative and the one with the lowest cost to public finances.

3. Policy Proposal: The Regional Minimum Wage (RMW)

The Regional Minimum Wage model proposes replacing the single national rate with values adjusted to the productive capacities of five macro-regions: Caribbean, Andean, Pacific, Orinoco and Amazon.

3.1. Essential Operating Rules

Protective floor: No Regional Minimum Wage may be lower than the National Minimum Wage of the year immediately preceding the issuance of the policy.

Flexibility cap: The maximum margin of regional wage reduction shall not exceed 20% with respect to the wage determined for Bogotá (the country's most productive node).

Gradual transition: Progressive implementation over a horizon of 3 to 5 years through pilot programmes in the regions with the highest rural informality and lowest productivity.

Legal feasibility: Article 146 of the Colombian Substantive Labour Code already requires consideration of regional characteristics and the economic capacity of employers when setting wages. Therefore, no complex constitutional or legal reform is required; a Regulatory Decree coordinated within the Permanent Commission for the Concertation of Wage and Labour Policies (Law 278 of 1996) is sufficient.

3.2. Institutional Framework and Concertation Process

It is proposed to create the Regional Wages Commission, led by the High Presidential Council for the Regions and composed on a tripartite basis by the Government, business associations and trade union confederations. The Ministry of Finance and DANE will provide technical support on CPI and productivity; the Ministries of Commerce and Labour will design productive incentives. Likewise, the policy incorporates a mandatory gender component through seed capital funds, microfinance and operational training aimed primarily at informal women workers in the three regions with the lowest productivity.

Conclusion

The persistence of labour informality in Colombia, and by extension in the emerging economies of the Andean region, does not respond solely to inspection failures or to a culture of non-compliance with regulations; it represents, above all, the inevitable result of an institutional design that ignores the productive heterogeneity of territories. Requiring the same minimum wage in highly productive metropolises and in rural or remote areas is tantamount to decreeing the illegality of work in peripheral regions. This distortion punishes women more harshly, subjected to an invisible double working day and relegated to subsistence jobs without social protection.

The adoption of a Regional Minimum Wage should not be understood as a precarization of workers' rights, but as a tool for territorial equity and formal inclusion. A realistic and adaptable wage floor allows micro and small enterprises to enter the legal circuit of credit, social security contributions and investment. By articulating with a social protection floor and labour retraining programmes for women in peripheral regions, it ensures that the RMW functions as a catalyst for formalization without perpetuating gender pay biases. In this way, public resources are freed up to be channelled towards regional infrastructure and the care economy.

Overcoming the political taboo of a single wage through tripartite dialogue and regional gradualism constitutes an indispensable step towards the modernization of Colombian labour law. Guaranteeing decent work in the twenty-first century requires abandoning the dogmas of uniformity in order to build public policies grounded in evidence, gender inclusion and the economic reality of every corner of the country.

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Incipient Digital Markets

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Abstract

This article analyzes incipient digital markets, challenging the assumption that digital markets have reached sufficient maturity to be evaluated solely under traditional criteria of dominance and anticompetitive conduct. These markets are characterized by being in early stages of development, displaying high levels of innovation, experimentation, uncertainty, and the entry of new competitors. The study highlights that, in digital contexts, the transition between incipient and mature markets can occur rapidly, whereas a market that is fully developed in advanced economies may still retain incipient characteristics in emerging economies. From a competition law perspective, the article proposes examining three main issues: the definition of the relevant market, the existence of market dominance, and theories of harm. In the latter realm, anticompetitive practices may diminish the innovation inherent to nascent markets or enable dominant firms in mature markets to leverage their power into emerging segments through strategies such as refusal to supply key inputs, tying/bundling, or a lack of interoperability. The article argues that this methodology enables competition authorities to properly distinguish between incipient and mature digital markets, accounting for their dynamic features and the local effects of anticompetitive behaviors.

Keywords: Digital markets, competition, innovation, market dominance, economic regulation.

1. Introduction

Today, the global discussion on competition in digital markets appears to start from a single premise: these markets are sufficiently developed and mature to generate risks of dominance and anticompetitive conduct (Crémer et al. 2019, 23). However, what happens when the market is new or developing? How should competition law analyze them? Should this analysis change in digital contexts?

