LUIZ FELIPE ROSA RAMOS

ANTITRUST AND COMPETITION

CONVERGENCE AND DIVERGENCE IN THE TROPICAL MIRROR

PH.D. THESIS (TESE DE DOUTORADO)

Supervisor: Professor Dr. Celso Fernandes Campilongo (University of Sao Paulo).
Co-supervisor: Professor Dr. Tobias Werron (University of Bielefeld).

UNIVERSIDADE DE SÃO PAULO
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Para Bia, minha irmã.

"In this manner, they endeavored to endow the market system with economic legitimacy. But, by the same token, they sacrificed the sociological legitimacy (…)*"* Albert O. Hirschmann, 1982.

"My rules for research: 1. Listen to the Gentiles (…)*"* Paul Krugman, 2008.

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One of the learnings from writing this thesis on competition was that significant things cannot be done without cooperation and exchange. Any list containing the names of those who cooperated and exchanged thoughts with me would be incomplete. I hope to be fair at least with the ones who were directly relevant for completion of this thesis. Any errors that remain are, of course, my sole responsibility.

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My co-supervisor Professor Tobias Werron was crucial for the definition of the methods and several references used in this work. Regarding Professor Tobias, I could only update the words someone else has written about a very different character: "*he depends for his results not all upon pedagogical fireworks but rather upon a quiet manner and a remorseless logic. He gives the impression of absolute intellectual integrity, a very rare quality and so immensely impressive when encountered*"[1].

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[1] Adapted from Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, xv (about Aaron Director).

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ABSTRACT

ROSA RAMOS, L. F. *Antitrust and competition: convergence and divergence in the tropical mirror.* 2019. 279 pages. Thesis (Ph.D. in Law, concentration area: Philosophy and General Theory of Law) – Law School, University of São Paulo, São Paulo, 2019.

The debate on antitrust goals is a rich, century-old dispute that seems to admit more than one approach. This thesis seeks to develop a historical-sociological approach by looking at such debate through the following question: What does it mean to protect competition as an objective of antitrust? In order to address such question, the dissertation recovers, in a first step, historical moments of the discussion and institutionalization of various antitrust goals. Although the focus is on the Brazilian case of society, even international contributions to such debate generally fail to semantically consolidate a concept of competition. It means antitrust agencies have struggled to find, in doctrine, definitions of competition that may be applicable to various decisions. In order to pursue alternative definitions, the dissertation observed how competition has been described by sociological studies. The observation of the encounters and incongruities between such "sociology of competition" and the emerged contributions in antitrust field has intrinsic value, that is, to illuminate the limits and latencies demarcated by antitrust when building its notions of competition. Nevertheless, the scope of the thesis is broadened by a suggestion that an approach capable of coupling sociology of competition and antitrust doctrine potentially offers a legally coherent and socially adequate concept for antitrust competition.

Keywords: antitrust, antitrust goals, competition, sociology of competition, systems theory.

RESUMO

ROSA RAMOS, L. F. *Antitrust and competition: convergence and divergence in the tropical mirror.* 2019. 279 p. Tese (Doutorado em Direito, área de concentração: Filosofia e Teoria Geral do Direito) – Faculdade de Direito, Universidade de São Paulo, São Paulo, 2019.

O debate sobre os objetivos do antitruste é um debate rico e centenário, que parece admitir mais de uma abordagem. Esta tese procura desenvolver uma abordagem histórico-sociológica, observando esse debate a partir da seguinte pergunta: o que significa proteger a concorrência como um objetivo do antitruste? Para endereçar essa questão, são recuperados, em um primeiro passo, momentos históricos da discussão e institucionalização dos diversos objetivos do antitruste. Embora o foco seja o caso brasileiro da sociedade, sugere-se que mesmo contribuições internacionais a esse debate falham, de maneira geral, em consolidar semanticamente um conceito de concorrência. Significa dizer que autoridades antitruste têm tido dificuldade em encontrar, na doutrina, definições de concorrência que possam ser aplicáveis a diversas decisões. A fim de buscar definições alternativas, a tese se dedica a observar como a concorrência foi descrita por trabalhos sociológicos. A observação dos encontros e desencontros dessa "sociologia da concorrência" com as contribuições surgidas no âmbito do antitruste possui valor intrínseco, qual seja, iluminar os limites e latências demarcados pelo antitruste ao construir suas noções de concorrência. Não obstante, em uma ampliação do seu escopo, o trabalho sugere também que uma abordagem capaz de acoplar sociologia da concorrência e doutrina antitruste potencialmente oferece um conceito juridicamente coerente e socialmente adequado para a concorrência do antitruste.

Palavras-chave: Antitruste, objetivos do antitruste, concorrência, sociologia da concorrência, teoria dos sistemas.

ZUSAMMENFASSUNG

ROSA RAMOS, L. F. *Antitrust and competition: convergence and divergence in the tropical mirror*. 2019. 279 S. Dissertation (Promotion in Rechtswissenschaften, Philosophie und Allgemeine Rechtslehre) – Fakultät für Rechtswissenschaft, Universität São Paulo, São Paulo, 2019.

