THE ROMANO-GERMANIC SYSTEM OF LIABILITY AND ITS FORMULAS APPLIED TO AN ANTITRUST TRIAL, REGARDING THE FACEBOOK CASE

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As it's well known, Law is an area of knowledge of primary importance in the modern world. It touches from the basic aspects of an individual's life, like family, to state or international affairs. Within this discipline one of the most transversal and technique areas is the study of "liability and damage". In a liability trial, either civil, criminal or administrative, it's defined nothing less than the possibility of a person to be sanctioned for the commission of a behavior considered illegitimate by Law.

Every society must have a way to respond to harmful behaviors, either by having the victim to stand them or the author to repair them, in any case, it will be the trial what defines such question. Liability is the obligation to repair damage, to respond for one's acts. It´s the lawful sanction of behaviors.[1]

Thanks to the figure of liability, damages are repaired, individuals know through Law what they can and cannot do, and despicable conducts are sanctioned and avoided in development of the exemplary labor of sentences.[2]

This article will address the structure of the liability system in the Romano-Germanic tradition systems (Civil Law), giving application to its use in antitrust Law, for doing so, the Facebook case, related to **Cambridge Analytica**, will be developed.

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[1] Fernando Hinestrosa, Tratado de las obligaciones, 182-194 (2003).
[2] Luis Diez Picazo & Ponce de León, Derecho de daños, 41-48 (1999).

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First, the civil and administrative liability systems within the Romano-Germanic regime will be explained, building Law equations. Then, those equations will be applied to antitrust Law. Finally, how the possible Facebook liability might fit into those equations in the aforementioned case.

For this article I counted on the collaboration of Lina Romero. Lawyer who has already antitrust Law and liability regimes pretty clear in her head.

1. Brief review to the Romano-Germanic Law system and to the Anglo-Saxon Law system

The Civil Law, which is the name given to Romano-Germanic tradition systems, is characterized for having written rules, its main source is Law, which seeks to give legal security to the system and shield it from judicial arbitrariness. Complex normative bodies are created through this written Law, those bodies are separated by topics that allow individuals to know in advance what prohibitions and dispositions they must observe in development of their activities.[3]

From this prevalence of written Law, it appears an essential principle in civil law, which is "Legality principle", according to which particulars cannot be submitted to prohibitions that are not included in Law, and in that sense, a sanction can't be applied, whatever its nature is, if there is not a previous Law stipulating it. However, next to this principle there is another one, which is the "Law abuse prohibition", also typical of the Romano-Germanic tradition.

There will be given a brief explanation of this figure, because it allows to show that there is an especial and a general "typicity". The special one allows to find written rules that specifically prohibit a hypothetical behavior described in the same Law. Something different

[3] Mauricio Velandia, Derecho de la competencia y del consumo, 207 (2011).

occurs with the general typicality, which is where "Law abuse" lies, as a prohibition to the wrongful use of Law. Let's see the situation:

The Law abuse prohibition answers to the fact that subjective rights and their practice aren't absolute[4], it works as a boundry to them, just like good faith, from which this principle derivates. "There is Law abuse, *lato sensu*, when '... its holder enjoys a freedom margin in the use that leaves open the possibility of a wrongful use, which is what is called abuse (…) only conceivable, by logic, with this condition: that the wrong use is not confused from the beginning with the absence of right'", "there is Law abuse in its abnormal exercise".[5]

"The behavior defined as abusive wouldn't be more or less than the transgression of the formal boundaries of the own right"[6]. That means there is Law abuse when under the system's dispositions, a person is allowed to exercise a right of his own, but transgresses its natural boundaries and ignores its purpose, harming a third party. In these cases, the actor is not going against a specific rule nor incurring in prohibited conducts, but he is ignoring the purposes of the rule that authorizes him and acts against system's principles.[7]

For Law abuse to be configured, the doctrine has talked about three necessary elements:

i) preexistence of a right; ii) subjective, objective or mixed attribution; and, iii) arising of a 'damage'. The preexistence of a right at the head of the actor is necessary because one can't abuse of what one doesn't have, here is where the difference between Law abuse and direct illegal conducts lie.[8]

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[4] Breccia, Bigliazzi, Natoli & Busnelli, Derecho civil, Tomo I Volumen I ,373 (1992).

[5] Carlos Ignacio Jaramillo, El abuso del derecho y su proyección en los ámbitos sustancial y procesal civil. Perfiles de la conducta abusiva e inobservancia del deber de obrar de buena fe, 76-84 (2019).

[6] Id., 480-481.

[7] Ernesto Rengifo, Del abuso del derecho al abuso de la posición dominante, 56-57 (2002).

[8] Jaramillo, Supra, 84-85

ii) Those who stand for a subjective attribution of Law abuse, argue that it's configured when the agent acts with intention to harm and/or in absence of a legitimate individual right; while those who defend an objective attribution put the focus on the purpose deviation and/or the abnormal exercise of the right. In practice, depending on the case, one or another criterion will prevail, anyway, both subjective and objective criteria should be observed in order to define which ones will stand out in the specific case.[9]

iii) Finally, if there is no damage or a certain threat of damage to a protected legal interest, there won't legally be abuse.[10]

Nothing said above happens in Common Law systems, typical of Anglo-Saxon law, there, instead, the main source is jurisprudence. In these systems the written rules are relatively few and very general; what truly fills with content the regulatory parameters, is the application given by judges to those rules in the specific cases; only that later more concrete written rules might appear, which actually collect what has been said in the precedents.

2. Liability regime in the Romano-Germanic system

2.1. Civil Liability

The civil liability goal is to repair the damage suffered by the victim[11]. It takes care of the private individual's interests of those who suffered a patrimonial detriment ('*perjuicio*') as a consequence of other persons' actions. The damage may be patrimonial or fall upon non-patrimonial issues like moral or "life of relationship", however, in the civil area this damage will always be translated in a detriment ('*perjuicio*') expressed in monetary terms, which amount will be the compensation received by the victim.

[9] Id., 86-93
[10] Id., 93-98
[11] Ricardo de Ángel Yagüez, Tratado de responsabilidad civil, 127 (1993)

In Romano-Germanic tradition there are two fundamental axioms, according to which the damage is the reparation's measure and the damage must be integrally compensated. The above means that the offender compensates the victim in an amount equal to the detriment ('*perjuicio*') equivalent to the damage he caused, he is not obligated to pay more than that amount, which is proved on trial.

If the compensation amount is higher than the detriment, as in Common Law through figures like punitive damages, in Romano-Germanic tradition, there would be configured "enrichment without fair cause" by the victim, and if on the contrary, he received as compensation an amount lower than the detriment, it would be an "impoverishment without fair cause", because he will be supporting with his own patrimony the consequences of a damage caused by other. In a Romano-Germanic system the victim must be left in a state as if the damage hadn't occurred, which means, not increasing nor lowering his patrimony.[12] I believe it's a mistake not to allow the punitive damages figure, because whoever causes it knows that he will end up paying the detriment only until the trial is over, so he can financially handle money in his favor in order to end up paying less. Likewise, conciliation has become a misused way to pay less than what is owed, generating a licit impoverishment through the figure.

The Romano-Germanic civil liability is usually divided in several classifications, below, we will talk about pre-contractual, contractual and extracontractual liability.

2.1.1. Liability around the contract

[12] Juan Carlos Henao, El daño. Análisis comparativo de la responsabilidad extracontractual del Estado en Derecho colombiano y francés, 45-76 (1998)

A contract has three moments: Before the contract, in its development and after the contract. Each one of those moments is important for Law and has its own Liability regime.

2.1.1.1. Pre-contractual Liability

This first type of liability answers to the importance of people's behavior towards prior acts of a contract, in that sense, negotiations have a fundamental part in the development of the future contract and may have important implications for the parties because they start preparing certain questions since before they enter into the contract, and if the other party behaves harmfully, that may implicate monetary losses for the individual. Precaution and good faith become important.[13] "The Law development in our days, shows the growing need to require parties to act with loyalty and amendment in the formation of contracts, what implies at the same time the protection to who trusts someone else's honorability. Therefore, there are interests that must be protected, regardless if the contract is celebrated or not"[14].

Pre-contractual liability is not peacefully considered as an independent category, some see it more like a subcategory; in any case, today in the Romano-Germanic tradition systems it's not disputed that in the pre-contractual stage, good faith and loyalty requirements between parties are fully applicable, and that the acts executed in that stage give rise to liability.

In Anglo-Saxon Law, on the other hand, it has been talked about preliminary agreements, under which the parties make investments and may result affected if one of them abandons abruptly the negotiation.[15] Traditionally, US Courts have been reluctant to declare

[13] Vladimir Monsalve Caballero, Responsabilidad precontractual. La ruptura injustificada de las negociaciones, 77-100 (2009)
[14] Id., 80.
[15] Alan Schwartz & Robert E. Scott, Precontractual Liability and Preliminary Agreements, Article at Harvard Law Review, Volume 120, Number 3, 662-663 (2007)

pre-contractual liability, unless the parties had manifest through preliminary agreements their intention to stay legally bounded somehow.[16]

In the Romano-Germanic Law this forms of behavior are developed with some loads, like clarity, precision, loyalty, care, sagacity, decorum and information, that put pre-business loads on both parties that will develop a business.

2.1.1.2. Contractual Liability

The "Legal Business" ('*Negocio Jurídico*') has been defined as a "will declaration headed to the production of legal effects"[17], as a "private autonomy act with legal relevance", or "act of will, declaration of will headed to legal purposes and producer of lawful modifications: creation, transformation, maintenance or extinction of legal situations and relationships".[18] It's an obligations' source through which particulars manifest their "will autonomy" ('*autonomía de la voluntad*') and dispose of the rights they have or acquire new ones.

The contract, on the other hand, has also been defined as "accordance of wills", or in a more precise way, as "coincidence of conducts with a social univocal meaning of act of disposition of interests".[19] Contracts are governed by the principle *pacta sunt servanda*, which is, the contract is law for the parties, that means that whatever they legitimately agreed to, is obligatory for them; whatever makes part of the contract's content (*praestare*) becomes mandatory for those who were obligated by it.

