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Towards a Conceptual Model of Legal Reasoning for the Practical Application of
Universal Principles of Proportionality and Reasonableness in Consumer Protection for
Online Sales Contracts.

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Peru is currently facing challenging times, with democracy and our legal system under threat from corruption. Therefore, it is my duty to contribute to my country through this thesis, inspiring new generations and fostering reflection, along with important authors such as Enrique Ghersi Silva, on how to improve legal application for a better future.

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ABSTRACT

This dissertation explores the legal standards of proportionality and reasonableness within consumer protection laws, particularly in online sales contracts. It examines the challenges in applying universal principles to ensure a fair balance between consumers and traders in digital transactions. While legislative norms establish explicit consumer protection obligations, they often fall short in addressing rapid technological and market changes. The study argues that proportionality and reasonableness serve as crucial legal standards that can enhance consumer protection beyond rigid legislative frameworks.

Through a comparative legal analysis of European Union law and Peruvian consumer protection legislation, the dissertation evaluates how these principles interact with allocative efficiency and the Consumer Welfare Hypothesis. The research suggests that legal reasoning frameworks based on these principles can provide a more adaptable and balanced approach to online sales contracts, mitigating informational asymmetries and power imbalances between consumers and provider or traders.

The dissertation also examines the limitations of national legal frameworks, emphasizing the importance of international legal harmonization in online consumer protection. Finally, it proposes a conceptual model for legal reasoning that integrates economic and legal theories to enhance fair contractual practices and market competition while safeguarding consumer rights.

Keywords: Consumer Protection, Online Sales Contracts, Proportionality and Reasonableness, Allocative Efficiency, Consumer Welfare Hypothesis, Legal Reasoning, Informational Asymmetry, European Union Law, Peruvian Law, Comparative Law.

I. INTRODUCTION

Seeking a balance between consumers and providers/traders is an ongoing challenge, evolving with technological advancements. Currently, legislative norms impose mandatory obligations to protect consumers in contracts. However, the shift from general sales contracts to online sales contracts has introduced complexities, crossing national boundaries and requiring universal principles to ensure fairness. Despite these efforts, codification remains incomplete.

A key international approach is found in Articles 26 and 169 of the Treaty on the Functioning of the European Union (TFEU), which regulate the internal market and promote consumer protection. Directive 2011/83/EU and Directive 2000/31/EC, along with Regulation 2022/2065/EU (DSA), reinforce these principles, particularly emphasizing transparency in online platforms. While the EU has advanced legislation, gaps remain. Applying proportionality and reasonableness, aligned with the Consumer Welfare Hypothesis, could enhance regulatory effectiveness and reduce normative pluralism.

The EU legal system seeks fair balance by systematically applying the TFEU and the Charter of Fundamental Rights of the EU (CFREU), particularly Articles 38, 52(1), and 54. However, whether legislative norms alone suffice remains debatable. Private law, by ensuring individual autonomy, must align with proportionality and reasonableness as universal legal standards.

The rise of informational asymmetries has heightened consumer-provider or trader imbalances, especially in the digital economy. Consumer protection is no longer just a national concern but an international priority, as technology transcends borders. The EU addresses this through regulations helping consumers but relying solely on legislation risks higher market costs and overlooking legal principles that could be more effective in free-market dynamics. This dissertation argues that proportionality and reasonableness offer a more efficient approach than rigid legislative norms, which are time- and context-dependent.

These principles contribute to legal reasoning by (i) identifying strong conceptual foundations and (ii) developing an analytical model within Allocative Efficiency and the Consumer Welfare Hypothesis, as proposed by Professor FABRIZIO ESPOSITO.

This dissertation will compare Peruvian law on consumer protection in online sales contracts to assess: (1) Whether the Peruvian Constitution considers freedom of contract and consumer protection as fundamental rights; (2) How Peruvian legislation regulates online sales contracts (3) How Peruvian case law ensures fair balance in consumer-trader relations (4) Whether proportionality and reasonableness are explicitly or implicitly recognized in Peruvian law and (5) The progress made despite Peru's lack of specific online sales regulations, relying instead on general contract law in the Peruvian Civil Code.

Given these issues, this dissertation will propose a conceptual legal reasoning model to support consumer protection in online sales through the Consumer Welfare Hypothesis. Unlike the EU's international regulatory approach, Peruvian consumer protection law remains nationally focused. Key questions remain, such as how to construct balanced online contract clauses when online platforms operate in Peru and how informational asymmetry can be addressed within proportionality and reasonableness.

To achieve its objective, this research adopts a comparative legal methodology, analysing EU and Peruvian consumer protection frameworks to identify challenges, similarities, and a

structured legal reasoning model for practical application. Accordingly, the dissertation will be structured as follows:

1. The first chapter explores the nature of universal principles and their significance as legal sources. It examines their role in law, the necessity of applying principles, and the legal nature of proportionality and reasonableness as standards. Additionally, it addresses the competitive nature of legal sources, highlighting principles as equally relevant as legislative norms, ultimately demonstrating their importance in positivist legal systems.
2. The second chapter analyses the relationship between party autonomy and a market-centered approach within contract law and consumer protection. It demonstrates how these concepts interconnect to foster competitiveness, functioning together as foundational principles.
3. The third chapter develops the Consumer Welfare Standard, advocating a shift from normative pluralism to allocative efficiency and consumer sovereignty. It examines legal reasoning and its construction through Allocative Efficiency and the Consumer Welfare Hypothesis within European and Peruvian legal frameworks, emphasizing proportionality and reasonableness.
4. The final chapter proposes a conceptual legal reasoning method for applying proportionality and reasonableness to achieve fair balance. It builds on the Consumer Welfare Hypothesis through (i) an integrated approach to market protection within competition and (ii) consumer-provider relations via reciprocity theory. This theory, rooted in market practices rather than legislation, bridges economic and legal theory.

In this regard, this dissertation does not seek to create new legal institutions but rather to leverage existing ones for a fresh approach to consumer protection in the digital era. Legal specialists must continuously adapt and refine their knowledge to enhance justice and sustainability.

II. UNDERSTANDING THE NATURE OF UNIVERSAL PRINCIPLES

To understand universal principles like proportionality and reasonableness, it is essential to examine sources of law within Legal Philosophy, Legal Practice, and Economic Analysis of Law. This includes understanding legal norms, their hierarchy in positivist systems, and their competitive interplay.

Before delving into the explanation of legal norm concept, it is imperative to note that a norm, as defined by author ELMER ARCE MARCIAL RUBIO CORREA, can be describe as a rule or a command that must be adhered to by the individuals to whom it is addressed. This command can be either legitimate or illegitimate; for instance, a legal norm represents a legitimate command emanating from State power. Moreover, the State's power is entirely legitimized, constituting the contemporary means of organizing the political power of a society residing within a specific territory¹.

Additionally, the term norm aligns with general usage, as defined by the Cambridge Dictionary is *“an accepted standard or way of behaving or doing things that most people agree with (i) varied cultural, political or ethical norms; or (ii) accepted social norms”*².

Consequently, various types of norms exist within society, including those of moral, social, and legal nature. For this dissertation, the focus will be solely on legal norms to distinguish them from others. Additionally, it is fundamental to assert that legal norms can function as rules just as they can operate as principles. Therefore, principles and rules are two facets of the same category, each with distinct aim and utility but essential for comprehending and correctly applying the law³.

2.1. Concept and Particular Features of the Legal Norm

According to the author ELMER ARCE MARCIAL RUBIO CORREA, a legal norm can be defined as a *“mandate established within the framework of the state's power, which must be fulfilled within social life by the people to whom it is directed and supported by the State in the event of non-compliance”*⁴. Consequently, this definition encompasses a broad sense, far from being strict.

In the same lines of thought, author SHOSCHANA ZUSMAN TINMAN, defines the concept of legal norm as *“those legal rules emanating from the State that are subject to interpretation”*⁵. However, she excludes the possibility that a legal norm can also function as principles.

Moreover, the main characteristics of legal norms are the following:

- a) **Necessity:** No society can exist without a legal system.

¹ MARCIAL RUBIO CORREA, ELMER ARCE; Teoría Esencial del Ordenamiento Jurídico Peruano; Fondo Editorial Pontificia Universidad Católica del Perú (2019); pg. 49.

² Cambridge Dictionary; Date of Consultation: 16th Novembre 2023; <https://dictionary.cambridge.org/dictionary/english/norm>

³ MARCIAL RUBIO CORREA, ELMER ARCE; Op cit at footnote 1, pg. 49.

⁴ MARCIAL RUBIO CORREA, ELMER ARCE; Op cit at footnote 1, pg. 49.

⁵ SHOSCHANA ZUSMAN, TINMAN; La interpretación de la ley teoría y métodos; Fondo Editorial Pontificia Universidad Católica del Perú (2018); pg. 75.

- b) **State Origin:** Law is monopolized by the state, with norms created by (i) the legislature or (ii) public administration for lower-ranking norms.
- c) **Coercive Nature:** Non-compliance results in sanctions, though some norms are merely declarative, prescriptive, or supplementary.
- d) **Generality and Abstraction:** Legal norms apply broadly but must be adapted to specific cases, ensuring fairness without undermining the legal system.
- e) **Bilaterality:** Legal norms create advantages for some while imposing obligations on others.

Legal norms function as rules or principles, guiding societal conduct. Ignoring principles limits their legal application. ELMER ARCE MARCIAL RUBIO CORREA precisely distinguishes: (i) rules (legislative norms) and (ii) principles as legal norms. The key difference lies in application. Rules set specific mandates based on facts, regulating certain situations while excluding others. For example, in EU Electronic Commerce Law:

- a) **Directive 2000/31/EC, Article 10(1):** Requires service providers to present key contract details—steps, accessibility, error correction, and language—clearly before an order is placed.

In the same lines of ideas:

- b) **Directive 2011/83/EU, Article 8(1):** Mandates traders to provide consumers with contract information in a clear, intelligible, and durable format.

Therefore, by analysing Article 10(1) of Directive 2000/31/EC and Article 8(1) of Directive 2011/83/EU, both establish trader information requirements for consumer protection. These rules share key legal norm characteristics: (i) necessity, ensuring market protection within the EU legal system; (ii) state origin, issued by the EU; (iii) coercive nature, with enforcement delegated to national laws; (iv) generality and abstraction, applying broadly to all consumers and traders in e-commerce; and (v) bilaterality, strengthening consumer rights while imposing obligations on traders.

In that sense these types of rules, as visualized in the examples given, apply to a concrete case with specific facts. However, this does not imply that these categorical rules are not subject to discussion or interpretation. Despite grammatically specifying concrete cases and facts, the language used can give rise to interpretation issues. For example, in the first provision cited, the information provided by services providers within electronic commerce must be clearly comprehensible, unambiguous. Additionally, in the same vein, the second provision cited states that information provided by traders using means of distance communication must be in plain and intelligible language.

While the grammar of both provisions is clear, the interpretation can vary depending on the nature of the products or services each provider or trader sells and whom it is being sold (different type of consumer profile). Therefore, the level of information clarity will vary in each independent case, necessitating interpretation of the provision.

On the other hand, legal norm as principles differs in that they do not pertain to the application of a concrete rule for specific facts but serve as general guidelines within peoples conduct. In other words, principles do not aim to solve specific cases as is the case with rules because they lack a specific definition or significance. For example, Article 38° of the Charter of Fundamental Rights of the European Union (CFREU), establishes that “*Union policies shall ensure a high level of consumer protection*”. This principle is general and binding but does not provide a categorical scope.

Similarly, paragraph 01 of article 52° of the Charter of Fundamental Right of the European Union (CFREU) states that “*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*” This article is interesting because it establishes two principles (i) the principle of maximum respect for human rights and freedoms; and (ii) the principle of proportionality and reasonableness.

The nature of principles, in contrast to rules, is that they do not establish unmovable frontiers. On the contrary the application frontiers of principles are flexible and can be only framed within their application in each specific case. Therefore, principles are fundamentals of the action or reasons that justify the behaviour of people. In this manner, principles help to justify conducts that have a common thread; nevertheless, in each concrete case, those conducts and facts could be classified as legitimate or illegitimate depending on whether the conduct makes more than one principle collide.

Additionally, it is important to state that principles are not interpretative lines of legal norms, they are “*legal norms and have coercive power*”⁶. Likewise, when principles conflict with each other, they are overcome with the “*balancing technique*”⁷ for each specific case.

Usually, principles are associated with the fundamental rights of people. For example, right of liberty, freedom of expression and information, freedom to conduct business, and high level of consumer protection, among others. However, at the same time they differ from the organizational principles such as the principles of legality, hierarchy of rules, or more favorable interpretation. Organizational principles are postulates that guide the application of norms in the legal system and do not serve as foundations that justify the actions of individuals.

In that sense, to correctly apply the law, it is of great importance to make a clear distinction between rules (legislative norms) and principles. Both are legal norms; nevertheless, the main difference lies in the fact that rules can only apply within the specific case and facts they regulate. On the other hand, principles can apply in any case, but this type of legal norm has deferred effectiveness. Principles have deferred effectiveness because they always must be grounded in a specific case, serving as guidelines within legal systems.

Finally, it is highly relevant to state that the following distinction between legal norms as rules and principles is shared by comparative law, with the legal systems of the EU and Peru serving as practical examples. Case law is fundamental in establishing the difference between rules and principles as legal norm in their practical application.

⁶ MARCIAL RUBIO CORREA, ELMER ARCE; Op cit at footnote 1, pg. 56.

⁷ MARCIAL RUBIO CORREA, ELMER ARCE; Op cit at footnote 1, pg. 56.

For example, according to point 01 of article 06°, systematically applied with article 08° of Directive 2011/83/EU, the rule states that information given to consumer who are going to enter into a distance contract, must be appropriate to the means of distance communication and be in a clear and legible. Notwithstanding this, there are cases where the application of a specific rule is not sufficient, and the use of principles must be employed to carry out a correct balancing of rights and obligations.

For better understanding, it is relevant to cite Case Law C-649/17 (*Verbraucherzentrale Bundesverband eV v Amazon EU*), where it was determined that Amazon breached its obligation to provide clear and legible information in distance or off-premises contracts by failing to include contact details such as a phone number, fax number, or email—despite the provision not explicitly requiring them. See paragraphs 28–30 of the judgment (*Verbraucherzentrale Bundesverband eV v Amazon EU*, 2019).

Consequently, this is a clear case in which rules and principles are being applied to resolve a consumer case. Provisions outlined within article 06° (1) and 08° of Directive 2011/83/EU establishes the obligation of traders to provide clear and legible information in distance or off premises contracts. However, these provisions do not give an exhaustive list of how to fulfill this requirement. That is why balancing of principles was applied, considering the principle of freedom to conduct business and the principles of high level of consumer protection and competitiveness of enterprises held in the Charter of Fundamental Rights of the European Union (CFREU).

Furthermore, in Peruvian case law, a similar approach can be observed in the judgment issued in Case File Number 1417-2005-AA/TC, where the Peruvian Constitutional Court distinguished legal norms as rules and principles based on their distinct practical aims and utility, as explained in Basis Number 11 of the Court's judgment. (Manuel Anicama Hernández vs Sentencia de la Cuarta Sala Civil de la Corte Superior de Justicia de Lima, 2005).

In this regard, rules and principles are two facets of the same category but differ in application. Rules apply to specific cases, while principles have broader applicability with deferred effectiveness. Next, I will explore the importance of applying principles in law.

2.2. The Importance of Applying Principles in Law

The broad concept of a legal norm, as discussed above, encompasses rules (legislative norms) and principles in a practical sense. While rules mandate human conduct and establish specific, concrete guidelines, principles serve as general frameworks with flexible boundaries, applicable in each specific case.

Moreover, it is a fact that rules, despite their precision, can never fully regulate all specific human conduct due to its evolving and changing nature. Circumstances are constantly changing, and with technological innovation, human life is rapidly evolving, presenting more challenges to solve. In this context, author JOSE MARIA DIAZ COSUELO aptly explores the challenges posed by legislative norms⁸ due to their rigid and inflexible nature⁹ (DÍAZ COUSELO, 1971).

⁸ DÍAZ COUSELO, JOSÉ MARÍA; *Los Principios Generales del Derecho*; Editorial Plus Ultra (1971); pg. 11.

⁹ DE DIEGO F. C, citado por RODRÍGUEZ-ARIAS BUSTAMANTE Lino, en *Ciencia y Filosofía del Derecho*, Ediciones Jurídicas Europa América, Buenos Aires, pág. 591. Conf. HECK Philipp, *El Problema de la Creación del Derecho*, Ediciones Ariel S. A., Barcelona, 1961, pág. 34 y siguientes.

Therefore, the specific subject matter subject to regulation undergoes variations, so legal remedies must necessarily change by adapting to new circumstances. In the same line of thought, author FRIEDRICH KARL VON SAVIGNY highlights the impossibility of foreseeing all future needs in the Codes that contain codified rules (VON SAVIGNY, 1946).

Consequently, the main problem of human evolution manifests itself with greater intensity during moments of profound and accelerated social transformations. Nowadays, it is not a secret that technological advances and innovation have expanded widely since the times of COVID-19 and will continue on the same path: *"The pandemic has demonstrated the importance of technology and, in many cases, accelerated digital transformation. We have analysed emerging trends in some key technologies that are being applied in developing economies and that can have a broad and lasting impact."* (OTUSKA, REPOND, WHEELER, & ASMOLOVA, 2020).

In that sense, the appearance of new, unforeseen circumstances, such as the rapid technological transformation resulting from the pandemic or COVID-19 times, generates (i) new situations, (ii) new ways of human interaction, or (iii) even new human conducts that were not foreseen by positive legal systems and, inclusively, not even thought of as hypothetically possible by legislators. In this way, these situations create "loopholes" within positive legal systems, with "loopholes" referring to the lack of adequate regulation of legal relationships or situations.

This is the main reason why author JOSE MARIA DIAZ COSUELO correctly develops the hypothesis that humans have never been able to build a legal system whose rules would provide a solution to all possible controversies. In this context, principles gain relevance to precisely address legal loopholes within rules. Moreover, the following hypothesis can be supported by the (i) Naïve Realism Theory; (ii) Scientific Empiricism Theory; (iii) Pragmatism Theory; (iv) Eclecticism Theory; and (iv) Philosophical Apriorism Theory, well explained by author MARCELA ISZASCUM BASTERRA, quoting the work of author JORGE REINALDI VANOSSI¹⁰. Thus, each of the theories mentioned will help to focus the practical discussion of gaps or loopholes:

- A. **The Naïve Realism:** Legal gaps exist because human intellect cannot foresee all future legal scenarios. (ISZASCUM BASTERRA, 2000, p. 280)
- B. **Scientific Empiricism:** Denies legal gaps, asserting that *"everything not prohibited is permitted."* Gaps are addressed through analogy, integrating rules and principles for legal completeness. (ISZASCUM BASTERRA, 2000, pp. 280-281)
- C. **Pragmatism Theory:** Acknowledges legal gaps but argues they should be denied to prevent societal disruption. This utilitarian view lacks scientific rigor. (ISZASCUM BASTERRA, 2000, p. 281)
- D. **Eclecticism:** Distinguishes between formal gaps (denied by the principle "everything not prohibited is permitted") and legislative gaps (acknowledging injustices in specific cases). (ISZASCUM BASTERRA, 2000, p. 281)

¹⁰ VANOSSI, JORGE REINALDI "La Interpretación Constitucional y las lagunas del Derecho"; "Teoría Constitucional"; 2da edición, actualizado; Editorial Depalma, Buenos Aires. marzo del 2000; Tomo II: pg. 505-42.

- E. **Philosophical Apriorism:** Rooted in HANS Kelsen¹¹ Pure Theory, it denies legal gaps, viewing law as a self-contained, total structure where nothing exists outside its framework. (ISZASCUM BASTERRA, 2000, p. 281)

Despite the different theories in place which discuss the possibility or non-possibility of existence or gaps or loopholes within the law or legislation (e.g., legislative norms). Principles gain much importance on this matter due to their legal nature which is to serve as general frameworks with flexible boundaries, applicable to each specific case. Likewise, principles are part of legal systems as explained but they must be found and analysed to remedy gaps or loopholes, which cannot be denied on existence; however, their existence does not mean they cannot be confronted by principles to find specific solutions.

Additionally, gaps or loopholes can be classified into two categories (i) regulatory gap or “loophole;” and (ii) axiological gap or “loophole.” The first category refers to cases that have no solution within a regulatory system. Meanwhile the second category occurs when the regulatory system does not provide a fair or just solution.

According to the author WERNER GOLDSMIDT, axiological loopholes can be sub divided into (i) direct; and (ii) indirect¹². Direct loopholes arise when the absence is due to historical causes because the authors of norms could not foresee the logical necessity of the norms. On the other hand, indirect loopholes occur when the norms are so unfair that they cannot be applied.

Therefore, the main characteristic of axiological loopholes is that the evaluation conducted by legal professionals (lawyers, attorneys, judges and legal specialists) is essentially a balancing test of fundamental rights. For example, the judgment of January 23, 2019, in the *Walbusch Walter Busch* Case C-430/17; EU:C:2019:47, clearly demonstrates a direct evaluative examination by the court, resulting from a gap in the Fundamental Right to a High Level of Consumer Protection, in relation to the Fundamental Right to Freedom to Conduct Business. This occurred within the practical application of the legal right to adequate information provided to the consumer in the context of distance contracts, as outlined in Article 8(4) of Directive 2011/83. See paragraphs 35–37 of the judgment (*Walbusch Walter Busch GmbH & Co. KG*, 2019).

Finally, other types of gaps or 'loopholes' can be found within the category of regulatory gaps. We refer to a regulatory gap as a situation not contemplated in the legal system, creating a legal void. The legal system lacks a normative solution for a specific case. For example, unlike Regulation 2022/2065/EU (DSA), the Peruvian Consumer Protection Code does not foresee specific obligations for providers of intermediary services to combat illegal content or ensure legal compliance. Meanwhile, the European Union legal system imposes such obligations (Article 7 of Regulation 2022/2065/EU); however, it can be debated whether the general provisions and lack of precision provide fair or just legal solutions.

Moreover, Peruvian legislation does not include specific laws regarding online sales contracts; therefore, in such cases, the Peruvian Consumer Code and the Peruvian Civil Code must be systematically applied under the provisions governing sales contracts. However, the provisions

¹¹ HANS Kelsen; *Teoría Pura del Derecho* (trad. De la segunda edición en alemán: Roberto Vernengo). México D.F; Universidad Nacional Autónoma de México e Instituto de Investigaciones Jurídicas, 1982.

¹² GOLDSMIDT WERNER; "Introducción Filosófica al Derecho"; Ediciones Depalma, 6ta edición; Buenos Aires, 1978; pg. 291-293

related to sales contracts are primarily designed for non-online transactions within the market. For instance, the definition of a Consumer Contract in Article 45 of the Peruvian Consumer Code is generic and even intended for non-online sales.

Furthermore, the right to withdrawal, as outlined in Article 59 of the Consumer Protection Code, does not provide a clear procedure for protecting consumers when exercising this right. Consequently, the regulation, though in compliance with the legal provision, lacks sufficient development.

Finally, the Peruvian Civil Code applies to any matters not addressed by the Peruvian Consumer Protection Code, as stated in the last paragraph of Article 45 of the Peruvian Consumer Protection Code. However, the provisions on sales contracts within the Peruvian Civil Code are conceived from a completely different perspective. For example:

- a. Article 1586 of the Peruvian Civil Code addresses the possibility of a withdrawal agreement, but in favor of the seller.
- b. This specific right of withdrawal was designed for immovable goods or, in the case of movable goods, those that are non-fungible and subject to public registration (e.g., cars, large machines, ships, airplanes). In line with this, paragraph one of Article 1588 of the Peruvian Civil Code establishes extended deadlines, while Article 1591 encourages public registration of the pact to enforce it against third parties.

Therefore, the main issue with the situation described is that the Peruvian Consumer Protection Code and the Civil Code regulations on contracts, particularly sales contracts, are general and primarily designed for non-online transactions. Nevertheless, this does not mean that consumer protection cannot be ensured under the existing legislative framework, as both sets of regulations promote (i) good faith and (ii) a fair balance.

In this sense, legal reasoning gains significance in such cases, as legislative norms must be analyzed from a fundamental rights perspective to identify foundations and construct legal interpretation and argumentation, assessing adequacy and contextual necessity. This point will be analyzed later in Chapter Three of the dissertation.

Likewise, it is important to note that online sales contracts are prevalent in the Peruvian market. According to IPSOS in 2021, *“there are 7.1 million adults in urban Peru who make purchases online, and 38% of them buy through social networks”*¹³. In this context, online sales contracts represent a significant trend in the Peruvian market, especially considering that Peru's total population is approximately thirty-three (33) million people, according to the Peruvian Government¹⁴.

In this regard, to ensure the application of legal norms, despite the lack of clear Peruvian rules on (i) withdrawal rights for consumers and (ii) online sales contracts, constitutional principles must fill these axiological gaps. Consumer Protection (Article 65) and Freedom to Conduct Business (Article 58) should be interpreted through proportionality and reasonableness (Article 3 and Article 200, final paragraph).

¹³ IPSOS; “Compras por Internet 2021”, Infografía Ipsos (2021), Published the 03rd of September of 2021. <https://www.ipsos.com/es-pe/compras-por-internet-2021>

¹⁴ INSTITUTO NACIONAL DE ESTADISTICA E INFORMATICA (INEI); “Población peruana alcanzó las 33 millones 396 mil personas en el año 2022”; Gob.pe; 11th of July of 2022; <https://www.gob.pe/institucion/inei/noticias/630584-poblacion-peruana-alcanzo-los-33-millones-396-mil-personas-en-el-ano-2022>

In this context, applying principles is essential to filling axiological or regulatory gaps. When legislative norms fail to cover all aspects of human conduct, principles serve as flexible legal frameworks, foundational to legal reasoning. Legal professionals must apply them carefully, ensuring balance, a topic further explored in this dissertation.

2.3. The Legal Nature of the Principles of Proportionality and Reasonableness as Standards

Despite the fact both principles are not explicitly outlined in Constitutional Charters or texts, they are implicit. The primary reason for this is that the legal nature of both principles lies in their transversal application to all independent legal systems in the fulfilment of the rights of liberty and justice.

According to the author ELVIS RUBEN PUMA PACCO, citing the work of author JUAN CIANCIARDO¹⁵, the principle of proportionality can be accurately defined as “*a prescription under which every intervention of the State in the activities of citizens must be a) suitable; b) indispensable; and, finally, c) proportionate*”¹⁶. Thus, the primary objective of the principle of proportionality lies in the idea that states, in general, can only restrict fundamental rights when a just cause exists. However, the measure must be adequate to guarantee the pursued objective, maintaining a fair balance and imposing the minimum possible restriction. In that sense, the main justification for this principle is human liberty and justice.

