

The Politics and Economics of Brazilian Competition Law

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Abstract

Against the renewed international debate on the relationship between competition law and wider social and economic goals, this paper examines the underpinnings of Brazilian competition law. It describes the evolution of the law against the backdrop of the wider transformations in capitalism, and reveals how legal, political, and economic disputes – both domestically and internationally – have shaped its design and implementation. The paper argues that while the foundation of modern Brazilian competition law can be found in a progressive Constitution and in principles that guide the economic order towards the promotion of substantive justice, competition enforcement and scholarship in Brazil have been gradually decoupled from the promotion of socioeconomic rights. This insulation of Brazilian competition practice from wider socio-political concerns was deeply influenced by the epistemological assumptions and the economic methodology of the Chicago School, that have directed competition – in the US and in other jurisdictions – towards formalist notions of efficiency.

Keywords

Competition law, Brazil, political economy, economic regulation

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La política y la economía de la ley de competencia brasileña

Resumen

Frente al renovado debate internacional sobre la relación entre la ley de competencia y objetivos sociales y económicos más amplios, este artículo examina los fundamentos de la ley de competencia brasileña. El artículo describe la evolución de la ley en el contexto de las transformaciones más amplias del capitalismo y revela cómo las disputas legales, políticas y económicas, tanto a nivel nacional como internacional, han dado forma a su diseño e implementación. El artículo argumenta que, si bien la base de la ley de competencia brasileña moderna se puede encontrar en una Constitución progresista y en los principios que guían el orden económico hacia la promoción de la justicia sustantiva, la aplicación de la ley de competencia en Brasil se ha desvinculado gradualmente de la promoción de los derechos socioeconómicos. Este aislamiento de la práctica de competencia brasileña de preocupaciones sociopolíticas más amplias estuvo profundamente influenciado por los supuestos epistemológicos y la metodología económica de la Escuela de Chicago, que han dirigido la defensa de competencia, en los Estados Unidos y en otras jurisdicciones, hacia nociones formalistas de eficiencia.

Palabras clave

Ley de competencia, Brasil, economía política, regulación económica

INTRODUCTION

In July 2021, the newly appointed president of the *Conselho Administrativo de Defesa Econômica* (CADE), the Brazilian competition authority, gave interviews to the main newspapers in the country stating that, under his leadership, the agency would be “less interventionist” in its approach¹ and “choose orthodoxy” when deciding cases.² The statements were provided in response to questions related to recent policy moves observed in the EU and in the US that point to a willingness to widen the role of competition law in economic policy.³ Around the world, there is growing concern that an overly narrow application of antitrust rules might have

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- 1 Lorena Rodrigues, ‘Novo Presidente Do Cade, Alexandre Cordeiro Diz Que Tenderá a Ser “Menos Intervencionista”’, *Estadão*, 14 July 2021, <https://economia.estadao.com.br/noticias/geral,novo-presidente-do-cade-alexandre-cordeiro-diz-que-tendera-a-ser-menos-intervencionista,70003778696>.
 - 2 Murillo Camarotto, ‘Cade Vai Optar Pela Ortodoxia Em Decisões’, *Valor Econômico*, July 15th, 2021, <https://valor.globo.com/empresas/noticia/2021/07/15/cade-vai-optar-pela-ortodoxia-em-decisoes.ghtml>.
 - 3 For example, the appointment of scholar Lina Khan to chair the Federal Trade Commission (FTC) in the US has been poised to affect a shift in the way that antitrust law is enforced and thought about in the US. Asher Schechter, ‘What Would Lina Khan’s FTC Nomination Mean For the Future of Antitrust Enforcement?’, *Promarket* (blog), March 10th, 2021, <https://www.promarket.org/2021/03/10/biden-lina-khan-ftc-antitrust-enforcement-new-brandeis/>. In the EU, Executive Vice-President Margrethe Vestager, who is also the European Commissioner for Competition, has repeatedly emphasised that competition policy is closely linked to other policy goals, such as climate neutrality by 2050 and the digital transition. European Commission, ‘A Competition Policy Fit for New Challenges’, https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-margrethe-vestager-2021-competition-law-conference-organised-association-finnish-lawyers_en.

ultimately contributed to higher industry concentration and rising economic inequality, leading to calls for legal and policy reforms. Industry-level data seem to indicate that feeble anti-trust enforcement helped to magnify winner-takes-most dynamics, leading “firms that have so far achieved market dominance primarily through innovative products and business practices to attempt to entrench their positions by erecting barriers to entry.”⁴

There is a renewed interest in discussing the goals of competition law, motivated by concerns that the mainstream competition standard, guided by narrow conceptions of consumer welfare, has been unable to supervise the structure of markets effectively and is unfit to address some of the pressing challenges of our time.⁵ Against this backdrop, CADE’s incoming president argued that although social issues such as economic justice and the environment are important, they are not “the role of the antitrust authority.”⁶ These statements made in this particular context raise the question: what is the role of Brazilian competition law and how has it changed over time? What does orthodoxy look like when it comes to enforcing Brazilian competition law?

This paper engages with these questions, seeking to contribute to current debates around how best to interpret and apply competition law, and what is the role of competition law in addressing the “multiple and interlocking crises” that pose challenges to contemporary society.⁷ To do so, it adopts a two-pronged approach. First, it develops a historical narrative that traces the foundations and the evolution of competition law and policy in Brazil, describing how competition law has been designed to shape markets in different historical contexts, in response to inflections in international and domestic political and economic priorities, and influenced by legal and economics scholarship. Secondly, the paper zooms in on one aspect of Brazilian competition law, namely merger control, to show the effects that transformations in the underpinnings of competition law have had on the adoption and review of specific

4 IMF, ‘Chapter 2: The Rise of Corporate Market Power and Its Macroeconomic Effects’, in *World Economic Outlook 2019* (Washington, DC: International Monetary Fund, 2019), 55–76, <https://doi.org/10.5089/9781484397480.081>.

5 One example of the revival of this approach is the fact that, in 2023, the Stigler Centre at the University of Chicago organized its annual Antitrust and Competition Conference around the consumer welfare standard, inviting participants to reflect on the question of whether there is an alternative to the consumer welfare standard in antitrust and, if so, what lies beyond it. As part of this initiative, a series of papers discussing alternative approaches were published. For instance, Beltrán’s paper examines how contemporary antitrust policy, driven by the consumer welfare standard, fails to consider the disproportionate negative impact of mergers on women and people of color. Laura Beltrán, ‘How the Consumer Welfare Standard Propagates Gender and Racial Inequalities’, *Promarket* (blog), January 9th, 2023, <https://www.promarket.org/2023/01/09/how-the-consumer-welfare-standard-propagates-gender-and-racial-inequalities/>. Similarly, Capers and Day explore how the aggregated approach embedded in the consumer welfare standard overlooks the disproportionate effects that potentially anticompetitive activities have on minority communities, proposing a ‘community welfare’ standard instead. Bennett Capers and Gregory Day, ‘Race and the Consumer Welfare Standard’, *Promarket* (blog), April 13th, 2023, <https://www.promarket.org/2023/04/13/race-and-the-consumer-welfare-standard/>. In a similar vein, Wu criticizes the narrowness of the consumer welfare standard and advocates for a return to the ‘competition and competitive process’ standard as the cornerstone of US antitrust doctrine. Tim Wu, ‘The Consumer Welfare Standard Is Too Tainted’, *Promarket* (blog), April 19th, 2023, <https://www.promarket.org/2023/04/19/the-consumer-welfare-standard-is-too-tainted/>.

6 Rodrigues, ‘Novo Presidente Do Cade, Alexandre Cordeiro Diz Que Tenderá a Ser “Menos Intervencionista”’.

7 Angela Harris and James J. Varellas, ‘Law and Political Economy in a Time of Accelerating Crises’, *Journal of Law and Political Economy* 1, no. 1 (2020), <https://doi.org/10.5070/LP61150254>.

rules that guide the review of concentrations, and on the Brazilian competition authority's interpretation and application of these rules. This two-level analysis is conducted through a law and political economy (LPE) framework, examining the interaction between law and markets within their social and political contexts. LPE provides powerful lenses through which to study the distribution of political and economic power, to understand the economic organization of society, the implications that different political structures have on the economy, and how cultural and historical factors affect these structures.⁸

As the paper explains, while the foundations of Brazilian competition policy are found in a progressive Constitution that establishes a charter of justiciable social and economic rights, the implementing legislation and its enforcement reflects more formalist perspectives rooted in neoclassical economics. More specifically, the paper shows that there has been a gradual insulation of Brazilian competition law and enforcement from wider socio-political concerns that have guided its development, and that this process was deeply influenced by the epistemological assumptions of the Chicago School and the law and economics methodology that shaped antitrust laws in the US and in other parts of the world in previous years.⁹

These arguments are developed as follows. Section one examines the evolution of competition law scholarship in the international context, from the so-called Gilded Age to the emergence of 'antitrust schools of thought'. Section two then maps legislative debates in Brazil and examines how the interplay between the international literature and internal debates affected the theoretical underpinnings of Brazilian competition law. To illustrate how these forces have shaped antitrust practice in Brazil, section three discusses the substantive enforcement of merger control and the emphasis that CADE's guidelines put on economic tests and methodologies. The paper concludes with a call to rethink the limits of existing competition frameworks in Brazil and to reflect on to what extent existing rules and prevailing practice demand adaptation.

THE ORIGINS OF US ANTITRUST LAW

Competition law emerged in the US as a regulatory tool deeply rooted in political economy. However, over the last century, a law and economics approach championed by the Chicago School has arguably become the prevalent approach to antitrust in many parts of the world. This approach to competition law puts an emphasis on economic models and economic efficiency to guide the law's interpretation and enforcement and has redirected scholarship and practice towards a version of antitrust which largely disregards moral or political considerations.¹⁰

8 Jedediah Britton-Purdy et al., 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis', *Yale Law Journal* 129, no. 6 (2020): 1784–1835.

9 As the paper will show, even though Brazilian lawyers and practitioners did not fully and purposely embrace law and economics theory in the interpretation and enforcement of competition law, it can be argued that Brazilian scholarship and practice assimilated a version of antitrust that incorporates key methodological aspects that are associated with law and economics, including the focus on economic analysis and the application of economic theory.

10 Martha T McCluskey, Frank A Pasquale, and Jennifer Taub, 'Law and Economics: Contemporary Approaches', *Yale Law and Policy Review* 35 (2016): 297–308.

The influence of this approach has not been confined to the US. Overall, it remains fairly uncontested that the Chicago School has had an influence on antitrust scholarship and practice in many jurisdictions.¹¹

This section traces the origins of some of the antitrust tenets that are currently at the centre of legal, economic, and political debates. It brings a law and political economy perspective to briefly revisit the foundation of antitrust law and scholarship that has structured the field over the years, from the original Gilded Age of the late nineteenth century to the emergence of influential schools of thought around the mid-twentieth century. In doing so, the historical narrative serves two purposes. First, it evidences the law's centrality in creating and shaping the economic domain, highlighting the close ties between legal institutions, politics, and the economy. Secondly, it identifies the roots of the "economic style of reasoning"¹² in antitrust that has over time dominated and considerably narrowed debates on competition policy, not only in the US but also in Brazil, as the paper will later show.