The contract's content is mainly defined by the parties; however, the system foresees supplementary, dispositive and imperative rules. With the first ones, the contract's content is

[16] Id., 673
[17] Fernando Hinestrosa. Tratado de las obligaciones II. De las fuentes de las obligaciones: El Negocio Jurídico. Vol I, 66-67 (2015)
[18] Id., 265-268
[19] Id., 232-235

integrated in points where the parties kept silence. With the second ones, the parties are allowed to choose if they take what's in the rule or define something different. The last ones impose mandatory conditions, that are necessarily understood as included in the contract, even if the parties kept silence or decided something different.

The above must be summed up saying that contracts have a primary content and a secondary content. The primary content is defined by the parties, whether verbally or written, and the secondary content is the one integrated by the system or the laws, whether written or said by the parties or not at the moment they were entering into the contract. The secondary content doesn’t only cover the three types of rules recently mentioned, but also a series of boundaries and loads to private autonomy, derived from the general principles of Law.

One of the most important boundaries is Good Faith, whose content is quite broad and is translated into several loads for individuals, among those there is the Law abuse prohibition. In the Romano-Germanic tradition it’s mandatory that every individual acts on good faith, so that at the time of entering into a contract, they must, at least, take into account the other party’s interests. The system doesn’t conceive that people behave egotistical and everyone watches only over what is convenient for them; instead, there is a “social” concept of Law, which means that society expects that its citizens behave in a way that society wins instead of loses.

It has been talked about two types of good faith, the subjective and the objective one. The subjective good faith refers to the internal conviction of being acting lawfully, while the objective one refers to a social correction duty according to which the contract’s interpreter

must observe what would have been the reasonable expectations of the parties and tend to maintain concordance with them; the one required in contractual affairs is the second one.[20]

So, if parties are not only obligated to fulfill what they specifically agreed to, but also the secondary content, what is logical is that liability and non-compliance complaints proceed for both, breach of obligations specifically included in the contract, and for ignoring the secondary content, implicit in the contract.

Now, in contracts there are “means obligations” and/or “result obligations”. Through means obligations, the debtor is only required to do as much as possible to achieve a purpose, so if it’s not reached, but the debtor did as much as he possibly could, there won’t be a contractual breach. In the result obligations, the debtor is required to achieve the result, and as long as it’s not accomplished there would be a breach and therefore liability.

According to the doctrine, the difference between these two types of obligation lies in the “prestational” content and not in the diligence level required from the debtor. Thereby, in means obligations, the content is the diligence and the use of all the possible means to achieve a result, while in the result ones, the obligation content is the result itself. It has also been said that “the difference lies in the rigor degree or the severity of the commitment assumed by the debtor in respect of the result”, and that it’s “a different assignation of the risk that the result would be achieved or frustrated”.[21]

From this classification derivate two different ways to structure liability; the situation of a result obligations’ debtor is more complex because the non-achievement of the result, alone, is enough to start the liability trial, it doesn’t matter if the debtor used all the possible means

[20] Diego Franco, Interpretación de los contratos civiles y estatales, 168-170 (2019)
[21] Carlos Vattier Fuenzalida. El interés de la clasificación de las obligaciones de medio y de resultado, 962 (Capítulo dentro del trabajo: Responsabilidad por daños en el tercer milenio. Directores, Alberto José Bueres & Aida Kemelmajer de Carlucci, 1997)

or not; while the means obligations' debtor would only respond if it's proven that he was negligent or didn't use correctly all the suitable means to achieve the result.

As a consequence of the above, the burden of proof is also different. The means obligations debtor will be excused proving diligence, while for the result obligations debtor that is not enough, it will only be useful the proof of the delivery of the promised result to detract the non-compliance, noting that there also exist Liability exempts.

2.1.1.3. Post-contractual Liability

The parties must behave in good faith both before, during and even after the celebration and execution of the contract. Even after a contract is over a person might perform conducts with which he harms the person who used to be his other party, for example, if he spreads information that the other one gave him in development of the contract. That's exactly why it makes sense to demand loyalty even when the parties are no longer formally bound by the contract.

These requirements are particularly demanded in cases where the relationship was prolonged and implied duties like non-competition or confidentiality. It happens for example in contracts like franchise, where the concessionaire must avoid to use the know how transferred to him, however, some discussions remain about the treatment that should be given to the acquired clientele. About the confidentiality, it must be taken into account that not only good faith, but also the intellectual property regime come together to guarantee it.[22]

Apart from the previous classification, there is another form of classification for liability.

Let's see:

[22] Fernando Hinestrosa. Tratado de las obligaciones II. De las fuentes de las obligaciones: El Negocio Jurídico. Vol II, 926-927 (2015)

2.1.2. Extracontractual Liability

Extracontractual liability is derived from cases in which there was no previous business bound between the parties, but there do is damage from one person to another; and that damage is not derivate from a contract's development.

In that sense, the liability doesn't come from the contract, but from another kind of relationship, as it's the social one, where a person may cause damage to another one because of their interaction in social means, as when someone is driving a car and runs over a pedestrian.

Within that extracontractual system there's a subjective and an objective liability regime.

The difference between these two regimes is that in the first one, the subjective, the liability trial for an individual depends on his subjective acts, it means, the person's behavior must be observed in order to determine if he acted with "intent" ('*dolo*'), or with "fault" (absence of prevision or due diligence). Instead, in the objective regime it won't matter how the person acted, especially if he behaved with intent or fault, the important thing is that him, with his actions or with "objects event" ('*hecho de las cosas*') set a harmful event.

The subjective regime and the idea of putting the focus on intent or fault are heritance of a liberal philosophy, according to which no one can be sanctioned for an event that wasn't consequence of his free actions, and the idea arose also in an industrial development context, in which sanctioning "fortuitus" events would have certainly increase the costs for industries developers, perhaps getting to slow the revolution in some level.[23] This protectionist thesis

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[23] Yagüez, Supra, 52-54

has been having changes and today the industrial risk is defended with the “state of art, science or technique”.

For its side, the idea of sustaining liability in created risk came up in the XIX century due to the emergence of a modernity charged with new risky activities and due to a pass from the idea of primarily punitive liability to a mainly reparative one. The objective liability regimes are exceptional and must be specifically included in Law to be applied; some criticize the figure because they consider it ignores some purposes of liability like prevention; anyway, it has been progressively applied in areas considered risky.[24]

The liability structure will be different if the regime is objective or subjective.

Below, we will explain its content through charts that contain the liability variables necessary for proving someone liable. In other words, what a plaintiff has to prove, what a defendant has to fight, or what the judge must definitely take into account to carry out the liability trial.

2.1.2.1. Objective extracontractual Liability

The objective regime’s elements are: i) Damage, ii) Action that caused the damage and iii) Connection between the first two elements.

As it can be observed, there’s not required any element related to the will the person had when committing the act.

Let’s explain the variables:

i) Damage: It must be translated into a monetary affectation and it must be certain, direct, harm a legally protected interest and not have been compensated before.[25]

[24] Id., 54-57
[25] Javier Tamayo, De la responsabilidad civil, 77 (1999)

ii) The action that caused the damage is the actor's action or omission, regardless of his will.[26]

iii) The connection between the first two elements is the cause and effect relationship between them, that means, that a person's action or omission has been the effective cause of the damage.

The summary of the objective liability chart with its elements is:

Objective extracontractual civil Liability	Damage: Harm caused to a particular translated into a detriment ('*perjuicio*') expressed in monetary terms.
	Action that caused the damage: Action or omission, regardless of the subjective component.
	Connection between the first two elements: The action or omission is the cause of the damage.

It's the Law itself what indicates if the liability regime is objective. So, if the Law indicates that the regime is objective, and these three elements are proven in trial, one can affirm that the person is liable for the damage and commanded to pay for the detriment. Noting that there are also liability exempts like those related to "foreign causes".

2.1.2.2. Subjective extracontractual Liability

This kind of Liability has as fundamental basis the prove of how the will concurred to the event. It has the following elements: i) Damage, ii) Intent or fault and iii) Connection between the first two elements.

i) As it was announced, for the damage to be compensable, it has to be certain, direct, unfair and not previously compensated. "Certain" means that there can't be any doubt about the detriment's ('*perjuicio*') consolidation, it can't be a mere suspicion. It must

[26] Velandia, Supra, 220

be clarified that the above doesn't mean that the damage can't be future, the important thing is that there's no doubt that it happened or will happen.[27] "Direct" means that the damage can only be claimed by the person who suffered it directly, so a damage suffered only indirectly or mediately by the plaintiff can't be compensated. It's worth to note that the personal nature of the damage is not the only requirement for someone to be legitimized for suing, it is required, for example, that the causes of action aren't result of illegal situations, among others.[28] By its side, the "unfair" nature of the damage means that the harm must fall on a protected legal interest, initially, it was required that they were subjective and absolute rights, however, the thesis evolved and now the requirement is only that the damage falls on a legal protected interest.[29] Finally, it is required that the damage "hasn't been previously compensated", it's logical regarding some postulates, already enunciated, like the prohibition of enrichment without fair cause, whose consequence is that an amount higher or lower than the detriment effectively suffered, can't be compensated; with the purpose of leaving the victim in the same state as if the damage hasn't occurred. If a damage is unfairly compensated, the receiver's patrimony would unfairly increase.

ii) The second element, that must be proven given the existence of the innocence presumption, is the intent or fault, and this element is also the consequence of the fact that the regime is subjective. "Fault" is defined as the lack of due diligence; it is referred to cases in which the actor didn't foresee the harmful results of his actions when he was supposed to. "Intent" is referred to a harmful intention, or willful misconduct, in other words, cases in which the author foresaw the harmful result and

[27] Henao, Supra, 129-132
[28] Id., 88-105
[29] Diez Picazo & de León, Supra, 294-297

being conscious of it decided to go ahead with his actions. About the fault, it must be noted that in the civil area there's a difference between contractual and extracontractual liability; in the extracontractual one, the fault's criterium is unitary, while in the contractual one it's divided in three degrees: the fault may be severe, slight or very slight; one or another will be applied depending on the contract's utility, if the creditor is the only one benefited with the contract, the debtor would only respond for severe fault, which is equivalent to intent; instead, if the contract is useful for both parties, the debtor is required to be more diligent and he responds until slight fault, which means, for not having a medium diligence; and finally, if the contract is only useful for the debtor, he is required to have an extremely precise diligence, so he responds until very slight fault.