Moreover, the principle of reasonableness finds its essence in the purpose of each rule and interpretation, serving their overall goal in strict observance of human liberty, justice and, mostly important, the eradication of any type of abuse within law. Author RICHARD HARO states that “*the reasonable is what aligns with the Constitution, not so much in its literal wording but in its spirit, and the unreasonable is what violates the Constitution, what is unconstitutional*”¹⁷. Thus, the principle of reasonableness can nowadays be considered a synonym of fundamental rights protection.

Likewise, within the principle of reasonableness, legal specialists move from balancing fundamental rights to systematically interpreting the relationship between fundamental rights and legislative norms. This is known as the test of reasonableness, which seeks to establish a legal framework where fundamental rights and legal norms can achieve predictability. In this line of thought, Professor ALFREDO BULLARD GONZÁLEZ strongly supports the idea that the predictability of norms, driven by market practices and competition, allocates justice efficiently¹⁸.

¹⁵ CIANCIARDO, JUAN; *El principio razonabilidad. Del debido proceso sustantivo al moderno juicio de proporcionalidad*. Buenos Aires, 2004: Editorial Ábaco, pg. 25.

¹⁶ PUMA PACCO, ELVIS RÚBEN; “Razonabilidad y Proporcionalidad: Principios Constitucionales Para Detener el Abuso del Poder Del Estado”; Universidad Santo Tomás; Instituto de Investigación Iberoamericano Apex Iuris; Perú – Colombia 2020; pagina 255.

¹⁷ HARO RICHARD; “El control de Constitucionalidad y el Rol Paradigmático de las cortes y tribunales constitucionales”; *Derecho & Sociedad* N°16 (2001), pg. 38-39

¹⁸ GONZALEZ BULLARD, ALFREDO; “Comprando Justicia: ¿Genera el Mercado de Arbitraje Reglas Jurídicas Predecibles?; *Themis* 53; 2007; Lima; pg. 72-74.

Likewise, author CAROLINA SALAS SALAZAR, citing Professor CARLOS BERNAL PULIDO, supports that the application of proportionality and reasonableness involves the balancing of principles as a “*rationale procedure for the application of legal norms*”¹⁹.

Therefore, while proportionality and reasonableness are similar concepts that aim at the same objective of avoiding arbitrariness, they are not identical and fulfil different roles. Nevertheless, both are interrelated, like two sides of the same coin, but with distinct functions. Proportionality, as advocated by professors ELVIS RUBÉN PUMA PACCO and JUAN CIANCIARDO, is used to balance fundamental rights, since no fundamental right is independent or absolute. Meanwhile, reasonableness seeks a systematic interpretation of fundamental rights and norms.

In that sense, Professor GIORGIO PINO asserts that there is a strong boundary between fundamental rights outlined in Charters of Fundamental Rights or Constitutional texts and principles, as fundamental rights are structured with a high level of generality, flexibility, and indeterminacy, subject to further interpretation within discretion. Thus, proportionality and reasonableness, as high principles, gain relevance in this context, as they are applied accordingly to resolve human conflicts (PINO, 2016, pp. 202-203).

Then, as initially mentioned, proportionality and reasonableness find importance within Constitutional texts or Charters of Fundamental Rights, but they are not explicitly developed worldwide. As explained, doctrine and scholarship find the essence of both principles within their axiological horizon. Nevertheless, this does not mean that proportionality and reasonableness are found only in doctrine; they can also be implicitly identified in the aforementioned texts.

To support this idea, I proceed to give an example, within a constitutional comparison of six different countries²⁰, from all existing Continents, can be cited to demonstrate how both principles, despite their lack of explicit regulation, can be readily identified as a fundamental means for each State to ensure fundamental right protection and justice.

- A. Fourth & Ninth Amendments (U.S. Constitution, 1789): The Fourth Amendment protects individuals from unreasonable searches and seizures, while the Ninth Amendment ensures that rights are not limited to those explicitly listed. Both uphold proportionality and reasonableness, limiting state power over fundamental rights.
- B. Article 52.1 (CFREU): Rights under the Charter of Fundamental Rights of the European Union are not absolute; limitations must be lawful, necessary, and proportionate to serve legitimate interests.
- C. Article 36 (South African Constitution, 1996): Rights may be limited only if the restriction is reasonable and justifiable in a democratic society, ensuring a proportionate balance between rights and their limitations²¹.

¹⁹ SALAS SALAZAR, CAROLINA; “CARBONELL, MIGUEL (coord.) (2010). El principio de proporcionalidad en la interpretación jurídica”; Revista de Derecho de la Universidad Católica del Norte, Sección: Comentarios de Bibliografía Año 17 - N.º 1, 2010; pg. 258.

²⁰ Web Site: “CONSTITUTE”, 03 of December of 2023;

https://www.constituteproject.org/constitutions?lang=en&status=in_force&status=is_draft

²¹ ROCA TRÍAS, ENCARNACIÓN & AHUMADA RUIZ, MARÍA ÁNGELES “Los principios de razonabilidad y proporcionalidad en la jurisprudencia constitucional española”; XV Conferencia Trilateral 24-27 de octubre 2013; <https://www.tribunalconstitucional.es/es/trilateral/documentosreuniones/37/ponencia%20espa%C3%91a%202013.pdf>

- D. Article 28D (Indonesian Constitution, 1945): Guarantees legal personality, protection, and equality under just laws, requiring a reasonableness test to balance fundamental rights.
- E. Articles 11 & 12 (Japanese Constitution, 1946): Guarantees fundamental rights but mandates public welfare considerations to prevent abuse, ensuring proportionality and reasonableness.
- F. Article 76 (Australian Constitution, 1901): Grants the High Court jurisdiction to interpret laws, requiring proportionality and reasonableness in legal development.
- G. Articles 3, 200 & Fourth Final Provision (Peruvian Constitution, 1993): Recognizes unenumerated rights and mandates proportionality and reasonableness in reviewing restrictions on constitutional rights, aligning with international human rights standards.

Finally, according to the Principle of Unity outlined in Paragraph 16 of the Peruvian Constitutional Court's judgment in Case No. 5854-2005-PA/TC²², constitutional articles must not be applied in isolation or independently but rather understood systematically.

In that sense, to ensure fundamental rights protection, as analysed in different constitutions worldwide, the principles of proportionality and reasonableness are implicitly found as fundamental mean to ensure human rights protection. Consequently, the main function of both principles would be to guarantee *Paradigmatic Function* within legal systems. From this perspective, author RICHARD HARO states that the *Paradigmatic Function* “*It should manifest itself not only in the substantive aspects of the legal order but also in its procedural aspects, so that the legal system as a whole ultimately serves the primary objective of the Courts or Constitutional Tribunals, which is to strengthen justice in society*”²³.

This aligns directly with the thesis of author MANUEL ATIENZA, who strongly supports the practical function of both principles within a Fundamental Rights protection or Constitutional State of Law “*The principle of proportionality holds a fundamental importance in both the practice and theory of legal argumentation*”²⁴. Understand proportionality in its broad sense, subject to fundamental rights balancing.

Additionally, this is the fundamental reason why sources of law cannot support a restricted or monopolized vision in which one source is deemed more important than others. Instead, every source is in constant competition and has a fundamental role within the legal framework. Judges, magistrates, and jurists, in general, must be pragmatic and constantly apply legal reasoning for case analysis. (HARO, 2001, p. 44)

Regarding this, author ALEXIS DE TOCQUEVILLE asserts that the “*American judge*”²⁵ wield great political power and must be statesmen, not just legal professionals, capable of

²² Paragraph 16 of Judgment of the Peruvian Constitutional Court within Case Law under file Exp N°. 5854-2005-PA/TC. “*Well, it is evident that after an isolated reading of any of these provisions, one will arrive at conclusions that are inconsistent with the unitary or systematic principle of the Constitution.*”

²³ HARO, RICHARD; Op cit at footnote 17, pp. 43.

²⁴ ATIENZA, MANUEL; Para una razonable definición de razonable, Revista Doxa, N.º4 (1987); pp. 194.

²⁵ The metaphor of the time corresponding to independence movements is significant.

adapting to the spirit of the times²⁶. Consequently, law should balance positivism with pragmatism within legal reasoning.

Moreover, ALEXIS DE TOCQUEVILLE highlights that the spirit of the times drives legal change, requiring legislative norms to adapt. This makes proportionality and reasonableness essential, as they transcend time, evolving while ensuring social justice.

In this regard, these principles are enduring, adapting to legal evolution and aligning with the competitive nature of legal sources. Their role as fundamental tools for legal reasoning will be explored further.

2.4. The Competitive Nature of Sources of Law as a Fundamental Element in the Development of Legal Reasoning

The concept of Sources of Law is one of the most widespread and popular in contemporary legal science and philosophy, considerable practical value. Moreover, it could be said that the concept is of recent data. Author ENRIQUE GHERSI SILVA asserts that the concept of “Sources of Law” was created by FRIEDRICH KARL VON SAVIGNY who first used this concept in the mid-19th century²⁷.

The main reason why Sources of Law matter, or should matter, is that in positive legal systems, following the hierarchical structure of norms, legislative norms are considered the most significant source of law. Nevertheless, Economic Analysis of Law maintains that all sources are important and constantly compete with one another. Following this logic, principles and legislative norms hold equal importance and serve as fundamental tools for legal reasoning which important for law analysis.

Furthermore, according to FRIEDRICH KARL VON SAVIGNY, the concept “Sources of Law” is derived from the idea of recognising “*The Spirit of People*” (Volksgeist). Thus “*The Spirit of People*,” was a way of legitimizing legal science. This idea, aligns with the thesis of ALEXIS DE TOCQUEVILLE, developing the concept of “*Spirit of Time*”²⁸, by purifying prevailing currents within societies²⁹ (GHERSI SILVA, *El Caracter Competitivo de Las Fuentes del Derecho*, 2003, p. 261).

Consequently, KARL VON SAVIGNY believed that the role of the legislator was not to create law but to purify and order it in view of “*The Spirit of the People*” within a specific time. However, in contemporary legal science and philosophy, there is no real theory corresponding to “Sources of Law.” What exists are types of classifications attempting to construct and explain the theory. Therefore, it is interesting at this point to analyse the theses of authors (i) LEON DUGUIT³⁰ and (ii) ALF ROSS, who, as supporters of the pragmatic vision of law, advocate for the development of dogmatical work over the “Sources of Law” rather than arbitrary classifications³¹.

²⁶ DE TOCQUEVILLE, ALEXIS; “Las Democracias de América”; Trotta; Madrid (2010)

²⁷ SAVIGNY, KARL VON; “De la vocación de nuestro siglo”; Editorial La España Moderna; Madrid (1895)

²⁸ DE TOCQUEVILLE, ALEXIS; Op cit at footnote 26.

²⁹ SAVIGNY, KARL VON; Op cit at footnote 27; pg. 13-14.

³⁰ DUGUIT, LEON; *Las Transformaciones Generales del Derecho*; Editorial Argentina; Buenos Aires, 1975.

³¹ ROSS, ALF; *Lógica de las Normas*; Ediciones Tecnos; Madrid, 1975.

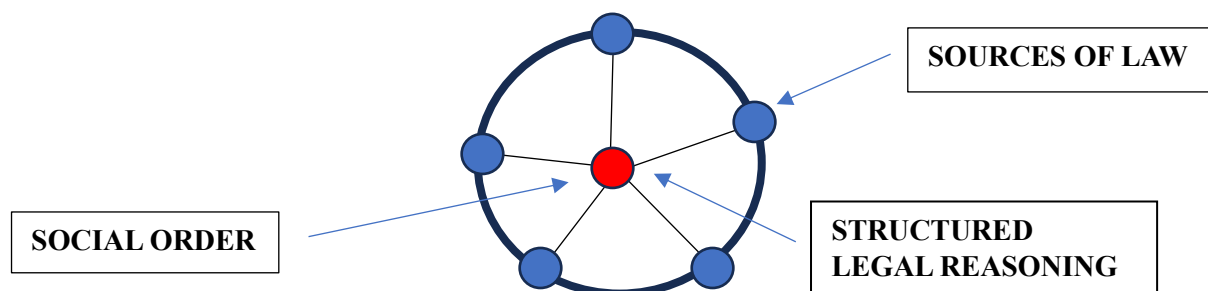
Moreover, to understand the essence of “*Sources of Law*,” it is crucial to note that it has never been about the development of arbitrary classifications. Instead, as KARL VON SAVIGNY argued, the essence lies in understanding law within its pragmatic function in “*The Spirit of the People*.” Conversely, the opposing position within legal doctrine is positivism, founded within Traditional vision of law.

About the following, author ENRIQUE GHERSI SILVA sustains that the Traditional Vision of Law suggests that the exclusive existence of hierarchy within “Source of Law,” correspond to a rational posture in legal philosophy. That is why *Jus Naturalism* and *Jus Positivism* share similarities because both philosophical currents support the idea that legal order must be subject to rules (e.g. divine rules in the case of *Jus Naturalism* or legislative norms in the case of *Jus Positivism*). Thus, divine rules or legislative norms, will have privileged and monopolized place within legal systems (GHERSI SILVA, *El Caracter Competitivo de Las Fuentes del Derecho*, 2003, p. 263).

Most interesting, in the case of *jus positivism*, author HANS Kelsen proposed a hierarchy of legal norms for interpreting and applying rules (KELSEN, 1946, p. 113). His theory, dominant in contemporary law, views legal sources as structured, with extreme positivism recognizing only law (legal rules) as the sole source, opposing natural law theory. However, both theories share the belief in a hierarchical legal order—natural law theorists attribute it to natural laws³² while positivists to positive law³³.

Both perspectives assume law has a monopoly and a rational origin from a single source. However, legal reasoning cannot rely solely on legislative norms; it requires multiple legal tools for proper interpretation and argumentation in case analysis. Therefore, economic theory suggests an alternative perspective. While traditional law enforces order through a monopoly system, economic theory advocates a competitive legal system, using diverse legal sources to align with the Spirit of the People, enhancing legal reasoning.

See the following graphic:



In that line of ideas, author ENRIQUE GHERSI SILVA argues that social order arises spontaneously from human action, not imposed will. Thus, Sources of Law are decentralized and evolve through cooperation. Though not rationally designed, they still follow logical patterns (GHERSI SILVA, *El Caracter Competitivo de Las Fuentes del Derecho*, 2003).

³² SAVIGNY, KARL VON; Op cit at footnote 27; pg. 72-73

³³ HART, HERBERT LIONEL; “El Concepto de Derecho”; Abeledo-Perrot; Buenos Aires; 1963; pg. 121

Similarly, LUDWIG VON MISES asserts that the competitive theory of law is not rationalist but emerges from practical human action ("*Praxis*"³⁴) Therefore, legal systems evolve organically, guided by behavior rather than preplanned structures.

Over time, the "Spirit of the People" shapes legal systems, reflected in legal norms, customs, doctrine, jurisprudence, and principles. These independent legal sources result from voluntary cooperation and evolve with time, forming the core of the Praxeological Theory³⁵, opposing legal monopolies in natural law and positivism (HAYEK V. F., 1981).

This theory broadens legal reasoning, integrating various legal institutions beyond legislative norms, strengthening interpretation and argumentation. However, achieving this requires access to diverse legal tools.

In this regard, Cost-Benefit Analysis is crucial in evaluating legal sources within the Spirit of the People, considering (i) time, (ii) space, (iii) human cooperation, and (iv) societal roles. Prioritizing legislation over other legal sources raises costs rather than improving efficiency. Thus, a monopolistic legal approach contradicts legal economic theory, which supports a competitive system as the foundation for structured reasoning.

2.5. Connecting the Dots: The Importance of Universal Principles within Proportionality and Reasonableness as Legal Standards and Sources of Law

Is important to highlight that legal norms, as principles, have broad applicability. As noted by Professor ELMER ARCE MARCIAL RUBIO, legal norms function both as rules (legislative norms) and principles³⁶. While rules dictate specific conduct, principles provide flexible frameworks. This dissertation examines proportionality and reasonableness, which address legislative gaps and uphold liberty and justice. As Sources of Law, they are practical and effective, though legal doctrine does not clearly separate them from legal norms. Instead, they interact, competing within legal systems like the EU and Peru.

The competitive nature of legal sources, explained through economic theory, highlights how rules and principles continuously shape legal reasoning. Understanding proportionality and reasonableness enables analysing the coexistence of individual autonomy and market protection, framed by these principles. Legal reasoning extends beyond legislative norms, requiring foundational concepts for proper interpretation and argumentation. Laws must be analysed within a broader framework, not in isolation. The goal is to resolve social issues efficiently rather than complicate law through rigid rules. Using multiple legal tools strengthens reasoning within proportionality and reasonableness.

Finally, the next chapter will examine whether individual autonomy and market protection form a unified principle supporting consumer protection. It will also explore Allocative Efficiency and the Consumer Welfare Hypothesis within EU and Peruvian legal systems to propose a structured legal reasoning model. However, this requires a thorough understanding of proportionality, reasonableness, and the competitive nature of legal sources for optimal legal analysis.

³⁴ MISES, LUDWIG VON; "La acción humana"; Unión Editorial; Madrid; 1980.

³⁵ HAYEK, FRIEDRICH VON; "Nuevo Estudios. En: Filosofía. Política, Economía e Historia de las Ideas"; Editorial Universitaria de Buenos Aires; Buenos Aires; 1981; pg. 110-115.

³⁶ MARCIAL RUBIO, ELMER ARCE; Op cit at footnote 1, pg. 49.

III. INDIVIDUAL AUTONOMY OF PARTIES AND MARKET PROTECTION: CAN BOTH BE CATEGORIZED AS ONE?

Traditionally, contract law has been analysed from a perspective centered on the principle of individual autonomy. Likewise, DAGAN & HELLER develop individual autonomy as a fundamental tool that enables people to cooperate in economic transactions, which take their objective form within the multiplicity of contract types in law. Nevertheless, sales law is heavily influenced by the modern digital sales landscape, which extends beyond substantive contract law to include regulatory techniques in private law, law enforcement, and new developments in private contractual practices. (DAGAN & HELLER, 2017)

In this regard, it is possible to find mechanisms of cooperation within principles which find their essence on good faith aligned with human dignity. That is the main reason why proportionality and reasonableness, as universal principles, provide guidelines to people's conduct within society and are analysed accordingly to each conduct. Therefore, as pointed by Professor ELMER ARCE MARCIAL RUBIO, legal norms in its wide range definition, can function as rules or principles. Not recognising the existence of principles will be limiting, especially in their application within law and specifically will limit case analysis.

Consequently, at this point, understanding the work of DAGAN & HELLER within contract law and self-determination, which is guided by social welfare, is essential for achieving long-term market success. Therefore, DAGAN & HELLER support self-determination through Choice Theory, within the boundaries of utility and individual autonomy, to facilitate a multiplicity of contract types for sustainable market development. (DAGAN & HELLER, 2017, pp. 68-69)

On the other hand, FELIX MAULTZSCH proposes a different approach. For example, the author acknowledges the emergence of "*new patterns of digitality*"³⁷ has replaced the previously centered perspective with a market-centered perspective that safeguards the European internal market as a fundamental right. Thus, this market-centered perspective, developed within the bounds of the principle of harmonization in EU legislative norms, aims to ensure equality of competition among traders and to establish a commercially safe transactional zone for consumers. The primary evidence for this will be the systematic application of Articles 114(1) and (2) of the Treaty on the Functioning of the European Union (TFEU), along with Article 38 of the Charter of Fundamental Rights of the European Union (CFREU). Both articles seek to guarantee (i) a high level of protection for the EU internal market and (ii) a high level of consumer protection as a fundamental right.

Accordingly, online sales in digital markets have significantly introduced new ideas within the consumer law approach. For authors such as FELIX MAULTZSCH, it is no longer a question of protecting individual autonomy or leveling the playing field between parties, but rather ensuring the protection of markets as such—especially within EU boundaries—while also serving as a fundamental model internationally. However, this idea can easily be counterargued by DAGAN & HELLER, who assert that the market is a human creation guided by the instrumental values of utility and community. This is the fundamental reason why self-determination and market development are two sides of the same coin, pointing toward innovation rather than normative limitation. (DAGAN & HELLER, 2017, pp. 79-82)

³⁷ MAULTZSCH, FELIX; "Paradigms of EU Consumer Law in the Digital Age;" Goethe-Universität; Frankfurt am Main; August 15, 2020.

In this regard, the systematic application of Articles 114(1) and (2) of the Treaty on the Functioning of the European Union (TFEU), along with Article 38 of the Charter of Fundamental Rights of the European Union (CFREU), best aligns with the values of Utility and Community proposed by DAGAN & HELLER, as explained. Both articles seek to guarantee (i) a high level of protection for the EU internal market and (ii) a high level of consumer protection as a fundamental right, while not restricting Choice Theory. Instead, they operate within the boundaries of utility and individual autonomy, facilitating a multiplicity of contract types for sustainable market development.

On the other hand, Peruvian approach is interesting because constitutional provisions, such as articles 58°, 61°, 65° of the Peruvian Constitution guarantees market protection, free competition within high level of consumer protection. However, the first paragraph of article 62° of the Peruvian Constitution it still does not set aside the principle of party autonomy as the main pillar in contract law.

Additionally, Peruvian Civil Code, in hand with article 62° of the Constitution, goes in hand with principle of party autonomy. For example, article 1354° of the Peruvian Civil Code promotes fundamental right of freedom of contract: *“The parties are free to determine the content of the contract, provided that it is not contrary to mandatory legal norms.”*

In the same way, EU legal system, despite doctrinal discussion brought by FELIX MAULTZSCH on the following topic. The author also recognizes that the change of contract law within the new centred market approach creates a dilemma by increasing in that way mandatory law for Business to Consumer (B2C) transactions³⁸ and weakening right of freedom to contract, in favor of contractual standardisation (MAULTZSCH, 2020, p. 5).

This perspective, put forth by FELIX MAULTZSCH, is not accurate, as the dichotomy between individual autonomy of parties and market protection can be resolved through a unified interpretation of the provisions on "Freedom of Contracts" or "Freedom to Conduct Business" and a "High Level of Consumer Protection." These principles are found in (i) the Charter of Fundamental Rights of the European Union and (ii) the Peruvian National Constitution (1993).

Moreover, the mentioned perspective put forth by FELIX MAULTZSCH on the centred market approach is questionable since it is indeed utility and community values which place typically consumer uninterested in personal relations with the merchant and does not want to dicker over terms. Therefore, this situation does not replace individual autonomy of parties over market protection but reflects both principles within its individual utility and efficient allocation of resources in society. (DAGAN & HELLER, 2017, pp. 80-83)

Efficient allocation of resources does not mean suppressing the autonomy of contracting parties due to a false belief in protecting a weaker party but rather ensuring that contractual parties have the freedom to choose among different contract types for sustainable market development. It is true that consumer contracts, in accordance with the fundamental right to a high level of consumer protection, grant protection to consumers from harm. However, this concept of preventing harm to consumers derives from the values of utility and community, aiming to overcome informational asymmetries and ensure market development. As an alternative route, it allows for the availability of different consumer contract types, granting options and reconfiguring existing ones. (DAGAN & HELLER, 2017, pp. 70-71)

³⁸ Although this protective approach is often invoked as the core of EU consumer law, see NORBERT REICH, General Principles of EU Civil Law (Intersentia 2014) 37 seq.

It is evident that digital markets have challenged consumer protection and exposed vulnerabilities that were not anticipated in previous decades. This presents a significant challenge, as demonstrated by various case laws. While these cases do not directly address digital markets—since jurisprudence in this field is still on development—they follow a pattern aligned with a high level of consumer protection within the boundaries of proportionality and reasonableness. Examples include: (i) *Elisa María Mostaza Claro v Centro Móvil Milenium SL* (C-168/05, EU:C:2006:675, para 37), (ii) *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* (C-94/00, EU:C:2002:603, para 42), and (iii) *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others* (C-377/20, EU:C:2022:379, para 46).

These cases illustrate that if the goal is to enhance consumer protection to improve the standard of living and quality of life, relying solely on legislative norms, even within the realm of competition, is not the only viable approach due to the increase in transactional costs. To address challenges in consumer protection and ensure a unified interpretation of Private Autonomy and Market Protection, it is crucial to first develop a concept model of legal reasoning, proposing Consumer Welfare Hypothesis as foundation to then use all available legal tools to guarantee this outcome. This will be explored in detail in the next chapter.

To that end, within the protection of fundamental rights, it may seem that both principles conflict in their objectives, as highlighted by author FELIX MAULTZSCH. However, the following section of this dissertation will analyze and discuss the inaccuracy of this view, demonstrating that both principles can coexist in a unified form under the principles of proportionality and reasonableness, ensuring market competition. Furthermore, in line with the ideas presented by DAGAN & HELLER, the focus should not be on increasing mandatory rules within consumer protection in online sales contracts, but rather on guaranteeing a fair balance within a competitive market framework. This approach, in accordance with the values of Utility and Community, enhances self-determination in the use of contracts.³⁹

3.1. Legal Nature of Individual Autonomy of Parties

To properly understand the nature of Individual Autonomy of Parties, it is useful to first analyse the Continental European Tradition, particularly the German Civil Code (*Bürgerliches Gesetzbuch*). FELIX MAULTZSCH explains that the German Civil Code adheres to a normative concept that can be described as a “personal” account of contract law⁴⁰. This approach categorizes contracts as autonomous acts of the parties, primarily achieving and maintaining a balanced equilibrium of interests. Consequently, the “*benchmark for contractual justice is set by the idea of private autonomy*”. (MAULTZSCH, 2020, p. 2)

The significant empowerment of private autonomy over the years stems from a paradigm shift and the reinforcement of the principle of liberty. In this context, author NORBERTO BOBBIO, referring to IMMANUEL KANT, elaborates that a “*liberal sense of freedom needs an absence of constraints*”, therefore “*the principle of freedom becomes the rule, and the prohibition, the exception: everything that is not forbidden is permitted*” (CERRA, 2017, p. 182).

³⁹ DAGAN & HELLER, “The choice Theory of Contracts, Cambridge University Press, Cambridge, 2017

⁴⁰ See JÖRG NEUNER, “Allgemeiner Teil des Bürgerlichen Rechts” (12th edn, CH Beck 2020) § 10 para 2 seq.

In this regard, IMMANUEL KANT is a philosophical pioneer in developing the principles of liberty and human dignity as fundamental maxims for human governance. Consequently, he advocated for the theory “*Categorical Imperative*,” through which he developed the notion of acting in a manner where the maxim or concrete norm governing each person’s actions, under any circumstance, does not contradict universal law (CERRA, 2017, p. 182).