A. From the Gilded Age to the emergence of Trust-Busters

By the end of the 19th century, as a result of technological innovation and the development of large-scale corporate structures, the US economy was dominated by giant corporations.¹³ This period, latter dubbed as the Gilded Age, witnessed substantial economic growth and a surge in productivity.¹⁴ Technological progress enabled improved productivity and facilitated the integration of mass production and distribution processes, leading to the consolidation of industries for greater efficiency. As Cashman points out, there was a significant shift in the nature of manufacturing firms between the 1870s and the 1900s. While in the 1870s, a manufacturing firm simply referred to a company that produced goods, by the 1900s, several key industries were controlled by a limited number of large corporations that oversaw all aspects of manufacturing: from raw material extraction to production and distribution.¹⁵ Firms that capitalized on technological advancements experienced rapid expansion, leaving their less

11 Although the extent of this influence varies across jurisdictions. See Anu Bradford, Adam S Chilton, and Filippo Maria Lancieri, 'The Chicago School's Limited Influence on International Antitrust', *The University of Chicago Law Review* 87, no. 2 (2020): 297–329.

12 Berman argues that the "economic style of reasoning" has dictated US policymaking since the 1960s, a style that shows "a deep appreciation of markets as efficient allocators of resources" and draws on "basic microeconomic concepts, like incentives, various forms of efficiency, and externalities," putting the quest for economic efficiency at the fore of public policy. Elizabeth Popp Berman, *Thinking like an Economist: How Efficiency Replaced Equality in U.S. Public Policy* (Princeton: Princeton University Press, 2022).2022

13 Freyer compares the development of corporate bigness and government response in the US and the UK, arguing that, while antitrust became a political and cultural value in the US before the First World War, in Britain the consensus around this regulatory tool took longer to emerge, gradually and unevenly converging with American policies in the period after the Second World War. Tony Freyer, *Regulating Big Business: Antitrust in Great Britain and America, 1880–1990* (Cambridge, UK: Cambridge University Press, 1992), <https://doi.org/10.1017/CBO9780511582387>.

14 The Gilded Age comprises the period during the late 19th century, running from roughly the end of the American Civil War, characterised by rapid economic growth, but also high concentration of wealth and deep inequality. See Sean Dennis Cashman, *America in the Gilded Age: Third Edition* (NYU Press, 1993).

15 Cashman, 38.

adaptable counterparts behind. The economic advantages of large-scale production during this period were considerable, extending beyond mere efficiency to encompass significant cost advantages. A larger company had greater access to credit, could procure raw materials at a lower cost, and could allocate resources towards research more effectively.¹⁶

The rise of corporate power was intimately connected with broader societal changes. The economic prosperity of businesses and industries during this period attracted a substantial number of immigrants, who eagerly sought any available opportunities, and provided a vast pool of cheap labour.¹⁷ However, despite the opportunities provided, the emergence of corporate capitalism in the US also exacerbated inequality.¹⁸ During the Gilded Age, the enormous profits generated by these new business arrangements were monopolised by a small group of “robber barons” who controlled industrial production.¹⁹ As profits soared, the disparities between the wealthy elite and the majority of workers intensified tensions and conflicts, fuelling a demand for government intervention.²⁰ This discontent was not limited to urban areas experiencing a rise in organised labour. The transformation from an agrarian society to a modern industrial State had a profound impact on the agricultural class, generating feelings of grievance and giving rise to movements for improvement. These efforts culminated in the “Granger movement”, an agrarian movement focused on the conditions of farmers and their economic and political challenges.²¹ The mounting social pressure resulting from increasing inequality intersected with a growing call for governmental oversight of large corporations. As Tony Freyer observed, the economic transformation that gave rise to this new form of capitalism also “spawned social and political tensions, compelling the public and policymakers to decide upon the appropriate response to big business.”²²

Within this context, the Sherman Act was enacted in 1900 as an attempt to tackle a wide range of issues. Hofstadter highlights that the goals of this legislation encompassed various

16 Cashman, 39.

17 It is worth noting that without this massive influx of immigrants, the United States could not have achieved industrial development at the rate it did. In fact, as stated by Cashman, “in 1890, 56 percent of the labor force in manufacturing and mechanical industries consisted of foreign-born individuals or those with foreign parentage.” Cashman, 85.

18 Veblen’s work sheds light on the emergence of the modern business enterprise and the complex society that unfolded during the Gilded Age. Thorstein Veblen, *The Theory of Business Enterprise* (Great Britain: Amazon, 2016).

19 Charles Camic and Geoffrey Martin Hodgson, eds., ‘General Introduction’, in *The Essential Writings of Thorstein Veblen* (Milton Park, Abingdon, Oxon; New York, NY: Routledge, 2011), 1–39. p. 5.

20 Veblen noted the formation of large industrial consolidations in the period and recognised that, while they could indeed increase productivity, business concentration often took place motivated solely by the pecuniary interest of businessmen: “The end of his endeavours is, not simply to effect an industrially advantageous consolidation, but to effect it under such circumstances of ownership as will give him control of large business forces or bring him the largest possible gain. The ulterior end sought is an increase in ownership, not industrial serviceability. His aim is to contrive a consolidation in which he will be at an advantage, and to effect it on the terms most favourable to his own interest”. Veblen, *The Theory of Business Enterprise*. p. 25.

21 While the “Granger movement” as a political and economic manifestation took shape between 1873 and 1875, its features were embodied in subsequent agricultural movements in the late nineteenth century. The movement’s grievances, rooted in the concerns of farmers, left a lasting political and economic legacy that extended into the early twentieth century. Solon J. Buck, *The Granger Movement: A Study of Agricultural Organization and Its Political, Economic and Social Manifestations, 1870-1880* (Cambridge, MA: Harvard University Press, 1913).

22 Freyer, *Regulating Big Business*. p. 1.

dimensions, including economic, political, and social and moral aspects. Economic goals were rooted in the belief in the classical model of competition, which emphasised economic efficiency through competition, although there was no consensus around the specific nature of governmental intervention on trusts. Political goals aimed at counteracting the consolidation of private power and safeguard democratic governance, driven by concerns about the conversion of political power into economic power and by apprehensions about economic decision-making occurring beyond their purview. Social and moral goals, in turn, focused on character development and the preservation of national morale, considering competition as a disciplinary mechanism.²³ Overall, the diverse and occasionally contradictory interpretations of the motivations behind the Sherman Act illustrate the rich contextual background that shaped the law. As Sullivan suggests, the political economy of the law should serve as a benchmark when exploring the history of antitrust, highlighting that antitrust law in the United States is not solely a legal framework but also a socio-political statement about society and the role that government should play as a regulator in the market.²⁴

The broad scope of interests surrounding the Sherman Act had a significant impact on both its legal language and subsequent enforcement. While the act employed general language to address the issue of competition, reflecting the diverse range of concerns, it also influenced how the law was subsequently applied.²⁵ Although the US Congress passed the Sherman Act in 1890, it took until the early 1900s for effective enforcement to curb corporate consolidation.²⁶ At the start of the 20th century, a consensus began to emerge amongst policymakers that the rise of big business required government action.²⁷ Leading the antitrust movement were figures such as Louis Brandeis, a legal scholar and US Supreme Court Justice who condemned the economic power held by industry-spanning monopolies.²⁸ Additionally, President Theodore Roosevelt championed progressive policies and advocated more vigorous action in addressing

23 Richard Hofstadter, 'What Happened to the Antitrust Movement', in *The Political Economy of the Sherman Act: The First One Hundred Years*, by E. Thomas Sullivan (Oxford: Oxford University Press, 1991), 23–24.

24 E. Thomas Sullivan, *The Political Economy of the Sherman Act: The First One Hundred Years* (Oxford: Oxford University Press, 1991), 3.

25 According to Hofstadter, "Congress emerged with a statute written in the most general terms, which for many years was emasculated by judicial decisions and administrative lethargy." Hofstadter, 'What Happened to the Antitrust Movement,' 23.

26 Freyer reports that, in the 19th century, the Sherman Act, alongside state antitrust laws, had been mainly used to fight cartels, but did little to tackle corporate concentration. In this period immediately following the adoption of the law, US courts and federal authorities outlawed most forms of price fixing and often struck down cartels and other forms of anticompetitive agreements. However, they did not condemn mergers in themselves and allowed the proliferation of tight corporate structures. This meant that, in practice, antitrust enforcement in the period undercut the survival of small business and facilitated rather than curtailed the emergence of large corporations. Freyer, *Regulating Big Business*.

27 In Hofstadter's words, "From the very beginning, at any rate, when the Sherman Anti-Trust Act was passed in 1890, it was recognized by most of the astute politicians of that hour as a gesture, a ceremonial concession to an overwhelming public demand for some kind of reassuring action against the trusts... Before the time of Theodore Roosevelt's presidency very little attempt had been made, and negligible results had been achieved, in employing the act to check business consolidations". Richard Hofstadter, *The Age of Reform: From Bryan to F. D. R.* (New York: Alfred A. Knop, 1956), 244.

28 On the role played by Brandeis in contesting corporate power, see Philip Cullis, 'The Limits of Progressivism: Louis Brandeis, Democracy and the Corporation', *Journal of American Studies* 30, no. 3 (1996): 381–404.

the problems of trusts and monopolies.²⁹ In this period, the US government brought a series of antitrust cases against the large trusts that had emerged over the previous decades, in an effort to address economic concentration.³⁰ A flagship case was the lawsuit against Standard Oil. In 1906, the US DoJ brought a suit against John D. Rockefeller's Standard Oil due to a long series of abuses and exclusionary practices, including exclusive cartel deals, abuse of its pipeline monopoly, and predatory pricing. The case concluded in 1911, when the Supreme Court considered that Standard Oil had violated the Sherman Act and ruled that the company should be broken-up into 34 constituent parts – including some which grew to become valuable and powerful firms, such as Exxon, Chevron, and Mobil.³¹ The concerns vocalised by trust-busters in this period to justify legal action were of a distinctively political economy nature; they argued that corporate concentration was not only bad for trade and businesses, but also that concentrated economic power had spilled over into policy and politics, threatening democracy itself.³²

B. Structuralism and the Harvard School

In the subsequent decades following the establishment of antitrust regulations, the field of antitrust developed as a scholarly and practical discipline. Economic institutionalism had a clear influence on the emergence of antitrust scholarship in the 1930s, and it dominated economic

29 From Roosevelt's autobiography: "When my Administration took office, I found, not only that there had been little real enforcement of the Anti-Trust Law and but little more effective enforcement of the Inter-State Commerce Law, but also that the decisions were so chaotic and the laws themselves so vaguely drawn, or at least interpreted in such widely varying fashions, that the biggest business men tended to treat both laws as dead letters." Theodore Roosevelt, *Theodore Roosevelt: An Autobiography* (Open Road Integrated Media, Inc., 2013), 357–58.