In the Romano-Germanic tradition there are used certain behavior standards, they are used to be compared with the subjects' actions in order to stablish if a person may be held liable or not. There are, for example, the standards of the good father or the good business man, among others, depending on the case it will be required from subjects to act according to one or another standard, which will be used to determine if a person had the diligence necessary for the specific case or not. When there's not a specific mention to some model, one must assume that the relevant ones are the medium man and the slight fault.

The use of this models is really useful because if the individual's behavior was analyzed in abstract, there might be various arbitrariness, and if the individual's behavior in the specific case was compared with the same individual's behavior in his ordinary life (in

order to determine if he was less diligent than usual), those who are usually careful would be harmed, and those who are usually careless would be benefited.[30]

iii) Finally, there is the connection between the first two elements; this requirement is referred to a cause and effect relationship. It means that if there is a harm, and the person acted with intent or fault, but that guilty behavior wasn't the cause of the damage, the person cannot be held liable. It's not easy to determine this element, and for doing so, along the history several theories have been elaborated, like "conditions equivalence" "suitable causality" and "close cause", all of them seek to determine when there's legally a connection between the elements, because "the physical, natural or material causality is a very different thing from the legal causality".[31] Currently, the most accepted theory is the "suitable cause" one, according to which there might be several causes coming together for the occurrence of an event, but not all of them are suitable or adequate, according to the rules of the experience, to achieve said result, so there must be analyzed which one is the truly suitable one.

Summarizing, the subjective extracontractual civil liability structure in a Romano-Germanic system is the following:

Subjective extracontractual civil Liability	Damage: Detriment caused to a particular translated into a harm ('*perjuicio*') expressed in monetary terms.
	Guilt: Fault (Lack of due diligence) or Intent (Harmful intention)
	Connection between the first two elements: Cause and effect relationship between damage and guilt

[30] Yagüez, Supra, 285-287
[31] Id., 752

Until this point the explanation of the civil liability regime applicable for an antitrust infraction depending on if its origin is contractual or extracontractual. So, we've talked about the civil regime, that may be applied by civil judges or arbitrators, chasing compensation for the detriments caused as a consequence of the antitrust behavior. In short terms, it is the compensatory antitrust Law. It's worth to note that the dominant position abuses may come from contracts in which that position is abused, and there's where the contractual regime of means and result obligations, the good faith principles and the contractual imperfect interpretation with economic dependence or the bindings of a contract, apply. On the other hand, there are behaviors that cause damage from the extracontractual point of view, like the sell under costs that breaks a competitor or the refuse to sell or the boycott. There are many examples in one case or another where an antitrust behavior causes damage to a patrimony and gives birth to civil Liability.

Let's move on now to study the other side of liability in the antitrust Law, referring specifically to the punitive regime, where fines are imposed due to a behavior against economy direction rules of a State, executed by a merchant deceiving the consumers' or producers' surplus, which means, causing an affectation to social interest. Let's see:

2.2. Administrative Liability

Despite according to the traditional tri-division of power, which seeks to avoid concentration of power, the administration is not, in principle, allowed to exercise jurisdictional functions, the Law evolution in the world has led to a broad acceptance in the Romano-Germanic regime today, of the possibility that the administration executes certain administrative sanctioning liability trials when public interests are in the middle.

To justify this possibility of the administration to sanction, there has been talked about a concept called '*ius puniendi'*, which is the sanctioning power at the head of the State. Some adduce different justifications, but this is the most accepted one. *Ius puniendi* is unique but has two manifestations: On one side there is criminal Law, and on the other there is administrative sanctioning Law.[32] This double manifestation of *ius puniendi* achieves a collaboration between branches of public power[33] and a regime that allows administration to make its commands effective and coercive, "the administration would be incomprehensible without a repressive or corrective regime that didn't punish disobediences to the internal State's structure or its external normative system".[34]

Despite some people criticize the figure saying it blurs unjustifiably the tri-division of power, in comparative Law it has proven to be useful for avoiding judicial collapse, actually, in Spain in 1812 they tried to eliminate it and keep the judiciary monopoly, but they had to reform it in the next year and maintain the administrative sanctioning power because the judicial collapse was evident.[35]

Because both, criminal and administrative sanctioning Law, are manifestations of *ius puniendi*, they have a lot in common, as a shared liability structure, in which we will deepen later. Criminal Law appears as a more severe form of sanction than administrative sanctioning Law, which is why some people defend the "decriminalization" and instead the making of some sanctions only administrative, so that for criminal Law there are only left the most severe behaviors, making it truly an '*ultima ratio'*.[36]

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[32] Alejandro Nieto, Derecho administrativo sancionador, 24-25 (2012)
[33] Jaime Ossa Arbeláez, Derecho administrativo sancionador. Una aproximación dogmática, 105 (2nd ed. 2009)
[34] Id., 97
[35] Id., 119-121
[36] Manuel Gómez Tomillo & Ínigo Sanz Rubiales, Derecho Administrativo Sancionador. Parte General, 45-73 (4th ed. 2017)

Anyway, it must be taken into account that the above doesn't imply a total equivalence between criminal and administrative sanctioning Law, nor between crime and administrative infraction; it's just that they share certain variables among their equations that must be proven with the shades of each area in the liability trials.[37] However, both trials are independent and the decision taken in one jurisdiction is not moved to or conditions the decision taken in the other one.[38]

Now, the pendulum of administrative sanctioning liability is diametrically opposite to the civil one, which we said is headed to the protection of particular and individual rights, instead, in the administrative sanctioning area what's pursued is the protection of the common benefit, which is not the sum of all the particular ones, but a purpose superior to them.[39]

The common benefit is the main purpose of a State because it exists by and for its members, so it must always act regarding the common benefit above the individual one, that way, it has been pointed out that "the State must be at the service of common benefit which is its final purpose. In those conditions the State ends up as tributary of itself"[40]. We will deepen in this later when we talk about the protected legal interest in the punitive antitrust Law, but by the moment, it must be clear that the interests aimed to protect with the administrative sanctioning liability trials are the public and collective ones. The focus is not in the damage suffered by a particular, but in the harm to protected legal interests.

[37] Id., 115-120

[38] Eduardo García de Enterría & Tomás-Ramón Fernández, Curso de derecho administrativo. Tomo II, 184-187 (8th ed. 2002)

[39] Id., 7-12

[40] Id., 7-12

The administrative sanctioning liability structure is equal to the one observed in criminal Law, but with the administrative shade; its equation variables or elements are: i) typicity, ii) unlawfulness, and iii) guilt.[41]

i) The typicity requirement to impose a sanction answers to the legality principle, existent in every State of Law, which demands a previous, written and certain law prohibiting the behavior. In that sense, there is typicity when there is equality between the conduct executed by the person and the prohibition described in a law.

The "types" can be of lesion, concrete danger or abstract danger. The lesion ones are referred to effective, real, concrete and direct affectations to the legal protected interest. The concrete danger ones don't require an effective lesion, but do require the confirmation of a real danger to the protected legal interest. Finally, about the abstract danger ones, we can say these are the ones that take more care of the protected legal interest, because they sanction the simple potential endanger of the protected legal interest, it's not even necessary that the danger is real for the type to be configured.[42]

In antitrust Law, and generally in all areas of Law, there are conducts specifically typified for the corresponding area; however, next to this special forms of typicity, there is a general one, framed in the "not to harm others" principle (*naeminem laedere*) and in the Law abuse, which was already talked about, so if there is not a specific rule allowing to prove the special typicity, the Law abuse, understood as general typicity, may be proven.

[41] García de Enterría & Fernández, Supra., 90-112
[42] Gómez Tomillo & Sanz Rubiales, Supra., 333-340

Typicity is many times considered as an indicator of the second element, unlawfulness,[43] because if a behavior is described in law it's not just for legislative arbitrariness, but because its aimed to protect some legal interest; however, it must not be treated as anything more than an indicator, because all three elements are independent and need to be proven.

At this point it's really important to indicate than some people has get used to do typicity trials instead of liability trials, forgetting that in the Romano-Germanic system, besides proving typicity, it's necessary to prove unlawfulness and guilt. Let's see now the unlawfulness element.

ii) Unlawfulness, as it was announced, has as its main concept the "legal protected interest". There will be unlawfulness when a legal protected interest is harmed or endangered.

There has been talked about two kinds of unlawfulness, the formal and the material one. Formal unlawfulness is defined as a simple contradiction between the behavior and the Law system. Material unlawfulness, which is the one that requires more attention at this point, is referred precisely to the harm or endanger of protected legal interests, which are ultimately the basis of the laws.[44]

In that sense, not all typical behaviors are also unlawful, because it may occur that the conduct's magnitude was so meaningless that it didn't triggered any issue. In the Romano-Germanic tradition Law, behaviors aren't sanctioned per se, unlike in

[43] Id., 419
[44] Id., 419-430

Anglo-Saxon Law. In Civil Law typicity alone is not enough to declare Liability, material unlawfulness must be proven as an independent element.

An unlawfulness trial has been defined as "the one by which is determined if a behavior is accordant with the Law system or not", which means it's the one through which it's stablish if a protected legal interest was harmed.[45] Thanks to this element, arbitrarily in the imposition of sanctions is avoided, as also the imposition of severe punishments for slight conducts; it's a way to guarantee proportionality. Depending on if it's a lesion or a danger type, the effective harm might be required or the endanger will be enough to set up unlawfulness.[46]

iii) Finally, guilt is treated the same way as in the civil area, it's a subjective evaluation of the agent's behavior according to which, liability can only be declared if the person acted with a harmful intention (intent) (*dolo*) or in absence of due diligence (fault) (*culpa*). Since it was already talked about these figures, it won´t be necessary to go back over them. The above means that in administrative sanctioning Law, the liability is subjective and not objective.