New or developing markets have been termed by doctrine and case law as incipient, nascent or emerging markets (nascent or emerging markets). According to the U.S. case Meta v. Within, these markets would have observable characteristics. For example, highly differentiated products, unstable market shares and new entrants (Federal Trade Commission v. Meta Platforms Inc., et al 2023, 57). By contrast, a mature market has been defined as "a market that has existed for some time, in which the technology used is known, widespread and has not undergone significant changes, in which no significant innovations in brands occur and demand remains relatively stable or declining" (European Commission, 2004, para. 118). In mature markets, anticompetitive effects may be greater than in incipient markets.

However, there is very little development on the concept, the characteristics and the implications for competition law in incipient digital markets. This is problematic. On the one hand, it is not clear when an incipient market can exert competitive pressure on a mature market. In a first case, both markets would compete side by side (Landman 2024, 46). In a second case, the former would be merely a small niche within a broader market. Consider the case of generative artificial intelligence tools and traditional search engines: do both constitute parts of the same market where they compete on equal terms? Or, on the contrary, are actors such as ChatGPT, Gemini and Anthropic not sufficiently developed to threaten search engines?

On the other hand, markets that are developed and mature in developed countries may be incipient in emerging

economies, such as Latin American ones. This was determined by the Chilean competition authority: given the significant difference in per capita e-commerce spending levels between Chile and the United Kingdom, in the first case it would be an incipient market (Denuncia por restricciones verticales en contra de Mercado Libre 2020, no. 28).

In this context, an incipient market requires a definition and an explanation of its characteristics. Likewise, a theoretical framework is required in order to analyze them from the perspective of competition law.

2. Definition and conceptualization of the incipient market

A first definition comes from the management literature. This doctrine has developed a "corporate life cycle" (Corporate Life Cycle), which allows analyzing the different "stages" of a company in the market. The first stage, start-up, is synonymous with an incipient market. First, there is a high level of experimentation. This is because new demand must be created for new products. Consequently, consumers have little knowledge (Grant 2008, 266). Second, experimentation leads to high levels of innovation. In this way, the combination of experimentation and innovation implies a high degree of uncertainty regarding the outcomes of business decisions (Eisenhardt 2021, 170). In digital contexts, the duration of an incipient or mature market may be much shorter than that of traditional markets (Damodaran 2024, 58-64).

Similarly, a second definition comes from Chilean competition law (Abarca 2021). An incipient market is one that is in early stages of development, with high levels of innovation and dynamism. From a competition perspective, this implies that the high share of an incipient actor can easily be replaced (Denuncia por restricciones verticales en contra de Mercado Libre 2020, § 35). In other words, incipient markets would have only situations of "temporary dominance". Furthermore, Chilean case law has established different criteria to distinguish between an incipient market and a mature one. For example, what percentage of the sales of actors in the mature market do the sales of products in an incipient niche represent? (Adquisición de Cornershop por parte de Uber Technologies, Inc. 2020, § 79-82).

2.1. Framework of analysis from competition law

Once an incipient market has been defined and conceptualized, how can competition law analyze it? Using the traditional methodology, three key axes are proposed:

2.1.1. Definition of the relevant market

The first question lies in the definition of the market. As stated above, an incipient market may be a mere niche that does not effectively compete with the mature segment. However, both markets may also compete strongly (Geroski 2003, 145). Thus, a first relevant market includes only the incipient market, in which new actors compete solely with each other. A second market is defined as one that includes both the incipient and the mature market.

2.1.2. Dominance analysis

The second question lies in dominance. Under the first market definition, it is not clear that an incipient market can be dominated or prone to tipping. This is because high levels of uncertainty imply, in turn, a greater probability of entry. Therefore, incipient actors will always be under the pressure of potential competition. Under the second market definition, the answer requires a prior question: can the uncertainty inherent in an incipient market exert competitive pressure on the mature market? If so, it would again be difficult to determine dominance, for the same reasons: a mature market may receive potential competition from an incipient segment.

If not, a dominant actor in a mature market may maintain its market power (van den Boom 2025, 159).