30 *Case Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). See generally Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (New York, NY: Columbia Global Reports, 2018).

31 Wu.

32 For example, Justice Brandeis' views on the relationship between political and economic power are prominently conveyed in a collection of his reflections published by Solomon Goldman. According to Brandeis, "[t]he trust problem can never be settled right for the American people by looking at it through the spectacles of bonds and stocks. You must study it through the spectacles of people's rights and people's interests; must consider the effect upon the development of the American democracy. When you do that you will realize the extraordinary perils to our institutions which attend the trusts...". Brandeis further remarked on the power of the corporations, stating that "when a great financial power has developed – when there exist these powerful organizations, which can successfully summon forces from all parts of the country, which can afford to use tremendous amounts of money in any conflict to carry out what they deem to be their business principle ... There develops within the State a state so powerful that the ordinary social and industrial forces existing are insufficient to cope with it". As Brandeis concisely put, "Many dangers to democracy ... are inherent in these huge aggregations". Louis D. Brandeis, *The Words of Justice Brandeis. Edited by Solomon Goldman, with a Foreword by William O. Douglas* (New York: H. Schuman, 1953), 133–36. In a similar vein, Roosevelt expressed the view that "Suits were brought against the most powerful corporations in the land, which we were convinced had clearly and beyond question violated Anti-Trust Law ... for it was only these suits that made the great masters of corporate capital in America fully realize that they were the servants and not the masters of the people, that they were subject to the law, and that they would not be permitted to be a law unto themselves". Roosevelt, *Theodore Roosevelt: An Autobiography*, 358.

thinking about competition policy from the 1940s through the 1960s.³³ Building on the understanding that markets were frail institutions, that they differed from one another, and that they required significant State intervention to set them right, economists began to suspect that true competition existed only in a few industries. This suspicion motivated scholars to investigate the links between the structure and how markets function, and to look for evidence to explain the great merger movement of the Gilded Age.³⁴

In 1937, economist Joan Robinson published the book *The Economics of Imperfect Competition*. This ground-breaking work was the first systematic technical analysis of firms with significant fixed costs and diverse products, and provided evidence that such markets were less robust than economists had initially imagined. Indeed, one of Robinson's greatest contributions was to show that real-world market competition was less than perfect and that, therefore, it is "more proper to set out the analysis of monopoly, treating perfect competition as a special case".³⁵ Her arguments were influential at the time, although Robinson's contributions are not always recognised in modern scholarship. Importantly, Robinson formally linked the market structure with the level of competition, leading the way to a novel school of economic thought that became known as the Harvard School.³⁶

Following the articulation by Robinson and other theorists that competition was the exception rather than the rule, and that product differentiation had implications for market performance, antitrust scholarship started to be increasingly preoccupied with anticompetitive practices in product-differentiated markets.³⁷ These views were taken up by mainstream economists, and motivated much of the subsequent inquiries into the working of imperfectly competitive markets – particularly by economists at Harvard University. Notably, these ideas were influential to the studies conducted by Edward S. Mason and Joe S. Bain, two scholars associated with Harvard's economics department, who became prominent members of the Structuralist School. Mason and Bain developed a paradigm for industrial competition directly linking an industry's structure to its performance, that is, to its degree of competitiveness. Their analytical tool became known as the "structure-conduct-performance," or S-C-P paradigm, according to which structure determines conduct, which in turn, entails performance.

In the US, Structuralist ideas and the S-C-P paradigm were highly influential from the 1940s through to the 1960s, dominating the scholarly debates and the enforcement of antitrust law.

33 Herbert Hovenkamp, 'Structuralism in Competition Policy', in *The Opening of American Law: Neoclassical Legal Thought, 1870-1970* (Oxford: Oxford University Press, 2014), <https://doi.org/10.1093/acprof:oso/9780199331307.001.0001>.

34 On the great merger movement during the Gilded Age, see Naomi R. Lamoreaux, *The Great Merger Movement in American Business, 1895 - 1904*, 1. (Cambridge, UK: Cambridge University Press, 1988).

35 Joan Robinson, *The Economics of Imperfect Competition* (London: Macmillan, 1979). p. 307.

36 Indeed, shortly after he immigrated to the US to be a lecturer at Harvard's department of economics, Joseph Schumpeter published a glowing review of *The Economics of Imperfect Competition*, which he described as an "admirable performance, both by virtue of its pioneer achievement and by the energy and straightforwardness of its exposition." Joseph A. Schumpeter and A. J. Nichol, 'Robinson's Economics of Imperfect Competition', *Journal of Political Economy* 42, no. 2 (April 1934): 249–59, <https://doi.org/10.1086/254595>. p. 251.

37 Another notable and influential theorist of imperfect competition is Edward H. Chamberlin who, around the same time as Robinson, independently published the book *Theory of Monopolistic Competition*, discussing further implications of product differentiation and articulated a model of monopolistic competition. Edward Hastings Chamberlin, *The Theory of Monopolistic Competition: A Re-Oriented of the Theory of Value*, 8. ed, Harvard Economics Studies 38 (Cambridge, Mass: Harvard University Press, 1969).

They also had a profound impact on the decisions of the Supreme Court during that period, which put an emphasis on preserving competition by preventing excessive market concentration.³⁸ The implication of the S-C-P paradigm was that, through an understanding of market structure, it would be possible to predict industry performance.³⁹ Underlying this idea was the belief that industrial concentration in the US was too high, and that firms were larger than necessary for them to be efficient.⁴⁰

As observed by Hovenkamp, “the dominant theme of the S-C-P paradigm was that anti-trust law should reduce the amount of monopoly in the economy”.⁴¹ As such, the Structuralist scholarship supported the more active role of antitrust enforcers in regulating the concentrated structure of markets that characterised competition policy in the period. Again, underpinning these ideas was the notion that law, and legal institutions play a constitutive role in the economy, or as stated by Harris and Varellas, that “markets and their constituents (...) are creatures of law and politics, crafted by the state.”⁴²

C. The Chicago School

Antitrust scholarship and policy during the second half of the 20th century, saw a dramatic shift in the theoretical underpinnings that guided enforcement. In the US, beginning in the 1950s, scholars associated with the University of Chicago promoted a two-pronged attack on the set of claims that underpinned Harvard’s Structuralist School and ultimately revolutionised

38 For example, in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) decided under the Clayton Act, the Court identified the prevention of oligopolies as a crucial objective of the law. Justifying its decision, the Court underscored the detrimental effects such mergers would have on local industry control and small businesses, stating that “[w]here an industry was composed of numerous independent units, Congress appeared anxious to preserve this structure”. Likewise, in *United States v. Philadelphia National Bank et. al.*, 374 U.S. 321 (1963), the Court contended that, particularly in horizontal mergers, market structure should be the paramount factor in decision-making, arguing that “we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”

39 See generally Edward S. Mason, *Economic Concentration and the Monopoly Problem* (Cambridge, Mass: Harvard University Press, 1957).

40 Another valuable publication that advanced this idea, published in 1973, was *Small is Beautiful*, by E. F. Schumacher, an economist and policymaker who served as Chief Economic Advisor to the British National Coal Board for two decades. This influential book challenged the prevailing economic emphasis on bigness and efficiency, advocating instead for a reformation of economic theory and policy rooted in ethics. Notably, Schumacher also questioned the significance placed on large corporations, challenging the assumption that large organizations are inherently indispensable, exposing what he called the fallacy of “bigness” also within the corporate realm. He noted that, as an organization grows, it inevitably faces the challenge of maintaining efficiency by striking a balance between smallness and bigness. More broadly, Schumacher argued that the field of economics during that time was overly focused on quantitative measurement, neglecting qualitative understanding. He asserted that this limited and fragmented approach could only be remedied by adopting a broader perspective, which he termed “meta-economics”, and by recognizing the significance of ethics in economic analysis. E. F. Schumacher, *Small is Beautiful: A Study of Economics as if People Mattered*, Vintage Classics (London: Vintage Books, 1993).

41 Hovenkamp, ‘Structuralism in Competition Policy’. p. 217.

42 Harris and Varellas, ‘Law and Political Economy in a Time of Accelerating Crises’. p. 5.

antitrust scholarship and enforcement in the 1970s and 1980s. From a descriptive perspective, they challenged previous assumptions about the complexity and the robustness of markets, and disputed the positive relationship between concentration and profits.⁴³ While Structuralism supported the claim that monopolies negatively affect performance and should therefore be eliminated, one of the central tenets of the Chicago School was that market power was not inherently bad, and could often result from enhanced efficiency rather than lack of competition.⁴⁴ From a normative and methodological perspective, the Chicago School aimed at distinguishing their work from the antitrust scholarship and practice developed in the previous decades which, they argued, was incoherent and lacked legal certainty.⁴⁵ Instead, Chicago scholars relied on a series of economic models, and in particular, on neoclassical price theory, to understand what incentives drove economic agents and to study legal rules. As a result, Chicago School supporters played a key role in making law and economics the centrepiece of antitrust scholarship and enforcement.⁴⁶

In the US, the ideas championed by the Chicago School contributed to the erosion of the consensus which had supported previously established antitrust doctrines and combined with a more conservative judiciary and political landscape, led to a gradual change in antitrust enforcement. Under the auspices of the Chicago School, an understanding of the goals of competition law evolved, putting economic efficiency at the fore of both scholarship and practice. Hence, a core tenant in antitrust law commonly attributed to the Chicago School is the idea that the goal of antitrust is to maximize consumer welfare.⁴⁷ This idea was more fully developed in his book *The Antitrust Paradox*, where Bork argued that “the only legitimate goal of antitrust is the maximization of consumer welfare”.⁴⁸ Based on the metrics of economic efficiency, this interpretation provided the basis for Chicago scholars to argue that antitrust authorities should only intervene if they could demonstrate a business arrangement would reduce ‘consumer welfare’, for example through an increase in prices.

Perhaps more relevant than the diffusion of specific descriptive claims and normative assumptions, was the dissemination of the methodology embraced by Chicago scholars. Indeed, their influence can be more broadly understood as a general contribution to reorienting legal scholarship and policy towards technical economic analysis and technocratic reasoning. Thus, the most enduring contribution of the Chicago School was arguably a methodological shift in academic production and policymaking towards the more widespread use of economic

43 Lina Khan, ‘The End of Antitrust History Revisited’, *Harvard Law Review* 133 (2020): 1655–82.

44 Hovenkamp, ‘Structuralism in Competition Policy’.

45 Richard A. Posner, ‘The Chicago School of Antitrust Analysis’, *University of Pennsylvania Law Review* 127, no. 4 (April 1979): 925, <https://doi.org/10.2307/3311787>.