Summarizing, the administrative sanctioning Liability structure in a Romano-Germanic system is the following:

<table>
<tr><td rowspan="3">Administrative sanctioning Liability</td><td>Typicity: Accordance of the committed behavior with a prohibitive law or configuration of the Law abuse elements</td></tr>
<tr><td>Unlawfulness: Harm or endanger of protected legal interests</td></tr>
<tr><td>Guilt: Fault (Lack of due diligence) or Intent (Harmful intention)</td></tr>
</table>

[45] Id., 419-430
[46] Id., 333-340

3. Antitrust Law

In the antitrust field, the recently explained liability structures are completely applicable. When there are affectations to collectivity and public interests, an administrative sanctioning liability trial will procced; and when there is a harm to a specific person and his individual rights and interests, a civil lawsuit will proceed. There might be cases in which the elements necessary for both trials are presented because they are independent, have a different nature, the conducts qualification made in one jurisdiction doesn't necessarily transfers to the other one, and none is pre-requirement for the other one to proceed.

3.1. The protected legal interest

In the correspondent paragraphs it was mentioned that the harm to protected legal interests is essential for liability to be declared, either by administrative sanctioning Law under the unlawfulness element, or by civil Law under the unfair nature of damage. At this point there will be analyzed what are the legal interests protected by antitrust Law, those whose lesion or endanger must be proven in order to declare Liability for a behavior restricting competition and the payment of civil detriments (*perjuicios*).[47]

First of all, standing in the administrative sanctioning liability field that, as was announced, is in charge of the protection of public interests, it's worth to repeat that the State exists by and for its members, so all its actions must be headed to the common wellness. The common benefit prevails over the particular one, which is why these interests are the ones that must be attended by the State.

[47] Mauricio Velandia, el Ocaso del Monopolio (Formato audiovisual), Capítulo IV. Estructura del Derecho. Disponible en: https://www.mauriciovelandia.com/ocaso/episodios.html

First, and with a broad view, the protected legal interest in the antitrust field is the social wellness, protected and enacted by all Constitutions of the world. In the antitrust field, that social wellness is translated to economic terms because, of course, competition in markets has economic implications. Regarding restrictive practices, the legal protected interest is the "Economic General Interest", and more specifically economic efficiency, consumers interest, proper market functioning, small businesses defense and market atomization, or various other postures that put the focus on different aspects related to this idea of Economic General Interest.[48]

There wouldn't be necessary to explain the two main elements of the market, which are Offer and Demand, but it must be said that because of them, the Economic General Interest has two aspects: the consumer's wellness, which is observed in the Demand; and the producer's wellness, which is observed in the Offer. The concept of "Wellness" is based on the idea that "when an individual is facing a decision among several possible options, he will choose the one that produces the most utility for him", on the basis that his budget and options are limited;[49] and that utility, by its side, is defined as "the satisfaction received when consuming a good or a service, or a set of goods and services; satisfaction, sense of wellbeing"[50].

In economic terms, this consumers' and producers' wellness that each seek to maximize, is translated into the concepts of consumer's surplus and producer's surplus. The consumer one is defined as "the additional value that the individual receives when consuming a good above of what he paid for it"[51]; and given the budgetary restriction that individuals have because their incomes are limited, "a lower price will increase the consumers' surplus and a higher

[48] Germán Coloma, Defensa de la competencia, 74-78 (2003)
[49] Walter Nicholson, Microeconomía intermedia y sus aplicaciones, 64-66 (8th ed. 2001)
[50] Mceachern, Supra., 68
[51] Nicholson, Supra., 108-109

price will reduce it"[52]. In that sense taking care of the consumers' surplus is taking care of his possibility to cover basic needs and the adequate functioning of Demand.

By its side, the producers' surplus is defined as the "additional value that a producer of goods obtains over the opportunity costs in which he incurs when producing it"[53]. The producer's surplus is related to the profits perceived by a company, which are the result of the subtraction between the obtained incomes and the costs of developing an activity. If for example the costs increase or there is an impediment for the income obtention, the surplus will be affected. Taking care of the producer's surplus is taking care of his right to perceive profits and the adequate functioning of Offer.

These surpluses are protected when there is competition, price variety, free entry, free choice and efficiency, and its free development will allow that both, producers and consumers, maximize their benefits. Producers because they won't have barriers impeding their access to market and because competitive pressure will lead them to look for a way to offer better prices and still increase their profits; and consumers because they will have a broad possibilities spectrum and they will be able to, at least in theory, make an informed decision that allows them to increase their wellness as much as possible taking into account the budgetary restriction.

In other words, there will be efficiency when there is maximization of the benefits, of both, producers and consumers, translated into their respective surpluses. In economic terms, Market Efficiency is "a situation in which the sum of consumers' and companies' benefits is

[52] Id., 109
[53] Id., 272

maximum". So, the wellness of one or another market agent must not be observed alone, because it will be the combination of both what determines efficiency.[54]

Until this point a quick explanation of what's protected with antitrust Law, the "protected legal interest". But facing that protected interest, it takes great importance to enter to discover the concept of "elasticity", without which it wouldn't be possible to understand the harm to the protected interest.

3.2. Offer's and Demand's Elasticity

It must be said that the "elasticity" concept is also really important in order to determine if there were a harm to the protected legal interest or not. Elasticity can be observed in both, Offer and Demand, and it's a concept used for determine if in a market, Offer or Demand are affected.[55] It's an element that allows to "measure the response capacity" of either consumers or producers after economic changes, for example, in prices.[56]

The opposite of an elastic Demand, is, of course, an inelastic or rigid Demand, which means it won't move even if there are changes in variables like price. When Demand is rigid, for example because there is only one offeror or the few others doesn't have enough capacity to attend all Demand, the consumer won't have any choice other than stay at the mercy of the changes made by the producer. If the consumer cannot go to other offerors in order to satisfy his needs and cannot do anything after price changes, Demand will be inelastic.

So, by contrast, and in order to understand better this concept, it's to be said that Demand is elastic when the consumer can react to a price increase by stopping to purchase from that producer, or that product, and satisfying his needs through another producer or product. The

[54] Coloma, Supra., 29-32
[55] Nicholson, Supra., 119-120, & 248-249
[56] Mceachern, Supra., 88-89

consumer won't be affected even if that offeror disappears because since there are more options, the consumer is not tied to him. If Demand is inelastic, it's less likely that producers will increase prices because they would lose clients, and it's also, according to some, less likely to find conducts like cartelization.[57]

About the Offer elasticity, it's presented when it's easy for new producers to enter to compete in the market thanks to the existence of a good viable profit margin, easy access to raw materials and absence of entry barriers. That allows a variety of offerors, and in consequence, also of prices. If it's hard for potential competitors to enter the market, it will be considered that the Offer is inelastic.

Under that context, a behavior is not unlawful if the market has Demand elasticity leaving apart the agents who celebrated a cartel. The behavior would be innocuous. This is what some legislations call an insignificant behavior or behavior that doesn't endanger the social interest.

3.3. Efficiency

The purpose is the market elasticity so that both, consumers and producers, have variety of options and free entry, respectively, with which is reduced the risk of harmful behaviors for the protected legal interest executed by the market agents, in other words, the risk of unlawfulness in the relevant market is avoided. However, it must be clarified that it's legitimate to maintain an inelastic Offer or Demand if it brings earns in terms of efficiency; efficiency excludes unlawfulness.

As it was announced, efficiency is reflected in a benefit maximization, for both, producers and consumers, that at the same time are translated into their respective surpluses. In

[57] Massimo Motta, Política de competencia. Teoría y Práctica, 186 (2018)

economic terms, Market Efficiency is “a situation in which the sum of consumers’ and companies’ benefits is maximum”. So, the wellness of one or another market agent must not be observed alone, because it will be the combination of both what determines efficiency.[58]

Naturally, Market Efficiency is desirable and one of the goals of antitrust laws; however, taking into account that efficiency is benefits maximization, it’s possible that it’s achieved in scenarios were competition is restricted; in other words, there might be cases in which, given the nature of the good or service, it’s better to limit competition and keep few offerors because it will mean more benefits for both, producers and consumers. As a consequence of the above, under the light of a Romano-Germanic tradition system, the earns in terms of efficiency are a valid defense from restrictive practices accusations.

It’s talked about consumer’s efficiency when he counts on enough information to make a decision that maximizes his incomes and his surplus, choosing the best option among a variety of prices and products; however, the obtention of this information might be more or less difficult depending on the case, and it will represent for the consumer, at least, a time investment to obtain it.[59] The producer, instead, will be efficient when he has different options, for example of supplies offerors, to reduce his costs; and when he’s in equal conditions with his competitors to attract a bigger number of clients and therefore increase his incomes.

In order to protect the adequate functioning of markets and consumer’s and producer’s surpluses, it’s necessary to guarantee for them a scenario in which they can be efficient, it means, in which they can maximize their benefits; so the system must guarantee to the consumer the information necessary to make smart purchases, and guarantee to the producer

[58] Coloma, Supra., 29-32
[59] Mceachern, Supra., 352-355

the absence of barriers that increase his costs or reduce his incomes unjustifiably. If these conditions do not exist in the market, its agents wouldn't be able to be efficient and that would lead to a decrease in their respective surpluses.

Summing up, the protected legal interest in antitrust Law is social wellness, composed by the consumer's surplus and the producer's surplus. Among these concepts it's really important to have clarity about the "elasticity" concept that may allow a behavior to be typical but not unlawful. And that "efficiency" is a way to defend that a behavior may be typical but not unlawful.

4. Application of the Civil and Administrative Sanctioning Liability systems to the Antitrust Law

All the explained so far about the liability regimes in the Romano-Germanic tradition Law is fully applicable to antitrust Law, so there will be cases from which only civil liability is configured, in others only administrative sanctioning liability, and in others both.

For explaining the application of the liability regimes to antitrust Law, two of the behaviors forbidden by antitrust Law will be used as example; these conducts will be discussed again when talking about the Facebook case, these are cartels and dominant position abuse.

4.1. Civil Liability

It must be reminded that civil liability is headed to compensate individual damages suffered by particulars, and that the plaintiff must prove the elements of damage, fault or intent and connection between the first two; given that the general rule is subjective liability.

About the first element, damage, it's not enough that the plaintiff claims that the cartel was illegitimate and that with it the prices were arbitrarily increased, but instead he has to prove

that as a consequence of it he suffered a certain, direct, unfair and not previously compensated damage; for example, because the price increase derived from the cartel led him to bankrupt and an imminent exit of market, or because he lost clientele while being part of an intermediary market. The plaintiff can only pursue a compensation if the patrimonial or extra-patrimonial damage he claims was effectively materialized, or there is no doubt that it will be materialized later. The defendant can rule out this element if he proves that the damage didn't fulfill one of the requirements aforementioned.