Die Debatte über die Ziele des Wettbewerbsrechts ist eine reichhaltige, jahrhundertealte Debatte, die mehr als einen Ansatz zulässt. Diese Arbeit entwickelt einen historisch-soziologischen Ansatz, der diese Debatte mit folgender Frage konfrontiert: Was bedeutet es, den Wettbewerb als Ziel des Wettbewerbsrechts zu schützen? Um diese Frage zu beantworten, rekonstruiert die Dissertation in einem ersten Schritt historische Momente der Diskussion und Institutionalisierung verschiedener Ziele des Wettbewerbsrecht. Obwohl der Schwerpunkt auf dem brasilianischen Fall der Gesellschaft liegt, haben auch internationalen Beiträgen zu dieser Debatte das Konzept des Wettbewerbs in der Regel nicht semantisch konsolidiert. Das bedeutet, dass es die Kartellämter schwergefallen ist, in der Lehre Definitionen des Wettbewerbs zu finden, die auf verschiedene Entscheidungen angewendet werden können. Um alternative Definitionsvorschläge zu entwickeln, untersuch die Dissertation sodann, wie der Wettbewerb in der soziologischen Literatur beschrieben wurde. Die Beobachtung von Parallelen und Differenzen zwischen der „Soziologie der Konkurrenz“ und der Literatur zum Wettbewerbsrecht hat einen inneren Wert, d.h. die vom Wettbewerbsrecht abgegrenzten Grenzen und Latenzen beim Aufbau seiner Wettbewerbsvorstellungen zu beleuchten. Dennoch wird der Umfang der Arbeit durch einen Vorschlag erweitert, dass ein Ansatz, der in der Lage ist, die Soziologie der Konkurrenz und mit der Dogmatik des Wettbewerbsrecht zu verknüpfen, potenziell ein rechtlich kohärentes und sozial angemessenes Konzept für den Wettbewerb bietet.

Stichworte: Wettbewerbsrecht, Wettbewerbsrechtliche Ziele, Konkurrenz, Soziologie der Konkurrenz, Systemtheorie.

SUMMARY

INTRODUCTION

In 2016, the Nucleus of Studies on Competition and Society (NECSO-USP) conducted an exploratory research on the perception of competition in the Brazilian case of society. Questionnaires were applied to entrepreneurs, executives and employees related to companies of various sizes in different business sectors. The professionals were asked about their understandings regarding competition, their knowledge on antitrust and the specificities of competition in Brazil. The answers obtained by the group, among which we now pick a few examples, anticipated some of the issues that will be discussed on the present thesis[2].

Competition came out of the responses as a multifaceted and ambiguous phenomenon. A bakery owner expressed his view on competition as "the other bakeries in the neighborhood that sometimes make a point of coming here to see the price of products and lower a few cents". "The problem", he said, "is that some shopkeepers make unfair competition, fighting over cents in the price of some products and selling goods that have nothing to do with their store". For example, "a clothing store on the street started selling ice cream, which is disloyal to my bakery that also sells ice cream because it sells other food products but does not sell clothes".

The partner of a medium-sized food retail chain, in turn, described competition as "a much broader concept than mere rivalry between firms", as it is determined by "the strength of buyers, the strength of suppliers, the potential for new entrants into the [market] sector, and the number of substitute products to this sector". Competition would be beneficial both for consumers, "because it could create a price war and the consequent collapse of prices", and firms, which will always have to "maintain the quality of their products and services, so as not to lose market presence".

The managing partner of a high-income financial consultancy also responded to our questionnaire. In his answer, competition means "the freedom to dispute the market with the main existing players, as long as in an ethical and fair manner". A firm that "wins the competition" shows that it is "alive" in the market and can become a "reference" in its activity. Nonetheless, in order to "beat its competitors by conquering the market", there will be need for "investments in the company (in people, method and process)".

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[2] See https://necsousp.com/. Although such responses were used only for internal discussion, they served as a prototype for a further research project whose results were presented at the 23rd International Seminar of the Brazilian Institute for Competition, Consumer and International Trade Studies (IBRAC, 2017).

The level of knowledge regarding antitrust regulation also varied among the responses. The bakery owner had on the counter a placard from a cigarette manufacturer saying that it "supports competition" – an obligation resulting from an antitrust investigation – but he does not know what competition compliance policies "are about". The partner of the food retail chain argued that law has an important role in the "merger of two companies that can greatly alter competition in a sector, even turning it into a monopoly", but his business does not have formal policies for competition compliance either. The partner of the financial consultancy said that his company "follows the rules required by regulatory agencies (…), in addition to internal policies of good practices" that maintain "excellent internal relationship and enormous credibility with customers".

With regards to the specificities of competition in Brazil, the bakery owner alleged that "small shopkeepers already have a lot of competition to face" and do not need further incentive to compete, whereas the culture of competition is necessary for big firms, "such as Car Wash's [a Brazilian corruption investigation] constructors". The food retail entrepreneur also stated that "sectors involving smaller enterprises are mostly characterized by extreme competition, while sectors with large firms are characterized mostly by duopolies", but he added that competition has no need "to become cultural in society", since it is a "concept of the business world" whose distance to "disunity" is "very small". The investment partner declared that there is "monopoly of some sectors" which prevents "development" of the nation, because of "protectionism and accommodation". As to the "culture of competition", he complemented, "we need to learn a lot from the big ones in each sector".