2.1.3. Theories of harm in incipient environments

The third question consists in analyzing the theories of harm:

Harm within the incipient market: Under the first definition, harm to the market is verified by the loss of the characteristics proper to an incipient market. For example, lower levels of innovation and uncertainty. On the one hand, a merger between two strong but incipient innovators could reduce innovation, without other innovators existing that can maintain its levels (Baker 2019, 153). On the other hand, an anticompetitive agreement that reduces innovation or levels of uncertainty may produce similar results.

Leveraging from mature markets: Under the second definition, harm to the market is verified through conduct by a dominant actor in a mature market. This actor will also seek to disincentivize the characteristics proper to an incipient market in order to secure its dominance. A first case may consist of a refusal of access to inputs necessary for the incipient market to function (Simpson and Cooke 2016, 24). Consider the case of chips (mature market) for generative artificial intelligence tools (in principle, an incipient market) (Autoridade da Concorrência 2026, 12). A second case encompasses leveraging conduct, that is, the extension of the dominance of an actor in the mature market to the incipient one. For example, technical bundling and refusals of interoperability (Competition and Markets Authority 2024, para. 39).

An interesting example of this latter case is the European Commission's ongoing investigation against Meta. Recently, Meta announced that it would allow only its own generative artificial intelligence (Meta AI) on WhatsApp. Thus, WhatsApp's dominance in the instant messaging market (mature market) would extend to the AI market, excluding other generative AI tools (incipient market). According to the Commission, the harm would be verified by the "likely exclusion of existing AI competitors, in particular small and non-vertically integrated competitors, at a time when they are scaling up and seeking financing in an incipient and dynamic market that can still be challenged by new entrants" (Exclusion of AI competitors from WhatsApp 2026, § 364).

3. Conclusion

In sum, incipient digital markets are a reality in both developed and emerging countries. However, their study is also incipient. This proposed methodology seeks to enable competition authorities, academics and practitioners to use it in order to distinguish between digital cases in which an incipient market exists and those in which a mature market exists. This will allow them to be analyzed on the basis of the eminently local effects that anticompetitive conduct may generate.

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Limited Liability and Corporate Risk: Market Efficiency from the Perspective of Economic Analysis of Law

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Abstract

This article analyzes limited liability from the perspective of Law and Economics, highlighting its function as an institutional mechanism that influences financial efficiency, investment, and corporate organization. Limited liability allows for the separation of the personal assets of partners and shareholders from the obligations of the legal entity, thereby reducing information and transaction costs, facilitating investment diversification, and promoting the efficient allocation of capital. However, this protection can also generate negative externalities, particularly when business risks are transferred to involuntary creditors and other third parties. The study examines the economic incentives derived from this institution and warns against the possibility of moral hazard when shareholders and managers adopt excessively risky strategies due to their limited patrimonial exposure. From a qualitative-microeconomic approach, elements of the theory of the firm, transaction costs, agency costs, and corporate governance are integrated. The results argue that limited liability is fundamental for the functioning of stock markets and entrepreneurship, but it requires institutional counterweights to prevent the externalization of social costs. Finally, the need for corrective mechanisms, such as piercing the corporate veil, is proposed to address fraud and the protection of vulnerable creditors.

Keywords: Limited liability, Economic analysis, Asset shielding, Corporate governance, Corporate risk.

1. Limited Liability between Financial Efficiency and Risk Transfer

This research critically and comprehensively examines the intersection between the historical institution of limited liability and the complex structures of contemporary corporate law. Traditionally approached from a strictly doctrinal perspective, the delimitation of liability has been conceived as a mere technical instrument of commercial law. However, within this analytical framework a fundamental premise is advanced: the asset shielding of partners and shareholders should not be understood simplistically as a passive or static rule of legal protection, but as an active and dynamic institutional element that directly and decisively influences the operational, financial and strategic architecture of the modern business environment.

In recent decades, the globalization of financial markets and the mass expansion of corporate investment have reconfigured the risks associated with economic activity. Under this scenario, limited liability operates as the fundamental pillar on which both the stock market and multinational corporations are built. By isolating the personal assets of investors from the debts and contingencies of the legal entity, the legal system drastically reduces information costs and fosters an efficient allocation of social capital. Nevertheless, this legal protection is not exempt from theoretical and practical tensions. The dissociation between ownership and control generates complex incentives that affect both the internal governance of companies and their non-contractual relations with third parties, creditors and society at large.