Moving on to the second element, a person who seeks compensation must prove that the agents who celebrated the cartel did so knowing the harm it would cause (intent) or ignoring it when they should have known (fault). If the defendant proves diligence and prevision, fulfillment of a legal duty, state of need or legitimate defense, he will rule out this element and will be able to excuse his liability.

Finally, the plaintiff must prove that the cartel executed with fault or intent was the cause of the suffered damage, if there were a foreign cause like fortuitus event, overwhelming force, third party's event or victim's event, this element will be ruled out and the defendant won't be forced to compensate.

The above is summed up in this chart:

<table>
<tr><td rowspan="3">Subjective Civil Liability derived from a price cartel</td><td>Damage: Bankrupt or imminent exit of the market. It must be certain, direct, unfair and not previously compensated</td></tr>
<tr><td>Fault or Intent: The cartel must have been executed with intention or in absence of due diligence</td></tr>
<tr><td>Connection between the first two elements: The cartel must be the real and effective cause of the individual's bankruptcy</td></tr>
</table>

What happens with dominant position abuse is pretty similar. The alleged victim must prove in the first place that he suffered a damage like bankruptcy or imminent exit of the market; it must have been suffered directly by the person who is claiming it, it must have harmed the victim's legitimate interests and not have been previously compensated.

In the second place it must be proven that the economic agent has a dominant position and that he abused of it knowing the consequences of his behavior or ignoring them when he should have known. So, there fit both, intentional and non-diligent or non-foresaw actions, but either intention or lack of care, must be proven.

Finally, the individual must prove that the damage he suffered was the consequence of that intentional or faulty behavior from the suspect; maybe the individual broke, and the economic agent executed abusive conducts, but if the last ones weren't what unchained the bankruptcy, but instead it was for example, due to a wrong business administration from the victim or a fortuitus case, the dominant agent's liability can't be declared.

Summing up:

<table>
<tr><td rowspan="3">Subjective Civil Liability derived from a dominant position abuse</td><td>Damage: Bankrupt or imminent exit of the market. It must be certain, direct, unfair and not previously compensated</td></tr>
<tr><td>Fault or Intent: It must be proven that the defendant has a dominant position (specific qualified subject for the prohibition), and the abuse must have been executed with intention or in absence of due diligence</td></tr>
<tr><td>Connection between the first two elements: The dominant position abuse must be the real and effective cause of the individual's bankruptcy</td></tr>
</table>

4.2. Administrative sanctioning Liability

By contrast, Administrative Sanctioning liability doesn't seek to compensate damages to particulars, but instead to sanction injuries to social wellness. So, the restrictive practices will be sanctioned through this way when the requirements of typicity, unlawfulness and guilt are fulfilled. Said sanction, by nature, will turn into money that will become part of the public funds.

Typicity can be general or special, the general one is referred to the proscription of Law abuse, and the special one, to the different legal regulations in the different systems that specifically contemplate cartels, dominant position abuse, mergers and acquisitions, and state aids. In order to prove this element, the legal contemplation of the claimed behavior, or failing that, the Law abuse configuration, must be proven. To rule out the typicity element, the alleged offender can only prove that his behavior doesn't adjust to all the elements described in Law, or that he acted according to Law, depending on the case.

About unlawfulness, what must be proven is the harm or affectation to the legal interests protected by antitrust Law, which are, in a broad sense the social wellness, and specifically the consumers' and producers' surpluses. This will happen when Offer or Demand are inelastic and there are not efficiency reasons that justify the inelasticity. The defendant can excuse if he proves absence of harm to protected legal interests or efficiency. If the cartel existed in an inelastic market, it must have certainly affected the surpluses, while if consumers had other options outside the cartelized agents, there wouldn't be harm because consumers didn't end up paying a higher price. It's important to clarify that offer or demand elasticity, and efficiency, are ways to exclude liability from cartels, but for dominant position abuses, elasticity can't be claimed as an excuse for unlawfulness, because by nature, having dominant position means being in an inelastic market. In that sense, of these two causes,

special and proper of antitrust Law, for abuse cases, only efficiency applies, understood as a situation in which the behavior, despite being unlawful, doesn't harm the social wellness and instead helps to its development.

It's important to indicate that these two unlawfulness causes, special and proper of antitrust Law, doesn't exclude the other causes proper of liability punitive trials.

Finally, the guilt element is studied just like in the civil area, it means, proving intention or lack of due diligence, and accepting foreign causes as liability excuses.

The above is summed up in the following chart:

Administrative Sanctioning Liability derived from a price cartel	Typicity: Article (s) in the national laws that forbids cartels, abuse, state aids, acts or disloyal competition which harms the market. Or article that forbids generally the Law abuse
	Unlawfulness: Harm or affectation to consumers' or producers' surpluses. Unlawfulness can be excluded by claiming offer or demand elasticity or by efficiency reasons in the behavior. From these two causes, for dominant position abuses only the efficiency one applies. There would also apply the ones proper of punitive liability systems.
	Guilt: The cartel must have been executed with intention (intent) or in absence of due diligence (fault)

5. Structuration and application of the Romano-Germanic Civil and Administrative Sanctioning Liability systems to Facebook for its part in the Cambridge Analytica case

In order to understand how the Facebook Liability would be structured it's necessary to start by understanding the case.

Cambridge Analytica was created in 2013 as a subsidiary of the SCL Group, that provides similar services, and is defined as "a company that offers services to businesses and political

parties who want to ‘change audience behavior’”, what they say they do is analyze big amounts of users’ data and classify them in a way that companies can direct their advertisement to their convenience according to each user’s or consumer’s profile.[60]

The biggest scandal because of the company’s behavior was in March 2018, when thanks to former employees’ statements it was found out that since the beginnings of 2014, the firm was exploiting unauthorizedly the data of nearly 50 million Facebook users, according to early versions that were later denied to talk about a number close to 87 million[61], and using them to favor campaigns like Donald Trump’s presidential campaign and Brexit’s; politically profiling the users and broadcasting advertisement designed to influence the voters’ decision. It’s worth to quote statements made by Christopher Wylie, a former employee of Cambridge Analytica who told The Observer: “We exploited Facebook to harvest millions of people’s profiles. And built models to exploit what we knew about them and target their inner demons. That was the basis the entire company was built on.”[62]

The technique used by Cambridge Analytica was originally developed by The Cambridge University’s Psychometrics Center, and despite the Center refused to work with Cambridge Analytica, the psychology professor of the same University, Aleksandr Kogan, didn’t hesitate to do so through an app he developed in June 2014.[63] Kogan’s app was called ‘This is your

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[60] Hilary Osborne. The Guardian, What is Cambridge Analytica? The firm at the centre of Facebook’s data breach, Online, Avaliable on: https://www.theguardian.com/news/2018/mar/18/what-is-cambridge-analytica-firm-at-centre-of-facebook-data-breach (March 2018, Consulted in November 2019)

[61] Nadeem Badshah. The guardian, Facebook to contact 87 million users affected by data breach, Online, Avilable on: https://www.theguardian.com/technology/2018/apr/08/facebook-to-contact-the-87-million-users-affected-by-data-breach (April 2018, Consulted in November 2019)

[62] Carole Cadwalladr & Emma Graham-Harrison. The Guardian, Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach, Online, Avaliable on: https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election (March 2018, Consulted in November 2019)

[63] Kevin Granville. The New York Times, Facebook and Cambridge Analytica: What you need to know as fallout widens, Online, Available on: https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html (March 2018, Consulted in November 2019)

digital life' and through it the users took a personality test and allowed the use of their data with allegedly academic purposes. The app was used by hundreds of thousands of users, however, not only their information was collected, but also their Facebook friends', what gave access to Aleksandr Kogan and Cambridge Analytica to the data of tens of millions of Americans.[64]

Although Cambridge Analytica was created in 2013, Kogan's contribution in the profiling through Facebook was in 2014, despite some of Cambridge Analytica's executives said that Kogan's contribution was of little help, today is more than evident that it was quite the opposite. In the following year, in December, there were already reports of Facebook's data use with electoral purposes in the Senator Ted Cruz's presidential campaign[65], about it, Mark Zuckerberg's company informed that they were investigating the case and taking action about it; about the most recent scandal, it has been said that it was in 2016 when Facebook sent letters to Cambridge Analytica demanding the elimination of the subtracted information; and despite according to some Facebook executives they received answers proving it was deleted, the New York Times and former employees have claim that there is still existing, at least, part of those data.[66]

One of the biggest accusations to Facebook is the fact that they didn't report the issue to neither users or authorities as soon as they found out in 2015, instead, it had to come to light thanks to statements like the ones from the already quoted Christopher Wylie. About it,

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[64] Cadwalladr & Graham-Harrison. The guardian, Supra.
[65] Harry Davis. The guardian, Ted Cruz using firm that harvested data on millions of unwitting Facebook users, Online, Available on: https://www.theguardian.com/us-news/2015/dec/11/senator-ted-cruz-president-campaign-facebook-user-data (December 2015, Consulted in November 2019)
[66] Matthew Rosenberg, Nicholas Confessore & Carole Cadwalladr. The New York Times, How Trump consultants exploited the Facebook data of millions, Online, Available on: https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html (March 2018, Consulted in November 2019)

Facebook's CEO, Mark Zuckerberg testified before the United States Congress in April 10th 2018 that as soon as Facebook learned the situation, they contacted Cambridge Analytica to demand the elimination of the information, Cambridge Analytica told them they did it, so Facebook considered it a closed case, trusting mistakenly that the company erased the illegitimately subtracted data.

Even during 2019 Facebook released new documents like employees' emails, which show that the company knew about the subtracted information at least since September 2015, that was nearly three months before The Guardian and The Observer reported the case of Ted Cruz's campaign.[67] Besides, in November 2019, Facebook revealed other cases of possible improper access to their users' information by nearly 100 app developers, about it they informed that there's no evidence of abuse but they are contacting the people involved to demand the elimination of the information, and they say they'll do audits to make sure developers do so.[68]

The discontent with Facebook's behavior in this scandal is such that even in the audience were the company's CEO was summoned in October 2019 before the Financial Services Committee of the United States Congress, due to Facebook's intention to participate in the creation of a virtual form of payment called Libra, and what would be its digital wallet, Calibra; they were still questioning him about the scandal and Facebook's actions for preventing similar situations to happen again; they also made strong accusations and manifestations of generalized distrust.