In our small sample, there seems to be no consensus around what competition actually means and on who benefits from it. There is also doubt about which parties would need a greater culture of competition in Brazil: whether only large firms, the entire economic sector, or even other spheres of society beyond the business world. Finally, the impact of the notions of competition as constructed by Brazilian antitrust agency (the CADE) seems to remain limited, although it apparently varies by company size. Even if they are intended to make no empirical proof, such results are a fine illustration of the problems and the hypothesis addressed by the present work.

The main problem from which our research stems is that competition has not been semantically consolidated as a goal of antitrust. People usually know antitrust as a "competition policy", antitrust agencies claim to foster a "competitive process", antitrust

attorneys call themselves "competition lawyers" – but only a few scholars have dedicated their works to decrypt what competition could possibly mean as an autonomous drive for antitrust. As far as one can see through the tropical mirror, this is an international issue. "*Both judicial and non-judicial writing manipulates the terminology and concepts*", argue the authors of an eminent treatise, "*often without penetrating the underlying substance*". As to competition, the same treatise observes:

> "*In passing the antitrust laws, 'Congress was dealing with competition, which is sought to protect, and monopoly, which it sought to prevent'. While rhetorically reassuring, this simple formulation is hardly self-defining, and it conceals a diversity of possible objectives*" [3].

Indeed, such "rhetorically reassuring" formulation has not prevented the concern with competition in antitrust from overflowing to the broader public discourse in the last few years. The media [4], the political system [5] and non-specialized publications [6] have been reflecting the call for "more competition". Antitrust scholars started to take the problem seriously and different nuances of the debate are showing up[7]. In Brazil, two of the most important antitrust scholars have recognized a "disappointment" or even a "paralysis" in the realm of antitrust[8].

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[3] Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer, xix and 3. Referring to the disagreement among antitrust practitioners and theorists on the meaning of competition as a "scandal", Oliver Black, *Conceptual foundations of antitrust* (2005), Cambridge, University Press, 6.

[4] See "The Economist", *The University of Chicago worries about a lack of competition* (Apr 12, 2017). Before, "The Economist", *Too much of a good thing* (Mar 26, 2016).

[5] See Democrats, *A Better Deal: Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power* (2017), available at https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf

[6] For instance, Jonathan Tepper, Denise Hearn, *The myth of capitalism: monopolies and the death of competition* (2019), New Jersey, Hoboken.

[7] See, among many, Carl Shapiro, *Antitrust in a Time of Populism* (2018), International Journal of Industrial Organization, available at SSRN: https://ssrn.com/abstract=3058345; Lina Khan, *Amazon's Antitrust Paradox* (2017), 126 Yale Law Journal 710; and generally the debate on the "New Brandeis School". In the European context, see Oles Andriychuk, *The Normative Foundations of European Competition Law* (2017), Cheltenham, Edward Elgar (arguing that the main constitutional importance of competition lies in the ethical value it represents for society).

[8] See Calixto Salomão Filho, *A paralisia do Antitruste,* in *Revista do IBRAC – Direito da Concorrência, Consumo e Comércio Internacional* (2009), vol. 16, 305-323 (referring to a loss of "theoretical density" in antitrust) and Paula Forgioni, *Os Fundamentos do Antitruste* (1998; 9th ed. 2017), São Paulo, Revista dos Tribunais, 128 (identifying, despite the advances, that Brazilian antitrust agency has focused almost exclusively on mergers, which rarely present relevant competition problems).

This thesis is not directly concerned with the current competitive structure of Brazilian markets, nor does it deliver a critique of a comprehensive set of CADE's decisions. We are interested in such topics as long as they help us better assessing our main research object: antitrust doctrine. Antitrust doctrine is a privileged arena for observing the discussion on antitrust goals, including competition, and the concepts thereby associated. Scholars have been discussing the goals of antitrust without the need to defend a specific party nor the pressure to decide a singular case. Although our primary focus is Brazilian antitrust, we accept it as being deeply tangled with the international debate. As will be made clear throughout this work, the "tropical mirror" reflects both the viewer and its context.

Our fundamental hypothesis is that antitrust doctrine has not consolidated a concept of competition that is both (i) legally coherent (with antitrust statutes and decisional criteria) and (ii) socially adequate (to competition empirical manifestation and its modern imaginary). Despite the efforts and advances, they have not resulted in a concept of competition that is consistently applied by agencies and perceived by the public as a specific antitrust goal. We also suppose that the supremacy of economic theory as a source of antitrust doctrine has contributed to such failure. If we are right in such outlooks, the supporters of competition as an antitrust goal could benefit from a socio-legal approach which incorporates other sources, such as the sociology of competition. As much as presumptions and definitions are made explicit, critics will also gain from enhanced transparency in the debate.