46 Bradford, Chilton, and Lancieri, ‘The Chicago School’s Limited Influence on International Antitrust’.

47 The origins of the consumer welfare benchmark are often attributed to Robert Bork, in the paper *The Legislative Intent and the Policy of the Sherman Act* published in 1966. In this work, Bork argued that the US Congress intended the courts to implement a consumer welfare standard which aimed at the maximization of wealth or consumer satisfaction. In his words, “Congress intended the courts to implement (that is, to take into account in the decision of cases) only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth of consumer want satisfaction”. Robert H. Bork, ‘Legislative Intent and the Policy of the Sherman Act’, *The Journal of Law & Economics* 9 (1966): 7–48. p. 7.

48 Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978). p. 7.

models to conduct legal analysis. This trend was observed not only in antitrust law, but in other areas of law more closely identified as being ‘about the economy’, such as intellectual property, contracts, and corporate law.⁴⁹ Critical legal scholars argue these fields were effectively colonised by economic models and economic methods, to the point that legal analysis was largely recentred around the concept of ‘economic efficiency’.⁵⁰

Although some scholars consider that antitrust literature and practice is currently experiencing a ‘post-Chicago’ moment, as the limitations of some of the tenets defended by the Chicago School are now better understood, the adoption of an economic methodology and of a cost-benefit analysis continues to be widely defended in the application of competition law. Although there has been a move away from excessive emphasis on economic efficiency, there continues to be strong resistance to the inclusion of objectives beyond promoting ‘consumer welfare’ in the goals of competition law.⁵¹ Significantly, there is substantial support among antitrust scholars for maintaining the consumer welfare standard, arguing that it provides a practical and useful framework for antitrust enforcers and regulators to assess anticompetitive behaviour and potential harms arising from mergers and acquisitions.⁵²

BRAZILIAN COMPETITION LAW AS A TOOL OF ECONOMIC POLICY

In parallel to the development of the normative assumptions that shaped antitrust law and enforcement, the mid-twentieth century witnessed the emergence of additional regulatory tools that provided supplementary means to govern markets and the economy. Indeed, Chang describes the period post-Second World War as the ‘age of regulation’, a period in economic history characterised by a stark increase “in the range and the depth of regulatory activities”.⁵³ Notably, this expansion of the regulatory toolkit coincided with a shift in understanding the

49 Britton-Purdy *et al* call the outcome of this set of developments in legal scholarship the “Twentieth-Century Synthesis”. Britton-Purdy *et al.*, ‘Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis’. This shift is also framed as part of a neoliberal agenda in law, see David Singh Grewal and Jedediah Purdy, ‘Law and Neoliberalism’, *Law and Contemporary Problems* 77, no. 4 (2014): 23.

50 Using another analogy from the biological sciences, Waller described the phenomena as the spread of the ‘Law and Economics virus’. Spencer Weber Waller, ‘The Law and Economics Virus’, *Cardozo Law Review* 31, no. 2 (2009): 367–403.

51 For example, Hovenkamp believes that despite the modern debate around the goals of antitrust law, today there is “more consensus about the goals of the antitrust laws than at any time in the last half century”, and that few people dispute that the core mission of antitrust is to protect “consumers’ right to the low prices, innovation, and diverse production that competition promises”. Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Cambridge, MA: Harvard Univ. Press, 2008). p. 1.

52 For instance, according to Hovenkamp, the modern version of the consumer welfare principle embodies a balanced approach, responding forcefully to explicit price fixing and adopting a more measured stance towards single-firm conduct or practices that have the potential to benefit consumers. In his words, “[t]he overall goal is clear, however, which is to encourage markets in which output, measured by quantity, quality, or innovation, is as large as possible consistent with sustainable competition. To the extent antitrust intervention furthers this goal it is justified on purely economic grounds”. Herbert Hovenkamp, ‘Is Antitrust’s Consumer Welfare Principle Imperiled?’, *The Journal of Corporation Law* 45, no. 1 (2019): 67.

53 Ha-Joon Chang, ‘The Economics and Politics of Regulation’, *Cambridge Journal of Economics* 21, no. 6 (1997): 703–28.

aims of state regulation, and by the development of new theories and scholarship that provided justifications for State supervision.

Regulation was embraced in many regions as a mechanism to rein capitalist institutions in response to the crisis in the interwar period, which was largely attributed to *laissez-faire* economic policies.⁵⁴ In developing countries, the desire to achieve economic and political independence also put developmental aims at the centre of regulatory frameworks. Measures such as import regulation and foreign direct investment were adopted to protect and strengthen domestic industries, while industrial licensing and other forms of market entry regulation were adopted to induce domestic investments in manufacturing.⁵⁵ Specifically, in Brazil, economic law and legal tools were actively embraced during the mid-twentieth century to advance public policy goals, particularly those related to industrialisation, growth, and development.

This section discusses how Brazilian governments developed new policy tools and re-framed existing ones in response to economic demands, and the specific contexts in which competition laws were adopted and amended in Brazil.

A. Competition Law in the Developmental State

During the developmental State of the Vargas period,⁵⁶ the Brazilian State made use of a plethora of regulatory tools to pursue political goals, including tariff protectionism, price control, the creation of monopolistic state-owned companies and sectorial regulatory councils, the use of financial incentives, credit lines, and public subsidies.⁵⁷ Concurrently, economic law played

54 In Germany, for example, regulation was heavily influenced by Ordoliberalism, a philosophical school of thought that rejects government intervention in directing economic activity but defends the exercise of strong State authority in ‘ordering’ the economy. The German ordoliberal tradition, also known as the Freiburg School, first emerged in the late 1920s, in the context of the economic and political crisis of the Weimar Republic but gained traction again in the post-war period. Economic freedom, according to ordoliberals, requires a strong State that organises the legal framework for market exchange relations. That is to say, “for the ordoliberals, the free economy is fundamentally a practice of government”. Werner Bonefeld, ‘Freedom and the Strong State: On German Ordoliberalism’, *New Political Economy* 17, no. 5 (2012): 633–56, <https://doi.org/10.1080/13563467.2012.656082>.

55 Chang, ‘The Economics and Politics of Regulation’.

56 Vargas Era alludes to the period in Brazilian history that comprises the years between 1930 and 1950 and roughly corresponds to the period when Getulio Vargas was in power, first ruling by decree as Head of the Provisional Government instituted by the Revolution of 1930 (1930–1934), then as elected president (1934–1937), and finally as a dictator (1937–1945). See Thomas E. Skidmore, *Politics in Brazil, 1930 - 1964* (Oxford University Press, 2007), <https://doi.org/10.1093/acprof:oso/9780195332698.001.0001>.

57 The term “developmental State” in this article refers to a distinct form of State characterised by its relationship with the economy and the polity. It represents a variant of “political capitalism” that deviates from the liberal state, incorporating State interventionism without complete centralised control over economic activities as in socialist economies. Ben Ross Schneider, ‘The Desarrollista State in Brazil and Mexico’, in *The Developmental State*, ed. Meredith Woo-Cumings (Ithaca, NY: Cornell University Press, 1999), 228, <https://doi.org/10.7591/9781501720383-011>. In the developmental State, the State actively promotes private activities with specific goals in mind, offering guidance, incentives, and support for private strategies. State intervention in the economy takes on a broader scope, encompassing various measures such as State-owned banks, enterprises, taxes, financial incentives, redistributive policies, and sectoral regulations. While developmentalism has historically been associated with authoritarian systems, it is not inherently incompatible with democratic regimes, although evidence suggests it is more readily implemented under autocratic conditions. Mariana

a pivotal role in creating and institutionalising the techno-bureaucratic apparatus that would support import substitution policies.⁵⁸ As described by Aguillar and Coutinho, several Brazilian agencies, councils, state owned enterprises, sector regulators, and other institutions were established during the post-war period.⁵⁹

The Brazilian Constitutions adopted during the Vargas Era (1934 and 1937) introduced provisions aimed at safeguarding competition (initially referred to as the “protection of the popular economy”) with the goal of repressing “abuses resulting from the exercise of economic power.”⁶⁰ These expressions were subsequently incorporated into legislation enacted during that period, including Decree-Law 869/1938, Decree-Law 7666/1945, and Law 1521/1951. Decree-Law 869/1938 defined crimes against the popular economy, such as selling goods below cost to prevent competition, and participating in consortium, agreement, adjustment, alliance, or capital merger, to prevent competition. It was adopted in the context of the developmentalist-nationalist project with the aim of protecting the market and Brazilian capital against cartels and abuse of international economic power.⁶¹ Although this is often considered Brazil’s first antitrust legislation, this decree addressed not only anticompetitive practices but also non-antitrust offenses such as fraudulent management and fraud related to weights and measures. There is limited evidence of consistent enforcement of its antitrust provisions, but it is noteworthy that these provisions were quoted in a legal opinion expressed by the Consultant-General of the Brazilian Republic, following a consultation from the Standard Oil Company of Brazil, which was part of the international group hit by antitrust action in the US.⁶²

Decree-Law 7666/1945, formulated by the then Minister of Justice and Interior Affairs, Agamemnon Magalhães, was the first antitrust legislation that had an administrative nature, and established antitrust offences that were “contrary to the moral and economic order.”⁶³ This legislation created the Administrative Commission for Economic Defense (*Comissão Administrativa de Defesa Econômica*), a body directly subordinate to the President of the Republic and chaired by the Minister of Justice and Interior Affairs, responsible for reviewing and approving concentrations in certain sectors of the economy (including banking, mining, transport, clothing, among others).⁶⁴ The trust-buster movement of the early 20th century in the US had a clear influence on the law’s design. The explanatory memorandum of the bill which gave rise to the decree, explicitly mentioned concerns with the emergence of trusts, which legislators considered

Mota Prado, Mario Schapiro, and Diogo R. Coutinho, ‘The Dilemmas of the Developmental State: Democracy and Economic Development in Brazil’, *Law and Development Review* 9, no. 2 (2016): 370–71, <https://doi.org/10.1515/ldr-2016-0015>. For an examination of developmental State models and a discussion of the unique characteristics of the Brazilian case, see Luiz Carlos Bresser-Pereira, ‘Models of the Developmental State’, *CEPAL Review*, no. 128 (2019): 35–47.

58 Fernando H. A. Aguillar and Diogo R. Coutinho, ‘A Evolução Da Legislação Antitruste No Brasil’, *Revista de Concorrência e Regulação* 2, no. 7–8 (2011): 139–59.

59 Aguillar and Coutinho. pp. 140-141.

60 Aguillar and Coutinho. pp. 142.

61 Prado, Schapiro, and Coutinho, ‘The Dilemmas of the Developmental State’.

62 Ana Paula Martinez, ‘Histórico e Desafios Do Controle de Concentrações Econômicas No Brasil’, *Revista de Concorrência e Regulação* 2, no. 7–8 (2011): 311–46.

63 This legislation is sometimes referred to as *Lei Malalaia*, in a derogatory reference to the Minister of Justice at the time.