Therefore, “private autonomy” emerged as an innovative principle that broke away from the Traditional Roman Law approach, which did not recognize private autonomy within contracts as a crucial institution for creating and establishing obligations. Contrarily, Traditional Roman Law was not consensual, but rather formalist, steeped in protocols designed to protect civilization from primitive practices⁴¹ as sustained by Professor RAYMOND MONIER (CERRA, 2017, p. 182)

Additionally, Professor FERNANDO HINESTROSA echoes the perspective of Professor RAYMOND MONIER:

“The primitive human group hardly manages to satisfy its most basic needs with impulsive and scattered common effort, leading to the thought of the absence of legal relations among its members, other than the primary tendencies to allow the survival of the species⁴².” (CERRA, 2017, p. 180)

In this context, for the purpose of securing contracts, it was crucial for Roman Law to adopt a formalist approach rather than one based on autonomy:

“In Roman law, a simple agreement of wills was not enough, in principle, to create an obligation; it required, in addition, a material or formalistic element, or, at the very least, that the agreement fell within the framework of consensual contracts expressly recognized by civil law⁴³.” (CERRA, 2017, pp. 180-181)

Consequently, the concept of Individual Autonomy of Parties finds its roots in the work of the philosophical pioneer, IMMANUEL KANT. This principle, relatively new and first developed in the eighteenth century, has had a significant global influence through liberalism. Another key example of the following can be found in the French Civil Code or “*Le Code Civil*,” which enshrines the principle of private autonomy in its article 1134°, detailing a well-known legal clause: “*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que dans leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi*” (CERRA, 2017, p. 183)

Furthermore, both the German Civil Code and the French Civil Code serve as fundamental examples in establishing the principle of “private autonomy,” tracing back to IMMANUEL KANT, a philosophical pioneer whose fame and influence were immense in the eighteenth century as father of liberalism. This influence continues to be significant outside the European System. For example: the (i) Peruvian Civil Code, still includes provisions concerning private

⁴¹ MONIER, RAYMOND, ““Manuel Élémentaire de droit romain. Les Obligations;” Domat-Monchrestien. D’édition 5ª. Printed in Paris (France); 1954; pg. 7.

⁴² HINESTROSA FORERO, FERNANDO; “Tratado de las Obligaciones II. De las fuentes de las obligaciones: El negocio jurídico”; Vol. I. Bogotá: Ediciones Universidad Externado de Colombia; Bogotá; 2015; pg. 46

⁴³ MONIER, RAYMOND; Op cit at footnote 42, pg. 32.

autonomy such as article 1354°, (ii) the Colombian Civil Code addresses it in articles 1602° and 1603°; and (iii) the Argentine Civil Code incorporates it under article 1140°.

Nevertheless, as pointed out by author FELIX MAULTZSCH, the era of technology and digitalization has altered the approach to law. This shift is a result of emerging Informational Asymmetries among traders who now operate on online platforms endowed with specific capabilities (MAULTZSCH, 2020, p. 4).

In this context, within the Digital Economy, the technological perspective is causing a disruptive shift in traditional legal concepts⁴⁴, particularly regarding private autonomy or self-determination as a fundamental principle of Individual Autonomy of Parties. As a result, the digital era is fostering the evolution of traditional concepts that have predominantly developed within the framework of Traditional Civil Law worldwide. However, this does not imply that the Principle of Individual Autonomy of Parties loses its importance. Instead, its application should now be guided by the principles of proportionality and reasonableness, viewed within its unified role in market protection to ensure competition. The main objective is not to see both approaches as divided but to recognize that they develop within the boundaries of the same Consumer Protection concept. This point will be further elaborated upon, making clear the formula of proportionality and reasonableness.

3.2. The Market-Centred Approach to Contract Law

With the rising importance of online sales contracts in digital markets, consumer law is showing a new paradigm⁴⁵. Therefore, a shift from a party centred perspective to a market centred perspective on consumer law contracts, based on international harmonization of rules idea. As analysed the essence of the party centred perspective is the “principle of private autonomy”, which importance, according to author MANUEL DE LA PUENTE Y LAVALLE, comes from market development by the means of contractual tools⁴⁶.

However, in contrast, the market-centered perspective struggles to establish its significance in fostering consumer confidence within the context of cross-border relations and boosting consumption. It is difficult to deny that, nowadays, this perspective still faces challenges, as it remains under development within the European Union's legal system and community law. This ongoing construction, according to author JÜRGEN BASEDOW, can lead to inconsistencies and terminological ambiguities, particularly in consumer protection⁴⁷. However, rather than being viewed as an issue of overregulation, it should be considered a long-term tool aimed at achieving a fair balance. Moreover, community law is intended to rediscover and reinforce contractual foundations and principles to promote broader legal development, which is still a work in progress.

Consequently, digitalisation is consolidating the market centred perspective, as consumers had the opportunity to reach out traders by means of digital orders. Moreover, this perspective can be explicitly found within the European Legal System, in the following binding and fundamental legal documents: (i) Paragraph one (01) and two (02) of Article 26° of the Treaty

⁴⁴ See ESPOSITO, FABRIZIO “The Consumer Welfare Standard, Consumer Sovereignty, and Reciprocity: An Evolutionary Foundation for the Positive Economic Approach to Law that Actually Works; SSRN; 2023.

⁴⁵ MAULTZSCH, FELIX; Op cit at footnote 38, pg. 2.

⁴⁶ DE LA PUENTE Y LAVALLE, MANUEL; “Libertad de Contratar”; Revista de Derecho: Themis N°33; 1996; pg.7

⁴⁷ BASEDOW JÜRGEN, “Freedom of Contract in the European Union” European Review of Private Law, 2008, Vol 16 (Issue 6), 901-923.

of Functioning of the European Union (TFEU) and, (ii) Article 38° of the Charter of Fundamental Rights in the European Union (CFREU)

Furthermore, it is interesting that there is no article, within the Treaty of Functioning of the European Union (TFEU); and the Charter of Fundamental Rights in the European Union (CFREU), which establish as fundamental right the party centered perspective, based on the principle of private autonomy. For this reason, within the provisions previously analysed in both legal documents; by applying systematic interpretation⁴⁸, the market centred perspective is duly foreseen within the European Legal System.

Additionally, the market centred perspective, can be found in diverse European Case-Law, within a fundamental right lecture in the basis of internal market protection with high level of consumer protection. For example, paragraph 28° of C-568/15 (Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV Comtech GmbH, 2017).

In that regard, recital 4° of Directive 2011/83/EU (Directive on Consumer Rights) establishes right balance between high level of consumer protection and the competitiveness of enterprise, to ensure European internal market integration and protection. In consequence, the market centred perspective is duly granted within the European Legal System.

On the other hand, the Peruvian Legal System is different because there is no direct or explicit provision that grants the market centred perspective. However, this does not mean that there is a “gap” or “loophole” on the topic, less so in a Constitutional State of Law.

According to article 62° of the Peruvian Constitution, the party centred perspective is explicitly granted, following liberalism ideals: *Article 62.- The freedom of contract guarantees that parties may validly negotiate, according to the rules in effect at the time of the contract. Contractual terms may not be modified by laws or any other provision whatsoever.*

Consequently, author MANUEL DE LA PUENTE Y LAVALLE names the party centred perspective as the “*Individualist Theory*”⁴⁹, in which a legal system delegates regulation power to individuals by the Principle of Private Autonomy. The Individualist Theory is explicitly contemplated within systematic application of article 62° of the Peruvian Constitution with article 1354° of the Peruvian Civil Code (DE LA PUENTE Y LAVALLE, 1996, p. 8).

Nevertheless, article 58° of the Peruvian Constitution establishes that private initiative is free but must be exercised within a social market economy. Likewise, article 65° establishes fundamental right of high level of protection to consumers.

Therefore, provisions analysed within the Peruvian Constitution must be interpreted. According to paragraph 12 of Sentence within Case File N° 5854-2005-PA/TC, the Peruvian Constitutional Court determined various principles which serve for interpretation of Constitutional Provisions. In that sense, there are two important principles that must be applied to determine if the Peruvian Constitution, implicitly, contemplates a market centred perspective: (i) Principle of Unity of the Constitution; and (ii) Principle of Practical

⁴⁸ HESSE, KONRAD; “Escritos de derecho constitucional”; Traducción de Pedro Cruz Villalón. 2da. Ed; Centro de Estudios Constitucionales, Madrid 1992, pp. 45-47.

⁴⁹ DE LA PUENTE Y LAVALLE, MANUEL; Op cit at footnote 47, pp. 8.

Concordance, towards fundamental rights protection (Sentencia del Tribunal Constitucional, 2005).

In consequence, through the application of both principles, it can be concluded that to guarantee a high level of protection for the right to human dignity, Articles 62 and 65 of the Peruvian Constitution aim to fulfill a market-centered perspective while respecting the individual autonomy of parties. This is achieved through the free choice of contractual tools within the boundaries of utility and community values. This approach aligns with the Constitutional State of Law, whose main focus, according to author ABRAHAM ZAMIR BECHARA LLANOS, is the use of legal reasoning and, in the case of the application of principles, the application of the principle-balancing technique⁵⁰.

In that way, when principles seem to collide, author ROBERT ALEXY establishes that one principle must prevail over another⁵¹. To determine which principle will prevail over another, will depend on case by case regarding which principle guarantees the supreme purpose of society and the State: the principle-right of human dignity⁵². This can only be fulfilled through legal reasoning.

For those reasons, nowadays following the Constitutional State of Law approach, found: (i) within the Treaty of Functioning of the European Union and the Charter of Fundamental Rights of the European Union, in the case of the European Legal System; or, (ii) in the Peruvian legal system, by “practical concordance” of articles 1°, 58°, 62° and 65° of the Peruvian National Constitution; both legal system seek to guarantee a market centred perspective. However, this does not mean that the market-centered perspective eradicates individual autonomy of parties; on the contrary, both principles must be viewed as necessary and unified.

Finally, it is clear that, in response to globalization and digitalization, market protection has gained fundamental relevance due to cross-border contractual relations and the increased use of digital means to facilitate the free movement of goods and services. Therefore, within private international law, it is crucial to focus on private autonomy to promote a high level of protection and ensure a fair balance in Business-to-Consumer relations under a market-centered perspective. This approach allows for the development of competition while upholding both principles within the market.

By adopting this approach, where both principles are viewed in a unified manner, legal specialists can utilize all available legal tools to promote a competitive mindset within the boundaries of fair balance, good faith, justice, and sustainability.

3.3. Towards a Unified Categorization Aimed at Market Competition and Development

In light of globalization and digitalization, as previously analysed, market protection is indeed a fundamental guarantee and can be categorized as a primary approach of any Constitutional State of Law or in Human Rights Protection. Moreover, considering the constant evolution of contract law in an era where electronic commerce is continually increasing⁵³, this perspective

⁵⁰ BECHARA LLANOS, ABRAHAM ZAMIR; “Estado Constitucional de Derecho, Principios y Derechos Fundamentales en Robert Alexy”; *Saber Ciencia Y Libertad*, Volumen 6, Numero 2, Cartagena de Indias; 2011; pg. 65.

⁵¹ BECHARA LLANOS, ABRAHAM ZAMIR; *Op cit* at footnote 51; pg. 65-66.

⁵² See paragraph 12 of Sentence within Case File N° 5854-2005-PA/TC of the Peruvian Constitutional Court.

⁵³ HUNG, PERCY; “E-Commerce Trends 2022: What The Future Holds”; *Forbes*, Published: March 14th 2022 (10:15am); Consulted January 03rd 2024; <https://www.forbes.com/sites/forbestechcouncil/2022/03/14/e-commerce-trends-2022-what-the-future-holds/>

is essential. Therefore, as observed, both the European Union System and the Peruvian System recognize, explicitly or implicitly, the necessity of this perspective to ensure the security of each internal market.

On the other hand, the principle of individual autonomy of parties, as analysed, finds its roots in liberalism and is evident within the Civil Law Tradition. Fundamental examples include: (i) Article 1134 in the French Civil Code, or “Le Code Civil”; (ii) Articles 312a and 312c in the German Civil Code, among others. Furthermore, it is noteworthy that Latin American countries, strongly influenced by the European Civil Law Tradition, explicitly regulate the principle of individual autonomy of parties. For example, the (i) Peruvian Civil Code includes provisions concerning private autonomy, such as in Article 1354°; (ii) the Colombian Civil Code addresses it in Articles 1602° and 1603°; and (iii) the Argentine Civil Code incorporates it under Article 1140°.

In this context, the Civil Law Tradition continues to recognize and strongly support the principle of private autonomy within contract law. However, the extent of private autonomy's application varies across different legal systems. For instance, the way the German Civil Code regulates provisions related to consumer contracts and distance contracts is notable. It establishes various obligations to be fulfilled, aimed at promoting consumer protection. Nevertheless, despite the presence of express mandatory provisions within consumer contracts and distance contracts in the German Civil Code, the principle of private autonomy is still duly acknowledged and upheld.⁵⁴

Likewise, the principle of private autonomy remains a robust legal institution within the Civil Law Tradition. Despite the passage of time since the emergence of liberalism ideals in the second half of the eighteenth century, it continues to exert significant influence in Civil Law systems worldwide. According to MANUEL DE LA PUENTE Y LAVALLE, the essence of the private autonomy institution is rooted in the proper interplay of two concepts: (i) legal liberty; and (ii) legal equality (DE LA PUENTE Y LAVALLE, 1996, p. 10).

Considering the long-standing civil law tradition, it is impossible to disregard the application of the principle of private autonomy, as the institution of contract law—rooted in both enduring and contemporary liberalism—has fundamentally been built on the individual autonomy of the parties. Furthermore, some countries, like Peru, have constitutional provisions explicitly granting fundamental protection to private autonomy (for example, Article 62 of the Peruvian Constitution). It is noteworthy that documents such as the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union, while not explicitly mentioning the principle of private autonomy, do not dismiss it; on the contrary, they recognize it as fundamental.

Moreover, within the Charter of Fundamental Rights of the European Union, the principle that strongly recognizes private autonomy is the Principle of Freedom to Conduct Business. This is articulated in Article 16°, which states: “*The freedom to conduct a business in accordance with Union law and national laws and practices is recognized.*” In this context, it is clear that freedom to conduct business cannot be fully realized unless the principle of private autonomy within contract law is legally supported and upheld.

⁵⁴ See, Paragraphs (2); (3); (4); (5); and (6) in article 312a of the German Civil Code. This provision permits space for negotiation within the means of reasonableness, according to each situation contemplated.

Consequently, the principle of freedom to conduct business, as analysed by ANDREA USAI, has been primarily of an economic nature from its inception, with little to no social inference⁵⁵. Furthermore, this principle stands out within the Charter of Fundamental Rights of the European Union, as it is the only fundamental right that broadly guarantees economic initiative. This is in line with the internal market protection outlined in Article 26° of the Treaty on the Functioning of the European Union.

Therefore, when conducting a comparative analysis between the European and Peruvian legal systems, it becomes apparent that their approaches to individual autonomy and a market-centered perspective differ significantly. The European legal system explicitly promotes a market-centered perspective, implicitly recognizing private autonomy through the principle of freedom to conduct business as a means to foster market development. In contrast, as previously analysed, the Peruvian legal system takes an explicitly opposite stance, with a market-centered perspective being implicitly embedded within the Peruvian Constitution.

In this context, the debate is not about which focus should prevail, as both perspectives - individual autonomy of parties and market-centered approaches - are crucial in guaranteeing key elements like (i) legal liberty; (ii) legal equality; (iii) the freedom to conduct business; and (iv) market protection:

- Individual autonomy of parties, as developed by DAGAN & HELLER, is sustained within the values of Utility and Community, offering providers, traders, and consumers the free choice of contractual tools based on time, information, and topic specialization. This allows consumer contracts to be governed not only by mandatory rules but also through alternative routes with different contract types (self-authorship). There is no express prohibition on this specific point within either the European or Peruvian legal system. (DAGAN & HELLER, 2017)
- A market-centered approach is sustained by the need for efficiency to generate a fair balance within contract law. In this specific case, according to the European and Peruvian legal systems, it ensures a high level of consumer protection to prevent consumer harm.
- In this sense, individual autonomy of parties and a market-centered approach are both recognized within contract law and, in this specific case, within the context of consumer protection in sales. Therefore, the values of Utility and Community must be adapted within the boundaries of proportionality and reasonableness, as individual autonomy and a market-centered approach coexist and even more in digitalized era.

Additionally, as highlighted by ANDREA USAI, economic initiative is a vital individual right. However, it must be considered within the confines of its social function to ensure fair competition (USAI, 2013, p. 1869).

Therefore, both principles of private autonomy and market-centered protection not only coexist but can be seen in a unitary way, as they represent two facets of the same category. It is not feasible to suppress private autonomy in favor of solely focusing on market protection. As noted by LUIS DIEZ PICAZO, contemporary history, tracing back to primitive laws, has

⁵⁵ USAI, ANDREA; “The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration”, Cambridge University Press; March 16th 2019; German Law Journal, Volume 14, Issue 9, September 01st 2013 , pp. 1867 – 1888; DOI: <https://doi.org/10.1017/S2071832200002534>

consistently demonstrated that private autonomy has always played a pivotal role in serving commercial purposes and expanding markets. (DIEZ PICAZO, 1996, p. 251)

In this regard, the influence of both perspectives—deeply rooted in the Civil Law Tradition and Human Rights Tradition within the European Legal System and its Member States—is significant worldwide. For example, the Peruvian legal system, despite having only about two hundred years of independence, incorporates both principles. Moreover, these perspectives, as two facets of the same category, are applied in a unified manner. Their scope depends on maintaining an equilibrium within the boundaries of proportionality and reasonableness to achieve a fair balance.

As a result, jurisprudence consistently reaffirms the coexistence and unification of both private autonomy and market protection within the framework of proportionality and reasonableness. This is exemplified in Case 4/73 (*J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*), where the European Court of Justice acknowledged that private autonomy can be exercised within the limits of social function to ensure optimal market protection. This interpretation is evident in the first two paragraphs of point 14 of the Court's Judgment (*J. NOLD, KOHLEN- UND BAUSTOFFGROSSHANDLUNG v COMMISSION OF THE EUROPEAN COMMUNITIES*, 1974).

In this context, author MANUEL DE LA PUENTE Y LAVALLE endorses this position, highlighting its potential applicability within the Peruvian Legal System. This is particularly relevant under interpretation of the Peruvian Constitution by Practical Concordance of Article 62° of the mentioned text to ensure fundamental rights protection.

For these reasons, both the perspective of individual autonomy of parties and the market-centered perspective coexists and are applied in a unified manner within the confines of proportionality and reasonableness. It is crucial to understand these perspectives as two facets of the same category, which must be viewed together to ensure market protection and commercial competitiveness. This understanding becomes even more important in an era where electronic commerce and online sales are rapidly expanding and revolutionizing international markets. In such a scenario, both perspectives are indispensable tools for establishing a fair balance in a digital, technology-driven economy.

3.4. The Competitive Understanding of the Principles of Individual Autonomy and Market Protection:

As discussed in Section 2.4, no principle should be prioritized over another; rather, their competitive nature must be understood as unified within proportionality and reasonableness. Professor Enrique Gherzi Silva argues that law is not purely rational or monopolistic but aligns with legal economic theory, emphasizing competition (GHERSI SILVA, *El Caracter Competitivo de Las Fuentes del Derecho*, 2003, pp. 264-265).

Additionally, Individual Autonomy and Market Protection are interdependent, as seen in the EU Legal System, where market protection, consumer rights, and freedom to conduct business coexist. Similarly, in the Peruvian Legal System, Article 62 guarantees individual autonomy, while Articles 58 and 65 implicitly ensure market protection. Both systems illustrate the unification of these principles.

Their practical application relies on proportionality and reasonableness, which: (i) Balance fundamental rights, ensuring justice and systematic application of legislative norms and (ii) Prevent arbitrariness by evaluating adequacy and necessity on a case-by-case basis⁵⁶.

Thus, proportionality and reasonableness safeguard fundamental rights, even in conflict. Professor HENRI LEPAGE supports the competitive nature of legal sources, arguing that law organizes principles, values, and customs to improve foresight and predictability⁵⁷.

In this regard, the explained presents an important technique for realizing rights based on competition and coexistence, without compromising legal equality. By adopting this competitive mindset, aligned with legal economic theory, the inclusiveness of fundamental principles will be ensured, as opposed to an exclusive or closed method.

3.5. Towards A Unified Framework

Nowadays, it is true that market protection indeed serves as a fundamental guarantee and can be categorized as a primary approach of any Constitutional State of Law within the scope of Human Rights Protection. Moreover, this principle is embedded in the essence of Social Market Economies, as seen in the cases of Europe and Peru.

Therefore, private initiatives must ensure market protection in the course of their activities to uphold the paramount purpose of both society and the State: the fundamental principle of human dignity, as stipulated in (i) Article 1 of the Charter of Fundamental Rights of the European Union, (ii) Article 1 of the Universal Declaration of Human Rights (1948), and (iii) Article 1 of the Peruvian Constitution (1993).

Nevertheless, market protection cannot function without private autonomy, which is fundamentally rooted in (i) the freedom to conduct business and (ii) private initiative. Both fundamental rights are recognized within the European and Peruvian legal systems. Thus, market protection and private autonomy are unified to ensure economic development but must be exercised in a proportionate and reasonable manner.

To prevent arbitrariness, rights must be applied through proportionality tests in case-by-case assessments. As Professor PEDRO GRANDEZ CASTRO states, Social and Democratic States should define rather than impose limits on fundamental rights, ensuring they align with constitutional objectives (GRANDEZ CASTRO, 2010, p. 345).

Regarding the Charter of Fundamental Rights of the European Union (CFREU), Article 52 explicitly establishes the test of proportionality as a fundamental tool for interpreting rights and principles. In contrast, while the Peruvian Constitution does not explicitly designate a specific article for the test of proportionality, it implicitly recognizes it. See Basis 109 in Case File No. 0050-2004-AI/TC (Colegio de Abogados del Cusco y del Callao y mas de 5000 ciudadanos vs Congreso de la Republica, 2005).

In this sense, individual autonomy and market protection form a unified concept for economic development, representing two facets of the same category. Their application requires a proportionality test to safeguard human dignity and justice, preventing arbitrariness through

⁵⁶ CESAR LANDA ARROYO; "Derecho Procesal Constitucional"; Fondo Editorial: Pontificia Universidad Católica del Perú; 2018; paginas 43-46.

⁵⁷ HENRI LEPAGE, "Mañana el Liberalismo" (Madrid: Ed, Espasa Calpe 1980), Epílogo.

case-by-case analysis of adequacy and necessity. Achieving a fair balance depends on legal reasoning, guided by a clear conceptual model. This will be further developed in the following chapters.

IV. TOWARDS CONSUMER WELFARE STANDARD: PARADIGM SHIFT FROM NORMATIVE PLURALISM TO ALLOCATIVE EFFICIENCY

After an exhaustive analysis in the following dissertation regarding the clear importance of using universal legal principles to solve problems, as well as their competitive nature as a fundamental source of law, it is crucial for any legal specialist not only to understand the significant functionality of these principles but also to apply them on a daily basis. Furthermore, it is important to highlight that the core premise of the Consumer Welfare Hypothesis is the acknowledgment that harming consumers is intrinsically wrong and cannot be justified, even if it leads to increased overall welfare.

Therefore, the use of legal tools such as legislative norms, or, in this specific case, universal legal principles like proportionality and reasonableness, within the framework of the consumer welfare hypothesis, can be effective but must align with a high level of consumer protection. For instance, the European Union system adheres to this approach, as Article 38 of the Charter of Fundamental Rights of the European Union (CFREU), along with Articles 4(f) and 101(1) of the Treaty on the Functioning of the European Union (TFEU), establishes a high level of consumer protection as a fundamental right. Moreover, consumer protection directives and regulations systematically follow this same path.

In the same way, the Peruvian legal system, as a positivist framework, also aligns with the consumer welfare hypothesis, as Articles 58 and 65 of the Peruvian Constitution (1993) guarantee a high level of consumer protection. Nevertheless, Article 200 of the Peruvian Constitution (1993), in its final paragraph, recognizes the application of universal legal principles such as proportionality and reasonableness to ensure the just and proper application and defense of fundamental rights. For this reason, a high level of consumer protection must be guaranteed within the boundaries of proportionality and reasonableness, extending beyond the mere application of legal norms to encompass comprehensive legal reasoning.

Moreover, it is clear, as pointed out by Professor ELMER ARCE MARCIAL RUBIO, that a legal norm can be defined as a “*mandate established within the framework of the state’s power, which must be fulfilled within social life by the people to whom it is directed and is enforced by the State in the event of non-compliance*”⁵⁸. Consequently, this definition encompasses a broad sense, understanding that a legal norm can be either a rule or a principle.

Likewise, from a constitutional or human rights perspective, principles derive their essence directly from the protection of the fundamental human right of dignity. Accordingly, they are integrated into the legal system. Additionally, Professor JUAN ALEJANDRO ESPINOZA ESPINOZA maintains that principles, as a fundamental source of law, can have a polysemic use. They not only serve as a method of integration in the absence of legislative norms but also act as fundamental values and rules within legal norms when their meaning and scope are not entirely clear (ESPINOZA ESPINOZA, 2015, pp. 555-556).

Having said this, it is important to note that, nowadays, the contractual framework is fundamental for (i) firstly conducting fair contractual clauses and protecting the balance within the boundaries of private autonomy between parties; and (ii) promoting market protection as a safe zone for consumers. Nevertheless, in the globalized, digital, and technological world we are now facing, the contractual approach continues to be a challenge.

⁵⁸ MARCIAL RUBIO, ELMER ARCE; Op cit at footnote 1, pp. 49.

However, the principles of proportionality and reasonableness can contribute to fostering a transversal mindset within the contractual framework. Contracts, in general, must be pre-negotiated, negotiated, drafted, and executed within the boundaries of fair balance. This fair balance is particularly essential in online sales contracts, which can be concluded on any online platform. For instance, some of the most well-known platforms include Google, Amazon, Mercado Libre, eBay, Shopee, and Temu, among others. Notably, under the mandate of the Digital Services Act, these platforms are required to actively ensure that traders, providers, and small- to medium-sized online platforms guarantee legal content, transparency, and fair balance in B2C transactions within the European Union system.

Consequently, in Social and Democratic States of Law such as the European Union and Peru, the use of legal principles like proportionality and reasonableness is crucial. These principles guide the balancing act between Market Protection and Individual Autonomy, allowing them to coexist harmoniously and act as a unified concept. To achieve market growth, protection, competitiveness, and importantly, sustainability, both categories must be effectively applied.

Furthermore, the European Union and Peru appear to be prioritizing what Professor FABRIZIO ESPOSITO refers to as the “*pluralist normative approach*”⁵⁹. This approach entails analysing legal institutions under a set of normative criteria. Typically, this includes not only efficiency but also a concern for the distributive effects of legal norms on the most disadvantaged members of the community, particularly when legislative norms are not constructed within the boundaries of established legal concepts⁶⁰. In this case, as argued by Professor FABRIZIO ESPOSITO under the Consumer Welfare Hypothesis, the efficient use of legal reasoning must be grounded in the fundamental principle that the prohibition of consumer harm is intrinsically efficient and essential to maintaining competitive fairness.

For example, in addressing digital markets, the European Union has regulated electronic commerce through Directive 2000/31/EU for many years. This directive establishes certain obligations for online platforms engaged in digital commerce. However, due to the rapid growth and evolution of the digital market over the last two decades, combined with a lack of good practices in the fair use of technology, the EU has developed the Digital Services Act (DSA) and the Digital Markets Act (DMA). The latter is set to come into effect starting May 2023.