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[67] Lauren Feiner. CNBC, Facebook learned about Cambridge Analytica as early as September 2015, new documents show, Online, Available on: https://www.cnbc.com/2019/08/23/facebook-releases-new-cambridge-analytica-documents.html (August 2019, Consulted in November 2019)

[68] Michael Nuñez. Forbes, Facebook is still leaking data more than one year after Cambridge Analytica, Online, Available on: https://www.forbes.com/sites/mnunez/2019/11/05/facebook-is-still-leaking-data-more-than-one-year-after-cambridge-analytica/#18dea8ed6180 (November 2019, Consulted in November 2019)

Finally, it would be necessary to say that Facebook already accepted to pay a £500.000 fine to the Information Commissioner's Office in the United Kingdom, by its part in the Cambridge Analytica scandal, clarifying that that wouldn't imply a recognition of their liability.[69]

Now, in order to aboard this case from antitrust Law, at least two important aspects must be taken into account[70], first, antitrust Law is not designed to protect non-economic interests like environmental or democratic ones, in order to protect these rights, not exactly patrimonial, there are other regulations, it can't be forgotten that what is seeking to be protected is the market, and that if the harm doesn´t lie on it, the case will escape from the antitrust Law's scope.

Second, some authors have considered that the antitrust Law is not prepared enough to face the challenges that the technologic era and the innovation brings; that's why, as mentioned earlier, jurisdictions like the German, and part of the doctrine argue that data and technological platforms should be considered as special facilities. The traditional criteria to determine, for example dominant position, may not be enough facing tech giants, whose power is not given by traditional aspects, like precisely the users data; and not only the power of this companies, but also the behaviors they can use to restrict competition are new for Law and are mediated by innovation, what can easily become predatory or restrictive. Because of that, antitrust Law must update and face these realities.

5.1. Liability by damage in this case, facing the Romano-Germanic Civil system

[69] Alex Hern. The Guardian, Facebook agrees to pay fine over Cambridge Analytica scandal, Online, Available on: https://www.theguardian.com/technology/2019/oct/30/facebook-agrees-to-pay-fine-over-cambridge-analytica-scandal (October 2019, Consulted in: November 2019)
[70] Thibault Schrepel. Revue Concurrentialiste, Retooling Antitrust Law for Digital Markets (2019)

To study if under a Romano-Germanic tradition system, Facebook might be declared civilly liable or not, by its part in the Cambridge Analytica case, the three elements that, as explained before, compose the structure of civil liability, must be studied separately.

i) The first element is damage, and for the Cambridge Analytica case there might be various, like damage to “relationship life” (*vida en relación*) of those whose intimacy and political freedom were affected. However, in order to avoid an excessive apart from antitrust Law, we will only referrer to specifically the damages suffered by market participants, which will be better understood with cases.

Think about the companies A, B, C, D and E, who are competitors and are looking for new ways to get to their clients and improve their marketing and advertisement systems. For achieving said purpose there are various offerors, like the companies Cambridge Analytica, W, X, Y and Z, who provide advice and consultancy services, specialized in personalize advertisement according to each consumer’s profile. Finally, company A hires Cambridge Analytica, B hires W, C hires X, D hires Y and E hires Z.

If Cambridge Analytica harvested data of millions of Facebook users and the other companies (W, X, Y and Z) didn’t; Cambridge Analytica would clearly have a competitive advantage, illegitimately obtained, above the others. Due to this advantage there might be damages in two stages of the market.

The first one would be the damage suffered by companies B, C, D and E, which by not having access to Cambridge Analytica’s services can’t be as efficient and competitive as A, who instead has the most efficient way to direct personalized advertisement to clients, obtaining a clear competitive advantage too. So, A’s superiority might lead one of its competitors to bankrupt or imminent exit of the market because he loss too many clients due

to A's advertisement and marketing effectiveness, which was provided by Cambridge Analytica. If this happens, the harmed individual (B, C, D or E) might prove that he suffered a patrimonial damage because his sales decreased to the point he broke and had to exit the market. Everything has as cause the data possessed by Facebook that were used outside the known.

On the other hand would be the damage that W, X, Y and Z might suffer because clients would stop looking for their services if they know Cambridge Analytica offers better results, if the clients loss is too big, it might lead these companies too to bankrupt or imminent exit of market, with which if any of them get to that point, they would have the possibility to prove the certain, direct, unfair and not previously compensated damage.

Under this situation, the behavior with the hypothetical actors mentioned, might generate damage.

ii) Moving on now to Guilt, it must be reminded that it's Facebook's liability the one being studied, not Cambridge Analytica's, nor Aleksandr Kogan's, so the focus must be in this company's behavior specifically.

According to the evidence existent so far, Facebook did not take an active part in decisions about information trading, and they had knowledge of the events only until after they occurred, given that there is no evidence that Facebook's part was conscious and intentional, it can't be said that there were Intent.

A different conclusion arises in terms of Fault, because, as it was already mentioned, it's defined as absence of diligence and of the objective duty of care. To determine the enforceable degree of diligence there are several criteria, in this case, the one required from Facebook is the one called "good businessman"; it means, due to the nature of Facebook's

business and to the sensitivity of the goods (data) it handles, it's required for them to have a greater diligence than the average, they must have a degree of care and prevision better than the medium.

Now, did Facebook achieved that required degree of diligence? Was the occurred violation of users' privacy foreseeable? Well, Aleksandr Kogan, through his company, Global Science Research, developed the app 'This is your digital life', whose users received a payment for taking a personality test and accepted the treatment of their data with academic purposes. It means, Kogan had permission for using the data from the app's users with academic purposes, and besides, according to Facebook's policies it was also allowed the collection of friends' data only to improve the experience with the app; and the commercialization of said data or their use with advertisement purposes were forbidden.[71]

So, Facebook granted to Kogan the permissions with academic purposes and forbid the commercialization and the use with advertisement purposes, but that is definitely not enough to achieve the "good businessman" standard, and with such traceability Facebook was required to have a more precise vigilance over the stored data given that it has been considered even as an essential facility by systems like the German.[72]

According to the "state of art" and reasonability, even from a medium person, it was foreseeable that app developers would violate Facebook's commercialization prohibition, especially if they had access to the data from users' friends as well, which are persons who didn't gave permission at all to the app for the use of their data. This permission given by Facebook was excessive by itself, and if it's summed up with the lack of control over the data

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[71] Cadwalladr & Graham-Harrison. The guardian, Supra.
[72] Thibault Larger. Político. Europe Edition., Germany finalizes proposed changes in competition rules, Online, Available on: https://www.politico.eu/article/germany-finalizes-proposed-changes-in-competition-rules/ (July 2019, Consulted in November 2019)

use in order to verify that it was in effect academic and/or not being commercialized nor used with advertisement purposes, the conclusion would be that Facebook was definitely far from achieving the requested degree of diligence, given the figure and the Romano-Germanic principle of “good vigilant of the objects”.

A company the size of Facebook must keep in mind the hackers and the security breaches as a constant risk that demands the implementation and actualization of protection actions. It’s unconceivable to think that the prohibition in Facebook’s policies was enough, given that it was such an attractive asset, they must have done, at least, a careful control to the compliance of the prohibition by developers and avoid such a wide spectrum in the permissions granted to them.

This way, it can be concluded that Facebook incurred in faults to due diligence and vigilance, that’s why the second element of liability is configured, which is Fault or Intent; in this case Facebook’s behavior might be Faulty.

iii) Finally, about the third and last requirement to declare Facebook’s civil liability under a Romano-Germanic scope, it must be said that if Facebook would have been diligent enough, the extraction of the information and its exploitation by Cambridge Analytica wouldn’t have occurred, and therefore neither the bankruptcy of some of the companies we referred to in the damage chapter, this is related to one of the first causality theories, which is the “equivalence of conditions”. According to this theory, all the causes that came together for the production of the damage, and without which it wouldn’t have occurred, have the same value.

So, the plaintiff must claim that the lack of diligence from Facebook lead to a wrongful use of millions of users’ data, which when exploited by Cambridge Analytica lead to a certain,

direct, unfair and not previously compensated patrimonial damage, consistent in the bankruptcy or imminent exit of the market.

However, it couldn't be affirmed that the lack of diligence from Facebook was the only cause of the mentioned damage, because there was also involved, of course, Cambridge Analytica's and Aleksandr Kogan's behavior, which among the trial against Facebook would be seen as "third party's event". Besides, there could be configured even the "victim's event", because some users, the ones who downloaded and used the app, accepted the collection of their data, even their transfer and selling, according to Kogan's statements[73].

Both, the users' acceptance and the behaviors of Cambridge Analytica and Aleksandr Kogan, were suitable causes for the damage production, that's why in Facebook's case there will be a "concurrence of causes or faults", that attenuates Facebook's liability and limits it to the proportion in which its behavior caused the damage.

Summarizing, Facebook's civil liability in a Romano-Germanic tradition system, could, among the case, be structured like this:

<table>
<tr><td rowspan="3">Facebook's Civil Liability due to its part in the Cambridge Analytica case</td><td>Damage: Bankruptcy or imminent exit of the market. (Certain, direct, unfair and not previously compensated) Suffered by the potential customers and/or the competitors of consulting companies like Cambridge Analytica</td><td>✔</td></tr>
<tr><td>Fault or Intent: Lack of the "good businessman diligence". Lack of foresight and vigilance duty given the state of art</td><td>✔</td></tr>
<tr><td>Connection between the first two elements: Facebook's lack of diligence was the cause of the wrongful use of data that lead to the plaintiff's bankruptcy. "Concurrence of causes" ("third party's and victim's event")</td><td>✔ ❌</td></tr>
</table>

[73] Lesley Stahl. CBS, Aleksandr Kogan: The link between Facebook and Cambridge Analytica, Online, Available on: https://www.cbsnews.com/news/aleksandr-kogan-the-link-between-cambridge-analytica-and-facebook/ (April 2018, Consulted in November 2019)

5.2. Administrative Sanctioning system (fine) among the case for a possible antitrust Liability

In order to determine if there would exist Administrative Sanctioning liability for Facebook or not, it must be verified if the three elements, aforementioned, for this type of liability: typicity, unlawfulness and guilt, are configured.