64 Martinez, ‘Histórico e Desafios Do Controle de Concentrações Econômicas No Brasil’.

were “disorganising small industry, putting the middle classes and the working classes in the shadow of economic poverty. It also referred to the Sherman Act, which was framed as a legislation aimed at “combating these institutions of economic oppression.”⁶⁵

Decree-Law 7666/1945 faced significant opposition, with criticism coming from political actors such as the opposition party União Democrática Nacional (UDN), major corporations, industry and agriculture federations, and even the United States, due to its nationalist character.⁶⁶ As a result, the decree had a short lifespan and was revoked just over four months later by Decree-Law No. 8167 on November 9th, 1945. However, despite its brief existence, Decree-Law 7666/1945 left a lasting impact on competition policy in Brazil, bringing about substantial legal and institutional advancements. The resistance it encountered sparked public debate on topics like trust, cartel, and antitrust. Moreover, the legislation’s focus on addressing antitrust issues through a specific law and the establishment of a specialised administrative authority to enforce it continue to shape the institutional framework of Brazilian competition law.⁶⁷

After the overthrow of Estado Novo, Agamemnon Magalhães was elected as a constituent deputy in the Constituent Assembly of 1946. He played a crucial role in introducing Article 148 into the constitutional text, which established that “law will suppress any and all forms of abuse of economic power (...) whatever their nature, that aim to dominate national markets, to eliminate competition, and to arbitrarily increase profits.”⁶⁸ This constitutional provision endorsed the need for specific antitrust legislation to address economic power abuse, highlighting the influence of Decree 7666/1945 and its author in shaping the foundations of Brazilian competition law institutions, as further discussed in the next section.

B. The Foundations of Modern Brazilian Competition Law

Brazil implemented a new antitrust law in 1962. This legislation resulted from a bill introduced in 1948 by Agamemnon Magalhães with the objective of regulating Article 148 of the 1946 Constitution. The bill underwent a protracted legislative process, significant amendments, and eventually was enacted as Law No. 4137 on September 10th, 1962, leading to the establishment of the Administrative Council for Economic Defence (CADE). Law 4137/1962 was also enacted within the framework of the Brazilian developmental State and the legislators’ understanding of the role of the State was explicitly stated in the explanatory memorandum, which

65 “Os trusts, desorganizando a pequena indústria, colocaram as classes médias e as classes trabalhadoras à sombra da indigência econômica” (...) “Os Estados Unidos vêm se aparelhando, desde 1890, para o combate a essas instituições de opressão econômica, através do seu Federal Anti-Trust Act (Lei Sherman)”. The longer transcription in Portuguese is available in Martinez.

66 Mário André Machado Cabral, ‘Silêncio Na Historiografia Econômica Brasileira: A Legislação Concorrencial Como Inovação Institucional (1937-1945)’, *Seqüência Estudos Jurídicos e Políticos* 42, no. 88 (8 December 2021): 22, <https://doi.org/10.5007/2177-7055.2021.e78946>.

67 For a detailed analysis of the institutional innovations brought by antitrust legislation in the Vargas Era, specifically during the Estado Novo (1937-1945), see Cabral, ‘Silêncio Na Historiografia Econômica Brasileira’.

68 Article 148, Brazilian Constitution 1946. In the original: “A lei reprimirá toda e qualquer forma de abuso do poder econômico, inclusive as uniões ou agrupamentos de empresas individuais ou sociais, seja qual for a sua natureza, que tenham por fim dominar os mercados nacionais, eliminar a concorrência e aumentar arbitrariamente os lucros.”

emphasised that: “if the Brazilian state is to be a State that commands, that directs, it must rein any economic power.”⁶⁹ The law also included another reference to US antitrust law and emphasised the importance of protecting consumers, stating that the law “will be the new freedom – freedom of the Brazilian consumer and freedom of the Government, because it will not be subject to the influences of economic groups.”⁷⁰ The law not only established forms of abuse of economic power, but also rules aimed at controlling the structure of markets, establishing a pre-merger review for some types of deals between firms (article 74). It also formally created CADE, with powers to contain abuse of economic power.

Despite the more detailed provisions and the existence of an enforcement body, the law was not consistently implemented. This was partially due to the lack of efficient procedural rules, resulting in protracted proceedings, but also because of the wider political and economic context. The economic policy adopted during the military dictatorship, which spanned from 1964 to 1985, heavily relied on import substitution, price control mechanisms, and the protection of the national industry, which limited CADE’s activities and hampered the development of an effective competition policy.⁷¹ The decade of 1980s saw a significant decline in the State’s investment capacity in Brazil. The period was characterised by a crisis of the developmental State, combined with economic stagnation and high inflation. In response, the Brazilian government made intensive use of new tools such as price fixing and the fixing of public service tariffs in attempts to control the inflation rate.

Adopted in this context, the 1988 Constitution formalised the role of the State as a normative agent and regulator of economic activity, and established the terms that would govern the relationship between the State and the market.⁷² On the one hand, it limited the situations in which the State could act as a direct player in the market, that is, the cases in which the State would be allowed to act as an entrepreneur. Public monopolies, for example, were strictly limited to exceptional circumstances and to certain sectors of the economy considered strategic. On the other hand, the Constitution laid down rules and principles to supervise economic activity in Brazil. Article 170 of the Constitution outlined the guiding principles of the country’s economic order, which include free competition and free enterprise, consumer protection, the reduction of social and economic inequality, and favourable treatment of small business. Furthermore, the Constitution granted the State the authority to enact laws to repress the “abuse of economic power aimed at the domination of markets, the elimination of competition, and the arbitrary increase of profits” (article 173, paragraph 4).⁷³ This particular provision is regarded as the constitutional basis for modern Brazilian competition law.

69 In the original: “(...) para que o Estado brasileiro seja um Estado que comande, que dirija, deve pairar acima de qualquer poder econômico”. The longer transcription in Portuguese is available in Martinez, ‘Histórico e Desafios Do Controle de Concentrações Econômicas No Brasil’.

70 In the original: “A América do Norte só conseguiu dominar os trustes de petróleo depois que a Suprema Corte em 1911 decretou a dissolução da “Standard Oil”. (...) Essa lei será a carta, será a nova liberdade – liberdade do consumidor brasileiro e liberdade do Governo, porque com ela não estará sujeito às influências de grupos econômicos”. The longer transcription in Portuguese is available in Martinez.

71 Martinez.

72 Aguillar and Coutinho, ‘A Evolução Da Legislação Antitruste No Brasil’.

73 Similar wording was already included in the Brazilian Constitution of 1946, 1967, and 1969 which proscribed the abuse of economic power aiming at “domination of national markets, elimination of competition and arbitrary increase in profits.”

The subsequent development of competition policy in Brazil was closely intertwined with the economic liberalisation agenda pursued by the government in the 1990s in the wake of debt crisis of the previous decades.⁷⁴ While laws and decrees aimed at the “protection of the popular economy” and at “[supressing] abuse of economic power” had already been adopted during the Vargas Era and the military dictatorship, they had not been comprehensively applied. Until then, the State had favoured alternative regulatory tools, such as price control mechanisms, in its attempt to rule over markets.⁷⁵ Following the approval of the 1988 Constitution, and throughout the 1990s, a neoliberal agenda was adopted to ensure fiscal balance, predictability, and economic efficiency.⁷⁶ Brazil joined other Latin American governments in crafting new legal instruments to restructure the relationship between the State and the market in response to international pressures, including tools for promoting competition and attracting private investment.⁷⁷ As noted by Gustavo Onto, in Brazil “the government narrative in the 1990s explains changes in the perception of regulators as to how to best govern the economy, resulting in a new conception of the economic reality and of the role of the State.”⁷⁸ Thus, in 1994, with the implementation of the Real Plan, Brazil effectively implemented a comprehensive competition law and established institutions for the enforcement of competition policy through the enactment of Law 8884/1994.

The implementation of Law 8884/1994 marked a significant milestone in the consolidation of competition policy in Brazil. It introduced a fully-fledged legal framework of an administrative nature, disciplining both anticompetitive practices and concentrations between two or more undertakings. Despite the institutional and structural limitations, the new legal framework contributed to the establishment of a (until then very incipient) culture of competition, with important cases being decided by the Brazilian System for Competition Defence (*Sistema Brasileiro de Defesa da Concorrência – SBDC*) during the period the law was in force (from 1994 to 2012).⁷⁹ The competition authority which had been formally created in 1962, CADE,

74 As noted by Azevedo, market-opening initiatives in the first half of the 1990s gave a prominent role to competition policy. As sectors of the economy that were particularly sensitive to competition problems, such as the steel and petrochemical industries, and public utilities, such as telecommunications and electricity, came under the control of the private sector, business decisions that were previously taken by the government were now made by private agents. This shift required even more careful supervision of competition policy to prevent the exercise of market power, and therefore more vigorous enforcement of competition law by CADE. Paulo Furquim de Azevedo, ‘Análise Econômica Da Defesa Da Concorrência’, in *Direito e Economia No Brasil: Estudos Sobre a Análise Econômica Do Direito*, ed. Luciano Benetti Timm (Indaiatuba: Editora Foco, 2019), p. 285-286.

75 Aguillar and Coutinho, ‘A Evolução Da Legislação Antitruste No Brasil’.

76 Aguillar and Coutinho.

77 The introduction of rules aiming at making the economy more competitive and to reduce barriers to the entry of new firms were widely adopted in Latin America in the 1990s as part of the *Washington Consensus*, the program of institutional reforms prescribed by policy analysts in the US as the solution to promote economic growth in developing countries, centred around minimal State intervention in the economy, restrictive monetary policies, and the encouragement of foreign investment. See Eleanor M. Fox, ‘Economic Development, Poverty and Antitrust: The Other Path’, *Southwestern Journal of Law and Trade in the Americas* 13, no. 2 (2007): 211–36.

78 Gustavo Onto, ‘Regulation as Cultural Transformation: The “Educational Role” of the Brazilian Competition Policy’, *Revista Direito e Práxis* 7, no. 4 (2016): 690–715, <https://doi.org/10.12957/dep.2016.26507>. p. 693.

79 Law 8884/1994 was certainly an improvement, but it was not without flaws. From an institutional point of view, as argued by Aguillar and Coutinho, the SBDC was fragmented and in some respects redundant. Competition

was finally given powers to review mergers and cases of unilateral or coordinated behaviour, and the wider system of the SBDC, which included the Secretariat of Economic Law (*Secretaria de Direito Econômico – SDE*) and the Secretariat of Economic Monitoring (*Secretaria de Acompanhamento Econômico – SEAE*), was created to enforce the newly created law.