The strategy chosen to address such issues is essentially three-phased, each phase corresponding to one chapter of this thesis. The first step asks: "*What has been tried?*". It retrieves important moments of the debate on antitrust goals to understand how competition has been differentiated from other goals. The same concern illuminates our assessment of Brazilian antitrust doctrine and its eventual impacts in CADE's practice. Closing the first chapter, we explore non-dogmatic sources of antitrust, such as political philosophy, economic analysis, law and economics and a promising law and society approach.

The second step asks: "*What has been missing?*". It tells an alternative story about competition that is centered on sociological works. Essentially, we look at social forms and potentially addressed social problems. The Brazilian nuances of such story are also outlined, as well as imbrications with the country's economic structure. The purpose of this chapter is to build a concept of competition that corresponds to its modern imaginary and emergence

in tropical contexts. Such task is ultimately endeavored based on the works of Niklas Luhmann, Tobias Werron, Harrison White and classics of Brazilian social thought.

Finally, the last step inquires: *"What could be tried?"*. It thoroughly analyses three antitrust cases in Brazil so as to identify the criteria used by the antitrust agency. We test whether the concept built in the precedent chapter could be compatible with antitrust reasoning in each of its main branches: cartels, mergers and exclusionary conducts. Such exercise is made with a view of current tendencies of antitrust analysis, so as to cope with its evolution. The chapter ends with theoretical considerations on the possible impacts of such an approach for antitrust, for legal doctrine and for legal sociology.

The method underlying our strategy is unavoidably multiple and cannot be coupled with a single theory. It is only so because of the complexity of our research object and due to the paths implied in the problems here addressed. As it happened to come out of the responses to NECSO's questionnaires, competition can be seen as a mere rivalry between bakeries, as investing to "win the market" or as a structure that includes buyers, suppliers, potential entrants and substitute products. Competition's effects are often ambiguously evaluated, and though there seems to be a tendency of its dissemination, one can still cast doubts at its real extension in the economy and at its need "to become cultural in society". Agencies maintain the job of spreading the competitive word, but placards supporting competition do not necessarily lead to compliance with antitrust-specific views, and even those who follow the policies of "good practice" are eager to learn with the "big ones".

All things considered, this thesis is partially a history of ideas' enterprise, as we are concerned with the historical construction of competition both in antitrust and in sociology. Partly, it is also sociological work, since we develop a second-order observation of the legal system and outline a social form of competition in the Brazilian context. Finally, and mostly in the last chapter, we will take a step that is usually done by legal doctrine: working on a concept based on distinctions adopted in antitrust decisions. The work that derives from the above-mentioned problems, hypothesis, strategies and methods is nothing but an*other* story about antitrust. It can nevertheless interest someone who is not only longing to see oneself in the other, but prone to find "*the other in oneself*"[9].

[9] Viveiros de Castro, *Prefácio* in Beatriz Azevedo, *Antropofagia: Palimpsesto selvagem* (2016), São Paulo, Sesi SP, 16.

I – ANTITRUST GOALS AND COMPETITION

I.I. THREE SNAPSHOTS OF THE "ANTITRUST GOALS" DEBATE

What follows is not a typical approach to the "evolution" of antitrust. This work is not concerned with antitrust several "Eras" or with its successive "Schools". It will focus instead on three historical moments regarding the debate on the goals of antitrust – moments we call "snapshots" so as to emphasize their fragmentary character. Although fragmented, such discussions around the Sherman Act (I.I.I.), the Chicago School (I.I.II.) or the recent aspects of the mentioned debate (I.I.III.) are illustrative enough for our theoretical purposes. We will proceed with a question in mind: how was the concept of *competition* developed in those moments and how has such development been related to antitrust *goals*?

I.I.I. ANTITRUST GOALS IN THE ORIGINS OF ANTITRUST

"The day of combination is here to stay," said John Davison Rockefeller after he had stepped aside from active management of Standard Oil in 1882. "Individualism has gone, never to return"[10]. Those were more than dramatic words of an empty prophecy: the oil company had been experimenting continuous expansion and by 1880 controlled much of the United States' petroleum refining[11]. At the time, such growth meant the need to face existing state laws and organizational complexities. Samuel Dodd, Standard Oil's general solicitor since 1881, devised a solution that became both famous and infamous. He created a legal instrument whereby individual owners of businesses would transfer their stocks to an entity, which could held the entire stock or majority interest in several companies.[12] "Because it was a trust in the sense in which the word was then understood", since it "vested a fiduciary obligation in a few for the benefit of many", the instrument was called "trust".[13] In the words

[10] Daniel Yergin, *The Prize: The Epic Quest for Oil, Money and Power* (1991), available at https://erenow.com/modern/theepicquestforoilmoneyandpower/3.html. (last access on December 18, 2017).

[11] The share of industry-refining capacity controlled by Standard Oil rose from about 10 percent in 1870 to roughly 90 percent in 1880. Cf. Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust* (2002), available at http://www.pitt.edu/~troesken/papers/letters.pdf (last access on December 18, 2017), 7.

[12] Rockefeller held certificates representing 41 percent of the value of the issued certificates – other eight individuals shared the remaining. See Barak Orbach, Grace Campbell Rebling, *The Antitrust Curse of Bigness* (2012), Southern California Law Review vol. 85, 611.