In this way, both legislative norms aim to ensure good practices in the fair use of technology in electronic commerce, creating a safer, fairer, and more transparent online environment, particularly for “*gatekeepers*” or the largest online platforms, in defence of consumers. Similarly, though not as advanced, Peru is adopting the same approach. Despite the absence of specific e-commerce laws or digital market or service acts, the Peruvian legal framework, including the Civil and Consumer Protection Codes, also strives to enhance transparency and accuracy by imposing additional legislative obligations on traders to protect consumers.

Therefore, the “*pluralist normative approach*” contrasts with the economic approach to law, which emphasizes competitiveness and promises superior analytical transparency, precision, and increased predictability in court decisions based on legislative sources. However, the

⁵⁹ ESPOSITO, FABRIZIO “The Consumer Welfare Standard, Consumer Sovereignty, and Reciprocity: An Evolutionary Foundation for the Positive Economic Approach to Law that Actually Works; SSRN; 2023; pp.1.

⁶⁰ See example: POSNER, ERIC A. & SUNSTEIN, CASS R, “Antitrust and Equality”; American Journal of Law and Equality, 2002, pp. 197 - 198.

reliance on the "*pluralist normative approach*" in both legal systems is notable for its legislative norms that (i) cannot possibly anticipate all scenarios, and (ii) are not only monopolistic but also arbitrarily impose greater obligations on Providers or Traders while placing minimal obligations on Consumers, without clear justification or reference to an applicable legal concept. This situation leads to what Professor ENRIQUE GHERSI SILVA refers to as the "*Cost of Legality*," which encompasses the time and essential information required for activities to be carried out effectively⁶¹.

In that sense, according to Professor ENRIQUE GHERSI SILVA, legal systems in general should aim to decrease transactional costs rather than increase them. To achieve this, the appropriate approach involves promoting: (i) the right to property, (ii) private autonomy within contracts, (iii) the establishment of a system of tort liability, and (iv) the development of clear legal concepts, in this case by following the economic approach to law.

Furthermore, the purpose of this dissertation is to demonstrate how contracts, specifically online sales contracts in a digitalized world, can be a powerful tool for achieving what professor FABRIZIO ESPOSITO describes as "*Allocative Efficiency*"⁶². This involves transitioning from a pluralist normative approach to one based on reciprocity, anchored in proportionality and reasonableness as legal standards within contracts. In doing so, business-to-consumer relations, within the framework of contractual and consumer protection laws, will be better founded, more sovereign, and less dependent on normative constraints, thereby reducing the Cost of Legality in both contracts and consumer protection.

In this regard, the following chapter aims to demonstrate that, within the framework of the principles of proportionality and reasonableness, it is feasible to achieve a Consumer Welfare Standard. This standard can (i) guarantee the development of Market Protection and Individual Autonomy as fundamentals for any market development, as explained, but also (ii) reduce reliance on legislative norms as the "most important" or "sole" source of law for resolving legal conflicts. Therefore, a shift in mindset must be established within positivist systems, as illustrated by the case studies centered on the European and Peruvian legal systems.

4.1. Normative Pluralism within Online Sales Contracts and Consumer Protection

As explained by Professors RONALD COASE and ENRIQUE GHERSI SILVA, the market is a costly mechanism where not all decisions can be made⁶³. Therefore, every transaction costs something to the person who performs it, regardless of their purposes. This transaction cost comprises the time and indispensable information needed for the activity to be carried out.⁶⁴

Consequently, the more complex an economy becomes, the higher the transaction costs will be. In that context, legislative norms serve as a mediating institution, intended to replace individual persons and the market in those functions where costs would be unsustainable in a context of pure exchange. In conclusion, the primary function of legislative norms is to reduce time and consolidate information, which are indispensable for decision-making.⁶⁵

⁶¹ GHERSI SILVA, ENRIQUE; "El Costo de Legalidad: Una Aproximación a la Falta de Legitimidad en el Derecho; Themis (19) Revista de Derecho, 1991, pp. 05.

⁶² ESPOSITO, FABRIZIO; Op cit at footnote 60, pp. 02.

⁶³ GHERSI SILVA, ENRIQUE; Op cit footnote 62, pp. 05.

⁶⁴ COASE, RONALD H; "The Nature of the Firm", *Económica* (Nov. 1937), pp. 306-405

⁶⁵ COASE, RONALD H; "The Problem of social cost. The journal of Law and Economics", Vol. III, 1960, pp. 1-44

In the same way, this aligns directly with the economic hypothesis of Professor VILFREDO PARETO, which posits that no one can improve their own position at the expense of worsening another's. The Pareto Principle is a useful tool within the essence of Law and Economics⁶⁶.

Therefore, according to the Law and Economics perspective, the main objective of legislative norms should be to reduce time and consolidate information to enhance understanding and compliance. This, in turn, promotes efficiency as a fundamental legal concept within the economic approach to law. Moreover, as developed by Professor FABRIZIO ESPOSITO, allocative efficiency aligns with the economic approach to law, as the consumer welfare hypothesis is based on developing legal reasoning under the principles of not harming consumers and aiming for reciprocity⁶⁷.

However, legal practice has often shown the opposite effect. For example, the European Union legal system, particularly in online sales contracts and consumer protection, complicates compliance due to the diversity of directives. Businesses and consumers must navigate multiple directives, such as Directive 2000/31/EU, Directive 2011/83/EU, Directive 2019/771/EU, the Digital Services Act (DSA), and the Digital Markets Act (DMA), among others. Nevertheless, legal reasoning remains unclear or not evident when analysing pluralist norms on consumer protection, making it necessary to establish a foundation for a clearer understanding of legal concepts.

In this regard, for the purposes of the following dissertation centered on online sales contracts, this chapter will aim to analyse recent European legislation on the topic: the Digital Services Act (DSA), Directive 770/2019/EU, and Directive 771/2019/EU. These laws, which currently lack clear jurisprudence, establish a wide range of obligations for traders to address illegal content and sales contracts within B2C transactions. They also seek to ensure transparency within online platforms, representing an advanced approach to the subject.

Furthermore, despite Peru having a Consumer Protection Code (Law No. 29571), it still falls short in adapting to the digital advancements and online trends of recent decades. Additionally, regarding online sales contracts, the general provisions of the Peruvian Civil Code (Legislative Decree No. 295) on sales contracts must be applied, as Peru has yet to enact a specific law addressing online sales contracts. Finally, Peruvian legislation lacks clearly established legal reasoning within the framework of consumer protection.

In this sense, given that information consolidation and legislation are frequently rendered outdated by rapid technological changes—a trend that will likely continue—it is evident that legislative norms cannot control or regulate all types of situations. As a remedy, the law has recognized other sources or legal tools to help fulfill its tasks: (i) principles or normative principles; (ii) jurisprudence; (iii) doctrine; (iv) customs; and, importantly, (v) contracts through private autonomy. However, as discussed throughout this dissertation, these sources of law must interact and be applied in accordance with the principles of proportionality and reasonableness.

As Professor FABRIZIO ESPOSITO explains, competition is key to successful protection. In this context, market protection can only be achieved if producers compete to prioritize consumer interests without causing any harm. Therefore, it is not a question of consumers

⁶⁶ GHERSI SILVA, ENRIQUE; Op cit footnote 62, pp. 06.

⁶⁷ ESPOSITO, FABRIZIO; Op cit at footnote 60, pp. 07-08.

adapting to producers' interests but the opposite mindset. However, it is not only the task of legislative norms to ensure this but also other sources of law to apply and compete accordingly to complete this mindset⁶⁸. In this regard, the consumer is the sovereign and providers or traders the servants.

Moreover, it is interesting to analyse that within positivist systems, according to *Kelsenian theory*⁶⁹, it is impossible to recognize the competitive nature of sources of law that exist outside the boundaries of legislative norms. Therefore, it can be said that within positivist systems, there is a tendency to place legislative norms in a higher position relative to other sources of law.⁷⁰ In this context, Professor ENRIQUE GHERSI SILVA maintains that it would be fictional to recognize the category of sources of law if they do not comply with the legislative norm (GHERSI SILVA, *El Caracter Competitivo de Las Fuentes del Derecho*, 2003, p. 263).

In this regard, traditional law still maintains that the way of producing law is a monopoly in favor of legislation. Upholding this position effectively underestimates the existence of other sources of law if they are not explicitly provided for by legislation. This is the main reason why normative pluralism is often viewed as a limited perspective within law; it restricts the range of tools available for comprehensively constructing law by confining them within the boundaries of legislation. It is important to note that law addresses diverse and evolving social-economic issues which often extend beyond these legislative boundaries. Therefore, recognizing a competitive nature among sources of law, rather than a legislative monopoly, is crucial.

By recognizing the competitive nature of sources of law, building legal concepts and legal reasoning becomes more feasible as a foundational element of legislative norms. Adopting this mindset, especially when drafting and developing legislative norms, and incorporating legal concepts such as the consumer welfare hypothesis, as suggested, allows allocative efficiency to be achieved as a fundamental pillar of contemporary Law and Economics.

4.2. European Union Legal System's Approach to Online Sales Contracts and Consumer Protection

As explained, the European Union (EU) legal system's approach to online sales contracts and consumer protection reflects its commitment to safeguarding consumer rights while promoting a digital single market. This approach is characterized by comprehensive directives and regulations that aim to ensure fairness, transparency, and accountability in online transactions. Here are key elements of the EU's legal framework to analyse:

1. **The Treaty of Functioning of the European Union (TFEU):** Ensures (i) market protection (Article 26) and (ii) high consumer protection (Article 169) across EU member states.
2. **The Charter of Fundamental Rights of the European Union (CHREU):** Guarantees a high level of consumer protection (Article 38) and systematically applies rights and freedoms protection (Articles 52(1) & 54) to prevent abuse.

⁶⁸ ESPOSITO, FABRIZIO; *The Consumer Welfare Hypothesis in Law and Economics*; Edward Elgar Publishing Limited; 2022; UK; pp. 30-33.

⁶⁹ KELSEN, HANS; Op cit footnote 11.

⁷⁰ See GHERSI SILVA, ENRIQUE (2003); pp.263.

3. **Digital Services Act or Regulation (EU) 2022/2065 (DSA):** Aims to create a safer digital space, protect users' rights, and establish a fair market, focusing on illegal content and transparency.
4. **Directive 93/13/EEC:** Protects consumers from unfair contract terms, reinforcing TFEU and CHREU consumer rights.
5. **Directive 770/2019:** Regulates digital content and services, ensuring contract conformity and consumer remedies for non-compliance.
6. **Directive 771/2019:** Governs sales contracts, including digital goods, ensuring market efficiency and high consumer protection.

Therefore, these fundamental and legislative norms can be seen as applying systematically and with practical concordance. However, online sales contracts and consumer protection remain institutions under construction in the early decades of the 21st century, still lacking a clear compass. For example, recital three of Regulation (EU) 2022/2065 (DSA) establishes that responsible and diligent behaviour by providers of intermediary services is essential for internal market safety. This ensures that Union citizens and persons can exercise their fundamental rights as outlined in the Charter of Fundamental Rights of the European Union, particularly the freedoms of expression and information, the freedom to conduct a business, the right to non-discrimination, and the attainment of a high level of consumer protection.

However, the following legislative norm still lacks effective jurisprudence and remains a recent update. Therefore, in the coming years, it will be fundamental to observe how judges apply this legislative norm in accordance with the fundamental rights outlined, with full respect for the principles of proportionality and reasonableness. Similarly to the previous E-Commerce Directive (2000/31/EU), which aimed to provide clarity, more than 20 years later, jurisprudence on online sales contracts remains uncertain, particularly in providing practical guidance on the application of proportionality and reasonableness.

Likewise, Directive 770/2019 and Directive 771/2019 do not provide practical guidance on the application of proportionality and reasonableness, despite both directives being aligned with the principle of proportionality to ensure a high level of consumer protection. This is an important point to establish, as Directive 770/2019 sets out common rules on subjective and objective requirements for contracts between traders and consumers for the supply of digital content or digital services, while Directive 771/2019 addresses similar rules concerning the conformity of goods. Nevertheless, a gap or loophole remains regarding how proportionality and reasonableness can be effectively applied in case analysis.

Consequently, since the analyzed legislative norms within the European Union system reveal axiological gaps and loopholes, as previously stated, regarding the application of the principles of proportionality and reasonableness within the framework of high-level consumer protection in online sales contracts, it has been proven that the directives under analysis lack a clear route of legal reasoning and jurisprudence. Therefore, it is of vital importance to develop legal reasoning from other sources of law, such as scholarly works on the topic, which can contribute to forming a coherent line of thinking among legal professionals.

In this regard, Professor FABRIZIO ESPOSITO develops on his outgoing work on Consumer Welfare Hypothesis in Law and Economics⁷¹, his approach to the foundation of allocative efficiency within consumer protection. For the following, Professor FABRIZIO ESPOSITO does recognize two important aspects which must combine in a systematic way: (i) legislative norms on consumer protection, must be built under the foundations of allocative efficiency which does not allow any harm to consumers; and (ii) establishing the foundation on allocative efficiency, legal reasoning within a specific formula which seeks for allocative efficiency on consumer protection.

Moreover, legal reasoning within the Consumer Welfare Hypothesis begins with a systematic application of Article 38 of the Charter of Fundamental Rights of the European Union (CFREU) alongside Articles 4 (f) and 101(1) of the Treaty on the Functioning of the European Union (TFEU). Thus, from the following foundation, allocative efficiency can be found and applied, in accordance with the following schematic way as developed by Professor FABRIZIO ESPOSITO within Consumer Welfare Hypothesis⁷²:

On Harm: The Consumer Welfare Hypothesis, in line with the CFREU and TFEU, acknowledges that harming competitors may be necessary to ensure adequate consumer protection within a competitive market.

On Defenses and Exceptions: This concept stems directly from the scope of consumer protection and its inherent limitations, rather than from external sources beyond the consumer protection domain. However, legislative norms—specifically those found in the consumer protection directive, the DSA, and sales contracts legislation—do not address this point in detail, confining themselves to grammatical provisions. At this juncture, legal reasoning must undertake an analysis of normative, interpretative, and argumentative statements as reflected in court decisions and case law. Establishing a proportionate and reasonable approach to legal reasoning within the confines of interpretation is, therefore, essential. This "*reverse engineering*" of legal reasoning serves to ensure compliance with foundational principles.

Sanctions within the Consumer Welfare Hypothesis for allocative efficiency can be divided into pecuniary and non-pecuniary types. In contrast, the Total Welfare Hypothesis considers only pecuniary sanctions. Consequently, the range of sanctions under the Consumer Welfare Hypothesis is diverse, depending on the harm caused.

Deadweight loss, elasticity, and productive efficiency: These variables are relevant insofar as they impact consumers' interests; accordingly, deadweight loss is significant but typically less so compared to transfers. The same applies to the elasticity of demand. Therefore, productive efficiency is important to the extent that it influences outcomes for consumers, who remain the central focus.

The aforementioned framework serves as a valuable foundational tool for scholarly analysis, focusing on case law related to consumer protection and online sales contracts. It ensures allocative efficiency under the Consumer Welfare Hypothesis and adheres to the universal principles of proportionality and reasonableness. When drafting legislative norms or analysing case law, it is vital to develop a mindset conducive to sound legal reasoning.

⁷¹ FABRIZIO ESPOSITO, Op cit footnote 69.

⁷² FABRIZIO ESPOSITO, Op cit footnote 69, pp 74-84.

For these reasons, the schematic approach developed by Professor FABRIZIO ESPOSITO, inspired by DAGAN & HELLER, on the values of Utility, Community, and Efficiency, incorporates the concepts of internal and external defenses and exceptions⁷³, which are indispensable for advancing legal reasoning and fostering robust discussions.

In this context, since legislative norms and jurisprudence do not currently incorporate the proposed schematic for legal reasoning, scholarship must assume a crucial role. Academic inquiry should focus on developing tools that apply proportionality and reasonableness to dynamic and evolving topics such as consumer protection and online sales contracts. It is, indeed, along these lines of thought that Professor ENRIQUE GHERSI SILVA proposed his theory on the competitive nature of sources of law. (GHERSI SILVA, *El Caracter Competitivo de Las Fuentes del Derecho*, 2003).

Therefore, it is vital today—particularly as law and technology continue to evolve—to adopt a broader range of techniques and achieve an optimal understanding of consumer protection in the application of B2C sales contracts. This dissertation aims to incorporate the principles of proportionality and reasonableness through a framework of allocative efficiency, designed to function within the boundaries of both normative and case law efficiency, which together serve as important tools of law.

As Professor GUIDO CALABRESI has pointed out, common law decisions are inherently normative and require efficiency⁷⁴. Consequently, the efficiency hypothesis is strongly supported by: (i) legal reasoning appropriately embedded in legislative norms, which serve as fundamental tools for judicial activity; and (ii) universal principles that underpin legislative norms.

In this regard, allocative efficiency can indeed be identified not only within a legislative approach but also within the principles that guide legislative norms. This is the primary reason why the TFEU, CFREU, and constitutional texts worldwide serve as important pillars of legal reasoning, as they represent foundational sources of law. Ultimately, allocative efficiency within the Consumer Welfare Hypothesis is not merely a matter of legislation but rather of developing legal reasoning within the boundaries of proportionality and reasonableness to ensure accuracy—especially since the topic remains relatively new in jurisprudence due to its novelty.

4.3. Towards Allocative Efficiency within application of Proportionality and Reasonableness as legal standards within consumer protection and online sales contracts.

Contrary to the theory of the Total Welfare Consumer Hypothesis, which posits that consumer protection is not an end, especially in competitive markets, it shows a limited vision of the real essence of consumer protection. In contrast, this dissertation argues the opposite, providing sufficient evidence that consumer protection in the 21st century is not only fundamental but is also recognized in both EU and Peruvian law. See article 38 of the Charter of Fundamental Rights of the European Union and article 65 of Peruvian Constitution (1993).

⁷³ DAGAN & HELLER; Op cit at footnote 40.

⁷⁴ CALABRESI, GUIDO; “The New Economic Analysis of Law: Scholarship, Sophistry, or Self-Indulgence?” (1982) *Proceedings of the British Academy* 85.

Therefore, the Total Welfare Consumer hypothesis cannot be applied due to its vague approach to consumer protection application. According to both the EU and Peruvian legal systems, Consumer Protection is considered an end, not an arbitrary means that serves competition. Conversely, competition within markets must aim towards Allocative Efficiency to guarantee market development and protection. This is the correct mindset, which every law professional should have to ensure consumer protection.

In this regard, Allocative Efficiency is fundamental to overcoming the Total Welfare Consumer hypothesis, which does not develop consumer protection as a legal concept worthy of protection but rather as a mean to promote competition. Nevertheless, this vision is narrow and will depend on judicial interpretation, which can vary widely depending on court-by-court judgment analysis.

Consequently, the Allocative Efficiency theory runs contrary and takes steps back in order to guarantee predictability on a long-term basis. The main objective is to build a model of legal reasoning that can combine different sources of law. According to Professor FABRIZIO ESPOSITO, legislation can serve as a fundamental tool for concept-fitness case-law analysis⁷⁵. Nevertheless, principles can also play a significant role by adjusting legislative norms' interpretation and concrete application in case law analysis. It is indeed possible to create a mindset from the application of principles, especially those of proportionality and reasonableness.

To build the mindset, it is important to establish foundations, in this specific case based on Allocative Efficiency to develop Consumer Welfare Hypothesis. Thus, taking as example European legislative norms on Consumer Protection and online sales contracts, due to its leading approach on topic, can be founded under the basis of Allocative Efficiency, which finds its essence a systematic application of Article 38 of the Charter of Fundamental Rights of the European Union (CFREU) alongside Articles 4 (f) and 101(1) of the Treaty on the Functioning of the European Union (TFEU):

1. About Regulation (EU) 2022/2065 (DSA)

- a. How does Regulation (EU) 2022/2065 (DSA) falls under the scope of Allocative efficiency?

Allocative efficiency, according to FABRIZIO ESPOSITO, involves accepting that harming consumers is intrinsically bad; therefore, consumer protection must be ensured to maintain competitiveness in the market. This same logic is reflected in Regulation (EU) 2022/2065, as follows: (i) Recital 3, which ensures the commitment of this regulation to securing consumers from any type of harm caused by very large online platforms, thereby generating a safe and trustworthy online environment for Union citizens. This is a foundational point of the regulation, which adapts to Article 26 TFEU and aligns with the scholarly theory of allocative efficiency.

Moreover, Regulation (EU) 2022/2065 (DSA) serves as a clear example that the EU legal system does not follow a model of the Total Welfare Hypothesis, which disregards transfers. According to the Total Welfare approach, no market participant is entitled to preferential

⁷⁵ ESPOSITO, FABRIZIO; Op cit footnote 69. pp. 66-74.

treatment. Whether a consumer or a competitor, any party can incur harm as long as total welfare is increased.

However, Regulation (EU) 2022/2065 (DSA) takes a different approach, aligning with allocative efficiency, which is the main pillar of the Consumer Welfare Hypothesis. Nevertheless, as stated in Recital 104 of the Directive, the principle of proportionality must be considered to ensure that a high level of consumer protection does not exceed what is necessary to achieve its objectives. Moreover, the principle of proportionality ensures the commitment of this regulation to securing consumers from any type of harm caused by very large online platforms, but with respect to the fundamental right to be heard and to have access to the file in the context of enforcement proceedings, the principle of proportionality and the rights and interests of the affected parties, emphasizing the importance of legal reasoning.

In this regard, it is notable that Regulation (EU) 2022/2065 (DSA) aligns with two fundamental theories: (i) the Consumer Welfare Hypothesis, within the framework of allocative efficiency, and (ii) the application of proportionality in the normative context, specifically regarding how responsible and diligent the behavior of providers of intermediary services should be and its importance for a safe, predictable, and trustworthy online environment, leaving its practical application within the boundaries of legal reasoning.

Unfortunately, like Directive 2000/31 (EU), Directive 2011/83 (EU) does not provide practical guidance on applying proportionality, leaving this specific aspect to legal reasoning.

b. Which is the reasoning within consumer welfare hypothesis?

As mentioned before, legal reasoning within the Consumer Welfare Hypothesis begins with a systematic application of Article 38 of the Charter of Fundamental Rights of the European Union (CFREU) alongside Articles 4 (f) and 101(1) of the Treaty on the Functioning of the European Union (TFEU), which will be analysed according to the following schematic.

From this foundation, allocative efficiency can be applied in the following ways:

On Harm: The Consumer Welfare Hypothesis, in line with the CFREU and TFEU, acknowledges that harming competitors may be necessary to ensure adequate consumer protection within a competitive market. The requirements imposed on the different intermediary services (e.g., mere conduit, caching, and hosting) outlined in Articles 4-10 of Regulation (EU) 2022/2065 (DSA) exemplify this principle in practice.

On Defenses and Exceptions: Here, proportionality must be evaluated within the framework of internal defenses and exceptions. This concept derives directly from the scope of consumer protection and its inherent limitations, rather than from external sources beyond the consumer protection domain. However, Regulation (EU) 2022/2065 (DSA) does not elaborate on this point, leaving it to legal reasoning through analysis of normative, interpretative, and argumentative statements in court. Thus, establishing a proportionate and reasonable approach to legal reasoning within the boundaries of interpretation is essential (reverse engineering of legal reasoning).

Sanctions: within the Consumer Welfare Hypothesis for allocative efficiency can be divided into pecuniary and non-pecuniary types. In contrast, the Total Welfare Hypothesis considers only pecuniary sanctions. Consequently, the range of sanctions under the Consumer Welfare Hypothesis is diverse, depending on the harm caused. Regulation (EU) 2022/2065 (DSA) is broad on this point, leaving its application to the discretion of member states, which may

choose to implement more than just pecuniary sanctions, unlike the Total Welfare Hypothesis that focuses solely on maximization through pecuniary sanctions. As mentioned, the regulation does not expressly limit sanctions to pecuniary ones, leaving room for other remedies.

Deadweight loss, elasticity, and productive efficiency: These variables are relevant insofar as they impact consumers' interests. Accordingly, deadweight loss is significant but typically less so compared to transfers. The same applies to the elasticity of demand. Therefore, productive efficiency is important to the extent that it influences outcomes for consumers, who remain the central focus. Articles 4, 5, 6, 7, 8, 9, and consequently 10 of Regulation (EU) 2022/2065 (DSA) clearly take these variables into account in support of consumer interests and high-level protection.

In this regard, the concept of the Consumer Welfare Hypothesis can be analyzed and found within the recitals and articles of Regulation (EU) 2022/2065 (DSA), aligned with the values of the CFREU and TFEU, such as consumer protection and internal market competitiveness.

2. About Directive 93/13/EEC (EU)

a. How to search allocative efficiency in law?

Allocative efficiency, as highlighted by FABRIZIO ESPOSITO, involves recognizing that harming consumers is inherently undesirable because such harm undermines market competitiveness and fairness. Within Directive 93/13/EEC, this principle is evident in its focus on identifying and preventing unfair terms that place consumers at a disadvantage in contractual relationships. The Directive's primary aim is to ensure that consumers are not subject to unfair clauses, thus safeguarding their welfare and maintaining market efficiency.

The scope of protection, can be found in the preamble of Directive 93/13/EEC which explicitly acknowledges the imbalance in bargaining power between consumers and traders, making it essential to ensure consumer protection. This aligns with allocative efficiency, which prioritizes consumer welfare as a basis for market functionality. Likewise, article 3(1) of the Directive defines unfair terms as those causing "a significant imbalance in the parties' rights and obligations," clearly reflecting an allocative efficiency framework that views consumer harm as detrimental to the overall market.

Additionally, Directive 93/13/EEC moves away from the Total Welfare Hypothesis, which tolerates harm if total market welfare increases. Instead, it focuses on protecting individual consumers from exploitative clauses, as seen in the directive's non-exhaustive list of unfair terms in the Annex.

Finally, while ensuring high consumer protection, the principle of proportionality and reasonableness is vital to avoid over-regulation that could stifle competitiveness. For example, the Directive requires a balance between protecting consumers and respecting the contractual freedom of traders, as seen in the judicial review of potentially unfair terms under Article 4(1), while maintaining the fundamental principle of preventing harm to consumers.

Unfortunately, like Directive 2000/31 (EU), Regulation 2022/2065 (EU) and Directive 2011/83 (EU) does not provide practical guidance on applying proportionality, leaving this specific aspect to legal reasoning.

b. Which is the reasoning within consumer welfare hypothesis?

As mentioned before, legal reasoning within the Consumer Welfare Hypothesis begins with a systematic application of Article 38 of the Charter of Fundamental Rights of the European

Union (CFREU) alongside Articles 4 (f) and 101(1) of the Treaty on the Functioning of the European Union (TFEU), which will be analysed according to the following schematic.