This study explores these dynamics in depth, adopting an interdisciplinary perspective that transcends the limits of traditional legal dogmatism. Through the analytical tools provided by the Economic Analysis of Law (EAL), it

seeks to unravel the underlying mechanisms that explain the persistence and evolution of this legal figure. In this way, it aims to make a substantive contribution to the contemporary academic debate on the efficiency of corporate rules and the search for an optimal balance between entrepreneurial freedom and the protection of legal transactions.

2. Incentives and Externalities

The central and structuring purpose of this study is to assess with analytical rigor how asset shielding operates, manifests itself and affects modern capital markets and corporate organizational structures. To achieve this goal, the research focuses specifically on a detailed analysis of its impact on the transaction costs inherent in economic activity and on the monitoring and oversight needs that institutional and individual investors must face on a daily basis.

First, the study seeks to determine how limited liability modifies the incentive structure of minority and majority shareholders. In a capital market devoid of this protective mechanism, investors would face an unsustainable cognitive and oversight burden, having to permanently and exhaustively monitor the daily operations of each company in which they hold shares in order to avoid the risk of unlimited personal insolvency. Consequently, the specific objective is to demonstrate how asset shielding acts as a mechanism that reduces transaction costs, enabling the fungibility of shares and facilitating the creation of diversified investment portfolios on a large scale.

Second, the study aims to examine the counterparts of this legal prerogative, inquiring into the negative externalities arising from the transfer of business risks to involuntary creditors and to society. Through this twofold analysis, the paper seeks to build an evaluative model that allows the static and dynamic efficiency of the corporate rule to be weighed, identifying the critical points where asset protection ceases to generate social economic value and begins to encourage opportunistic behavior or excessive risk-taking by corporate managers.

3. Economic Analysis of Incentives, Governance and Risks to Third Parties

Methodologically, the paper is developed under the rigorous theoretical and methodological parameters of the Economic Analysis of Law (EAL). This epistemological current allows legal rules to be examined not only from the standpoint of their formal validity, but primarily on the basis of their practical consequences, their efficiency in the allocation of resources and their impact on the behavior of economic agents interacting in the market.

Through a methodological approach of a qualitative-microeconomic nature, the positive externalities that this legal design generates for the diversification of financial portfolios and for the stimulation of corporate entrepreneurship are examined in depth. The methodology breaks down the economic incentives of shareholders, modeling how the limited liability rule encourages investment in projects involving high innovation and technological risk, which would be ruled out outright under a regime of unlimited liability owing to the fear of personal financial ruin.

Likewise, this methodological framework contrasts these advantages in detail with the perverse moral hazard incentives that inevitably emerge in corporate structures. When shareholders and managers know that their maximum losses are limited to the capital invested in the company, the temptation to adopt excessively risky business strategies, partially financed with third-party resources, increases. The methodological analysis also addresses the consequent transfer of these risks to non-contractual creditors, such as victims of non-contractual harm or involuntary labor and tax creditors, who lack prior contractual mechanisms to negotiate interest rates or

security interests that adequately cover their exposure to corporate risk.

To achieve this goal, the research processes comparative economic and legal literature, integrating the classic contributions of the theory of the firm (Coase) with modern developments on agency costs and corporate governance.

4. Conditional Efficiency: Investment, Social Risks and Institutional Counterweights

The findings derived from this analytical study allow the crucial institutional importance of a clear and precise delimitation of legal liability in the modern corporate sphere to be determined with precision. First, it is empirically and theoretically verified that limited liability constitutes an indispensable prerequisite for the efficient functioning of stock markets and the massive mobilization of citizens' savings toward the productive apparatus.

However, the results reveal a fundamental conclusion: it is established that an adequate and balanced structuring of asset shielding is absolutely indispensable to effectively mitigate the unwanted externalization of social costs toward third parties and to balance the economic incentives of all market participants. When the legal system grants excessive protections without adequate institutional counterweights, severe market failures arise that erode contractual fairness and undermine the stability of the financial system as a whole.