[13] This was the explanation given by Dodd at a special meeting in March 1892, when the board of trustees of Standard Oil decided to terminate the Trust Agreement. Dodd lamented that "other persons (…) found this trust plan a convenient one, and it is alleged that it has been adopted for and adapted to purposes

of its creator, power of combinations could be used both for "good" and "evil", but in any case it "must not be destroyed; it must be regulated".[14]

Lawmakers from the United States seemed to agree at least with the need for regulation. Senator Sherman from Ohio declared on March 21, 1890[15]:

> *"Unlawful combinations, unlawful at common law, now extend to all the States and interfere with our foreign and domestic commerce and with the importation and sale of goods subject to duty under the laws of the United States, against which only the General Government can secure relief"*

The type of "combination" that was object of Senator Sherman's concern was the same candidly named after a "fiduciary obligation in the benefit of many" years earlier, the "trusts":

> *"But associated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president"*[16]

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quite different from those which actuated the framers of this trust". Barak Orbach, Grace Campbell Rebling, *The Antitrust Curse of Bigness* (2012), Southern California Law Review vol. 85, 615 – 616.

[14] It is interesting to confront Dodd's view with the one of Frederick Pollock, the famous British jurist. In his correspondences to his lifelong friend, the American Justice Oliver Wendell Holmes Jr., Sir Pollock stated: "an intelligent monopolist can undoubtedly be a benefactor as well as an intelligent despot. But intelligence can not be guaranteed, which is why both despotism and monopolism are in principle unwelcome". Fredrik Neumeyer, *Monopolkontrolle in USA* (1953), Berlin, Duncker & Humblot, 38.

[15] Congressional Record Senate (1890), 2456, available at http://www.appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf.

[16] Congressional Record Senate (1890), 2457, available at http://www.appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf.

Contrasting "combination" and "competition" as though they were direct opposites was a habit of Americans in the 1880s[17]. "The sole object of such a combination", in Sherman's view, was "to make competition impossible":

> *"It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer."*[18]

Such remarks reveal a great deal of the pressure suffered by U.S. Senate at the time, but only partially the economic structure of the country. After the Civil War (1861 – 1865), great developments in transports and communications in the United States had been followed by strongly linked markets, large enterprises and multiple-location business operations. On the one hand, the flourishing industrial arrangements could mean reduced costs, as firms integrated backward to sources of supply, or forward into downstream production processes or distribution[19]. On the other hand, the agricultural sector, still a major part of the American economy in 1890, was depressed by the deflation of the 1879-93 period and felt harmed by monopolies such as the railroads[20]. In many cases, the rise of large business firms – increasingly equated to "trusts" in the imaginary of the time – also implied intensified labor vs. capital conflict and displacement of smaller firms with the loss of control from local communities[21].

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[17] Cf. William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, 9.

[18] Congressional Record Senate (1890), 2457, available at http://www.appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf.

[19] Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer, 9.

[20] George Stigler, *The Origin of the Sherman Act* (1985), in The Journal of Legal Studies, Vol. 14, n. 1, 1-12.

[21] See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged* (1982), 34 Hastings Law Journal 65, 103-104 ("With the rise of trusts, interdependence became impotence. Decision-making was transferred from traditional power centers to the great industrialists. Self-reliant farmers, business owners, and local leaders became dependent on the discretionary power of a few very rich men. Local control of society ended as numerous small power centers were swept away by the new class, one perceived as greedy and evil"); see also James May, *Antitrust in the*

Economic structure aside, the pervasive antitrust sentiment, as William Letwin puts it, did not spring up overnight[22]. One of the oldest American political habits, hatred towards monopoly expressed differently at different times. But it had always meant a feeling against an unjustified power that raises obstacles to equality of opportunity, either in the older form of a special legal privilege granted by the state or, at the time, as an exclusive control enabled by a trust. Since the Civil War, the fear of plutocracy had decisively substituted the fear of oligarchy. The rapid growth of national wealth gave new grounds for believing that corporations were monopolistic and would use their wealth to make it serve their own interests. Such a belief led to attacks that were increasingly specific, aiming at certain practices instead of corporations in the mass. As liberty was deemed endangered, the optimistic Americans, usually averse to fatalism, would search for a cure in regulation. But which stakeholders could be mobilized for that "curative" purpose?

Economists were hardly one of them: nearly all the economists of the epoch were convinced that any attempt to prohibit combinations would be either unnecessary or futile[23]. Not many lawyers felt that statutes were needed, and even fewer suggested how the statutes should be framed[24]. Democrats believed that no law likely to be passed would be as favorable to competition as the common law declared in the *North River Sugar* decision, a state court verdict from the Court of Appeals in New York[25]. Even consumers, who could be expected to react to the economic effects of monopolies, had their pressure softened by the fact that

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Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880 – 1918 (1989), in Ohio State Law Journal vol. 50 n. 2, 258; finally, William E. Kovacic, *Module 1: Origins and Aims of Competition Policy* (2011), International Competition Network, available at http://www.icnblog.org/ftc/ftc-1-module-4-28-11/player.html (last access on December 10, 2017)

[22] See William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, 59 - 67.