As the volume of transactions and investigations carried out by CADE grew, significant limitations and shortcomings of the law became more apparent.⁸⁰ Gradual reforms were introduced to address specific problems that were identified along the way, but over time they proved insufficient to resolve wider systemic issues.⁸¹ The legislation attracted criticism from the legal and business communities for being inefficient and unable to keep pace with the new dynamics of Brazilian capitalism. Stakeholders advocated for more substantive changes to align its provisions with international ‘best practices.’ The primary areas of concern included the lengthy procedures, the existence of multiple bodies with overlapping competencies, and the practice of conducting merger reviews after transaction completion (*ex post* merger review).⁸² Amongst politicians and the government, a consensus began to emerge that the SBDC required reforms to better integrate Brazil into the global economy of the early 21st century. Indeed, reforming the system was included as one of the objectives of the Growth Acceleration Program (*Programa de Aceleração do Crescimento – PAC*), an economic stimulus package introduced by the federal government in 2007. The expectation was that reforming the competition law framework would contribute to the creation of an institutional environment more conducive to the “free functioning of markets and private investment.”⁸³

A bill was proposed and after a long period of consideration by the Brazilian National Congress, a new law was finally enacted in 2011 to address problems that had been identified over the years and to streamline the SBDC. Law 12529/2011, which came into force in 2012, introduced significant institutional, procedural, and substantive reforms in the Brazilian system of competition defence. With the new law, Brazil adopted a model of enforcement that granted CADE independent powers of investigation and the jurisdictional authority to judge and punish violations of the economic order.⁸⁴ Notably, the new law changed the institutional design

policy in Brazil faced problems of institutional coordination not only within the different Brazilian bodies that comprised the system, but also between the SBDC and other government agencies, including the Central Bank of Brazil (in charge of financial regulation), CVM (the capital market regulator) and newly created sector regulators. Furthermore, the SBDC struggled with persistent lack of resources and of qualified staff, which significantly impacted its capacity for handling the large number of cases brought to the attention of the authorities in the early years of the law. Over time, the internal division of tasks and roles were better established and the system built capacity to enable more effective enforcement of the provisions. Aguillar and Coutinho, ‘A Evolução Da Legislação Antitruste No Brasil’.

80 Between 1962 and 1996, a total of 33 transactions were subject to review, in stark contrast to the 600 transactions that were reviewed between 1996 and 2000. That is, in a period of only four years, CADE reviewed many more cases than it did in the 34 years following its creation. CADE, *Defesa Da Concorrência No Brasil: 50 Anos* (Brasília: Conselho Administrativo de Defesa Econômica, 2013). p. 18.

81 On the gradual and incremental changes introduced in the framework established by Law 8884/1994, see Mario Gomes Schapiro and Fabiana Mesquita Bacchi, ‘Análise Dos Atos de Concentração No Brasil: Forma, Função e o Incrementalismo Reformista Do CADE’, in *Direito Econômico Concorrencial*, by Leonor Cordovil and Vinícius Marques de Carvalho (São Paulo: Saraiva, 2013), 49–96.

82 Martinez, ‘Histórico e Desafios Do Controle de Concentrações Econômicas No Brasil’.

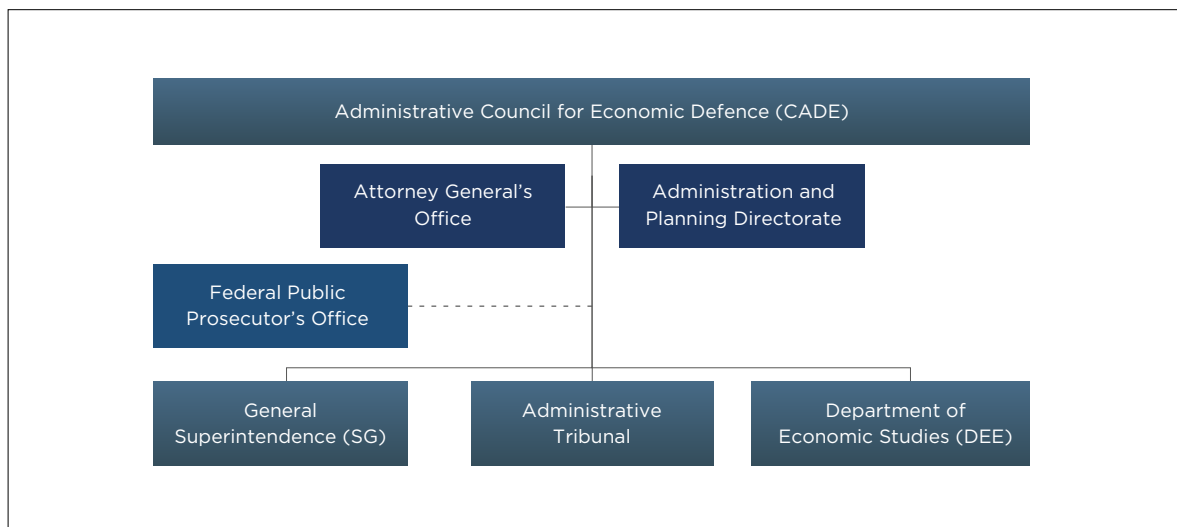
83 Martinez.

84 Paulo Burnier da Silveira, *Direito Da Concorrência* (Rio de Janeiro: Editora Forense, 2020).

of CADE to allow it to perform both investigative and adjudicative functions, with an internal functional division.⁸⁵

Under the new law a revamped structure was established, comprising the Tribunal, a General Superintendence (SG) and a Department of Economic Studies (DEE). The Tribunal was created as a composite decision-making body, gathering CADE's six Commissioners and its President. The SG combined the main functions previously performed by SDE and SEAE, giving it more faculties to carry out preparatory procedures and to conduct administrative inquiries, to initiate or terminate administrative proceedings investigating anticompetitive practices, and reviewing concentrations. The DEE replaced the technical role formerly fulfilled by the SEAE (which now focuses on competition advocacy), and is responsible for preparing economic studies and opinions that inform proceedings.⁸⁶ Additionally, the new CADE incorporated two independent offices that can be called upon to provide opinions before the Tribunal in specific cases: The Attorney General's Office (*Procuradoria Federal Especializada*), which also represents CADE in court, and the Federal Public Prosecutor's Office (*Ministério Público Federal*), which is also responsible for criminal prosecutions.

Figure 1. CADE's structure under the Law 12529/2011



Source: Author, based on information publicly available on CADE's website

The historical overview provided in this section reveals that since the 1930s, Brazil adopted multiple pieces of legislation aimed at regulating competition. It also demonstrates significant variation in the nature of legal instruments adopted and the level of enforcement, with changes

85 Silveira.

86 It is worth mentioning that the Department of Economic Studies had been previously established in 2009, through Resolution No. 53/2009. However, it was only in 2011 that the organism was formally recognised as a constitutive part of CADE. For a detailed discussion of the evolution of the Brazilian antitrust legislation and the changes introduced by the new law, see Aguillar and Coutinho, 'A Evolução Da Legislação Antitruste No Brasil'. For the evolution of concentration control, more specifically, see Martinez, 'Histórico e Desafios Do Controle de Concentrações Econômicas No Brasil'; Schapiro and Bacchi, 'Análise Dos Atos de Concentração No Brasil: Forma, Função e o Incrementalismo Reformista Do CADE'.

being introduced in close connection to the political economy of each specific historical period. The enactment of Law 8884/1994 marked a turning point, when a more coherent competition policy was implemented in Brazil. This occurred as part of a political project for the liberalisation of the economy and to achieve monetary stabilisation in the 1990s, which was influenced by the international interests that shaped Latin America's politics during that time. The reforms introduced with Law 12529/2011 aimed at further supporting the globalisation of the Brazilian economy and streamlining procedures to enhance predictability for businesses. These reforms also sought to incorporate a particular view of the role of the State in the economy into the Brazilian competition framework – a political agenda presented as international 'best practice.' As the following section will illustrate, this perspective also influenced the implementation of the law. While lawyers and practitioners did not fully and intentionally embrace law and economics theory in interpreting and enforcing competition law, it can be argued that Brazilian scholarship and practice have assimilated a version of antitrust that incorporates key methodological issues associated with law and economics, including the focus on economic analysis and the application of economic theory to decision-making.

THE HYBRID NATURE OF BRAZILIAN COMPETITION LAW

The legal basis of competition law and policy can be found in the chapter of the 1988 Constitution that sets the rules governing the economic order in Brazil. This Constitution was the centrepiece of the democratisation efforts carried out following the end of the military dictatorship, and enshrined a comprehensive political pact, accommodating a wide range of social demands. According to Virgílio Afonso da Silva, the 1988 Constitution was intended to be a transformative Constitution, in other words "a constitution that aims at changing the *status quo* by establishing goals to be pursued and defining the standards of public policies in different areas."⁸⁷ As such, the general principles of economic activity – principles that the economic order should respect and promote – should be interpreted as part of the wider constitutional project that formally recognised a range of social and economic rights, developmental objectives, and principles of distributive justice. Fabio Konder Comparato argues that all principles governing the economic order (as laid out in article 170) are to be understood and harmonised in view of the greater objective established in the *caput*: achieving social justice.⁸⁸

Despite its constitutional roots, competition law gradually shifted away from promoting socioeconomic rights. Over time, decision-making processes and the application of the law became detached from substantive arguments of a constitutional nature and shifted towards the pursuit of economic efficiency – a trend referred to as "methodological desconstitution-alisation" by Schuartz.⁸⁹ This reveals a significant division between the social and economic realms of legal scholarship and practice, which the law and political economy framework seeks

87 Virgílio Afonso da Silva, *The Constitution of Brazil: A Contextual Analysis*, Constitutional Systems of the World (Oxford, UK: Hart Publishing, 2019). p. 2.

88 Fabio Konder Comparato, 'Regime Constitucional Do Controle de Preços No Mercado', *Revista de Direito Público* 24, no. 97 (1991): 17–28.

89 Schuartz identified the "peculiar e notável fenômeno de impermeabilização e 'desconstitucionalização metodológica' do direito de defesa da concorrência brasileiro". Luis Fernando Schuartz, 'A Desconstitucionalização

to unveil.⁹⁰ Although the current law, as did the previous legislation, explicitly mentions that the enforcement should be guided by constitutional provisions,⁹¹ the implementation of competition policy arguably did not incorporate these constitutional goals. Instead, it was primarily driven by the desire to open up and integrate the Brazilian economy into the global economy, guided by principles of economic efficiency and market liberalisation.⁹² In essence, competition policy in Brazil evolved as part of a broader neoliberal agenda which dominated the political economy of the late 20th century in Western nations.⁹³ This process was deeply influenced by the epistemological assumptions of the Chicago School and the law and economics methodology that had shaped antitrust law in the US and in other parts of the world in previous years – an approach that prioritises allocative efficiency and total welfare measures while neglecting the distributional aspects.⁹⁴

To illustrate how this decoupling of Brazilian competition law from its constitutional roots has been expressed in the interpretation and application of the law, the next subsections present a brief introduction to the institutional design and the enforcement of merger review. This overview includes a discussion of the relevant rules and procedures in Brazil, how they were first introduced into the legal regime, and the evolution of the legislation over time. The analysis focuses on the substantive aspects of merger review including the criteria for assessing the potential impacts of the merger, mostly rooted in an economic analysis of efficiencies.⁹⁵ It shows

do Direito de Defesa da Concorrência', *FGV Direito Rio - Textos para Discussão*, 2008, <http://hdl.handle.net/10438/1762>. p. 2.