Let's move on again to the competitor companies A, B, C, D and E, who look for new ways to reach their clients and improve their marketing and advertisement systems. For achieving said purpose there are various offerors, like the companies Cambridge Analytica and others, W, X, Y and Z, who provide advice and consultancy services, specialized in personalize advertisement according to each consumer's profile.

In this case, let's see first the matter under the light of dominant position abuse and then under the light of cartels. Let's see:

5.2.1. Facebook's case under the light of dominant position abuse

In this point it's developed the study of the facts under the scope of Administrative liability related to the figure of dominant position abuse.

i) About typicity, it must be reminded that there is a special typicity and a general typicity. The first one is presented when the behavior's proscription is specifically in a law. The second one is presented when there is no prohibition and the individual abuses of that, it's called 'Law abuse'. The general one of Law abuse is not configured in this case, because, as explained in the correspondent chapter, there must be a legitimate right granted by Law and an extra-limitation in its use, or a behavior that ignores the purposes of the mentioned Law. In that sense, there is not a subjective right in heads of Facebook in which exercise they abused;

as it was mentioned, and as will be repeated when the time comes, it's more a case of lack of diligence and vigilance or excess of trust.

Now, about the special typicity, in antitrust Law one might think that Facebook has dominant position and therefore they would fulfill the requirements of the qualified active subject of the many manifestations of the dominant position abuse prohibition, however, it's worth to make a more exhaustive analysis in order to determine if Facebook has such quality or not.

Only the one who certainly has such quality may incur in dominant position abuse, because one can't abuse of what one doesn't have. Traditionally the dominant position has been defined as "a situation in which a company has a high degree of market power that allow it to charge prices 'really close' to the ones a monopolist would charge"[74]. It means, an economic agent has dominant position when he has such power that he can "act independently" from the other market agents, so that the decisions he makes, for example about increasing prices, won't make the demand displace so that he loses clientele, he has so much power that he can block competition effectively without reducing his benefits.[75]

An agent has dominant position when he doesn't have competitive pressure or conditioning factors,[76] it means, when the market is inelastic enough so that the behaviors executed by the agent doesn't find a counterweight produced by its competitors. Now, in its moment we explained that inelasticity can be given by lack of competitors or because they doesn't have enough capacity to attend all consumers; so, the first question that needs to be answered in

[74] Motta, Supra., 70-71

[75] Inmaculada Gutiérrez & Jorge Padilla, Una racionalización económica del concepto de posición de dominio. Article in the book 'El abuso de la posición de dominio', directed by Santiago Martínez Lage & Amadeo Petitbó Juan, 17-19 (2006)

[76] Cani Fernández, Cuota de mercado y poder de mercado. Article in the book 'El abuso de la posición de dominio', directed by Santiago Martínez Lage & Amadeo Petitbó Juan, 64 (2006)

order to determine if Facebook has dominant position or not is if the market is inelastic or not.

Facebook has competitors in several fronts, observing it as a social network, Facebook has bought Instagram and WhatsApp, but nevertheless there are other apps of both, instant messaging and massive content diffusion. Prove of the above is the fact that in China, despite Facebook and Google are completely blocked, the population also uses social networks massively, it has been reported that a 71% of the population uses them[77]; there is no WhatsApp but there's WeChat, and there are not search engines like Google, but there do is Baidu.

At the end of the day what happens with the special case of China is not so much a competition between platforms, but more as a communication and information war between the United States and China, were the last one restricts the entry of NorthAmerican companies to prevent them from collecting information of their citizens, their culture and their most intimate way of being, it's an evident form of State intervention in the economy and the free competition, to which always have been attributed National security reasons that of course come with a lot of international political tensions that go way beyond antitrust Law.

Anyway, in the social media area, Facebook doesn't only compete with Twitter, Snapchat, Telegram, and a countless number of other platforms, but besides, in territorial markets in which Facebook hasn't been allowed to enter, there is still a massive use of social media; which allow to conclude that Facebook is not essential in the social networks' market, and there is a good range to capture content consumers.

[77] We are social, Hootsuite, China Digital Report 2019, Online, Available on: http://wearesocial.cn/digital-2019-china/

According to the studio Global Digital Report 2019, conducted by We are Social and Hootsuite, social media counts on 3.484 billion monthly users, of which 2.271 million use Facebook, 1900 YouTube and 1.083 We Chat, just to mention a few examples; additionally, while Facebook reported a growth of 1,7% in their users number, WeChat grew a 2,3%.[78] Clearly Facebook is the leader and the most used platform, but having the biggest market share doesn't mean having dominant position, and given the great number of competitors and their possibility to make competitive pressure to Facebook, it's really hard to argue that said company has dominant position. In other words, despite Facebook has the biggest market share, the market is elastic.

It would be worth to mention that in some jurisdictions, like the German, there have been recently included additional criteria to stablish the dominant position of digital platforms, under which might be easier to affirm that social networks like Facebook have dominant position. Among these new criteria is the one called "intermediator power", used to stablish the dominance of digital platforms whose power over data, considered as essential facility, plays an important role in markets that need access to those data; so, it means the intermediate power that digital platforms and social networks have thanks to data, must be taken into account in order to determine if they have dominant position or not.[79]

Based on the mentioned criteria, the German antitrust authority has accused Facebook of dominant position abuse[80]; however, since these criteria doesn't exist in other jurisdictions,

[78] We are social, Hootsuite, Global Digital Report 2019, Online, Available on: https://wearesocial.com/global-digital-report-2019

[79] Gibson Dunn, Competition 4.0 in Germany: Proposed changes to german antitrust laws targeting digital platforms, Online, Available on: https://www.gibsondunn.com/competition-4-0-in-germany-proposed-changes-to-german-antitrust-rules-targeting-digital-platforms/ (November 2019, Consulted in November 2019)

[80] La República, Alemania acusa a Facebook de abuso de posición dominante, Online, Available on: https://www.larepublica.co/internet-economy/alemania-acusa-a-facebook-de-abuso-de-posicion-dominante-2583189 (December 2019, Consulted in December 2019)

one couldn't affirm definitely that Facebook fulfills the requirements for being a qualified active subject for the type in the dominant position abuse rules.

Now, Facebook also competes in another front, which is advertisement; in the past decades, new technologies and internet have been a pretty helpful channel, broadly used by advertisers; according to the already quoted studio, 2.121 million of Facebook users can be reached by advertisement, but clearly this is far from being the only channel used by announcers, so in terms of advertisement, Facebook competes with all the other internet platforms in which announcements are posted, and with all the traditional channels like printed, broadcasted, and televised advertisement, among others. This way, is also unconceivable to think that Facebook has dominant position among this market.

So, it's clear that Facebook doesn't have dominant position. It's now necessary to study the facts under the scope of cartels or restrictive arrangements.

5.2.2. Facebook's case under the light of cartels or restrictive arrangements

In this point it's developed the study of the facts under the light of Administrative liability corresponding to the figure of cartels:

i) A cartel has been defined as "a group of independent industrial corporations, usually on an international scale, which agree to restrict trade to their mutual benefit. Although prevalent outside the United States, such groups are generally found to violate federal antitrust laws."[81]

It's worth to evaluate if in the concrete case, the requirements to talk about a cartel, are fulfilled.

[81] Steven H. Gifis, Law dictionary, 76 (7th ed., 2016)

First, it's talked about "a group of corporations", so in order to talk about a cartel there must be two or more subjects, which in this case would be Cambridge Analytica and GSR. Cambridge Analytica was "a company that offers services to businesses and political parties who want to 'change audience behavior'"[82], it means, a consulting company whose model was based on psychological profiling.

GSR was a company created by Kogan to capitalize what he had been developing in Cambridge University as academic, which was psychological profiling techniques developed in the Cambridge University's Psychometrics Center[83]. GSR offered two products, "Peek, a tool to help businesses understand the 'psychological, economic, ethnographic knowledge' profiles of their customer bases, and SurveyExtender, a tool to forecast survey results".[84]

So, both, Cambridge Analytica and GSR, were dedicated to psychological profiling and based on it they offered optimization in the reaching of clients to other companies. So, both companies coincide in the same activity.

In May 2014 GSR signed a contract with SCL Elections, who is a subsidiary company of Cambridge Analytica. Through this contract, Kogan received money to pay small amounts of money to people to take his survey. So, SCL was benefited by Kogan's app 'This is your Digital Life', which had permission to collect the users' data and

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[82] Hilary Osborne. The Guardian, Supra.

[83] Kevin Granville. The New York Times, Supra.

[84] Julia Carrie Wong, Paul Lewis & Harry Davis. The guardian, How academic at centre of Facebook scandal tried -and failed- to spin personal data into gold, Online, Available on: https://www.theguardian.com/news/2018/apr/24/aleksandr-kogan-cambridge-analytica-facebook-data-business-ventures (April 2018, Consulted in November 2019)

their Facebook friends', not being necessary that the last ones granted any authorization at all.[85]

Clearly, with this alliance the companies didn't compete between them, but besides, their collaboration had as sole purpose the use of a supply (intermediate market) unique in the market, because no one else offered it, they were the only ones who could use it, monopolizing it, and with it the competition was clearly restricted because competitors weren't allowed to use or access the supply, these companies had a huge competitive advantage over those who didn't have such quantity and quality of data, there was no substitute with such sharpness in the market of data and profiles, being more attractive for market.

Now that we indicated that what's being monopolized is a substitute, let's deepen on it: It's true that there are other sources of data in other platforms or social networks, but none of them sells or allows the use of the information. So, recognizing that there are other networks, the information for profiling was unique because of its availability, and it was only in heads of the contractual bound created between GSR and SCL Elections.

This system or supply sets and proves the basis of what the economist and philosopher Shoshana Zuboff has called **"surveillance capitalism"**, a form of capitalism "without precedents" that predicts the actions of the internet users in the real world with the sole purpose of benefiting the companies. The users' experiences become a prime matter that allows to create data to foresee future behaviors.[86]

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[85] Id.