[23] Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (2005), Cambridge, Harvard University Press, 42. A first attempt to organize a professional society of economists in the United States had been made shortly after 1880 by Edmund James and Simon Nelson Patten, who completed their studies in Germany. They believed the aim of the Society would be "to combat the widespread view that our economic problems will solve themselves". In a later attempt in 1886, a 'balanced' position between liberalism and interventionism was sought, but many economists were convinced that Darwin's laws governed the evolution of human society, and so combination was regarded as an evolutionary advance. Cf. William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, 71 - 76. Tracing the "evolutionary vision" as part of a longstanding dialect between two opposing, incommensurable ideologies in antitrust policy, William H. Page, *Ideological Conflict and the Origins of Antitrust Policy* (1991), Tulane Law Review Association vol. 66 n. 1.

[24] Cf. William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, 83-84.

[25] See *The Sugar Trust Illegal* (1890), New York Times, available in http://query.nytimes.com/mem/archive-free/pdf?res=990DEFD6123BE533A25756C2A9609C94619ED7CF (last access on December 17, 2017).

the 1880s was a decade of steeply declining prices[26], in addition to all obstacles of non-organized political influence[27].

Interested in avoiding an uncomfortable reputation of being the "Party of Monopolists", the Republican Party had compelling need to condemn the trusts. One of its senators found additional reasons: he blamed General Russel Alger, involved with Diamond Match Company's monopoly, for his unexpected defeat in the Republican presidential nomination. Soon after being defeated by future president Benjamin Harrison, Senator Sherman began to take serious interest in the trust question. He received numerous letters during the late 1880s on the antitrust issue. All of them came from small businesses which complained about innovations in transportation (such as refrigerated rail cars in meat-packing, and tank cars in oil refining) that displaced small producers who could not avail themselves the new technologies[28].

On March 21, 1890, Sherman submitted a bill which intended to destroy all those combinations "which the common law had always condemned as unlawful"[29]. Such historical account of the common law was nevertheless inaccurate[30]. For a long time, common law had supported an economic order in which the individual's opportunities were limited by the exclusive powers of guilds, chartered companies and patentees. Even if it

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[26] Cf. Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (2005), Cambridge, Harvard University Press, 41. Before, Hans Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (1954), Stockholm, Norstedt & Söner, 160 (stating that such tendency was extended beyond 1890). To exemplify with an important product in antitrust discussions, the real price of refined oil fell by nearly 80 percent between 1860 and 1893. Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust* (2002), available at http://www.pitt.edu/~troesken/papers/letters.pdf (last access on December 18, 2017), 6 – 7.

[27] Stating that consumers were a less effective lobbying class than small businesses, Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer, 6; also Thomas J. Di Lorenzo, *The Origins of Antitrust: An Interest-Group Perspective* (1985) 5 International Review. Law & Economics 73. Not every author agrees that small businesses were the dominant interest group. See references in Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust* (2002), 1. Finding modest support for interest group in the Sherman Act, George Stigler, *The Origin of the Sherman Act* (1985), in *The Journal of Legal Studies,* Vol. 14, n. 1.

[28] Noting that small oil companies located in Ohio "had the greatest influence on Sherman", Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust* (2002), available at http://www.pitt.edu/~troesken/papers/letters.pdf (last access on December 18, 2017).

[29] Congressional Record Senate (1890), 2456 available at http://www.appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf.

[30] See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act* (1966), The Journal of Law & Economics, vol. 9, 36 – 37. Showing that the common law never proved a very effective means in controlling monopoly, let alone fostering competition, Hans Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (1954), Stockholm, Norstedt & Söner, 9-53.

began to oppose to this system at the end of the sixteenth century, by the middle of the nineteenth century it had lost enthusiasm for the task[31]. While the state corporate law failed to deal with the trust problem[32], the English bodies of law against contracts in restraint of trade or against combinations in restraint of trade were interpreted in a manner that weakened their capacity for controlling modern monopolies[33].

Therefore, the Sherman Act had a firmer foundation in the United States than in England. Not only because American common law in 1890 still contained provisions that could be made to serve purposes for which they had not been originally intended, but also because the Act brought innovations that went far beyond the common law. Two examples were the authorization for Attorney General to indict violators and the power ascribed to injured persons to sue such perpetrators. Letwin summarizes this idea: "*it did not, as they thought, merely declare the common law. It can almost be said to have helped create the common law, insofar as its authors' convictions helped spread the belief that the common law always expressed as much antagonism to monopoly as they wrote into the Sherman Act"*[34].

The framers of Sherman Act had indeed a rare opportunity to *create* the goals of a policy, which was so encompassing that some have ascribed a "constitutional" quality to it[35].

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[31] Cf. William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, 19 – 52 (noting that the idea that the common law opposed monopolies from the earliest time "was invented largely by Sir Edward Coke, who argued that monopoly was forbidden by the Civil Law, and implicitly by Magna Carta as well as by certain statutes of Edward III's reign").