From this foundation, allocative efficiency can be applied in the following ways:

On Harm: The Consumer Welfare Hypothesis, consistent with the CFREU and TFEU, recognizes that harming competitors may sometimes be necessary to ensure adequate consumer protection within a competitive market. Directive 93/13/EEC aims to prevent unfair terms that disadvantage consumers in contractual relationships. Consequently, this directive departs from the Total Welfare Hypothesis, which permits harm as long as it leads to an increase in overall market welfare.

On Defenses and Exceptions: Here, proportionality must be evaluated within the framework of internal defenses and exceptions. This concept derives directly from the scope of consumer protection and its inherent limitations, rather than from external sources beyond the consumer protection domain. However, Directive 93/13/EEC does not develop this point, leaving it to legal reasoning through analysis of Normative, Interpretative, and Argumentative Statements in court. Thus, establishing a proportionate and reasonable approach to legal reasoning within the boundaries of interpretation is essential (Reverse engineering of legal reasoning).

Sanctions within the Consumer Welfare Hypothesis for allocative efficiency can be divided into pecuniary and non-pecuniary types. In contrast, the Total Welfare Hypothesis considers only pecuniary sanctions. Consequently, the range of sanctions under the Consumer Welfare Hypothesis is diverse, depending on the harm caused. Directive 93/13/EEC is broad on this point, leaving its application to the discretion of member states, which may choose to implement more than just pecuniary sanctions, unlike the Total Welfare Hypothesis that focuses solely on maximization through pecuniary sanctions.

Deadweight loss, elasticity, and productive efficiency: These variables are relevant insofar as they impact consumers' interests; accordingly, deadweight loss is significant but typically less so compared to transfers. The same applies to the elasticity of demand. Therefore, productive efficiency is important to the extent that it influences outcomes for consumers, who remain the central focus. Articles 3, 4 and consequently 5 of Directive 93/13/EEC clearly take these variables into account in support of consumer interests and high-level protection.

In this regard, the concept of the Consumer Welfare Hypothesis can be analyzed and found within the recitals and articles of Directive 93/13/EEC, aligned with the values of the CFREU and TFEU, such as consumer protection and internal market competitiveness.

3. About Directive 770/2019 (EU)

a. How to search allocative efficiency in law?

Allocative efficiency, according to FABRIZIO ESPOSITO, involves accepting that harming consumers is intrinsically bad; therefore, consumer protection must be ensured to maintain competitiveness in the market. This same logic is reflected in Directive 770/2019 (EU) as follows: Recital 11 (which ensures harmonized rules on the conformity of digital content or digital services in contractual relations) and Articles 6, 7, 8, and 9 (which establish harmonized subjective and objective requirements for conformity). The mentioned recital (number 11) and articles seek to ensure consumer protection, as the values of utility and community indicate that direction, recognizing that informational asymmetries affect consumers and place them in a weaker position compared to traders or providers.

Directive 770/2019 (EU) serves as a clear example that the EU legal system does not follow a model of Total Welfare Hypothesis, which disregards transfers. According to the Total Welfare approach, no market participant is entitled to preferential treatment. Whether a consumer or a competitor, any party can incur harm as long as total welfare is increased.

However, Directive 770/2019 takes a different approach, aligning with allocative efficiency, which is the main pillar of the Consumer Welfare Hypothesis. Nevertheless, as stated in Recital 86 of the Directive, the principle of proportionality must be considered to ensure that a high level of consumer protection does not exceed what is necessary to achieve its objectives.

In this regard, it is notable that Directive 770/2019 (EU) aligns with two fundamental theories: (i) the Consumer Welfare Hypothesis, within the framework of allocative efficiency, and (ii) the application of proportionality in the normative context, specifically regarding subjective and objective requirements for the conformity of digital content or digital services.

Unfortunately, like Directive 2000/31 (EU), Directive 2011/83 (EU), Directive 771/2019 (EU), and Regulation 2022/2065 (EU), this Directive does not provide practical guidance on applying proportionality, leaving this aspect to legal reasoning.

c. Which is the reasoning within consumer welfare hypothesis?

As mentioned before, legal reasoning within the Consumer Welfare Hypothesis concept begins with the systematic application of Article 38 of the Charter of Fundamental Rights of the European Union (CFREU), alongside Articles 4(f) and 101(1) of the Treaty on the Functioning of the European Union (TFEU), as well as relevant directive articles, which will be analysed according to the following schematic.

From this foundation, allocative efficiency can be applied in the following ways:

On Harm: The Consumer Welfare Hypothesis, in line with the CFREU and TFEU, acknowledges that harming competitors may be necessary to ensure adequate consumer protection within a competitive market. The subjective and objective requirements for the conformity of digital content outlined in Directive 770/2019 (EU) exemplify this principle in practice.

On Defenses and Exceptions: Here, proportionality must be evaluated within the framework of internal defenses and exceptions. This concept derives directly from the scope of consumer protection and its inherent limitations, rather than from external sources beyond the consumer protection domain. However, Directive 770/2019 (EU) does not develop this point, leaving it to legal reasoning through analysis of Normative, Interpretative, and Argumentative Statements in court. Thus, establishing a proportionate and reasonable approach to legal reasoning within the boundaries of interpretation is essential (Reverse engineering of legal reasoning).

Sanctions within the Consumer Welfare Hypothesis for allocative efficiency can be divided into pecuniary and non-pecuniary types. In contrast, the Total Welfare Hypothesis considers only pecuniary sanctions. Consequently, the range of sanctions under the Consumer Welfare Hypothesis is diverse, depending on the harm caused. Directive 770/2019 (EU) is broad on this point, leaving its application to the discretion of member states, which may choose to implement more than just pecuniary sanctions, unlike the Total Welfare Hypothesis that focuses solely on maximization through pecuniary sanctions.

Deadweight loss, elasticity, and productive efficiency: These variables are relevant insofar as they impact consumers' interests; accordingly, deadweight loss is significant but typically

less so compared to transfers. The same applies to the elasticity of demand. Therefore, productive efficiency is important to the extent that it influences outcomes for consumers, who remain the central focus. Articles 6, 7, 8, 9, and consequently 10 of Directive 770/2019 (EU) clearly take these variables into account in support of consumer interests and high-level protection. This follows the logic that, due to informational asymmetries— which benefit traders and providers by placing consumers in a weak position through information management and the use of digital tools that depend exclusively on the choice of providers or traders— consumers must have access to transparent and efficient tools to form digital contracts.

In this regard, the concept of the Consumer Welfare Hypothesis can be analyzed and found within the recitals and articles of Directive 770/2019 (EU), aligned with the values of the CFREU and TFEU, such as consumer protection and internal market competitiveness.

b. About Directive 771/2019 (EU)

a. How to search allocative efficiency in law?

Allocative efficiency, according to FABRIZIO ESPOSITO, involves accepting that harming consumers is intrinsically bad; therefore, consumer protection must be ensured to maintain competitiveness in the market. This same logic is reflected in Directive 771/2019 (EU) as follows: Recital 3 (which ensures harmonized rules on sales of goods, taking as basis a high level of consumer protection) and Articles 5, 6, 7 and 8 (which establish harmonized subjective and objective requirements for conformity of goods).

Directive 771/2019 (EU) serves as a clear example that the EU legal system does not follow a model of Total Welfare Hypothesis, which disregards transfers. According to the Total Welfare approach, no market participant is entitled to preferential treatment. Whether a consumer or a competitor, any party can incur harm as long as total welfare is increased.

However, Directive 771/2019 takes a different approach, aligning with allocative efficiency, which is the main pillar of the Consumer Welfare Hypothesis. Nevertheless, as stated in Recital 70 of the Directive, the principle of proportionality must be considered to ensure that a high level of consumer protection does not exceed what is necessary to achieve its objectives.

In this regard, it is notable that Directive 771/2019 (EU) aligns with two fundamental theories: (i) the Consumer Welfare Hypothesis, within the framework of allocative efficiency, and (ii) the application of proportionality in the normative context, specifically regarding subjective and objective requirements for the conformity of goods.

Unfortunately, like Directive 2000/31 (EU), Directive 2011/83 (EU), Directive 770/2019 (EU), and Regulation 2022/2065 (EU), this Directive does not provide practical guidance on applying proportionality, leaving this aspect to legal reasoning.

b. Which is the reasoning within consumer welfare hypothesis?

As mentioned before, legal reasoning within the Consumer Welfare Hypothesis begins with a systematic application of Article 38 of the Charter of Fundamental Rights of the European Union (CFREU) alongside Articles 4 (f) and 101(1) of the Treaty on the Functioning of the European Union (TFEU), which will be analysed according to the following schematic.

From this foundation, allocative efficiency can be applied in the following ways:

On Harm: The Consumer Welfare Hypothesis, in line with the CFREU and TFEU, acknowledges that harming competitors may be necessary to ensure adequate consumer

protection within a competitive market. The subjective and objective requirements for the conformity of goods outlined in Directive 771/2019 (EU) exemplify this principle in practice.

On Defenses and Exceptions: Here, proportionality must be evaluated within the framework of internal defenses and exceptions. This concept derives directly from the scope of consumer protection and its inherent limitations, rather than from external sources beyond the consumer protection domain. However, Directive 771/2019 (EU) does not develop this point, leaving it to legal reasoning through analysis of Normative, Interpretative, and Argumentative Statements in court. Thus, establishing a proportionate and reasonable approach to legal reasoning within the boundaries of interpretation is essential (Reverse engineering of legal reasoning).

Sanctions: within the Consumer Welfare Hypothesis for allocative efficiency can be divided into pecuniary and non-pecuniary types. In contrast, the Total Welfare Hypothesis considers only pecuniary sanctions. Consequently, the range of sanctions under the Consumer Welfare Hypothesis is diverse, depending on the harm caused. Directive 771/2019 (EU) is broad on this point, leaving its application to the discretion of member states, which may choose to implement more than just pecuniary sanctions, unlike the Total Welfare Hypothesis that focuses solely on maximization through pecuniary sanctions.

Deadweight loss, elasticity, and productive efficiency: These variables are relevant insofar as they impact consumers' interests; accordingly, deadweight loss is significant but typically less so compared to transfers. The same applies to the elasticity of demand. Therefore, productive efficiency is important to the extent that it influences outcomes for consumers, who remain the central focus. Articles 5, 6, 7, 8 and consequently 10 of Directive 771/2019 (EU) clearly take these variables into account in support of consumer interests and high-level protection. This follows the logic that, due to informational asymmetries— which benefit traders and providers by placing consumers in a weak position through information management and the use of digital tools that depend exclusively on the choice of providers or traders— consumers must have access to transparent and efficient tools to form digital contracts.

In this regard, the concept of the Consumer Welfare Hypothesis can be analyzed and found within the recitals and articles of Directive 771/2019 (EU), aligned with the values of the CFREU and TFEU, such as consumer protection and internal market competitiveness.

In that sense, as exemplified within consumer and online sales contracts under European legislation, the main aim of Allocative Efficiency is to deliver the best possible explanation for legal reasoning, not by judicial independent assertion, but through the application of a concept-model mindset, which will provide predictability within case-law analysis. Professor ENRIQUE GHERSI SILVA goes further and argues that the real nature of law is to be competitive and not monopolistic⁷⁶. However, it can be competitive through the application of its different sources, which enrich the topic, such as principles or scholarship, serving normative and case analysis.

As a clear example, the Freiburger Case (C-237/02 – Freiburger Kommunalbauten) correctly illustrates how the Consumer Welfare Hypothesis, within the boundaries of proportionality and reasonableness, as universal principles and as foreseen within the Charter of Fundamental Rights of the European Union (CHREU), is relevant in determining when a contractual term is unfair or not, without depending on a purely grammatical interpretation. In this specific case, a grammatical interpretation of Article 3(1) of Council Directive 93/13/EEC (Directive on

⁷⁶ GHERSI SILVA, ENRIQUE; “El Carácter Competitivo de Las Fuentes del Derecho”; *Advocatus*; 2003; pp. 265

Unfair Terms in Consumer Contracts) would not suffice. See paragraphs 19-21 of the Judgment (Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter., 2004).

It is interesting to note how important it is to evaluate the context in which contracts are formed to determine if, because of the nature of the goods and services, clauses can be unfair. Therefore, proportionality and reasonableness must apply as a block to (i) balance the scope of protection of the institution (contracts in this particular case) and (ii) analyze the correct systematic interpretation of legislative norms, keeping in mind the details and circumstances of the contractual relation, which provides justification.

Nevertheless, it will be a great tool to use the exposed schematic as a fundamental part of legal reasoning, guiding any legal professional on how case-law conclusions can be reached, as seen in the Freiburger Case (C-237/02 – Freiburger Kommunalbauten). In this way, a concept-model mindset that provides predictability within case-law analysis can be developed and asserted, focusing on Normative, Interpretation, and Argumentation foundations, starting from Consumer Protection and Allocative Efficiency.

Ultimately, the significant challenge of Allocative Efficiency lies in achieving the Consumer Welfare Hypothesis by protecting consumers as an end in themselves, not merely as a means⁷⁷. Similarly, ensuring consumer protection requires the application of legal reasoning derived from diverse sources and tools in law, which often compete and cooperate with each other to enhance legislative norm construction and judicial interpretation. Therefore, it is crucial to integrate different legal sources appropriately and acknowledge that they can apply in a competitive manner, with the ultimate goal in this context being Consumer Protection. This highlights the fundamental importance for legal professionals to adopt a mindset grounded in the principles of proportionality and reasonableness, regardless of how advanced a legal system may be in terms of legislative norms and case law.

4.4. From Allocative Efficiency to Consumer Sovereignty: Leveraging Sources of Law as Valuable Tools

Allocative Efficiency, within the Consumer Welfare Hypothesis, is essential for achieving Consumer Sovereignty as a goal. It provides legal professionals with diverse tools to ensure Consumer Protection.

Unlike the Total Consumer Welfare Hypothesis in common law, which prioritizes judicial assertion, this approach establishes a mindset for all legal professionals, not just judges. The key is recognizing and integrating various sources of law to solve legal issues effectively. As Professors FRIEDRICH VON HAYEK and ENRIQUE GHERSI SILVA highlight, law develops in a decentralized, competitive manner, with no single provider of norms in society⁷⁸. Therefore, legal sources extend beyond legislative norms and judicial decisions to include:

1. **Customary Law** – Evolving traditions and practices within industries or communities.
2. **Contractual Agreements** – Privately established norms between parties.
3. **Legislative Norms** – Government-enforced regulations.

⁷⁷ ESPOSITO, FABRIZIO; Op cit footnote 69. pp. 177.

⁷⁸ GHERSI SILVA, ENRIQUE (2003); Op cit footnote 77. pp. 263.

4. **Academic and Expert Opinions** – Scholarly interpretations shaping legal thinking.
5. **International Law and Treaties** – Cross-border legal frameworks.
6. **Market Practices** – Industry practical norms reflecting competitive realities.

By integrating these sources, legal professionals ensure Consumer Protection in a decentralized, competitive legal landscape. Therefore, as pointed by Professor ENRIQUE GHERSI SILVA, sources of law provide the possibility for the continuous development of legal tools⁷⁹.

Moreover, as Professor Fabrizio Esposito notes, modern market economies prioritize consumers interests over producers, reinforcing competition and Consumer Sovereignty. This principle is central to both the EU and Peruvian legal systems, where Consumer Protection is a constitutional priority. (ESPOSITO, *The Consumer Welfare Hypothesis in Law and Economics*, 2022, p. 177)

In that sense, to uphold consumer interests, law provides various tools—legislative norms being one of them. The EU Digital Services Act and Peruvian Consumer Protection Laws exemplify this. However, legislative norms alone are insufficient; they require a structured legal reasoning model based on Allocative Efficiency, Proportionality, and Reasonableness. This approach enhances predictability in case-law interpretation and ensures a high level of Consumer Protection.

Since laws must adapt continuously, a conceptual legal model based on universal principles strengthens legal interpretation. Proportionality and Reasonableness (i) define the scope of Consumer Sovereignty within the Consumer Welfare Hypothesis and (ii) guide legal analysis of facts and norms. This discussion will continue in the next chapter.

4.5. Competition as fundamental tool to promote Consumer Welfare Hypothesis

It is relevant to understand that legal systems are not free. The utilization of any Source of Law is costly because it engages time and information to fulfil regulation. It is in that context, that competition among sources must be guarantee as important tools for legal problem solving. According to Professor FRIEDRICH VON HAYEK, it is the collective who decides which sources to apply depending on specific situations and context⁸⁰. In the same lines, this is connected to the thesis sustained by Professor FRIEDRICH KARL VON SAVIGNY, that concept “Sources of Law” is derived directly from the idea of recognising “*The Spirit of People*” (Volksgeist) because it is the collective, in the end, who establishes different regulations through various and specific Sources of Law⁸¹.

In this regard, Sources of Law are important and must be observe in a competitive way and not in a monopolistic way by which legislative norms have the privilege. As developed by Professor ENRIQUE GHERSI SILVA, under the boundaries of Legal and Economic theory, Sources of Law must be seen as assets for human decision making. In that sense, Source of law must be seen as providers of norms which can come from (i) principles or normative principles; (ii) jurisprudence; (iii) doctrine or scholarship; (iv) customs; and importantly (v) contracts

⁷⁹ GHERSI SILVA, ENRIQUE; Op cit footnote 77. pp. 266

⁸⁰ HAYEK, FRIEDRICH VON, “Derecho, Legislación y Libertad. Tomo I. 2da. Edición, Madrid: Union Editorial, 1985, pg. 185.

⁸¹ SAVIGNY, KARL VON; Op cit at footnote 27; pg. 13-14.

through private autonomy (GHERSI SILVA, *El Caracter Competitivo de Las Fuentes del Derecho*, 2003).

Therefore, competition is a fundamental tool for achieving justice and must be taken seriously to understand legal foundations and establish a conceptual model mindset that enables professionals to achieve better legal reasoning. This dissertation specifically focuses on consumer protection and online sales contracts but can be replicated and studied in other professional areas of law. Consequently, the Consumer Welfare Hypothesis is foundational for the proposed conceptual model mindset. Moreover, as previously noted, according to Professor FABRIZIO ESPOSITO, this approach involves recognizing the consumer as an end and providers or traders as servants to that end⁸². In this context, to achieve the stated objective, it is imperative to promote competition among all legal tools to ensure high level of consumer protection.

For example, see Paragraphs 48 - 50 in Joined Cases C-664/22 and C-666/22, which provide a correct systematic interpretation of European international measures concerning online intermediation services and online search engines in relation to national measures adopted by a member state. All of the above aims to ensure (i) the development of the Internal Market, (ii) the free movement of information society services between Member States, and (iii) competition among online providers. This is done within the boundaries of proportionality and reasonableness, in accordance with the interpretation of the objectives of Article 53(1) TFEU and Article 62 TFEU, as well as the European Directives currently under revision.

The cited jurisprudence shows that consumer sovereignty can be ensured without the need for numerous legislative measures, but rather through the application of existing laws, which must be implemented within the boundaries of proportionality and reasonableness. Additionally, for better legal reasoning, if the analysis was built through the schematic previously proposed, from Consumer Welfare Hypothesis approach or foundation, then legal interpretation and argumentation could be better constructed for better judiciary predictability and unifying a legal system. In this case, as observed, the mentioned universal principles were key to resolving the matter; however, legal reasoning could be improved by following an organized and well-defined schematic for the construction, understanding, and application of legislative norms.

In this line of thought, legal reasoning involves utilizing all legal tools for human problem-solving, specifically addressing the challenges that consumer protection and online sales contracts present within the fields of law and technology. For these reasons, Professor ENRIQUE GHERSI SILVA work on the competitive nature of legal sources is relevant, as it assists legal professionals in establishing a conceptual model mindset for better application—particularly in the context of consumer protection and online sales contracts—while adhering to the boundaries of proportionality and reasonableness.

In conclusion, Allocative Efficiency, Consumer Sovereignty, and Competition are essential to constructing the Consumer Welfare Hypothesis as a practical approach for legal reasoning aimed at promoting justice within Consumer Protection, especially in an increasingly advanced and digitalized era where technology fosters greater human interaction through online sales contracts on digital platforms. However, it is not solely the task of legislative norms to promote competition or build legal concepts. Other sources of law, such as the principles of

⁸² ESPOSITO, FABRIZIO; *Op cit* footnote 69. pp. 177

proportionality and reasonableness, which are universal, flexible, and without boundaries, also play a crucial role.

4.6. Peruvian Legal System's Approach to Online Sales Contracts and Consumer Protection

On the other hand, the Peruvian approach to online sales contracts and consumer protection is different. Unfortunately, the Peruvian legal system does not contemplate specific legislative norms on this topic. Peru only has general and separate legislation that can apply, but it does not explicitly promote consumer protection within the digital market. Consequently, there is no specific treatment under the Consumer Welfare Hypothesis. However, this does not mean that consumer protection in digital transactions, such as online sales contracts, is entirely absent. General legislation on the topic has been constructed to ensure fairness, transparency, and accountability in online transactions.

For better knowledge and understanding, here are key elements of the Peruvian legal framework:

1. **Peruvian Constitution (1993):** Article 3, establishing fundamental rights as *numerus apertus*; Article 62, based on freedom of contracts; and Article 65, based on consumer protection.
2. **Peruvian Civil Code (1984):**
 - **Contracts General Provisions:** Article II (Abuse of Rights), Article 1354 (Freedom of Contracts), Article 1361 (Conformity of Parties), and Article 1362 (Principle of Good Faith applied to contracts).
 - **Sales Contracts Specific Provisions:** Article 1529 (Sales Contract Definition), Article 1549 (Obligations of the Seller), Article 947 (Transfer of Movable Property), Article 1558 (Obligations of the Buyer), and Article 1567 (Risk of Loss of Certain Assets) to understand the approach to sales contracts within Peru.
3. **Peruvian Consumer Protection Code:** Article V, based on the principle of “Information Asymmetry” within digitalization and globalization. Understand the following within a consumer relationship. Moreover, the application of Article V within the principles of “Consumer Sovereignty” and “Good Faith” in B2C relations.
4. **Peruvian International Private Law (Civil Code of 1984):** Article 2058, about the competence of Peruvian courts for starting claims to exercise court actions with patrimonial content against persons or companies domiciled abroad; Article 2095, about applicable law for contractual obligations; and Article 2096, about Individual Autonomy of Parties for applicable law within contracts.

Therefore, a diverse spectrum of legislative norms can be seen, applying systematically and with practical concordance, but in a general sense due to the lack of specialization on the topic. As mentioned, Peru, being a positivist legal system outside the boundaries of the European Union, is lagging in Law and Technology within a more digitalized world.

In that sense, online sales contracts and consumer protection remain institutions under early construction that must be applied within the boundaries of the existing legislative norms. For example, the Peruvian Consumer Protection Code (Ley N° 29571) is outdated, still primarily focused on physical transactions involving tangible movable products.

However, while time and transaction methods have changed, the Consumer Protection Code remains an important legal framework in development, which must align with constitutional foundations within the boundaries of proportionality and reasonableness. This approach aims to strengthen legal defenses and the application of exceptions, as fundamental rights are not absolute⁸³ and must be analysed under the normative, interpretative and argumentative statements.

This is the main reason why building a conceptual model of legal reasoning is fundamental, since this tool enables legal professionals schematize their analysis, developing a line of interpretation and argumentation, with due respect to conceptual foundations and fundamental rights. In this specific case Allocative efficiency and Consumer Welfare Hypothesis. Even if the legal framework, is general and not topic specific because as well spotted by Professor ANIBAL TORRES VASQUEZ *“Every subjective right implies a corresponding duty, so there are no absolute rights and, consequently, no possibility for their exercise to be unlimited”*⁸⁴.

In this context, Peruvian legislatives norms mentioned presents multiple and significant gaps that need to be addressed by other sources of law, adhering to the principles of proportionality and reasonableness, starting from the fact that until the Peruvian legal system does not count with specific digital or ecommerce legislation. Next, I will highlight some significant examples of these loopholes:

1. Lack of Specific Regulation for Online Sales Contracts

- The Peruvian Civil Code (Articles 1529°, 1549°, 947°, 1558°, 1567°) regulates sales contracts, but its provisions were designed for traditional, instant sales transactions, not for digital and online commerce.
- This gap requires systematic interpretation under proportionality and reasonableness to ensure consumer protection in e-commerce.

2. Ambiguity in the Balance Between Private Autonomy and Consumer Protection

- Articles 62° and 65° of the Peruvian Constitution and Article 1354° of the Civil Code protect freedom of contract, reinforcing individual autonomy.
- However, they lack clear guidelines on how consumer rights should limit private autonomy, leading to potential abuse by traders.
- A systematic interpretation is needed to align private autonomy with market and consumer protection.

3. Gaps in International Private Law for Cross-Border Consumer Transactions

⁸³ MARCIAL RUBIO CORREA, ELMER ARCE; “La Vigencia y Validez de las normas jurídicas en la jurisprudencia del Tribunal Constitucional”; Revista Themis (Edición N° 51); Lima; 2005; pp 13

⁸⁴ TORRES VÁSQUEZ, ANÍBAL; “Código Civil. Comentarios y Jurisprudencia”. Editorial IDEMSA. Quinta edición. Lima, 2000, pp.23

- Articles 2058°, 2095°, and 2096° of the Peruvian Civil Code govern court jurisdiction and applicable law in international contracts.
- These provisions create legal uncertainty as they allow foreign law to apply, potentially weakening consumer protections.
- A stronger consumer-focused approach is needed to ensure Peruvian law prevails in consumer disputes, while preventing harm to consumers.

4. Broad and Underdeveloped Consumer Protection Principles

- Article V of the Consumer Protection Code outlines essential principles (e.g., consumer sovereignty, transparency, good faith), but they remain too broad and lack practical enforcement mechanisms.
- These principles must be refined and integrated into legal reasoning to provide stronger protections in online sales and technological transactions.

5. Rigid Interpretation of Ownership Transfer in Sales Contracts

- Articles 1549° and 947° of the Civil Code require physical delivery (*Traditio*⁸⁵) for ownership transfer.
- This does not reflect modern digital commerce, where goods may be delivered electronically or via distant shipments.
- Legal adaptation is necessary to accommodate digital transactions while maintaining consumer protections.

Consequently, the Peruvian legal system encompasses a wide range of legislative norms that systematically apply the legal system within the boundaries of consumer protection. Nevertheless, Peruvian consumer protection legislation is still young and, in the context of online sales contracts, remains generic, nonspecific, outdated, and off-topic.

Therefore, as seen, the principles of proportionality and reasonableness have a wide range of applications due to exposed loopholes within the legislation and could be established as legal standards within this area⁸⁶. This does not mean that they will be denaturalized in case-by-case applications. On the contrary, having legal standards will be an important starting point for case-by-case analysis.

It is along these lines that a well-constructed conceptual model mindset, providing predictability—specifically in this dissertation under Allocative Efficiency and the Consumer Welfare Hypothesis—will enable optimal legal reasoning. This approach will significantly aid normative, interpretative, and argumentative analysis within case evaluations. Let's now examine the proposed schematic for analysis in the following subtitle.