90 Britton-Purdy et al., 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis'.

91 Article 1 of Law No. 12529/2011 establishes that the law will be guided by the constitutional provisions that establish freedom of initiative, free competition, the social function of property, consumer protection, and repression of abuse of economic power.

92 As argued by Silva, the majority of ordinary laws that aimed at limiting economic activity adopted after the promulgation of the 1988 Constitution "have no relation to the major principles and goals set forth in Art 170". Silva, *The Constitution of Brazil*. p. 192.

93 Miola's study provides empirical evidence of how the structuring of a new legal and institutional framework for regulating market competition in Brazil (Law 8884/1994) served the political project of promoting economic liberalisation. Iagê Zendron Miola, 'Competition Law and Neoliberalism: The Regulation of Economic Concentration in Brazil', *Revista Direito e Práxis* 7, no. 4 (2016): 643–89, <https://doi.org/10.12957/dep.2016.26512>.

94 See for example the discussion in *Ibid* and also in Ana Frazão, 'A Necessária Constitucionalização Do Direito Da Concorrência', in *Direitos Fundamentais e Jurisdição Constitucional* (São Paulo: Editora Revista dos Tribunais, 2014), 139–58. It is important to emphasise that the greater acceptance of economic analysis in Brazilian antitrust scholarship and practice was not a deliberate and full-fledged adoption of the doctrines and premisses of law and economics. Rather, in the Brazilian case, this influence was more limited and mainly translated into assimilation of the methodological approach and the adoption of analytical steps centred on the application of economic theory, in particular neoclassic economics.

95 Interestingly, even at that time, contradictions in the enforcement of competition law in Brazil were evident in view of the broader political economy backdrop, highlighting the hybrid nature of the country's competition law. This is exemplified by cases where economic tests and a law and economics approach were employed, yet broader industrial policy objectives might have been considered. One such case is the merger of Antarctica and Brahma, which resulted in the creation of Ambev (Merger Review No. 08012.005846/1999-12). The brands owned by both companies, including Brahma, Skol, and those belonging to Antarctica, included the three most popular among consumers, which collectively accounted for approximately 75% of beer sales in Brazil. See Laíse Da Correggio Luciano, 'The AmBev Decision and the Regulation of Economic Power in Brazil: At a Crossroads between the US and the EU Competition Law Models', *World Competition* 34,

how CADE's decisional practice still represents the strong influence of the Chicago School and the economic analysis of Brazilian antitrust law enforcement and reinforces the 'desconstitutionalisation' of competition law. The current merger guidelines still adopt a cost-benefit analysis by emphasising the need to weigh the efficiencies resulting from the transaction against its harms and does not require the effects of the merger to be measured against constitutional principles governing the economic order.

A. The shift to an *ex ante* approach

One of the key innovations implemented by Law 12529/2011 was the introduction of pre-merger control procedures.⁹⁶ In Brazil, under the previous legislation (Law 8884/1994) the review of concentrations took place *ex post*, that is, CADE would analyse relevant concentrations after the transaction was completed.⁹⁷ This post-merger review was considered highly inefficient and was the object of criticism of antitrust experts. From the perspective of the authority, a major shortcoming of the previous regime was the so-called 'scrambled eggs' effect, where separating the whites from the yolks is significantly harder once the eggs are cooked. Mergers could take years to analyse and, by the time the authority finally reached a conclusion, the effects of the transaction would already be consolidated and hard to reverse.⁹⁸ From the perspective of businesses, the long period that it took for CADE to review the cases and the possibility of overturning the transaction created legal uncertainty.⁹⁹

With the adoption of Law 12529/2011, a more modern *ex ante* procedure was adopted. The change in the moment of the merger review was largely welcomed by business and legal communities, labelled as a move that would increase legal certainty and consistent with international practice. Indeed, the change in the notification regime was part of the recommendations put forward by the OECD to reform Brazilian legislation during the peer reviews conducted in both 2005 and 2010.¹⁰⁰

no. Issue 1 (2011): 139–55, <https://doi.org/10.54648/WOCO2011007>. In this case, one of the arguments put forth in support of the merger was that it would establish a "national champion" capable of competing internationally, but the arguments and the evidence articulated by the competition authority were based on microeconomics. See OECD, 'Roundtable on Competition Policy, Industrial Policy and National Champions' (Global Forum on Competition, 19 October 2009), para. 28.

96 Carlos Emmanuel Joppert Ragazzo and Cristiane Landerdahl de Albuquerque, 'From Post- to Pre-Merger Notification: The Ultimate Outreach Challenge', *CPI Antitrust Chronicle*, no. 2 (2012): 1–8.

97 Some paradigmatic decisions during this period illustrate the reliance on economic tests to guide the enforcement of competition law in Brazil. For example, the Colgate/Kolynos decision (merger case No. 27/95, Colgate-Palmolive Company/Kolynos do Brasil S.A., decided in 1996) employed a series of economic tests to anticipate the future effects of the merger, as discussed in Marco Botta, 'The Definition of the Relevant Market and the Degree of Market Concentration in the Emerging Economies: Case Study on Brazil and Argentina', *World Competition* 33, no. Issue 4 (2010): 663–82, <https://doi.org/10.54648/WOCO2010053>.

98 There was an attempt to mitigate this risk through agreements (*Acordo de Preservação de Reversibilidade da Operação* – APRO) whereby the undertakings agree to ensure the effectiveness of any remedies later adopted by CADE, but the effectiveness of these mechanisms in avoiding the 'scrambled eggs' effect was limited.

99 Martinez, 'Histórico e Desafios Do Controle de Concentrações Econômicas No Brasil'.

100 See OECD, 'OECD Peer Reviews of Competition Law and Policy: Brazil' (Paris: Organization for Economic Co-operation and Development, March 25th, 2019), <https://www.oecd.org/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-2019.htm>.

B. The substantive enforcement of control of concentrations in Brazil

The main substantial prohibition in the law is concerned with transactions which could exclude existing competitors in a substantial part of the relevant market, create or reinforce a dominant position, or lead to the dominance of a relevant market (article 88, para. 5). Brazilian competition law adopts an effects-based approach; the analysis focuses on the likely future effects of the merger. This requires the competition authority to assess the effects of an anticipated merger on the market before deciding whether companies should be allowed to move forward with a transaction that meets the notification criteria. The decision is premised on the actual or likely detrimental effects that a given merger will have on competition in the relevant market.

The methods and steps of analysis that the Brazilian competition analysis follows to conduct such analysis are not defined by hard law but have rather evolved through practice. As many other jurisdictions, Brazil has created merger guidelines that specify the application of the law, clarifying how legal and economic concepts should apply to merger cases. The language in the legal provisions that support merger review alludes to notions that go beyond economic efficiency, such as proscribing mergers that lead to the exclusion of competitors, and to concerns related to imbalance of power and creation of market power, but the guidelines that CADE has developed and applied reflect more formalist perspectives and are largely centred around economic tests. Drawing on microeconomic models and animated by the “economic style of reasoning,” CADE usually follows five steps of analysis when reviewing mergers: i) defining the relevant market, ii) analysing the level of concentration, iii) verifying the probability of the exercise of market power through the verification of conditions of entry and rivalry, iv) in cases involving input markets, evaluating the buyer power existing or created as a result of the transaction, v) examining efficiencies, including the evaluation of its net effects on the market.¹⁰¹

First, to identify the relevant market, the guidelines suggest that the analysis should consider the set of economic agents (including both customers and producers) that would affect and constrain decisions made by the merged firm, including aspects such as price, quality and quantity of the products or services offered. Similar to the US guidelines, CADE’s guidelines mention economic tests that can be carried out to support the definition of the relevant market, such as using the ‘small but significant and non-transitory increase in price’ (SSNIP) metric to assess supply-side substitutability (that is, whether there are other players able and willing to provide the products or services in the same geographic region after a small but significant and non-transitory increase in price), and to conduct a hypothetical monopolist test.

Regarding the level of market concentration, the guidelines recommend analysing the market shares in the relevant market. While this tends to be a static measure, the guidelines recommend taking into consideration the level of development of the market and whether it has been stable. Again, similar to US guidelines, CADE’s guide also suggests adopting the Herfindahl-Hirschman Index (HHI) and establishing clear quantitative thresholds to assess the level of concentration of the markets, based on changes in market shares.¹⁰² The Brazilian

101 CADE, ‘Guide for Horizontal Merger Review’, Guidelines (Brasília: Conselho Administrativo de Defesa Econômica, 2016), <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/GUIDE%20FOR%20HORIZONTAL%20MERGER%20REVIEW.pdf>.

102 The Herfindahl-Hirschman Index (HHI) is widely considered a useful measure of market concentration. The index is calculated based on the number of firms and the proportional distribution of market share between

guidelines mention that the HHI should be considered as an ‘initial assumption’, which should be admitted cautiously in particular cases, such as when one of the parties is a maverick firm. However, there is no clear reference as to how this metric links to theories of harm, nor a critical discussion of the tool’s limitations in assessing competitive dynamics, imbalances of power, or matters related to economic justice. The limitations of these economic tests in evaluating competitive dynamics are especially apparent in cases involving multi-sided markets, such as digital platforms. In digital markets, there are examples of cases where CADE’s assessment of mergers based on these economic tests overlooked important factors, such as the interdependencies between the platform and the ecosystem of players depending on it.¹⁰³

The third and fourth steps of the analysis outlined in CADE’s guidelines aim at a specific understanding of the dynamics at play in the market under review. This includes assessing whether the merged entity would be able to unilaterally exercise market power, whether the merger would increase the purchasing power of firms in the market, and whether it would reduce rivalry between firms and increase the likelihood of explicit or tacit coordination. Also in these steps, the guidelines recommend the adoption of statistical models and quantitative thresholds to estimate the potential effects of the proposed merger. For example, to identify barriers to entry the guidelines suggest assessing the effectiveness of past entrances, and the likelihood, timeliness, and sufficiency of new players entering and competing in the market and propose adopting economic metrics such as the Likelihood of Entry Analysis (LEA). The wide range of variables to be considered in the analysis aims at providing an impression of objectiveness to what, in practice, is a complex analysis surrounded by a high level of uncertainty.