[32] As late as 1900, the eminent treatise writer Christopher Tiedeman argued that the only way to prevent the continuing growth of the giant business corporation was to "return to the previous era of individual, legislatively granted corporate charters". Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer, 35.

[33] As to contracts in restraint of trade, common law was inclined to uphold them for the same reasons that moved it to sustain any good contract. It was also inclined to invalidate those that deprived a man of the means to earn a livelihood or, increasingly more important, deprived the public of the advantages of competition. However, by the end of nineteenth century, English law believed that community suffered a greater injury from infraction of "fair dealing between man and man" than from contracts in restraint of trade. As to the statute law governing combinations, it had turned a "full circle": while, earlier in the century, unions had been legalized because combinations of masters were seldom ever punished, by the end of the century business combinations were held to be exempt from punishment because labor unions had been legalized. See Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition* (1989), 74 Iowa Law Review, 1025.

[34] William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, 51 – 52.

[35] See Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer, 100. As late as in 1972, the Supreme Court of the United States would keep declaring such constitutional character, with emphasis on a specific set of basic rights:

Like in constitutional provisions, terms such as "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" or "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce" carried a high degree of generality and adaptability. Despite the legislative opportunity, the objectives chosen in the bill approved by the Judiciary Committee – in a broad outline, similar to Sherman's original one[36] – were not clear. The unspecified bill was nonetheless signed by President Harrison on July 2, 1890.

The definition of antitrust goals was left for judges and commentators. A famous interpretation holds that Congress intended the courts to implement only the value of "consumer welfare", or the policy of "maximization of wealth or consumer want satisfaction"[37]. The opinion is based on excerpts from the Congressional Record, such as the one in which Senator Vest defends a protective tariff because "we know very well that competition always reduces prices", or another in which Congressman Teller nominates, as the victims of improper oil price, "the sixty-five millions of people in the United States who use oil". Such position also relies on citations from Senator Sherman regarding the effects of the monopolistic trusts at prices. To the protection of small businessmen – a literal suggestion coming out of the records in speeches like the one from Senator George – Bork concedes only a complementary role, one that is not to be paralleled with the main goal of consumer welfare.

Also drawing conclusions upon the legislative history of the Sherman Act, a competing view defends that trusts and monopolies were condemned principally because they "unfairly extracted wealth from consumers"[38]. Such view is supported on terms like the

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"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete – to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster". *United States* v. *Topco Associates, Inc.,* 405 U.S. 596, 610 (1972).

[36] Yet, Sherman was not pleased with the final text, even though he voted for it when the time came. The Act bears his name as a matter of courtesy. William Letwin, *Law and Economic Policy in America: the Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, 94.

[37] Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act* (1966), The Journal of Law & Economics, vol. 9. See also Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 16-17 (providing a more detailed concept of "consumer welfare").

[38] Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged* (1982), 34 Hastings Law Journal 65. Therefore, Bork would be correct to conclude that Congress was concerned with "consumer welfare", but incorrect in his effort to define this term as "economic efficiency".

ones used by Senator Sherman, who claimed that monopolies "extorted wealth", or Congressman Coke, who referred to monopolistic overcharges as "robbery". Secondarily, the aversion to output consequences of monopoly were rooted in concerns such as the maintenance of productive efficiency, preservation of economic opportunities for small enterprises, and the concentration of economic, social, and political power in a few hands.

Bearing in mind that, on the one hand, the modern concept of allocative efficiency was not known in 1890[39] and, on the other hand, the drafters of the Sherman Act were more concerned about injury to competitors than about injury to consumers[40], it is probably fair to conclude that neither the economic efficiency theory nor the wealth transfer theory are entirely accurate[41]. The legislative history does not point consistently in any single direction. Most congressmen appear to have believed that the goals of opportunity, efficiency, competition, fair distribution and political freedom were largely consistent[42]. Their product could be no other than a statute that is not fully consistent with collectivist ideology nor with laissez-faire orthodoxy[43].

Such ambition of encompassment has few equivalents in legal history, perhaps one of them being the otherwise opposite enterprise of the codification movement which culminated in the Napoleonic Code. To be sure, there is one additional feature that unites the fate of both statutes. In the Civil Code, a suppression made by the *Conseil d'État* would result in a paradoxical gap[44] with long-lasting hermeneutic consequences[45]: the article on the

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[39] Apart from the fact that the Senators were not trained economists, it is enough to mention that Alfred Marshall's *Principles of Economics* were published in the United States only in 1890.

[40] See Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis* (1993), The Journal of Economic History vol. 53, n. 2, 359. Also Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer, 42 – 43.

[41] Here we agree with Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (2005), Cambridge, Harvard University Press, 41.

[42] Cf. James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880 – 1918* (1989), in Ohio State Law Journal vol. 50 n. 2, 299.

[43] See William H. Page, *Ideological Conflict and the Origins of Antitrust Policy* (1991), Tulane Law Review Association vol. 66 n. 1, 37 (arguing that the Act reflects an intentional [collectivist] vision for it is an effort to control private economic power, and an evolutionary [laissez-faire] vision as it seeks to correct perceived monopoly practices by restoring competition).