4.7. Conceptual Model for Legal Reasoning under Allocative Efficiency and the Consumer Welfare Hypothesis within the Boundaries of Proportionality and Reasonableness in Peruvian Legislation

Taking legal tools found on Peruvian legislative norms on consumer protection, universal principles and important scholarship opinions on topic, such as the developed by professor FABRIZIO ESPOSITO on Consumer Welfare hypothesis and Professor ENRIQUE GHERSI

⁸⁵ Paragraph 05; Case File No. 415-99-Lima; Peruvian Supreme Court of Justice.

⁸⁶ Paragraph 12, Case File No. 1554-2015-Lima; Peruvian Supreme Court of Justice.

SILVA, on his work on competitive nature of sources of law, it is possible to spot conceptual model for legal reasoning. In this specific case limiting the research to consumer protection and online sales contracts. For that reason, the model to apply must follow the next schematic steps:

A. Towards Identifying Whether Peruvian Constitutional Principles Align with a High Level of Consumer Protection

The Peruvian Constitutional Court, in Case File N° 5854-2005-PA/TC, recognizes the rights of free market access, market protection, fair treatment, and corporate defense in favor of consumers as fundamental components of fundamental rights. This systematic application arises from articles 3°, 62°, and 65° of the Peruvian Constitution. These provisions not only expressly aim at a high level of consumer protection but also seek to ensure market protection. This legal interpretation highlights the balance between protecting consumers and preserving market efficiency and fairness, aligning with fundamental rights within the Peruvian constitutional framework.

As observed, the foundations of market protection and a high level of consumer protection are established within the Peruvian framework. As specifically developed in paragraph 21 of Case File N° 5854-2005-PA/TC, the fundamental rights derived from market and consumer protection are relatively new in the early decades. However, their protection is increasingly being recognized, not only through the development of legislative norms but also from doctrine, scholarship, social customs, and jurisprudence.

Nevertheless, the test of proportionality still lacks a conceptual model mindset, which is the primary objective this dissertation seeks to achieve. Therefore, by identifying the foundations of market and consumer protection within the Peruvian constitutional framework, it becomes possible to pursue allocative efficiency within the law.

B. How to search allocative efficiency in law?

Allocative efficiency, according to FABRIZIO ESPOSITO, involves accepting that harming consumers is intrinsically bad; therefore, consumer protection must be ensured to maintain competitiveness in the market. This same logic is reflected (i) in the systematic application of articles 3°, 62°, and 65° of the Peruvian Constitution. In this sense, the foundations aligned with allocative efficiency are established and can be found within the Peruvian constitutional framework.

Moreover, Article V of the Peruvian Consumer Protection Code establishes the principles of consumer sovereignty, informational asymmetries, transparency, and good faith, which must be systematically applied alongside Articles 3° and 65° of the Constitution, as both constitutional articles seek a high level of consumer protection and aim to eradicate any abuse of the law for optimal market protection⁸⁷.

In this sense, the Peruvian legal system, in the context of consumer protection, complies with the concept of allocative efficiency as outlined by Professor FABRIZIO ESPOSITO, since legal reasoning must be built around the core principle of defending consumers and safeguarding their interests. Likewise, harming competitors can be beneficial to consumers, as it encourages a stricter focus on consumer interests within the market. However, this will

⁸⁷ Paragraph 15, Case File N° 5854-2005-PA/TC

always require a test of proportionality when applying defenses and exceptions. Nevertheless, the foundations are clear and well established, as demonstrated through conceptual analysis.

The Consumer Protection Code, within its principles established in Article V, aligns with allocative efficiency, which is the main pillar of the Consumer Welfare Hypothesis. Moreover, Article V complies with the aim of not harming consumers, in concordance with the high level of consumer protection foreseen in Article 65 of the Peruvian Constitution. However, it is also true that Article 65 of the Constitution must be systematically applied in conjunction with Article 3 of the Peruvian Constitution, which guarantees proportionality and reasonableness. As established by Professor Aníbal Torres Vásquez, rights cannot be exercised in an absolute manner⁸⁸.

In this regard, Contract Law, as established within the Peruvian Civil Code, must apply, as the Peruvian legal system does not have specific legislation for online sales contracts. However, it must be applied within the context of consumer protection. If the foundations point to allocative efficiency under the Consumer Welfare Hypothesis, leaving behind the Total Welfare Hypothesis—under which no market participant is entitled to preferential treatment—it is important to note that general contract provisions will systematically apply in conjunction with Article V of the Consumer Protection Code, seeking to fulfil fairness and good faith on behalf of consumer interests, which positively affects market protection.

The same logic will apply regarding Articles 2058, 2095, and 2096 of the Peruvian International Private Law (Civil Code of 1984), to guarantee the Consumer Welfare Hypothesis with the objective of not harming consumers and maximizing their protection and interests, as this is beneficial for market protection and competitiveness.

Unfortunately, the analysed legislative norms—the Peruvian Consumer Protection Code, Civil Code, Peruvian International Private Law, and even the Peruvian Constitution—do not provide practical guidance on applying proportionality, leaving this aspect to legal reasoning.

C. Which is the reasoning within consumer welfare hypothesis?

As mentioned before, legal reasoning within the Consumer Welfare Hypothesis in the Peruvian Legal System begins with a systematic application of articles 3°, 62°, and 65° of the Peruvian Constitution.

From this foundation, allocative efficiency can be applied in the following ways:

On Harm: The Consumer Welfare Hypothesis, in line with the Peruvian Constitution, acknowledges that harming competitors may be necessary to ensure adequate consumer protection within a competitive market, to safeguard consumers. This goes alongside with the established principles in article V of Peruvian Consumer Protection Code.

On Defenses and Exceptions: Here, proportionality must be evaluated within the framework of internal defenses and exceptions. This concept derives directly from the scope of consumer protection and its inherent limitations, rather than from external sources beyond the consumer protection domain. However, The Peruvian Consumer Protection Code, the Civil Code or even Peruvian International Private Law does not develop this point, leaving it to legal reasoning through analysis of Normative, Interpretative, and Argumentative Statements in court. Thus, establishing a proportionate and reasonable approach to legal reasoning within the boundaries

⁸⁸ TORRES VÁSQUEZ, ANÍBAL, Op cit footnote 85.

of interpretation is essential (Reverse engineering of legal reasoning). This can take place from foundations established within article 3 of the Peruvian Constitution.

Sanctions within the Consumer Welfare Hypothesis for allocative efficiency can be divided into pecuniary and non-pecuniary types. In contrast, the Total Welfare Hypothesis considers only pecuniary sanctions. Consequently, the range of sanctions under the Consumer Welfare Hypothesis is diverse, depending on the harm caused. The Peruvian Consumer Protection Code permits both types of sanctions (Articles 115–116), and Contract Law is broad on this point, leaving its application to the discretion of the state or even the parties (trader/provider and consumer) during negotiations. It is possible to choose and implement more than just pecuniary sanctions, unlike the Total Welfare Hypothesis, which focuses solely on maximization through pecuniary sanctions.

Deadweight loss, elasticity, and productive efficiency: These variables are relevant insofar as they impact consumers' interests; accordingly, deadweight loss is significant but typically less so compared to transfers. The same applies to the elasticity of demand. Therefore, productive efficiency is important to the extent that it influences outcomes for consumers, who remain the central focus. Articles I, II and V of the Peruvian Consumer Protection Code clearly take these variables into account in support of consumer interests and high-level protection, in concordance to constitutional foundations.

In this context, the concept of the Consumer Welfare Hypothesis can be analysed and found within the Peruvian Consumer Protection Code, Civil Code, Peruvian International Private Law, and even the Peruvian Constitution, as it aims to achieve a high level of consumer protection. This is clearly developed in paragraph 21 of Case File No. 5854-2005-PA/TC, where the test of proportionality is applied and is now reinforced by the proposed schematic of legal reasoning to identify foundations and develop the universal principles of proportionality and reasonableness derived from the Consumer Welfare Hypothesis.

On this matter, e-commerce is a new concept within the Peruvian legal system that lacks specific regulation on the topic. According to the World Trade Organization, e-commerce is *"the purchase or sale of goods or services conducted over computer networks by methods specifically designed to receive or place orders"*⁸⁹. This encompasses all economic activities with a profit motive carried out through virtual channels specifically designed for the buying and selling of various goods and services to make the market more dynamic. Additionally, it includes not only the sales or purchases made by the businessperson and the user over the internet but also all phases of the business process, as long as these are conducted over the network⁹⁰.

Nowadays, e-commerce⁹¹ can be conducted between businesses and governments, in which case it is referred to as "Business to Administration" (B2A); between businesses, known as "Business to Business" (B2B); and between suppliers and consumers, referred to as "Business to Consumer" (B2C). Furthermore, in the B2C market⁹², various methods or types of e-

⁸⁹ Secretaría de la Organización Mundial del Comercio, *"El comercio electrónico en los países en desarrollo, Oportunidades y retos para las pequeñas y medianas empresas"*, Organización Mundial del Comercio, Ginebra, 2013- Tomado de: https://www.wto.org/spanish/res_s/booksp_s/ecom_brochure_s.pdf

⁹⁰ MILLÉ, ANTONIO, "Impacto del comercio electrónico sobre la propiedad intelectual", Conferencia en VII Congreso Iberoamericano de Derecho e Informática, Montevideo, 4 a 8 de mayo de 1998. Citado por BURGOS PUYO, ANDREA, "El consumidor y los contratos en internet", Universidad Externado de Colombia, Colombia, 2007, pp. 19.

⁹¹ VEGA MERE, YURI, "Encienda su computadora y compre: consumidor e Internet", En *Ius et Veritas*, Revista, Editada por estudiantes de la Facultad de Derecho de la Pontificia Universidad Católica del Perú, Año 2004, N° 29, pp.223.

⁹² SEOANE, ELOY, "La Nueva Era del Comercio: El Comercio Electrónico, Las Tic's Al Servicio De La Gestión Empresarial", Ideas Propias, España, 2005, pp. 120-122.

commerce transactions can be found, such as: (i) the virtual store, which is a virtual site where products and services are offered for purchase; (ii) the virtual mall ("emall"), which is a virtual site hosting several virtual stores; (iii) coupon sites (referred to as the discount model), where products are offered at cost price or with discounts; (iv) marketplaces, which are models where, through a virtual site, various suppliers and consumers freely interact with the aim of buying or selling products; (v) the extranet, which is a private network created by the supplier to securely share business and operational information with suppliers; among others.

Currently, e-commerce has experienced significant growth due to advancements in computer networks and its contracting quality characteristic of the globalized era. This development has reduced the transaction costs of traditional commerce by eliminating intermediaries and allowing consumers and suppliers in remote areas to overcome logistical and geographical obstacles. In summary, the importance of e-commerce lies in its utility for boosting the economy by streamlining the exchange of goods and services⁹³.

For these reasons, it is crucial, within this specific context, to work beyond legal reasoning to protect markets effectively. In this case, where consumer protection is the central theme of discussion, the dissertation proposes the Consumer Welfare Hypothesis within the framework of proportionality and reasonableness to ensure consumer well-being. This is why it is essential that, within e-commerce, all parties involved (consumers and suppliers) uphold the principles of good faith, equity, trust, and transparency in consumer relationships, as stipulated in Article V of the Peruvian Consumer Protection Code. These principles should be applied in the most proportionate and reasonable way possible, with the understanding that harming consumers is inherently detrimental to market development.

4.8. Towards Consumer Welfare Standard Hypothesis: Building Defenses and Exceptions within Legal Reasoning

Therefore, after thoroughly analyzing the topic, adopting a Consumer Welfare Standard proves to be a practical and advantageous option within positivist systems, such as those of the EU and Peru. This standard serves as a fundamental tool with a specific purpose: to understand the producer-consumer relationship in practical alignment with fundamental rights, which is foundational to these systems.

In this context, the boundaries of competition must be viewed from two perspectives. First, there is competition between producers, which ultimately benefits consumers, as emphasized in Article 38 of the Charter of Fundamental Rights of the European Union (CFREU) and Article 65 of the Peruvian Constitution (1993). Second, there is competition between sources of law, which are not confined to legislative measures alone. While legislative norms are essential, other sources, such as legal principles, also serve the same objective and have the capacity to address legal loopholes. Consequently, legal reasoning transcends the mere application of legislative norms. It involves utilizing additional tools, such as principles, to build a conceptual model for sound legal reasoning.

At this specific point, legal standards of proportionality and reasonableness apply, recognizing, in the first instance, that no fundamental right is absolute or has unlimited application, as well articulated by Professor ANIBAL TORRES VÁSQUEZ⁹⁴. Understanding that no fundamental right is absolute, it is the job of the legal specialist to identify conflicts between rights. In the

⁹³ Considerando veintidós (22); (INDECOPI vs Supermercados Peruanos SA); Expediente N.º 054-2021/CC3 (INDECOPI).

⁹⁴ TORRES VÁSQUEZ, ANÍBAL; Op cit footnote 85.

case of online sales contracts, the conflict often centers on (i) the freedom to conduct business and (ii) a high level of consumer protection, which is typically found within contractual terms and conditions or even Return or Refund Policies.

Both rights must be carefully balanced to ensure reciprocity within contractual clauses. The goal is not to favor (i) producers over consumers or (ii) consumers over producers, but to make contractual measures more accessible to both parties, thereby generating long-term market trust. This aligns closely with the fundamental right to transparency, which can be found in Article 7 of the Digital Services Act (DSA) and Article V of the Peruvian Consumer Protection Code. Thus, achieving a fair balance in consumer protection must align with principles of good faith and informational transparency.

Both principles, as seen are foundational, and has no boundaries derived from Market Protection, Freedom to Conduct Businesses and High Level of Consumer Protection, form the basis of applying Allocative Efficiency within Consumer Welfare Standard. Consequently, they are of great importance for legal reasoning, which must follow the conceptual model proposed under Allocative Efficiency and the Consumer Welfare Hypothesis within the Boundaries of Proportionality and Reasonableness, for accuracy on consumer protection and online sales contracts analysis.

This analysis must be constructed based on the second point of the proposed schematic, derived from the conceptual model, which refers to defences and exceptions. In this context, this point allows for (i) analyzing legislative norms; (ii) attributing meaning to normative statements during analysis; and (iii) finding justification for interpretation. This approach is thoroughly developed by Professor FABRIZIO ESPOSITO for case analysis after identifying foundational principles.⁹⁵ Thus, defences and exceptions must be structured in the following way to construct argumentation for legal reasoning:

- A. **Normative Statements:** Legislative norms on consumer protection and online sales contracts as exposed and founded in the European Legal System or the Peruvian Legal System.
- B. **Interpretative Statements:** To give a meaning to normative statements according, and in so doing, produce a line or interpretation without changing grammatically speaking the norm. For the following, Allocative Efficiency and Consumer Welfare Hypothesis must be spotted within foundations, and concord with a line of rights defence and protection:
 - i. **Identify Fundamental Rights on Conflict:** The professional must identify the fundamental rights at stake and, according to the conceptual model, determine the foundational concept being protected in the topic. Specifically, within the boundaries of proportionality and reasonableness, we have identified that both legal systems align with Allocative Efficiency and the Consumer Welfare Hypothesis to support market protection and development.
 - ii. **Balancing Legislative Obligations towards Consumer Welfare Hypothesis:** Systematic interpretation and application of legislative norms are crucial to balancing conflicting rights. The European and Peruvian legal systems, though differing in approaches and contexts, exemplify how freedom of contract and consumer protection can interact within the boundaries of reasonableness, as

⁹⁵ ESPOSITO, FABRIZIO; Op cit footnote 69. pp. 72-74.

viewed from a fundamental rights perspective. Therefore, if the foundational concept protected in the topic aligns correctly with Allocative Efficiency and the Consumer Welfare Hypothesis, consumer protection within online sales contracts must strive for a fair balance and good faith. The ultimate objective should be to prevent harm to consumers while ensuring optimal market protection.

C. Argumentative Statements: Assigning meaning to normative statements through interpretation requires justifying the interpretative statement. At this stage, while the foundational principles and a line of interpretation have been identified, it is essential to evaluate the following:

- i. **Adequacy of Interpretation Statements to Context:** The identified line of interpretation must be adapted and applied to the factual context of conflicts concerning consumer protection and online sales contracts. Therefore, in alignment with Allocative Efficiency and the Consumer Welfare Hypothesis, it is necessary to determine whether the contractual conflict between the Trader/Provider and the Consumer, within the boundaries of proportionality and reasonableness, is indeed causing harm to consumers under the framework of Market Protection. Consequently, at this stage of analysis, it is crucial to study the facts and context to identify potential violations of the foundational principles underlying the line of interpretation, and, most importantly, to assess the harm caused to consumers.
- ii. **Assessment of Necessity:** In this context, applying the proportionality test is vital, as the necessity of consumer protection must be thoroughly analysed to identify potential harm. The assessment of necessity should determine whether certain fundamental rights, within the systematic interpretation of legislative norms on the topic, are being violated and whether they align with the Consumer Welfare Hypothesis. Additionally, it is crucial to evaluate how necessary and severe the line of interpretation and argument must be, based on the facts and context, to justify robust consumer protection in the specific conflict or case law.

In this way, defences and exceptions can be structured under the proposed scheme for Normative Statements, Interpretative Statements, and Argumentative Statements to optimize the construction of legal reasoning in case law. By following this approach, legal reasoning aligns with a conceptual model that reflects Allocative Efficiency and the Consumer Welfare Hypothesis within two distinct legal systems, the EU and the Peruvian legal system, which share the same objective.

Having identified the foundations of consumer protection analysis in online sales contracts and constructed a scheme of defences and exceptions for further development of legal reasoning, an analysis is conducted to determine whether the conclusions reached in relevant jurisprudence on the topic align with Allocative Efficiency and the Consumer Welfare Hypothesis. This is examined within the framework of a High Level of Consumer Protection and the boundaries of universal principles of proportionality and reasonableness.

Unfortunately, the development of online sales contracts is a relatively new area, with less than ten years of evolution. Consequently, consumer protection cases where proportionality and reasonableness have been tested under the concept of consumer protection are presented. For example:

A. Within EU Law:

- a. Paragraph 31 and 32; Judgment in Case C-173/23 *Eventmedia Soluciones*. (Eventmedia Soluciones, 2024)

i. **Case Analysis:**

Normative Statements: Normative statements articulate the legal norms and obligations derived from the law and relevant directives. In this case, the judgment relies on the normative framework established by Articles 6(1) and 7(1) of Directive 93/13/EEC, which sets the standard for protecting consumers against unfair contractual terms, in accordance with the foundations laid out in Article 38 of the Charter of Fundamental Rights of the European Union (CFREU), as well as Articles 4(f) and 101(1) of the Treaty on the Functioning of the European Union (TFEU).

Specifically: (i) article 6(1) mandates that unfair terms in consumer contracts shall not be binding on the consumer. (ii) Article 7(1) requires Member States to ensure adequate and effective measures to prevent the continued use of unfair terms.

The judgment also invokes the principles of procedural autonomy, equivalence, and effectiveness. While EU law does not prescribe the exact procedures for reviewing unfair terms, national procedures must: 1. Be no less favorable than those applied to similar domestic actions (principle of equivalence), 2. Not make it excessively difficult for consumers to exercise their rights under EU law (principle of effectiveness).

Thus, the normative statement here emphasizes that domestic courts must respect these principles when implementing the directive's consumer protection standards.

Interpretative Statements: Interpretative statements involve clarifying how the norms are to be understood and applied. Paragraphs 31 and 32 of the judgment interpret the obligations of national courts under Directive 93/13 in light of procedural autonomy and the principles of equivalence and effectiveness. Paragraph 31: The Court clarifies that although the procedural rules are determined by national legal systems, they must not undermine the substantive rights provided by EU law. This is particularly significant when addressing whether a contractual term is unfair, reinforcing that the national court has a duty to balance procedural autonomy with EU law's fundamental objectives. Paragraph 32: The Court extends its interpretation to scenarios involving third parties, such as commercial companies acting as assignees of a consumer's claims. It emphasizes that, in such cases, national courts must still evaluate the fairness of contract clauses to uphold the principles of consumer protection. This interpretation expands the scope of judicial review to ensure that even indirectly related parties, like assignees, do not bypass the safeguards for consumers.

Argumentative Statements: Argumentative statements are employed to justify the conclusions or reasoning applied in the case, often connecting the law's objectives with its practical enforcement. In this judgment, the argumentation revolves around the importance of ensuring effective consumer protection through: (i) the necessity of reviewing contractual clauses for fairness, regardless of whether the consumer or a third party (e.g., an assignee) is initiating the action. This ensures that the fundamental purpose of Directive 93/13—to eliminate unfair terms from consumer contracts—is not circumvented, and (ii) A balancing of procedural autonomy with the broader goals of EU law. The Court justifies that while national procedures are respected, they must not obstruct or diminish the

protections guaranteed under EU law, in order to uphold the foundations, set out in Article 38 of the CFREU.

The argumentation further incorporates case law (e.g., *Addiko Bank*, C-407/18 and *SPV Project 1503*, C-693/19) to underscore the consistent application of equivalence and effectiveness principles, as a powerful tool to justify and generate a line of interpretation.

Conclusion: The normative, interpretative, and argumentative statements in this case demonstrate a cohesive legal reasoning framework that integrates universal principles of proportionality and reasonableness. The normative statements establish the legal obligations under Directive 93/13, the interpretative statements ensure their proper application in light of procedural autonomy, and the argumentative statements provide a robust justification for extending consumer protections even in complex procedural contexts, consistently aiming to avoid harm to consumers. As demonstrated, this case analysis, under a conceptual model of legal reasoning, reflects the application of Allocative Efficiency and the Consumer Welfare Hypothesis, whereby the EU Court seeks to protect consumers and prevent harm, upholding the foundations set out in Article 38 of the CFREU.

b. Paragraph 26 and 27; Judgment in Case C-472/11 *Banif Plus Bank* (*Banif Plus Bank*, 2013).

ii. Case Analysis:

Normative Statements: Normative statements define the legal framework and establish obligations derived from the relevant European Union law. In this case, the normative basis lies in Directive 93/13/EEC on unfair terms in consumer contracts, in accordance with the foundations laid out in Article 38 of the Charter of Fundamental Rights of the European Union (CFREU), as well as Articles 4(f) and 101(1) of the Treaty on the Functioning of the European Union (TFEU).

Key provisions include: The principle of procedural autonomy, under which Member States retain authority over procedural rules for safeguarding EU-derived rights, subject to two overarching constraints: (i) Principle of equivalence: National procedural rules must be no less favorable than those applied to similar domestic actions; (ii) Principle of effectiveness: National rules must not make it practically impossible or excessively difficult to exercise EU-conferred rights.

Moreover, Directive 93/13 also stipulates that consumers must not be bound by unfair contractual terms, and national courts have a duty to apply this principle in practice. The judgment reiterates that under EU law, the effectiveness of consumer protection requires national courts to ensure that consumers are not bound by unfair terms. However, this is balanced by an acknowledgment that consumers retain autonomy to accept such terms if they knowingly choose to do so.

Interpretative Statements: Interpretative statements clarify how the normative obligations should be applied. Paragraphs 26 and 27 of the judgment provide important interpretations regarding procedural autonomy, the principles of equivalence and effectiveness, and the role of national courts:

- Paragraph 26: This paragraph interprets procedural autonomy in the context of EU consumer protection law. While procedural rules fall under national jurisdiction, they must align with EU law's principles of equivalence and effectiveness. This interpretation stresses

the importance of harmonizing national legal frameworks with the substantive rights guaranteed under Directive 93/13.

- Paragraph 27: The Court interprets the obligation of national courts to penalize unfair terms. Specifically, it clarifies that: (i) National courts must establish all consequences under domestic law to ensure that consumers are not bound by unfair terms; (ii) However, national courts are not required to automatically exclude an unfair term if the consumer, after being properly informed, does not intend to assert its unfair or non-binding nature.

This interpretation reflects a balance between ensuring robust consumer protection and respecting the autonomy of the consumer. It also emphasizes the proactive role of national courts in safeguarding consumer rights while preserving procedural flexibility.

Argumentative Statements: Argumentative statements justify the conclusions reached by connecting the legal obligations and their practical implications with broader principles of EU law.

- The judgment argues that the principles of equivalence and effectiveness are essential to ensuring that consumer protection under Directive 93/13 is not undermined by procedural variations across Member States. Without these principles, the fundamental objectives of EU consumer law—to eliminate unfair terms—would be jeopardized.
- The judgment further justifies the need for national courts to play an active role in penalizing unfair terms to ensure compliance with the directive. This duty is not absolute but requires courts to strike a balance between protecting consumers and respecting their autonomy, as seen in the interpretation of the consumer's right to accept a term despite its unfairness.
- The Court references prior judgments (e.g., *Asturcom Telecomunicaciones* and *Pannon GSM*) to reinforce the consistency of its legal reasoning. This enhances the legitimacy of the argument by placing it within a broader jurisprudential context.

Conclusion: The normative, interpretative, and argumentative statements in this case demonstrate the EU Court's effort to balance consumer protection with procedural autonomy under Directive 93/13. Normative statements establish the legal obligations of Member States and national courts. Interpretative statements clarify the interplay between procedural autonomy, equivalence, and effectiveness, while addressing the limits of consumer protection enforcement. Argumentative statements justify the Court's reasoning by emphasizing consistency with prior case law and the directive's goals.

This case illustrates how the conceptual model of legal reasoning integrates the principles of proportionality and reasonableness to achieve Allocative Efficiency and uphold the Consumer Welfare Hypothesis, ensuring consumer rights are protected without undermining procedural flexibility.

B. Within Peruvian Law:

- a. Paragraph 48 and 49; Administrative Judgement N°084-2022/CC3 (INDECOPI vs Supermercados Peruanos SA); N.º 054-2021/CC3-INDECOPI (INDECOPI vs SUPERMERCADOS PERUANOS S.A., 2022)

iii. Case Analysis:

Normative Statements: Normative statements establish the legal framework and obligations that guide the analysis of this case. The judgment draws from Article 201 of the Peruvian Civil Code, which provides that an error is grounds for the annulment of a legal act when it is both essential and knowable. Articles 202 and 203 of the Civil Code further elaborate the definitions of these criteria: (i) An essential error is one that is determinative for the party's decision to contract and is also considered significant according to common judgment in relation to the circumstances; and (ii) A knowable error is one that could reasonably have been detected by a person exercising normal diligence, given the context, content of the act, and the parties' attributes.

In this specific case, the discount offer promoted by the supplier, with a reduction of nearly 99% from the normal price, constitutes the core normative element. The normative framework obligates suppliers to fulfill their offers unless these offers are flawed in a manner that is both essential and knowable, which would render them unenforceable. This aligns with consumer protection principles that prohibit misleading offers or practices, ensuring fairness in contractual obligations, in accordance with Article 65 of the Peruvian Constitution and Article V of the Consumer Protection Code.