[86] Su libro más reciente, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* ("La era del capitalismo de la vigilancia: la lucha por un futuro humano en la nueva frontera del poder", 2019), un extenso tomo de 690 páginas, es el intento más ambicioso hasta la fecha de reflejar los efectos de la digitalización en nuestras vidas y en la sociedad.

So, it’s a practice headed to monopolize an unique supply that is part of the intermediate market, particularly the one that allows to know what happens in the black boxes of consumers’ minds with plain precision of direct data.

Now, it must be analyzed what was Facebook’s part in the events, and for doing so, we must talk about the concept of “facilitating practices”. This concept appeared in NorthAmerican jurisprudence in the 70’s and it’s referred to “a conduct that increases the possibility of another anticompetitive behavior, and therefore facilitates it”. It means, conducts that manage to “reduce the uncertainty about the competitors’ behavior”, making easier the coordination between them.[87]

What characterizes a facilitating practice is its aptitude for favoring anticompetitive behaviors while generating certain affectation to the case and market in concrete, so what for one cartel may have been facilitating, for another one would have not. The facilitating practice is independent from the cartel it facilitated, for example, the practice might be unilateral, but the cartel, by nature, cannot.[88] There is not an exhaustive list of facilitating practices, because, once again, it depends on the concrete case. It’s possible to argue that in the issue studied in this paper, Facebook’s behavior do is considered as a facilitating practice for a cartel, because it was precisely the broad spectrum of permissions granted by Facebook to apps like Kogan’s before 2014, what gave GSR an asset of such interest for Cambridge Analytica and their contractual bound.

[87] Carmen Estevan de Quesada, Las prácticas facilitadoras. Control de la colusión en los mercados oligopolísticos, 137-141 (2013)
[88] Id. 142-148

The cooperation between Kogan and Cambridge Analytica wouldn't have been possible if SCL wouldn't have offer money to Kogan to pay for the surveys taking, and if GSR wouldn't have had in its domain the app through which all friends list's data could be extracted, and that was pretty much thanks to Facebook, who not just only had the data but also had policies that allowed the extraction, and a lack of control about the prohibition of commercializing them.

So, the elements of the type of cartels are configured, only that Facebook wouldn't respond as author, but instead as facilitator, which might attenuate but not exclude his liability.

ii) By its side, unlawfulness is given by the two possible forms of affectation to the protected interest, which is, social wellness. It means, a damage to Cambridge Analytica's competitors and/or an affectation to the potential competitors of Cambridge Analytica's clients, in its role of producer's surplus, and/or affectation to the consumers of the different compromised markets, in its role of consumer's surplus.

In this case, if the company has such a strong advantage over the other consulting companies it competes with, not only they will be affected, but also their clients, that at same time compete with each other, and they will be in disadvantage if they don't have the power of the data that the company who hired Cambridge Analytica has.

These two possible damages are translated into a harm to the producer's surplus, only that in different stages of the market. Cambridge Analytica's competitors are, of course, producers who offer consultancy services to politicians and entrepreneurs, and they find their surplus affected because they are in a position of unfair disadvantage because all clients would prefer Cambridge Analytica, who has better results given the

quality and quantity of the data they work with, lowering with it, in general terms, their incomes due to the loss of clients.

On the other hand, the clients of the companies mentioned above are also producers, because they are companies who look for these kind of consultancy services in order to reach better for consumers, increase the sells, and direct better the advertisement. These services aren't of course hired by consumers, but instead for producers who seek efficiency. Producer's surplus would also be affected because the one who hired Cambridge Analytica would have an advantage, illegitimately obtained, and surely would have better results in the reach of advertisement and consumers' acceptance, that would lead to an increase in the number of their clients, and a consequential decrease of the other ones', affecting their incomes, profits and surplus, with a clear domino effect and risk of contagious.

iii) Finally, about guilt we would have to say the same as in the civil area about guilt and connection between damage and fault. Facebook's behavior couldn't be considered Intentional because there wasn't a harmful will; but it could be Faulty, because there were clear lacks of the required degree of diligence, that under a Romano-Germanic point of view, would be the "good businessman" one, given that the platform's policies allowed developers to obtain information of the app's users' friends lists and despite they forbid the economic exploitation of said data, there wasn't much control about it, and there should have been given the state of art.

However, Facebook's faulty behavior wasn't the only one that concurred to this typical and unlawful behavior, there were also very important the Intentional conducts from Cambridge Analytica and Aleksandr Kogan, as also the faulty behavior of the users of

Kogan's app, who unwarily gave permission for the use of their data and their friends'. According to the above, in this case it's structured a concurrence of faults or causes, which means that even if Facebook's behavior was faulty, it wasn't the only one, because there were also third party's event (Cambridge Analytica and Kogan), and victim's event (affected users); these two are causes that exclude liability, but in this case, they don't exonerate Facebook completely because there do was a faulty behavior, but they do attenuate their liability since it's shared with third parties and victims.

All the above is clearly summed up in the following Liability chart:

<table>
<tr><td rowspan="3">Facebook's Administrative Sanctioning Liability due to its part in the Cambridge Analytica case</td><td>Typicity: Facilitating practices of a cartel between Cambridge Analytica and GSR (There is no Law abuse nor Dominant position abuse)</td><td>✓</td></tr>
<tr><td>Unlawfulness: Harm to producers' surplus in two stages of the market: Potential clients and/or competitors of Cambridge Analytica</td><td>✓</td></tr>
<tr><td>Guilt: Lack of the "good businessman diligence". Lack of foresight and vigilance duty given the state of art. "Concurrence of causes" ("third party's and victim's event")</td><td>✓ ✗</td></tr>
</table>

6. Rights tension

The rights tension is a topic that today reflects some situations in which two valid rights go against each other. As a result of that confrontation it must be decided what right prevails over the other one, and for doing so it's necessary to study in each specific case, what are the facts and risks.

In the modern age, with the boom of new technologies and the massive use of internet, Law has been facing realities and conflicts with no precedent. To begin with, we find that the

national security and the individuals' security are in conflict with at least three rights in the case we've been studying:

The first one is the free development of personality, because in its exercise, individuals autonomously decided to share their preferences, ideas and political thoughts in their Facebook pages, making that people's opinions spread easily in a massive way and that big amounts of personal information from many people are available just a few clicks away. Said data were freely published by subjects. This right is faced to the national security one, because in it lies the secrets of a nation and of its leaders and individuals. Surely the second one weights more than the first one.

Additionally, there is another conflict of interests between national security and free competition. This tension is clearly evident in China, where platforms like Facebook are not allowed to enter to compete because the national government impedes it, at the end, arguing national security reasons, that given the scandals for infringement to users' privacy, have at least certain grounded reasons. The most extreme case of restriction to free competition for digital platforms is China, but in the world, every country imposes more or less barriers to the performance of these companies in order to guarantee the national security. With the case of China what is clearly reflected is a consequence of the economic and communications war between both countries, which from control and differential treatment to national and foreign companies seek to maximize their economic dominance in the world.

In the third place, national security is in conflict with the intimacy right too. Facebook is a platform that facilitates communication and content diffusion, and this, of course, is not always done with legal purposes; Facebook has been requested to have a mayor control over terrorism and child pornography developed in their platform; they have been questioned even

in hearing in October 2019, when the company was criticized for the implementation of functions like end to end encryption that impedes that any third party know the users' activity, making harder the control and prevention that authorities can do towards criminal activities.

It's not only hard to determine the prevalence of one or another right in each case, but also one of the biggest discussions currently in the world is up to what point goes the liability of the platform because of the use people do of their tools and the consequences in the real world this can bring. This way, Facebook has even been accused in hearing before the United States Congress in 2018, for being partly responsible for the genocide in Myanmar because a great part of the hate policy was developed through Facebook pages. Once again, there will never be a definitive or exclusively correct answer about it, the point is that after scandals like Cambridge Analytica, the tendency is to request an every time major active role in the control and prevention by platforms, to restrict their activity, limit their power over data and give prevalence to the national security.

7. Conclusions

The Cambridge Analytica case definitely shocked the whole world and putted over the table an endless number of discussions and issues associated to the use of social media. Clearly, the questions that Law must do aren't few either, and perhaps the most important and transversal one is the Liability question. The structuration of liability has several differences between the Anglo-Saxon systems (Common Law) and the Romano-Germanic tradition ones (Civil Law), in the last ones, civil liability has the elements of i) Damage, ii) Fault or Intent, and iii) Connection between the first two; and the administrative sanctioning one covers i) Typicity, ii) Unlawfulness, and iii) Guilt.

Applying these two liability schemes to Facebook's participation in the Cambridge Analytica case, it's concluded that in the Civil area, the platform could be held Liable for certain, direct, unfair and not previously compensated damages, caused to competitor companies and/or potential clients of Cambridge Analytica, given that Facebook acted with fault because they didn't achieve the diligence standard of the good businessman, and that lack of diligence was the cause of the damage to companies; clarifying that other causes concurred like third party's and victim's event, which would attenuate Facebook's liability.

About the administrative sanctioning liability, the general typicity of Law abuse is not configured, and neither the dominant position abuse, but there do can be considered that Facebook behaved like a facilitator of a typical conduct which is cartelization, because the lack of control in their policies observance and the excessive spectrum of some permissions allowed the cooperation between Cambridge Analytica and Aleksandr Kogan.

From the above derive a damage definitely unlawful consistent in the harm to producer's surplus of the companies that compete with Cambridge Analytica and/or are its potential clients. Finally, and just like in the civil area, a faulty behavior from Facebook is configured due to the already exposed reasons.

The role that social media has acquire in the world leads to a much deeper analysis than the one achieved studying Facebook's liability in the Cambridge Analytica case, we are in an era determined by the tension between freedoms and security and by a communications and information war between countries like China and the United States, where one blocks big companies from the other one under the flag of national security and defense of their citizens' privacy.

This case shows issues that go way beyond antitrust Law, it implies a deep analysis of how the world is using the new technologies that come to their grasp and how they are strongly influenced by political and philosophical reasons that go from economic discrepancies between world powers, to the blurry divisor line between the right individuals have to free expression and the risks of its abuse. About it there are not definitive answers, but it’s really important to analyze the consequences in diverse fronts of the decisions that authorities make in one sense or another.