In this way, the results show that the harmonious integration of transaction cost theory and the dynamics of current corporate governance is consolidated as a highly useful and versatile analytical tool. Its practical application is oriented toward optimizing overall social welfare, reducing margins of managerial opacity and favoring a fair and efficient allocation of economic resources in the contemporary business environment. As a corollary, the optimal design of corporate liability rules should contemplate flexible mechanisms of judicial correction, such as the doctrine of piercing the corporate veil, in order to sanction fraud and adequately protect vulnerable creditors without distorting the economic essence of the institution.

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Special Issue: Richard Posner (1939-2026). Economics as the Grammar of Law

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Abstract

Richard Posner died on November 10, 2026. For more than half a century he was one of the central figures of Law and Economics, first as a professor at the University of Chicago and later as a judge on the United States Court of Appeals for the Seventh Circuit. This special issue offers a reading of his work, a selection of his key books and a dialogue with two ALACDE articles that take up his intellectual program. This is not a hagiography. It is an attempt to take seriously his questions about the consequences of legal rules, even when his answers remain contestable. Posner taught that law cannot be understood through its concepts alone, but through the incentives it creates and the effects it produces on people. His legacy invites us to think, rigorously and without reverence, about what it means to do Law and Economics in Latin America.

Keywords: Richard Posner, Law and Economics, legal pragmatism, efficiency, economic regulation.

Introduction

Richard Allen Posner was born in New York on January 11, 1939, and died on November 10, 2026. His intellectual biography deliberately blurs the roles that the academy usually keeps separate: he was a professor, a judge, an editor, a polemicist and the author of nearly forty books. The Journal of Legal Studies identified him as the most cited jurist of the twentieth century. That figure does not explain his importance, but it does suggest the magnitude of a body of work that spanned private law, economic analysis, legal theory, antitrust, regulation and public life.

This special issue does not attempt to summarize that body of work in a few pages. It proposes something more modest and more useful: to offer an entry point, to organize some readings and to show how his questions remain alive in Latin American conversation. Posner was an intellectual provocateur. He wrote with a clarity that is sometimes unsettling and defended theses that he himself revised when the facts ceased to support them. To read him seriously requires distinguishing between method and conclusions, between the question about consequences and the specific answer he proposed.

1. From Yale to Chicago: The Formation of a Perspective

Posner studied English literature at Yale and graduated summa cum laude in 1959. He then entered Harvard Law School, where he served as president of the Harvard Law Review and graduated in 1962. He clerked for Justice William J. Brennan Jr. on the Supreme Court and for Commissioner Philip Elman at the Federal Trade Commission. That combination of literature, law and institutional practice anticipates the style that would make him recognizable: precise prose, curiosity without disciplinary boundaries and a systematic distrust of solutions that do not withstand scrutiny of their consequences.

In 1969 he joined the University of Chicago, the place where economics and law were beginning to converse in a new way. There he coincided with Ronald Coase, Aaron Director and Gary Becker, among others. In 1972 he founded The Journal of Legal Studies, a platform for interdisciplinary research. A year later he published

Economic Analysis of Law, the book that would turn a scattered intuition into a research program.

2. The Invention of a Discipline

Economic Analysis of Law was not the first work to apply economics to law. Coase had published The Problem of Social Cost in 1960, and Guido Calabresi had explored the relationship between costs, risks and tort liability. Posner's merit was systematic: he traversed property, contracts, torts, family, crime, antitrust and regulation with the same question. What incentives does a rule create, and what consequences does it produce? That question, formulated rigorously, transformed the way law is taught and researched.

Posner defended a strong version of economic analysis: efficiency as a normative criterion and wealth as a measure of social welfare. That thesis was criticized from moral philosophy, rights theory and welfare economics. The criticisms were not an accident. Posner himself incorporated them, qualified them and sometimes abandoned them. The vitality of his program resides, in part, in that willingness to argue with his own arguments.

The legacy of the book is not a single formula. It is a discipline that learned to move between positive analysis, which describes how institutions work, and normative analysis, which asks how they should work. In Latin America, that distinction is especially important: rules matter, but so do state capacities, informality and the inequalities that condition their application.