Interpretative Statements: Interpretative statements clarify how the legal norms apply to the facts of this case, ensuring their proper application within the specific circumstances:

- Paragraph 48: The judgment raises a reasonable doubt: whether a consumer could reasonably assume the offer to be legitimate. Initially, the supplier's obligation to fulfill offers suggests an affirmative answer. However, the Court interprets that if the terms of the offer are patently unreasonable (e.g., unrealistic discounts), the consumer may recognize a potential flaw, questioning the enforceability of the offer. This interpretation balances the supplier's obligations against the consumer's reasonable expectations and the principle of good faith.
- Paragraph 49: The interpretation of essential and knowable error becomes crucial. The Court highlights that offering discounts of nearly 99%, resulting in significant discrepancies from the normal cost, constitutes an essential error because the exaggerated discount was decisive for consumers' purchasing decisions. Furthermore, the error is considered knowable because any consumer exercising reasonable diligence could recognize the substantial and implausible nature of the discount.

This interpretation frames the offer as both flawed and unenforceable, aligning with Article 201 of the Civil Code while ensuring consumer rights are protected from misleading practices.

Argumentative Statements: Argumentative statements provide the reasoning behind the application of legal norms and their interpretation in the judgment:

- The Court argues that the principle of reasonableness is central to assessing whether the consumer could assume the offer was legitimate. While suppliers are generally bound to honour their offers, an offer that is patently unreasonable fails the threshold of enforceability. This reasoning incorporates consumer behavior analysis, recognizing that consumers rely on good faith but also possess a baseline capacity for reasonable judgment.

- The Court supports its conclusion by referring to the doctrine of essential and knowable error, arguing that:
 - a. The extreme nature of the discount was clearly determinative for the consumer's purchasing decision, satisfying the requirement of an essential error.
 - b. The implausibility of a 99% discount was easily detectable, meeting the knowable error requirement. A diligent consumer could recognize the discrepancy, making the supplier's offer unreasonable and invalid.
- This reasoning aligns with broader principles of consumer protection under Peruvian law, ensuring fairness in contractual relationships and deterring misleading commercial practices. It also emphasizes the balance between consumer diligence and supplier accountability.

Conclusion: This analysis demonstrates a cohesive application of normative, interpretative, and argumentative statements to evaluate the validity of the supplier's offer. The normative statements establish the legal framework of essential and knowable error under Articles 201, 202, and 203 of the Peruvian Civil Code. The interpretative statements clarify how these norms apply to the exaggerated discount offer, while the argumentative statements justify the Court's reasoning through the principles of reasonableness and consumer protection.

Ultimately, the judgment reflects the application of proportionality and reasonableness as legal standards, ensuring that consumers are not harmed by misleading practices while recognizing their duty to exercise basic diligence. In this way, a high level of consumer protection is ensured within the framework of the Consumer Welfare Hypothesis, as this basic consumer diligence does not result in harm.

- b. Paragraph 37 and 38; Administrative Judgement N° 3319-2018/SPC-INDECOPI (Martin Arnaldo Zapata Diaz vs Limaautos Automotriz del Peru S.A./MC Autos del Peru S.A., 2018).

iv. Case Analysis

Normative Statements: Normative statements define the legal obligations and principles guiding the resolution of this case. In this judgment, the legal framework is based on consumer protection principles established under Article V of the Consumer Protection Code and general contract interpretation norms within Peruvian law, within the boundaries of the foundations set out in Articles 3 and 65 of the Peruvian Constitution.

Consequently, key normative principles include:

- **Good faith and transparency in advertising:** Suppliers must ensure that advertisements provide clear and accurate information to avoid misleading consumers. Ambiguous or incomplete information that could mislead consumers breaches these principles.
- **Reasonableness in consumer interpretation:** Advertisements are assessed based on how a reasonable consumer would interpret the information, taking into account the market context and the characteristics of the targeted audience.

This normative framework underlines the obligation of suppliers to provide sufficient information to allow consumers to make informed decisions, while also considering the consumer's ability to reasonably interpret the advertisement.

Interpretation Statements: They clarify how the normative framework applies to the facts of the case.

- **Paragraph 37:** The Collegiate Body clarifies that there is no contradiction between the radio advertisements and the information provided on the Mitsubishi website. While the radio advertisements do not explicitly specify that the listed price refers to monthly instalment payments, the Body interprets this omission as insufficient to mislead a reasonable consumer into believing the listed price represents the total cost of the vehicle. The interpretation is grounded in the assumption that, within the automobile market, consumers are likely familiar with instalment-based pricing models.
- **Paragraph 38:** The Body further interprets the reasonableness of consumer expectations by evaluating the specific factual elements of the case. Two key factors are considered:
 1. **The market type:** The automobile market is characterized by instalment-based payment models, and consumers within this market are reasonably expected to understand that advertised prices often refer to monthly payments.
 2. **The complainant's profile:** The absence of evidence demonstrating that the complainant was in a state of vulnerability or lacked knowledge about the product further supports the conclusion that a reasonable consumer in this context would not have been misled.

This interpretation underscores the importance of considering both market norms and the individual circumstances of the complainant when assessing the reasonableness of consumer understanding.

Argumentative Statements: They provide the reasoning and justification for the Collegiate Body's conclusions, connecting the legal norms to the specific facts of the case.

- The judgment argues that the principle of reasonableness is central to resolving disputes over potentially misleading advertisements. In this case, the omission of explicit details in the radio advertisements is not sufficient to establish misleading conduct because the broader context (including the website information and the nature of the automobile market) allows a reasonable consumer to correctly interpret the advertisement.
- The judgment also emphasizes the complainant's duty to provide evidence of special vulnerability or lack of knowledge that could influence how the advertisement was understood. The absence of such evidence supports the Body's finding that the complainant was not misled.
- The Body balances the supplier's obligation to provide clear and accurate information with the consumer's responsibility to interpret advertisements reasonably within the norms of the relevant market. This reasoning reinforces the application of proportionality and reasonableness as legal standards in consumer disputes.

Conclusion: This case reflects a structured application of normative, interpretative, and argumentative statements to assess the reasonableness of advertising practices. The normative statements establish the supplier's obligation to provide transparent and non-misleading information. The interpretative statements clarify how these norms apply to the specific facts, particularly the context of the automobile market and the characteristics of the complainant. Finally, the argumentative statements justify the Body's conclusion by emphasizing the importance of reasonableness and proportionality in consumer interpretation.

This analysis highlights the balance between protecting consumers from misleading practices and recognizing their ability to interpret offers reasonably, aligning with broader consumer protection principles under Peruvian law, without conflicting with Allocative Efficiency or the Consumer Welfare Hypothesis, as this situation does not generate real harm to consumers.

As a result, case law within the European and Peruvian legal systems widely demonstrates that Allocative Efficiency in consumer protection can be effectively applied within the boundaries of proportionality and reasonableness by analyzing the reciprocity between the freedom to conduct business and a high level of consumer protection. This aligns with conceptual frameworks such as the one proposed by Professor FABRIZIO ESPOSITO regarding Allocative Efficiency and the Consumer Welfare Hypothesis.⁹⁶ This is the key justification for Consumer Sovereignty, recognizing that traders serve consumer interests and enabling the development of a conceptual model of legal reasoning for improved legal analysis, understanding, and problem-solving.

Therefore, the foundations developed under the fundamental right to a high level of consumer protection can be applied in both systems within the framework of Allocative Efficiency and the Consumer Welfare Hypothesis, but within the boundaries of proportionality and reasonableness. This applies as long as it is ensured that different contexts or factual situations, when analyzed in case law, do not promote harm to consumers.

In this regard, this is the main reason why legislative norms alone are insufficient to achieve this goal and require support from different sources of law to establish comprehensive legal reasoning. Principles are essential and provide direct interpretations where legislative norms fail to make distinctions. However, this mindset should not be applied solely within case law but should be continuously developed to provide legal specialists with a practical tool for their daily work. This approach is the most effective way to ensure not only competition but also compliance within the boundaries of reciprocity and informational transparency in provider/trader-consumer relations.

4.9. Connecting the Dots: A Shift in Mindset towards Consumer Welfare Hypothesis for Constructing Legal Reasoning

As demonstrated throughout the dissertation, the Consumer Welfare Hypothesis serves as a foundational concept within both European and Peruvian legal systems, as reflected in their legislation and jurisprudence. In these systems, traders or providers are free to compete among themselves to meet consumer interests and deliver optimal goods and services, provided that such activities do not harm consumers. Furthermore, e-commerce has grown significantly; for instance, the turnover in European B2C e-commerce increased from €849 billion in 2021 to €899 billion in 2022.⁹⁷

In the same vein, Peru is one of the main e-commerce markets in Latin America and the Caribbean. Although its development is still in its early stages, there are opportunities for maturation and growth. According to estimates by the Peruvian Chamber of Electronic Commerce (CAPECE), e-commerce sales exceeded 9 billion dollars in 2021 and reached 12 billion dollars in 2022⁹⁸.

⁹⁶ ESPOSITO, FABRIZIO; Op cit footnote 69.

⁹⁷ CASSETTI LUCAS; "A word from Ecommerce Europe"; Ecommerce Europe; 2023; Amsterdam, pp.2

⁹⁸ NACIONES UNIDAS; PERÚ: "Evaluación sobre el estado de preparación para el comercio electrónico"; Naciones Unidas; 2023; Ginebra; pp.2

Consequently, online sales contracts, regulated by (i) generic terms and conditions and (ii) simple models of refund and return policies, do not reflect a fair balance and transparency in B2C online transactions. It is precisely in this scenario where the application of the Consumer Welfare Hypothesis is needed, not from a normative pluralism point of view, but from an allocative perspective, empowered by reciprocity enforced within the construction of legal reasoning. On this topic, Professor FABRIZIO ESPOSITO is quite expressive and provides an example where informational asymmetries can be easily overcome by competition through allocative efficiency. Moreover, this situation can only be achieved by (i) understanding providers or traders as servants of consumer interests, (ii) protecting the market with a win-win perspective (on the long-term run), and (iii) the strict application of what Article 7 of the DSA refers to as good faith and due diligence⁹⁹.

Therefore, to achieve allocative efficiency and consumer sovereignty, the relationship between providers or traders and consumers should operate within the boundaries of reciprocity and be carefully constructed through legal reasoning. This goal can be accomplished not only through legislative norms but also through contractual agreements and market practices, with due consideration for proportionality and reasonableness in the construction of legal reasoning.

Regarding the following, it is indeed a question of good faith among the parties when negotiating, forming, executing, and post-executing contracts. Moreover, case-law C-237/02 - *Freiburger Kommunalbauten* exemplifies this relationship, which must be taken into account when analyzing unfair clauses within contracts, considering the specific context in which the reciprocity of the parties has been a determining factor. See paragraphs 20-22 of the Judgment.

In that sense, the Consumer Welfare Hypothesis, as consistently observed, is constructed within the boundaries of competition and reciprocity to serve consumers' interests through the application of good faith. As illustrated in case-law C-237/02 - *Freiburger Kommunalbauten*, the judicial decision can be framed within the conceptual model of legal reasoning that has been extensively explained:

- i. **Foundations:** As mentioned before, legal reasoning within the Consumer Welfare Hypothesis begins with a systematic application of Article 38 of the Charter of Fundamental Rights of the European Union (CFREU) alongside Articles 4 (f) and 101(1) of the Treaty on the Functioning of the European Union (TFEU). From this foundation, allocative efficiency can be applied in the following ways:
- ii. **On Harm:** The Consumer Welfare Hypothesis, in line with the CFREU and TFEU, acknowledges that harming competitors may be necessary to ensure adequate consumer protection within a competitive market. Therefore, to determine if a particular term harms or not a consumer, article 4 of Directive 93/13/EEC establishes that the nature of goods and services for which the contract was concluded, must be duly analysed.
- iii. **On Defenses and Exceptions:** Here, proportionality must be evaluated within the framework of internal defenses and exceptions. This concept derives directly from the scope of consumer protection and its inherent limitations, rather than from external sources beyond the consumer protection domain. However, Directive 93/13/EEC does not develop this point, leaving it to legal reasoning through analysis of Normative, Interpretative, and Argumentative Statements in court. Thus, establishing a proportionate and reasonable approach to legal reasoning can follow the following criteria established:

⁹⁹ ESPOSITO, FABRIZIO; Op cit footnote 69. pp. 19-20

1. **Normative Analysis:** The judgment establishes that the annex in Article 3(3) of the Directive is non-exhaustive, meaning it serves as an indicative guideline rather than a definitive list of unfair terms. It highlights the need to evaluate the unfairness of terms based on the nature of the goods or services, the circumstances surrounding the contract's conclusion, and the applicable legal consequences under national law. While the Court interprets general criteria for unfair terms, it refrains from applying them to specific cases, leaving this task to national courts.
 2. **Interpretative Analysis:** The Court employs a purposive interpretation of the Directive, ensuring flexibility and adaptability to different contractual contexts. It interprets Article 3(3) as providing guidance rather than rigid standards, ensuring broader consumer protection. By emphasizing the importance of contextual factors—such as the nature of transactions and legal consequences—the Court aligns its interpretation with the Directive's objective. It also maintains subsidiarity by limiting its role to defining general criteria, leaving the application of these criteria to national courts.
 3. **Argumentative Analysis:** The judgment effectively argues that the non-exhaustive nature of the annex allows the Directive to adapt to evolving unfair contractual practices, supporting consumer protection goals. The focus on context-specific evaluations ensures that determinations of unfairness remain fair and responsive to the unique circumstances of each contract.
- iv. **Sanctions:** within the Consumer Welfare Hypothesis for allocative efficiency can be divided into pecuniary and non-pecuniary types. In contrast, the Total Welfare Hypothesis considers only pecuniary sanctions. Consequently, the range of sanctions under the Consumer Welfare Hypothesis is diverse, depending on the harm caused. Directive 93/13/EEC is broad on this point, leaving its application to the discretion of member states, which may choose to implement more than just pecuniary sanctions, unlike the Total Welfare Hypothesis that focuses solely on maximization through pecuniary sanctions. Nevertheless, in this specific case, no sanction is recommended since no harm has been found to the consumer. In this regard, no violation of the Consumer Welfare Hypothesis as a foundation has been found.
- v. **Deadweight loss, elasticity, and productive efficiency:** These variables are relevant insofar as they impact consumers' interests; accordingly, deadweight loss is significant but typically less so compared to transfers. The same applies to the elasticity of demand. Therefore, productive efficiency is important to the extent that it influences outcomes for consumers, who remain the central focus. Articles 3 and 4 of Directive 93/13/EEC clearly take these variables into account in the analysed case.

In this way, the conceptual model of legal reasoning within consumer protection and online sales contracts can be applied to future cases to seek for optimal solutions under the boundaries of allocative efficiency and Consumer Welfare Hypothesis. This involves applying principles of proportionality and reasonableness, to construct a concrete balance between the freedom to conduct business and a high level of protection, within the limits of adequacy and necessity of each individual context on topic. There, professionals can count with a diligent and optimal mindset that must be developed to ensure market protection, as exposed through the following dissertation.

Unfortunately, jurisprudence in consumer protection and online sales contracts under European Directives, while showing advancements and innovative approaches to online platform regulation, is still lacking and needed for the better development of case law. However, I strongly believe that the proposed conceptual model of legal reasoning will significantly aid the development of future case law on the topic.

V. ESTABLISHING A CONCEPTUAL MODEL OF LEGAL REASONING IN CONSUMER PROTECTION AND ONLINE SALES CONTRACTS FOLLOWING THE CONSUMER WELFARE HYPOTHESIS: TOWARDS A STANDARD FORMULA WITHIN THE BOUNDARIES OF PROPORTIONALITY AND REASONABLENESS

As demonstrated throughout this dissertation, proportionality and reasonableness can be considered universal principles that transcend the boundaries of legislative norms because they serve as foundational concepts. Furthermore, both principles function as legal standards that are particularly significant in the context of contract usage, especially in consumer protection. Experience has shown that informational asymmetries highlight an imbalance between providers or traders and consumers. For these reasons, these principles are essential to legal reasoning.

Consequently, as pointed out by Professor FABRIZIO ESPOSITO, information asymmetries can be categorized into two types: (i) those related to private information, which is unknown to the counterparty (hidden knowledge); and (ii) actions that the counterparty cannot observe, verify, or evaluate (hidden action).¹⁰⁰ This aligns with the importance of fostering a mindset of proportionality and reasonableness to fulfill the principles of good faith and due diligence among parties. It is important to understand that consumers may find themselves in a disadvantaged position due to hidden knowledge and hidden action.

That is why the Consumer Welfare Hypothesis, based on Allocative Efficiency and Consumer Sovereignty, is relevant because it establishes an important legal concept in which providers or traders act as servants of consumer interest as an end. This is contrary to what is known as the Total Welfare Hypothesis, where protecting consumers is instrumental to the maximization of total welfare. However, the key factor is to understand that Allocative Efficiency and Consumer Sovereignty can be achieved through reciprocity.

It is important to understand that reciprocity can be found or developed within any source of law, but it requires proportionate and reasonable conduct among parties to be effective (this refers to human conduct in execution). In this regard, throughout the following dissertation, it has been proven that the Allocative Efficiency and Consumer Welfare Hypothesis, as aspects of consumer theory, can be identified within the European and Peruvian legal systems, embedded in the protection of fundamental rights. As specified by Professor GIORGIO PINO, this is achieved through a proper test of proportionality, supported by the analysis, interpretation, and argumentation of legislative norms¹⁰¹.

In this sense, this dissertation, apart from proving that the Allocative Efficiency and Consumer Welfare Hypothesis can be duly founded in both legal systems, proposes to establish a conceptual model of legal reasoning applied to consumer protection and online sales contracts, especially given the lack of developed jurisprudence on the subject.

Therefore, legal reasoning within the Consumer Welfare Hypothesis begins with a systematic application of fundamental rights, which both systems share at a high level of consumer protection, under the boundaries of proportionality and reasonableness. From this foundation,

¹⁰⁰ ESPOSITO, FABRIZIO; Op cit footnote 69. pp. 27.

¹⁰¹ PINO, GIORGIO; "Fundamental rights and the proportionality principle"; *Derecho & Sociedades* 48 Asociación Civil, Lima, 2016, pp 199-211.

allocative efficiency can then be applied, following the schematic approach developed by Professor FABRIZIO ESPOSITO within the Consumer Welfare Hypothesis.¹⁰²

On Harm: The Consumer Welfare Hypothesis, in line with the CFREU, TFEU or the Peruvian Constitution dispositions on consumer protection (granted as fundamental right in both legal systems), acknowledges that harming competitors may be necessary to ensure adequate consumer protection within a competitive market.

On Defenses and Exceptions: This concept stems directly from the scope of consumer protection and its inherent limitations, rather than from external sources beyond the consumer protection domain. However, legislative norms—specifically those found in the European legislation or the Peruvian consumer protection legislation—do not address this point in detail, confining themselves to grammatical provisions. At this juncture, legal reasoning must undertake an analysis of normative, interpretative, and argumentative statements as reflected in court decisions and case law. Establishing a proportionate and reasonable approach to legal reasoning within the confines of interpretation is, therefore, essential. This "*reverse engineering*" of legal reasoning serves to ensure compliance with foundational principles.

In this sense, defences and exception must be develop under this schematic for case analysis:

1. **Normative Statements:** Legislative norms on consumer protection and online sales contracts as exposed and founded in the European Legal System or the Peruvian Legal System.
2. **Interpretative Statements:** To give a meaning to normative statements according, and in so doing, produce a line or interpretation without changing grammatically speaking the norm. For the following, Allocative Efficiency and Consumer Welfare Hypothesis must be spotted within foundations, and concord with a line of rights defence and protection:
 - **Identify Fundamental Rights on Conflict:** The professional must identify the fundamental rights at stake and, according to the conceptual model, determine the foundational concept being protected in the topic. Specifically, within the boundaries of proportionality and reasonableness, we have identified that both legal systems align with Allocative Efficiency and the Consumer Welfare Hypothesis to support market protection and development.
 - **Balancing Legislative Obligations towards Consumer Welfare Hypothesis:** Systematic interpretation and application of legislative norms are crucial to balancing conflicting rights. The European and Peruvian legal systems, though differing in approaches and contexts, exemplify how freedom of contract and consumer protection can interact within the boundaries of reasonableness, as viewed from a fundamental rights perspective. Therefore, if the foundational concept protected in the topic aligns correctly with Allocative Efficiency and the Consumer Welfare Hypothesis, consumer protection within online sales contracts must strive for a fair balance and good faith. The ultimate objective should be to prevent harm to consumers while ensuring optimal market protection.
3. **Argumentative Statements:** Assigning meaning to normative statements through interpretation requires justifying the interpretative statement. At this stage, while the

¹⁰² FABRIZIO ESPOSITO, Op cit footnote 69, pp 74-84.

foundational principles and a line of interpretation have been identified, it is essential to evaluate the following:

- **Adequacy of Interpretation Statements to Context:** The identified line of interpretation must be adapted and applied to the factual context of conflicts concerning consumer protection and online sales contracts. Therefore, in alignment with Allocative Efficiency and the Consumer Welfare Hypothesis, it is necessary to determine whether the contractual conflict between the Trader/Provider and the Consumer, within the boundaries of proportionality and reasonableness, is indeed causing harm to consumers under the framework of Market Protection. Consequently, at this stage of analysis, it is crucial to study the facts and context to identify potential violations of the foundational principles underlying the line of interpretation, and, most importantly, to assess the harm caused to consumers.
- **Assessment of Necessity:** In this context, applying the proportionality test is vital, as the necessity of consumer protection must be thoroughly analysed to identify potential harm. The assessment of necessity should determine whether certain fundamental rights, within the systematic interpretation of legislative norms on the topic, are being violated and whether they align with the Consumer Welfare Hypothesis. Additionally, it is crucial to evaluate how necessary and severe the line of interpretation and argument must be, based on the facts and context, to justify robust consumer protection in the specific conflict or case law.

Sanctions within the Consumer Welfare Hypothesis, sanctions for allocative efficiency can be divided into pecuniary and non-pecuniary types. In contrast, the Total Welfare Hypothesis considers only pecuniary sanctions. Consequently, the range of sanctions under the Consumer Welfare Hypothesis is diverse, depending on the harm caused. This approach complies with the EU and Peruvian legal systems, as studied, and can be duly determined based on the particularities of case law.

Deadweight loss, elasticity, and productive efficiency: These variables are relevant insofar as they impact consumers' interests; accordingly, deadweight loss is significant but typically less so compared to transfers. The same applies to the elasticity of demand. Therefore, productive efficiency is important to the extent that it influences outcomes for consumers, who remain the central focus.

The aforementioned framework serves as a valuable foundational tool for scholarly analysis, particularly in relation to case law concerning consumer protection and online sales contracts. It ensures allocative efficiency under the Consumer Welfare Hypothesis and adheres to the universal principles of proportionality and reasonableness. When drafting legislative norms or analysing case law, it is essential to cultivate a mindset conducive to sound legal reasoning, which helps legal professionals effectively structure case law analysis to achieve optimal solutions.

Additionally, nowadays, the development of legal reasoning within defences and exceptions, which lies at the core of case analysis, requires (i) interpretation and (ii) argumentation of normative statements of legislative norms. This is even more crucial when legal systems, as noted by the author MARCELA ISZASCUM BASTERRA, present axiological gaps or loopholes that necessitate legal reasoning to ensure justice. Even if a solution is contemplated within the legal system, it may fail to achieve justice due to the underdevelopment of legal reasoning necessary to safeguard fundamental rights. (ISZASCUM BASTERRA, 2000, p. 284)

In the same vein, WERNER GOLDSMIDT refers to axiological gaps or loopholes as *dikelogical*, as all legal systems must always ensure justice. Thus, legal reasoning plays a crucial role in fulfilling this objective, since exceptions and defences are necessary to properly construct a line of interpretation and argumentation when legal norms need to be analysed. (GOLDSMIDT, 1978, pp. 291-293)

Consequently, based on the fundamental rights protection thesis proposed by Professor FABRIZIO ESPOSITO on Allocative Efficiency and the Consumer Welfare Hypothesis¹⁰³, the line of interpretation can be followed in accordance with the following formula:

1. **Identify Fundamental Rights on Conflict:** In this specific case, the two main rights that are in constant conflict are the “freedom of contract” or “freedom to conduct business” and Consumer Protection or a High Level of Consumer Protection.

By applying the Consumer Welfare Hypothesis as a foundation, the approach will be to balance both rights and establish priorities. To fulfil the hypothesis under the principle of cooperation, it must be established that 'freedom of contract' or 'freedom to conduct business' should ultimately serve consumer protection. Furthermore, it is important to acknowledge that information asymmetries place consumers in a weaker position, especially considering that hidden knowledge and hidden actions are contingent.

Moreover, legal specialists must consider the nature of the goods or services that consumers are acquiring through online platforms, as well as the level of informational asymmetry that may exist. For example, in the goods sector, purchasing clothing is not the same as buying toys, electronics such as smartwatches, laptops, iPads, iPhones, among others.

Therefore, informational asymmetries vary significantly depending on the type of contract for goods and services to be fulfilled and the type of contract to be concluded, which places providers or traders and consumers at different levels of knowledge and access to transparency and information.

This is the main reason why Article 7 of the DSA, for example, establishes obligations of good faith and diligence for providers of intermediary services when conducting voluntary investigations on their own initiative to ensure transparency, informational accuracy, and the eradication of illegal content that may affect consumers due to informational asymmetries. The DSA can be considered an advanced piece of legislation within the European Union legal system regarding e-commerce.

Despite the absence of specific legislation on e-commerce in the Peruvian legal system, Article V of the Peruvian Consumer Protection Code broadly addresses the obligations outlined in Article 7 of the DSA. Therefore, it is up to legal specialists, regulators, judges, lawyers, academics, and others to analyse and apply this first step of the formula, considering not only fundamental rights but also the Consumer Welfare Hypothesis, as well as its foundation within the Peruvian Constitution (1993) and consumer protection law.

Finally, the balancing of fundamental rights can be referred to as a proportionality test in the strict sense on foundational basis.

¹⁰³ FABRIZIO ESPOSITO, Op cit footnote 69.

- 2. Balancing Legislative Obligations towards Consumer Welfare Hypothesis:** After passing the first step of the formula regarding fundamental rights found within charters or constitutions (e.g., (i) The Charter of Fundamental Rights of the European Union, or (ii) the Peruvian Constitution (1993), as analyzed throughout the entire dissertation), it is important for legal specialists to identify which legislative norms develop these fundamental rights in conflict and to what extent.

This is fundamental for establishing a systematic interpretation between fundamental rights and legislative norms. For example, 'freedom to conduct business' (as set out in Article 16 of the Charter of Fundamental Rights of the European Union) must be balanced with contractual fairness, good faith, and transparency obligations, as provided in Article 7 of the DSA, Articles 6 and 8 of Directive 2011/83/EU, or the provisions contained in Directive 93/13/EEC, Directive 770/2019, and Directive 771/2019 within the European legal system.