Finally, in assessing the competitive effects of the merger, Brazilian competition law recognises efficiency defences, whereby an otherwise anticompetitive merger can be approved if it is expected to generate one or more of the following efficiencies: i) an increase in productivity or competitiveness, ii) an improvement in the quality of goods or services, iii) promote efficiency and economic or technological development.¹⁰⁴ The analysis of efficiencies, as described by the scholarship and practice, must assess the economic and structural effects of the anticipated merger to determine if it hinders the ability of actual and potential competitors to compete effectively in the market. Mergers are permitted where the authority believes they will not create

them in a given market. The use of the HHI and its thresholds to estimate market power was explicitly adopted under the Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission and is also considered by other authorities around the world. In Brazil, the HHI was included in the *Guia para Análise de Atos de Concentração Horizontal* published in 2016, although the Brazilian competition authority was already using it before then. See Ana Frazão, *Direito Da Concorrência: Pressupostos e Perspectivas* (São Paulo: Saraiva, 2017).

103 See, for example, Beatriz Kira, ‘Is IFood Starving the Market? Antitrust Enforcement in the Market for Online Food Delivery in Brazil’, *World Competition* 46, no. 2 (2023): 133–62, <https://doi.org/10.54648/woco2023009>; Nicolo Zingales and Bruno Renzetti, ‘Digital Platform Ecosystems and Conglomerate Mergers: A Review of the Brazilian Experience’, *World Competition* 45, no. Issue 4 (2022): 473–510, <https://doi.org/10.54648/WOCO2022021>.

104 “Art. 88, para. 6º: Os atos a que se refere o § 5º deste artigo poderão ser autorizados, desde que sejam observados os limites estritamente necessários para atingir os seguintes objetivos: (...) a) aumentar a produtividade ou a competitividade; b) melhorar a qualidade de bens ou serviços; ou c) propiciar a eficiência e o desenvolvimento tecnológico ou econômico”

barriers to effective competition in Brazil, or when they create efficiencies that outweigh their potential anticompetitive effects.

This efficiency-driven perspective, although some argue that it offers a measurable and objective framework, fails to include considerations of a different nature. Transactions will often produce both positive and negative competitive effects. According to the law, when the positive effects outweigh the negative ones, the merger should not be prohibited (article 88, para 6). However, in practice, balancing the pro-competitive and anticompetitive effects is often a complex task that goes beyond an economic-driven cost-benefit analysis. For example, the definition of who needs to benefit from such efficiencies is unclear. There are often multiple interests at stake and the analysis of whom would benefit or lose from a transaction cannot be captured in a binary assessment. Significantly, while the law explicitly requires that a relevant part of the resulting benefits should be passed on to consumers, the guidelines are vague in defining the assessment criteria. The guidelines suggest that the evaluation should consider “the net non-negative effect on the economic welfare of consumers”, a language strongly associated with an economic efficiency-oriented analysis.¹⁰⁵ While economic theory and evidence can provide valuable insights for antitrust analysis, the predominant emphasis on efficiency-driven arguments and metrics in decision-making overlooks distributive concerns. This approach disregards issues of equality and justice, which are integral to the constitutional text, and delegates distributional questions to other areas of law and policy beyond the purview of competition law.¹⁰⁶

Overall, CADE’s official merger guidance demonstrates that, despite the constitutional foundations of competition law in Brazil, the analysis conducted by CADE prioritises economic tests. This focus on economic factors has limited the scope for considering more holistic aspects of market structure and the underlying power dynamics at play, which could arguably be supported by constitutional provisions. However, it is important to acknowledge that there are concerns raised regarding the introduction of non-economic elements in antitrust analysis and the potential risks associated with incorporating such arguments. For instance, apprehensions exist regarding the uncertainty in the actions of the antitrust authority and the potential legal insecurity faced by businesses. Critics argue that decisions based on non-economic criteria may be less predictable and could give rise to concerns such as corruption or capture.¹⁰⁷ Indeed,

105 Frazão criticizes the 2016 edition of *Guia H* for establishing that a transaction could be approved if, in an analysis of efficiencies, the net result is “non-negative” for consumers. According to Frazão, the mere existence of an efficiency is not enough to meet the criteria established in Brazilian competition law, which is “very clear in the sense that the consumer must have a relevant part of the benefits of the transaction”. Frazão, *Direito Da Concorrência: Pressupostos e Perspectivas*.

106 The traditional perspective of economic efficiency, often associated with the Chicago School of thought in antitrust law, emphasizes allocative efficiency and total welfare measures while inadequately considering the distribution of gains or losses in the cost-benefit analysis it relies on. On the shortcomings of a cost-benefit analysis when it comes to legal matters, see Duncan Kennedy, ‘Cost-Benefit Analysis of Entitlement Problems: A Critique’, *Stanford Law Review* 33, no. 3 (1981): 387–445.

107 For example, Wright et al. argue that broadening the scope of competition policy and replacing consumer welfare with a different set of values would result in “uncertainty in the business community that ultimately would have a chilling effect on procompetitive conduct and encourage new efforts by firms to influence antitrust outcomes through political pressure and agency rent-seeking”. Joshua D. Wright et al., ‘Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust’, *Arizona State Law Journal* 51, no. 1 (2019): 363. McChesney examines whether politics can “corrupt” antitrust law and argues in favor

adopting a more holistic approach would undoubtedly introduce complexity to antitrust analysis. It would necessitate the interpretation of the law and engagement with arguments of a legal nature, specifically pertaining to the implications of different scenarios on individuals' rights, rather than solely focusing on economic implications. However, competition law enforcers have the capability to tackle this challenge. Rights-based considerations align with the nature of arguments that decision-making bodies responsible for enforcing legislation encounter in other areas of law. This approach would bring commissioners at the competition authority closer to the role of judges in court. Arguably, their level of expertise, institutional design, and granted independence position them well for such a role, provided that this expansion in faculties is accompanied by effective measures of accountability.

Furthermore, it is crucial to recognise that economic arguments are not neutral or detached from political considerations. Efficiency is not a neutral or purely technical goal; it is pursued and interpreted in view of political choices and in alignment with a political agenda, as discussed in the previous sections. Economic evidence, too, is subject to interpretation and discussion. Therefore, similarly as to how the Brazilian authority has developed the capacity to assess and evaluate economic arguments, considering that not all economics is sound economics, competition law enforcement can be strengthened by directly and transparently engaging with other considerations that may be relevant in antitrust analysis but often remain unseen or poorly articulated in decision-making. This would be done alongside arguments of an economic nature. As Monti puts it, "what threatens to make competition law unworkable is not the pursuit of a wide range of public policy objectives, but the fact that market participants are unaware of the policies being pursued. The primary concern should not be the presence of policy considerations, but the lack of transparency in the decision-making process".¹⁰⁸

CONCLUSION

The influence of the Chicago School gradually declined around the 1990s and 2000s. Around that time, scholars started to work on alternative theoretical references in an attempt to circumvent what were considered flaws in the basic doctrines of the Chicago School, including some of the rationales for market exclusion. In most parts of the world, the modern enforcement of competition law has been redirected towards a more diffuse set of theories and shaped by multiple schools of thought.¹⁰⁹ Indeed, in the US, many use the term 'post-Chicago' to label the set of economic principles that currently guide mainstream antitrust thinking.¹¹⁰ Nonetheless,

of maintaining economic standards. Fred S. McChesney, 'Economics versus Politics in Antitrust', *Harvard Journal of Law & Public Policy* 23, no. 1 (1999): 133–44. Similarly, Lipsky Jr. defends the "microeconomic takeover of antitrust" asserting that the singular pursuit of economic objectives has streamlined and rationalized antitrust enforcement. Abbott B. Lipsky Jr., 'Antitrust Economics - Making Progress, Avoiding Regression', *George Mason Law Review* 12, no. 1 (2003): 163–77.

108 Giorgio Monti, *EC Competition Law* (Cambridge, UK: Cambridge University Press, 2007), 16.

109 Bradford, Chilton, and Lancieri, 'The Chicago School's Limited Influence on International Antitrust'.

110 Post-Chicago critics are generally rooted in a combination of game theory, behavioural economics, and the adoption of economic modelling and empirical tools to assess competition. Daniel A. Crane, 'A Neo-Chicago Perspective on Antitrust Institutions', *Antitrust Law Journal* 78, no. 1 (2012): 43–65.

the influence that the Chicago School had and still has on competition law and practice in many jurisdictions – including in Brazil – is rarely contested. One of its main contributions has been to redirect competition law towards aspects surrounding economic efficiency, manifested through the consumer welfare standard. As a result, over the last few decades, questions of distribution, power, and democracy, were largely excluded from the study of competition law.

This paper shows how, inspired by the tenets of the Chicago School and as part of a liberalisation project driven largely by foreign interests, Brazilian competition law has gradually shifted away from its constitutional roots. The adoption of economic tests and methodologies, under the guise of neutrality, has obscured and advanced a specific set of political projects: one that often reproduces privilege, enhance concentration of power, and exacerbate inequality.¹¹¹ This trend of separating competition law and enforcement from broader socio-political considerations is not unique to Brazil, but has also been observed in other jurisdictions, particularly in other Latin American countries. For example, Colombia's Constitution acknowledges socio-economic rights, on the one hand, while supporting a neoliberal economic model, on the other.¹¹²

Overall, the observed trends discussed in this paper show the historical roots of competition law and its development, which were driven by political and economic forces. In recent decades, under the auspices of the methodology defended by the Chicago School, the pursuit of economic efficiency has narrowed the scope of competition law and hindered its effectiveness in countering rising market concentration. As expressed by Wilks, “[a] great expansion in policy powers and enforcement is accompanied by a great increase in the global power of large corporations. Competition policy has developed, and been enforced, in ways that benefit and support large global corporations.”¹¹³

To counter this trend and make competition law fit to address the multiple crises of our time, legal scholarship and practice should embrace political economy considerations – shifting from the analysis of economic efficiency to an analysis of economic power.¹¹⁴ In Brazil, this shift would entail questioning how to better align the tools and procedures of competition law with the goals set in the 1988 Constitution. In practical terms, it requires considering how to reform competition law and enforcement to give life to democratic principles embodied in the constitutional text, such as social justice and equality.

111 Britton-Purdy et al., ‘Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis’. Pp. 1813-1814.

112 For a discussion of the provisions on the Colombian Constitution that address competition and how they are related to development, see Juan David Gutiérrez and Andrés Felipe Suárez, ‘Using Competition Law to Link Regulation and Development’, *Law and Development Review* 16, no. 1 (2023): 145-184, <https://doi.org/10.1515/ldr-2022-0045>.

113 Stephen Wilks, ‘Competition Policy’, in *The Oxford Handbook of Business and Government*, by David Coen, Wyn Grant, and Graham Wilson (Oxford: Oxford University Press, 2010), <https://doi.org/10.1093/oxfordhb/9780199214273.003.0033>.

114 As argued by proponents of the LPE, “At least three forms of power deserve our attention: the *constitutive power* of law to create endowments that shape all voluntary bargains, the *market power* that legal structures enable, and the *political power* that may arise from differential endowments, market power, or ways that legal rules insulate economic power from democratic reordering. In selecting topics and framing questions, this reorientation would inquire into how *law creates, reproduces, and protects political-economic power*, for whom, and with what results.” Britton-Purdy et al., ‘Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis’. p. 1820.

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