3. The Judge Who Studied Judges

In 1981, Ronald Reagan appointed him to the Seventh Circuit. Posner presided over that court between 1993 and 2000 and remained in the post until 2017. His experience as a judge did not distance him from theory. It made theory more concrete. In texts such as What Do Judges and Justices Maximize? and How Judges Think, he shifted his gaze from rules to the people who apply them. Judges are not automatons. They have incentives, preferences, workloads, reputations and worldviews.

That pragmatic perspective does not imply cynicism. It implies recognizing that law is a human practice and that institutions matter. Posner defended a judicial pragmatism that evaluates decisions by their consequences, but also by their coherence with the system. In his later years on the court he adopted more liberal positions on issues such as same-sex marriage and abortion, which earned him criticism from conservatism. His intellectual independence was, perhaps, his most consistent form of fidelity to theory.

4. An Uncomfortable Intellectual

Posner wrote about animal rights, feminism, drug prohibition, marriage, literature, capitalism and national security. That breadth was not dispersion. It was a single conviction: economic analysis is a tool for thinking about public problems, not an ideology for foreclosing them. In A Failure of Capitalism (2009) he argued that the financial crisis of 2008 required revisiting the assumptions of rationality and self-regulation that had dominated his own formation. Few academics of his prestige are willing to say they were wrong.

His polemical style generated adversaries and disciples. He was accused of reducing law to a calculator and of ignoring income distribution. He replied that a theory that does not confront consequences is an incomplete theory. That tension remains open. The special issue does not resolve it. It turns it into a productive question.

5. Posner in ALACDE

ALACDE's conversation with Posner is not new. Two articles published in the ALACDE Forum show how his

program translates into concrete problems.

Related article: The New Frontier of Law and Economics. Rubén Méndez Reátegui · 2026. The article places Law and Economics before a new stage, marked by complexity, technology and the need to revise the classical assumptions. Posner appears as a starting point and as a critical interlocutor.
https://asociacionalacde.org/la-nueva-frontera-del-law-and-economics/

Related article: Neoconstitutionalism and the Economic Analysis of Contract Law in Colombia. Alejandro Linares Cantillo · 2025. The text examines how the constitutionalization of private law transforms contractual incentives and requires articulating efficiency, fundamental rights and institutional design.
https://asociacionalacde.org/neoconstitucionalismo-analisis-economico-contratos-colombia/

Both works show that Posner's agenda is not limited to importing formulas. It is about asking how rules work in contexts of inequality, informality and institutional distrust. That is, perhaps, the most valuable contribution of his method for Latin America.

Other ALACDE readings engage with that tradition: The Arbitrator before the Rules of Competition, by Antonio Robles Martín-Laborda, and Blank Criminal Law and Open-Ended Offenses in the Economic Analysis of Law, by Rafael Vega Llapapasca.

This special issue remains open to new readings on Posner's work. Proposals may be sent through the ALACDE contact page.

6. Key Works

- 1973. Economic Analysis of Law. The book that systematized the economic analysis of law and turned it into a recognizable discipline.
- 1981. The Economics of Justice. A defense of efficiency and wealth as criteria of justice, with its tensions.
- 1990. The Problems of Jurisprudence. A pragmatic critique of legal theories that ignore consequences.
- 1992. Sex and Reason. A polemical exercise in economic analysis applied to sexuality and law.
- 2001. Antitrust Law. An economic reading of competition law, its institutions and its remedies.
- 2008. How Judges Think. A realistic theory of judicial behavior and the incentives that shape it.
- 2009. A Failure of Capitalism. A self-critique of the model of rationality and self-regulation in the face of the 2008 crisis.
- 2013. Reflections on Judging. A retrospective look at the practice of judging and the limits of theory.

7. Conclusions

Richard Posner leaves an enormous body of work and an uncomfortable lesson. Law cannot be understood without consequences; economics cannot be understood without institutions. His project was not a compact ideology but a demanding conversation among disciplines. That conversation remains open.

In Latin America, reading Posner does not mean adopting his answers. It means taking responsibility for his questions: what incentives does a norm create, who bears its costs, what institutions make compliance possible and what price does efficiency exact when inequality is structural. The best way to honor his legacy is to discuss it with the same freedom with which he discussed it with himself.

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