On the other hand, in the Peruvian legal system, it is also crucial to establish a systematic interpretation, for example, the “freedom of contracts” (as set out in Article 62 of the Peruvian Constitution of 1993) and Articles 1354, 1362, and 1529 of the Civil Code and Article V of the Peruvian Consumer Protection Code. Unfortunately, since Peru does not have specific legislation on consumer protection within online sales contracts, the general provisions contained in the Peruvian Civil Code and the Consumer Protection Code must apply.

This process should always be carried out by legal specialists and serve as a reasonableness test, aiming to establish a pattern of systematic interpretation within legal systems. It is, indeed, the second step of the following formula, moving toward a Consumer Welfare Hypothesis mindset, as previously identified in both systems as foundational.

In this regard, the following can be achieved by applying principles as a fundamental source of law (in this case, proportionality and reasonableness), which contributes not only to prioritizing legal norms but also to establishing a systematic interpretation aimed at preventing harm to consumers or determining whether harm has occurred in case analysis. According to Professor ALFREDO BULLARD GONZALES, systematic interpretation is a crucial method for overcoming textual imperfections, which can be corrected through a comprehensive reading of related legislative norms that apply simultaneously and appropriately. The same method can be used to correct imperfect contracts with flawed clauses as a fundamental step in legal reasoning.¹⁰⁴

In this way, by identifying fundamental rights in conflict and determine foundations to be followed, in this specific case Allocative Efficiency and Consumer Welfare Hypothesis, it is possible to balance legislative norms obligations towards foundation protection. This is the correct and organized way to establish an interpretational line which then must be reinforced with an argumentation following the next formula:

- 3. Adequacy of Interpretation Statements to Context:** This involves the skill of the legal specialist, who, after identifying the fundamental rights in conflict, applies a test of proportionality and determines that “freedom of contract” or “freedom to conduct business”

¹⁰⁴ BULLARD GONZALES, Alfredo (2010). “Análisis Económico de la interpretación contractual en el sistema peruano”. En: Revista de Derecho Económico, Tomo 1, Guayaquil: Universidad Católica de Santiago de Guayaquil, Facultad de Jurisprudencia, pp. 101-146.

and Consumer Protection or a High Level of Consumer Protection must be applied accordingly, with the understanding that providers or traders, within the boundaries of competition, serve the interests of the consumer.

Then, by passing the reasonableness test in the concrete application of the systematic interpretation of contractual and consumer protection legislative norms, under the concept of the Consumer Welfare Hypothesis, it is crucial to analyse the adequacy of the measures, according to each case law context. This is especially important, as pointed out in Paragraph 21 of the Judgment referred to in case-law C-237/02 - *Freiburger Kommunalbauten*.

In this regard, the measures to be applied must be adequate to the nature of the goods, time, price, circumstances, and other relevant factors when elaborating, negotiating, and concluding the contract. This is why it is important to consider adequacy, especially in the drafting of terms and conditions or the negotiation of online sales contracts, since goods and services differ in each individual case context.

Therefore, as defended by Professor FABRIZIO ESPOSITO, adequacy of legislative norms, guidelines or contractual clauses must be done having as north the Consumer Welfare Hypothesis, understanding the following: *“consumer harm is intrinsically problematic; harm to competitors (and others) is only instrumentally problematic, so that when competitors are harmed but consumers benefit, the conduct is desirable.”*¹⁰⁵ In that sense, context is essential for building a line of argumentation, but it must remain within the boundaries of interpretative statements that duly respect foundational principles—in this case, the proposed framework of Allocative Efficiency and the Consumer Welfare Hypothesis in both legal systems under analysis.

Consequently, this adds an additional layer of effort to the work and professional diligence of legal specialists, as the next step is to implement adequate measures for argumentation, considering contextual signals and staying within the boundaries of the established foundations. In this specific context, consumer protection should be prioritized over the interests of providers or traders, especially when information asymmetries reveal a significant imbalance to the detriment of consumers. As observed, this is a universal concept that can be applied within any legal system, and it is desirable for specialists and professionals to operate within the boundaries of sustainability to prevent consumer harm.

- 4. Assessment of Necessity:** Finally, it is important to keep in mind that the test of proportionality, which involves balancing fundamental rights, systematic interpretation of legal norms, and the adequacy of measures to be applied accordingly, must also be analyzed within the boundaries of concrete necessity. Therefore, assessment of necessity within the application of specific legal institutions is indeed the last step of the formula to be applied.

In this regards, Professor LUIS PRIETO SANCHÍS establishes that any intervention in the realm of rights that involves a sacrifice in their exercise must be justified and proportional to the need to preserve a good of analogous importance, directly or indirectly connected to the very constellation of values on which the rights rest¹⁰⁶. In this case, the Consumer Welfare Hypothesis which balance Consumer benefit over Competitors.

¹⁰⁵ ESPOSITO, FABRIZIO; Op cit footnote 69. pp. 140.

¹⁰⁶ PRIETO SANCHÍS, LUIS, “Diez argumentos sobre neoconstitucionalismo, juicio de ponderación y derechos fundamentales”. En: Luis Ortega y Susana de la Sierra (Coords). Ponderación y derecho administrativo. Marcial Pons, 2009, pp. 53-54.

Therefore necessity, finds its essence within the very confines of the Constitutional State model, built on anthropocentric premises that is, on the recognition of human freedom and dignity. Moreover, Professor JAVIER BARNES will argue that “(...) *the principle of proportionality embodies a fundamental idea of substantive justice: the prohibition of any sacrifice of freedom that is useless, unnecessary, or disproportionate*¹⁰⁷.”

Consequently, Professor GIORGIO PINO also argues that the principle of proportionality “admits several complementary foundations¹⁰⁸,” namely: (i) the very nature of the principles of fundamental rights; (ii) the principle of the Rule of Law; (iii) the principle of justice; and (iv) the principle of the prohibition of arbitrariness. This is why necessity must be evaluated to determine if certain fundamental rights, within the systematic interpretation of legislative norms on the topic, have adequate measures to promote liberty and human dignity as the ultimate fundamental rights or principles.

Concerning Consumer Protection and online sales contracts, necessity should be found within the boundaries of a fair balance between “freedom of contract” or “freedom to conduct business” and “High Consumer Protection”, to promote liberty and human dignity in the boundaries of justice and sustainability. Even if it is not explicitly included in the 17 Sustainable Development Goals of the United Nations¹⁰⁹, the Consumer Welfare Hypothesis aims for sustainability, as the concept seeks responsible competition.

In this sense, it is indeed possible not only to recognize the importance of legal reasoning in law but also to propose a conceptual model of legal reasoning for legal professionals in consumer protection and online sales contracts, following the Consumer Welfare Hypothesis as a foundational principle. This model is deeply analyzed and envisioned within two different legal systems that share the common goal of protecting fundamental rights in this area.

This established conceptual model is significant because it not only provides a structured approach to analysing and formulating normative, interpretative, and argumentative statements but also facilitates the practical application of two universal principles—proportionality and reasonableness—that are foundational in law. While these principles have been extensively examined, their application remains challenging due to the lack of a standardized analytical framework.

¹⁰⁷ BARNES, JAVIER, “El principio de proporcionalidad. Estudio preliminar”. En: Cuadernos de Derecho Público, N.º 5, especial dedicado al estudio del Principio de proporcionalidad. Madrid: INAP, 1998, p. 19.

¹⁰⁸ PINO, GIORGIO; Op cit footnote 101.

¹⁰⁹ UNITED NATIONS, Sustainable Development Goals within United Nations, 2024, <https://sdgs.un.org/goals>

VI. DEVELOPING FINAL CONCLUSIONS

As analysed throughout the dissertation, it is necessary to internalize that legislative norm, while useful as a source of law, are not the only determining factor within the realms of Consumer Protection and Online Sales Contracts. This is particularly true given that both areas (i) are not codified at the international level and (ii) are constantly evolving due to technological advances. Consequently, it is important to establish a tentative and broad concept of Consumer Protection within this specific field.

Moreover, there are other sources of law that serve as guidelines and have universal application, such as principles—specifically, the principles of proportionality and reasonableness—which can be established as legal standards. Both principles are as important as legal norms and have the capacity to be applied broadly and comprehensively through case-by-case analysis. Even in the context of this discussion presented in the dissertation, these principles can serve as practical guidelines, helping to establish a specific mindset for legal reasoning, as seen in consumer protection and online sales contracts.

If legal specialists internalize and follow proportionality and reasonableness as guidelines for legal standards, applying both principles on a daily basis through a progressive test of proportionality, which involves the application of the conceptual model of legal reasoning, which permits enables to balance fundamental rights, systematically interpretate legal norms, and assess the adequacy of measures within the boundaries of concrete necessity, for the development of (i) Sustainable Terms and Conditions for Online Sales and (ii) Sustainable Refund Policies. This will definitely fulfil more transparency and market protection duties, which are considered fundamental rights.

Online platforms such as Meta, Google, YouTube, Twitter, Microsoft, and others are updating their private policies to comply with Regulation 2022/2065 (DSA) for example, based on Article 7—and likely also within the framework of Directive 770/2019 and Directive 771/2019 (EU).

This is why the conceptual model of legal reasoning, within the boundaries of proportionality and reasonableness, is practical. It enables online platforms to develop private compliance guidelines while also facilitating an organized and logical approach to case analysis, ensuring adherence to fundamental legal foundations as explained.

Likewise, as studied and discussed, the European Union legal system and the Peruvian legal system, both being positivist systems, share the same approach, differing only in the advancement or specificity of legislative norms. This is the main reason, as pointed out by Professor FABRIZIO ESPOSITO, why it is important to establish a universal concept that can be framed within the boundaries of proportionality and reasonableness. This is particularly relevant in the case of the Consumer Welfare Hypothesis, which offers an innovative approach to the topic without prejudice to changes in legal norms or jurisprudential approaches¹¹⁰.

The Consumer Welfare Hypothesis is the main concept, which asserts that providers or traders, under a competition approach derived from the fundamental right of market protection, are servants of consumer interest maximization. From a legal-economic point of view, this is efficient because it promotes competition to its fullest extent; moreover, as pointed out by

¹¹⁰ ESPOSITO, FABRIZIO; Op cit footnote 69. pp. 180-183.

Professor POSNER, disregarding legal reasoning offers a limited approach, even for predicting jurisprudence¹¹¹. Therefore, to achieve the following, it is crucial to count with legal reasoning, which develops foundational concepts for legal analysis. These concepts, viewed through the lens of different sources of law, find their essence not exclusively in legislative norms but in the application of principles, as is the case with the Consumer Welfare Hypothesis, which is based on Allocative Efficiency and Consumer Sovereignty.

However, what the practical application lacks is (i) an organized conceptual model of legal reasoning to guide legal specialists in their analysis of the topic and (ii) explicit recognition of proportionality and reasonableness as universal legal standards with consistent application. This deficiency is evident in various jurisprudence not only at the EU level but also within the Peruvian legal system. For example, consider Case C-237/02 - *Freiburger Kommunalbauten*; Case C-173/23 - *Eventmedia Soluciones*; Case C-472/11 - *Banif Plus Bank*; Administrative Judgment No. 084-2022/CC3 (*INDECOPI vs. Supermercados Peruanos S.A.*); and Administrative Judgment No. 3319-2018/SPC-INDECOPI (*Martin Arnaldo Zapata Diaz vs. Limaautos Automotriz del Peru S.A.C/MC Autos del Peru S.A.*).

Unfortunately, neither legal system has developed jurisprudence to date on this specific topic concerning the application of Regulation 2022/2065 (DSA), Directive 770/2019, and Directive 771/2019, which are relevant to consumer protection and online sales contracts. Nevertheless, there is existing jurisprudence on other consumer protection topics, such as unfair clauses in the offline world, like those mentioned above. However, this jurisprudence follows legal foundations in a disorganized manner, as there is no clearly established conceptual model of legal reasoning for analysis.

Nevertheless, the conceptual model of legal reasoning is currently being applied in consumer protection cases, not directly within consumer protection and online sales contracts, but rather in ensuring contractual fair balance within the boundaries of proportionality and reasonableness. In the following two cases to be presented, the defence strategy was developed by the dissertation author, following the schematic rationale, and resulted in unanimous victory:

1. Case N° 1514-2022/CC2 - INDECOPI (Aimee Araceli Jimenez Perez vs Alcion Inversiones S.A.C.)

a. Defence developed by dissertation author against Alcion Inversiones S.A.C

1. Normative Statements Analysis: The complaint is based on the Consumer Protection Code (CPC), the Civil Code, and the Constitution, highlighting:

- Suitability Obligation (CPC Articles 18° and 19°): The provider must ensure the product meets what was promised.
- Constitutional Rights (Articles 1°, 2°, and 3°): Protection of dignity, property, and consumer well-being.
- Contract Execution (Civil Code Article 1362°): Requires good faith in fulfilling obligations.
- Procedural Rules (CPC Article 106.2 and Civil Procedural Code Title XV): Justifies the claim for costs.

¹¹¹ POSNER RA, *Frontiers of Legal Theory* (HUP 2001)

Additionally, the principles of proportionality and reasonableness strengthen the fair enforcement of these norms under the systematic application of Articles 3 and 200 of the Peruvian Constitution (1993).

2. Interpretative Statements Analysis: The complaint argues that:

- Proportionality: The provider's response does not match the harm caused. The company's demand for a consumer-funded expert report imposes an excessive burden.
- Reasonableness: Expecting a new property in perfect condition is justified. The delayed response and lack of communication are unreasonable. The offered compensation (S/ 2,750.00) is insufficient to cover actual damages.

3. Argumentative Statements Analysis: The claim is backed by:

- Objective Facts: The property has structural defects, documented in technical and municipal or district authority reports.
- Legal Grounds: Violations of the CPC, Constitution, and Civil Code prove non-compliance.
- Proportional and Reasonable Remedies: The requested sanctions, repairs, and compensation should match the impact on the consumer.

b. Final Resolution N° 671-2024/CC2 As Follows Conceptual Model of Legal Reasoning:

- **On harm:** Legal reasoning follows the Peruvian Consumer Protection Code (CPC) and Constitution, emphasizing suitability duty (Articles 18 & 19, CPC) and transparency (Article V), with proportionality and reasonableness ensuring fair application. The judgment confirms the real estate company failed to meet suitability obligations by delivering a defective apartment with misaligned doors, faulty outlets, and water leakage, violating consumer rights. The provider failed to prove compliance.
- **On Defences and Exceptions:** (i) the proportionality principle applies in determining the adequacy of the company's responses. The company acknowledged certain defects but attempted to shift responsibility by citing prior inspections; (ii) Reasonableness was assessed by evaluating whether the defects could have been foreseen and whether corrective actions were properly offered. The resolution found the company's actions insufficient and unreasonable under the CPC; and (iii) The contractual terms under fair balance and good faith, allows for contextual analysis of contract breaches. The Consumer Commissioners upheld a broad interpretation of consumer rights, deferring the specific application to national authorities.
- **Sanctions:** The company was found liable for violations of consumer protection laws. Consequently, corrective measures were imposed, including: (i) The obligation to fix the property defects; (ii) Ensuring proper channels for consumer complaints; (iii) A financial penalty proportionate to the harm caused.

- **Deadweight Loss, Elasticity, and Productive Efficiency:** The resolution aligns with Articles 3 and 4 of Directive 93/13/EEC, considering economic factors like deadweight loss and market efficiency, ensuring that consumer protection does not disrupt market balance.
- **Conclusion:** The real estate company was sanctioned for failing to provide a property that met legal suitability standards. The resolution reinforces consumer rights through proportional and reasonable enforcement, ensuring that corrective actions are effective and fair. The vote was unanimous among the four Consumer Protection Commissioners.

2. Case N° 2066-2022/CC1 - INDECOPI (Familia Kaufman vs BANCO DE CREDITO DEL PERU & CREDICORP CAPITAL S.A.)

a. Defence developed by dissertation author against BANCO DE CREDITO DEL PERU (BCP) & CREDICORP CAPITAL S.A. (CREDICORP)

1. **Normative Statements Analysis:** The complaint is based on the Consumer Protection and Defence Code (CPC):

- Suitability Obligation (Articles 18 & 19 CPC): The financial institution must ensure proper fund management.
- Duty of Information (Article 1.1(b) & Article 2 CPC): Providers must inform consumers about significant transactions.
- Procedural Rights (Article 107 CPC): Allows consumers to file complaints for violations of financial service obligations.

Proportionality & Reasonableness: The complaint argues that BCP and CREDICORP failure to investigate the alleged fraud and its lack of response were disproportionate to its duty of diligence and unreasonable given the nature of the financial services.

2. **Interpretative Statements Analysis:** The case questions whether BCP and CREDICORP failed in:

- Securing funds: The complainants' mutual funds were withdrawn without consent.
- Providing timely information: BCP delayed its response by six months.
- Ensuring contract fairness: Alleged signature forgery was ignored.
- Proportionality & Reasonableness: The lack of security measures and delayed action warrant corrective measures.

3. **Argumentative Statements Analysis:**

i. **Facts**

- Complainants deposited \$13,000 in 2007; funds were allegedly withdrawn in 2008.

- They denied authorizing the withdrawal and requested a handwriting analysis.
- BCP & CREDICORP failed to investigate and provide original documents.

ii. Evidence & Legal Arguments

- Forgery indicators: Signatures do not match complainants' records.
- BCP's and CREDICORP negligence: No internal security investigation was conducted.
- Consumer rights violation: Failure to ensure security and transparency.

iii. Proportionality & Reasonableness

- Proportionality: The severity of potential fraud justifies strong corrective measures.
- Reasonableness: BCP's and CREDICORP lack of action is unjustified.

c. Final Resolution N° 2178-2023/CC1 As Follows Conceptual Model of Legal Reasoning:

- **On Harm:** The decision follows the Peruvian Consumer Protection Code (CPC) and the Constitution, emphasizing suitability duty (Articles 18 & 19, CPC), contract fairness, and transparency (Article V, CPC). Proportionality and reasonableness guide enforcement. The judgment confirms CREDICORP failed to prove the legitimacy of a fund withdrawal, violating consumer rights. The provider bore the burden of proof but failed to present original documentation or investigate possible fraud.
- **On Defenses and Exceptions:** (i) Proportionality: The severity of the harm justified a financial sanction against CREDICORP; (ii) Reasonableness: BCP's delayed response (6 months) and lack of internal investigation were deemed unjustified; and (iii) Fair contract execution: The ruling affirms a broad interpretation of consumer rights, deferring specific applications to national authorities.
- **Sanctions:** The Commission ruled as follows: (i) BCP: Official warning for failing to respond to consumer complaints on time; (ii) CREDICORP: S/122,889.50 (Soles) fine for failing to verify fund withdrawals; (iii) Corrective action: Credicorp must return \$13,000 plus interest to the complainants, (iv) Both companies were registered in INDECOPI's Violation Registry.
- **Deadweight Loss, Elasticity, and Productive Efficiency:** The resolution aligns with the Consumer Welfare Hypothesis, as the consumer was in a weak position, affected by informational asymmetries, and demonstrated diligent conduct upon noticing the unauthorized withdrawal of funds. In this way, Final Resolution N° 2178-2023/CC1 ensures consumer protection, economic efficiency, and market stability.
- **Conclusion:** The ruling reinforces consumer rights by applying proportional and reasonable enforcement. The decision was unanimous among the Consumer Protection Commissioners and was upheld unanimously by the second-instance authorities.

Thus, these two case law defenses, pursued and duly counseled by the dissertation author, prove that the conceptual model of legal reasoning works in practice for consumer protection and can be applied to online sales contract defenses in B2C cases. Unfortunately, there is still a lack of practical cases on the matter, posing a challenge. However, the schematic also demonstrates

that legal reasoning has practical effects and actively supports legal specialists in case building and resolution.

Consequently, both national and international jurisprudence (i) does not develop to date a clear conceptual model of legal reasoning; and (ii) continue to struggle with the explicit application of legal standards such as proportionality and reasonableness, alongside doctrinal principles. Nevertheless, this does not mean that these standards are not applied; rather, they are implemented after a systematic analysis of jurisprudential texts, such as those analyzed in this dissertation but without following a clear line of conceptual model of legal reasoning.

In this regard, this dissertation does not present anything entirely new or innovative. Its focus is to emphasize the importance of valuable legal institutions, such as sources of law, which contribute to sound reasoning among legal specialists. These can be systematized within a conceptual model of legal reasoning for practical application.

Moreover, proportionality and reasonableness as legal standards are not new. Their highest expression or reference can be found, as discussed throughout this dissertation, in Charters or Constitutional texts that establish both principles as fundamental rights. For example, in the European Legal System, their essence is captured in the first paragraph of Article 52 of the Charter of Fundamental Rights of the European Union (CHREU). Similarly, in the Peruvian Legal System, both principles are enshrined in article 3 or the last paragraph of Article 200 of the Peruvian National Constitution (1993).

Unfortunately, no specific legislative norm within the Peruvian Legal System, or even within the European Legal System, establishes a concrete method for applying both principles in the protection of fundamental rights. In this specific case, it remains unclear at what stage a fair balance can be achieved between the relationship of providers or traders and consumers, particularly in a more globalized digital and technological era that eliminates territorial boundaries in contractual relations.

It is in this context that legal specialists face one of the most challenging trials: to find concrete solutions to these matters, which, as mentioned, are neither innovative nor new, but are crucial for establishing universal techniques or methods. For example, Professor GUIDO CALABRESI strongly advocates for jurisprudence and emphasizes the vital role of judges in creating legal concepts and law as a fundamental source of law¹¹².

However, other sources of law are also vital in fulfilling legal roles, such as principles like fair balance or good faith. Professor ENRIQUE GHERSI SILVA emphasizes the importance of all sources of law, as they serve as fundamental tools for legal specialists and can be combined to establish concepts and methods. This is why Professor ENRIQUE GHERSI SILVA strongly supports the competitive nature of these sources of law, acknowledging that multiple sources can coexist and complement each other (GHERSI SILVA, *El Caracter Competitivo de Las Fuentes del Derecho*, 2003, p. 268).

In this regards, Professor FABRIZIO ESPOSITO, in application of economic analysis of law, makes a doctrinal proposal on contractual and consumer protection which is supported within the entire dissertation, known as Consumer Welfare Hypothesis. The concept is not only attractive and complaint with fundamental rights and sustainability as seen but also gives room

¹¹² CALABRESI GUIDO, "The New Economic Analysis of Law: Scholarship, Sophistry, or Self-Indulgence?" (1982) *Proceedings of the British Academy* 85.

for normative discussion. In the end, as Professor FABRIZIO ESPOSITO states, we do not try to reinvent the wheel with innovative concepts but to make them sharper and actualized with worldwide changes¹¹³.

Therefore, the main purpose of the following dissertation, since fundamental rights, legislative norms, even jurisprudence does not establish it correctly, is to purpose an applicative method of legal reasoning within based on proportionality and reasonableness having as a foundational starting point Consumer Welfare Hypothesis by recognizing the importance of providers or traders' competition to promote consumer realization within the market. Nevertheless, consumer realization within the market has no specific limits but evolves constantly with technology and human changing needs.

Is relevant to have in mind, that time is subject to changes and inevitable affects law. For example, it is not the same legal approach the European than the Peruvian in norms. The European Union System is advance on Consumer Protection within Law and Technology and is a reference worldwide, even for positivist systems such as the Peruvian. Notwithstanding, legislative norms are not the only responsible within legal advancement but also doctrinal, principles, market, customs or jurisprudence approach, among others.

Is in this precise context, that a mindset of reciprocity and cooperation within Providers or Traders and Consumer can be established by applying proportionality and reasonableness as legal standards by the following formula which has no boundaries, and as pointed by professor GUIDO CALABRESI is fundamental to fit economic theory with the legal world in its broad way¹¹⁴, or as professor FABRIZIO ESPOSITO establishes, not to reinvent concepts but use those existent and legal tools to make them actualized, innovative and sharp¹¹⁵.

The solution for achieving legal coherence, in my analysis, is to establish a conceptual model of legal reasoning for consumer protection and online sales contracts. This model follows the proposed foundations extensively analysed by Professor FABRIZIO ESPOSITO, based on Allocative Efficiency and the Consumer Welfare Hypothesis, as foundational to the fundamental right to a high level of consumer protection.¹¹⁶ This model must adhere to the proposed formula, which constructs legal reasoning to enhance compliance and legal analysis, as previously outlined in Chapter Five.

In this context, the stated conceptual model of legal reasoning is a practical tool for legal specialists and professionals, allowing them to use and combine different sources of law to build a fair balance within consumer protection and online sales contracts on online platforms. Therefore, it is not only a matter of applying legislative norms or relying solely on jurisprudence but also of fostering a conceptual mindset of structured legal reasoning, under the boundaries of proportionality and reasonableness.

Unfortunately, legal specialists are often only aware of the existence of proportionality and reasonableness, as these principles are broadly mentioned in Constitutions or International Charters. However, no legislative norm, jurisprudence, or even doctrinal approach has provided a specific formula to apply these legal standards in Consumer Protection. This is particularly

¹¹³ ESPOSITO, FABRIZIO; Op cit footnote 69. pp. 14-15.

¹¹⁴ CALABRESI GUIDO, *The Future of Law and Economics: Essays in Reform and Recollection* (Yale University Press 2016).

¹¹⁵ ESPOSITO, FABRIZIO; Op cit footnote 69. pp. 14-15.

¹¹⁶ ESPOSITO, FABRIZIO; Op cit footnote 69.

crucial today, as online sales, which are now global, have become a spotlight and a necessity for many brands since the pandemic. For example, online retail sales as a percentage of total retail sales were around 19% in February 2020. By 2021, online retail sales had increased to almost 35%, showing significant growth that is not slowing down. (MOLE, 2021)

Precisely, considering the increase in online sales contracts since the pandemic and the lack of a formula or method for better Consumer Protection using universal legal standards, the following dissertation promotes a different mindset by applying Economic Analysis of Law. As mentioned, the proposed formula is based on the Consumer Welfare Hypothesis and aims to improve the practical application of legal reasoning for justice and sustainability.

This does not imply a change within the positivist system but rather a way to combine different sources of law, which compete with one another, as tools for optimal legal reasoning. Therefore, it is not about creating new tools or legal institutions but reminding legal specialists that existing sources of law can be used and combined within the boundaries of proportionality and reasonableness. Ultimately, the key aim in law is not to establish centralism or a monopoly on norms through legislative regulation but to seek efficiency through competition.

Finally, as stated by Professor ENRIQUE GHERSI SILVA, law in its broad sense must be viewed as an instrument for decision-making that follows a cost-benefit analysis. Giving practical purpose, this is why sources of law must be considered competitive (GHERSI SILVA, *El Caracter Competitivo de Las Fuentes del Derecho*, 2003, p. 268).

For this reason, competition among sources of law is relevant and necessary to promote optimal legal reasoning, under foundations proposed on Consumer Welfare Hypothesis, which, as pointed out by Professor FABRIZIO ESPOSITO, positions the consumer as: (i) the creditor of the characteristic performance; and (ii) a key figure in the socio-economic function of contracts in the 21st century, a world that constantly strives to meet sustainability goals¹¹⁷.

¹¹⁷ ESPOSITO, FABRIZIO; Op cit footnote 69. pp. 180-181.

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