[44] Cf. Charles Huberlant, *Les Mecanismes intitués pour combler les lacunes de la loi* (1964) in Chaim Perelman, *Le problem des lacunes en droit* (1968), Bruxelles, Établissements Émile Bruylant, 54-55.

[45] See John Gilissen, *Le problème des lacunes du droit dans l'évolution du droit médiéval et moderne* (1967), in Chaim Perelman, *Le problem des lacunes en droit* (1968), Bruxelles, Établissements Émile Bruylant, 203-207.

insufficiency of legal rules had no rule determining how to fill its own gaps. In the Sherman Act, the substitution of the Judiciary Committee's bill for the Sherman's original proposal[46] left a competition law, in the words of Holmes, saying "nothing about competition"[47] and also subject to enduring interpretative difficulties.

Had it kept at least a mention to competition, perhaps other quotes from legislative debates, such as the one from Representative Fithian, would have deserved more attention:

> *"skill is created and is stimulated by competition. A recent writer on political economy says: 'Wherever monopoly is dominant, the incentive for improvement and skill is deadened. It is only when competitors contend with each other for the favor of the consumer that they are stimulated to attract that consumer by presenting him with wares both skillfully and cheaply made"*[48].

In classical common law, competition had been a form of liberty: people should be unrestrained in their decisions about what price to charge or with whom to deal. According to Hovenkamp[49], the Sherman Act's notion of competition reflected an emergent neoclassicism: it was an anti-merger and price-fixing[50] statute. Neoclassicism broadened the classical concept of "coercion", originally concerned with artificial restrictions placed on the individual's freedom to act. It included what might be called "market coercion", or the deprivation of opportunities which the competitive market itself could be expected to

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[46] Its first section condemned practices "with a view, or which tend to prevent full and free competition."

[47] *Northern Securities Co v. United States* (1904), 193 U.S. 197.

[48] *Congressional Record* (May 1, 1890), 4102, available at https://www.govinfo.gov/content/pkg/GPO-CRECB-1890-pt5-v21/pdf/GPO-CRECB-1890-pt5-v21-2-2.pdf (quoting an unnamed "political economist") .

[49] Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition* (1989), 74 Iowa Law Review. But see William H. Page, *Ideological Conflict and the Origins of Antitrust Policy* (1991), Tulane Law Review Association vol. 66 n. 1, 43 (according to whom the shift to Neoclassicism in economics was not a cause of the change in the perception of monopoly, but a parallel effect of a common cause – the growing prominence of what the author calls the "intentional vision").

[50] Two of the first antitrust cases decided by the Supreme Court of the United States stablished so: "What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any *competition* (…) will be seriously affected by that fact". Peckham, *United States v. Trans–Missouri Freight Association* (1897) Supreme Court of the United States, 166 U.S. 290, "the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but *all contracts or acts which theoretically were attempts to monopolize* (...)" White, *Standard Oil Co. of New Jersey v. United States* (1911) Supreme Court of the United States, 221 U.S. 1. (our emphasis)

provide[51]. A voluntary price-fixing agreement was not anti-competitive in the sense that anyone's freedom to act was artificially restrained, but because market opportunities were lost. While Holmes's *Northern Securities* dissent insisted in the classical position, Taft's *Addyston Pipe*[52] opinion fused the classical doctrine with the neoclassical economics model, creating the illusion that the common law had always been concerned with competition neoclassically defined. Half a century later, antitrust would witness another brilliant attempt to assure a methodological monopoly.

I.I.II. A "PARADOX", A "WINDY CITY" AND A MEANING OF "COMPETITION"

Our second "snapshot" has its roots in the 1940s. Recently after joining the University of Chicago Law School in 1946, the economist Aaron Director was involved in a research project with his brother-in-law Milton Friedman, Frank Knight, Theodore Shultz and Edward Levi. The research project was called the "Free Market Study" and had as one of its products an "Antitrust Project" created six years later. This latter initiative was headed by Director with assistance of Levi, both lecturers of a famous antitrust course at Chicago Law School. In the words of a student who also joined the Antitrust Research Project, "a lot of us who took the antitrust course or the economics course underwent what can only be called a religious conversion. It changed our view of the entire world"[53].

In 1978, the converted student and now a Professor at the Yale University published an influential book[54] whose introduction spoke of a "crisis in Antitrust". According to its

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[51] This resembles the current antitrust jargon which determines one to look at the "but for" world of a practice or merger. Defining market competition as the absence of monopoly power in a market, George J. Stigler, *Perfect Competition, Historically Contemplated* (1957) 65 The Journal of Political Economy, 14. For a concrete example, *Rambus Inc. v. FTC* (2008) United States Court of Appeals, District of Columbia Circuit. 522 F.3d 456. – emphasis added ("Thus, if JEDEC, in the world that would have existed *but for* Rambus's deception, would have standardized the very same technologies, Rambus's alleged deception cannot be said to have had an effect on competition in violation of the antitrust laws").

[52] *United States v. Addyston Pipe & Steel Co.* (1898) Circuit Court of Appeals of the United States, Sixth Circuit, 85 F. 271, affirmed, 175 U.S. 211 ("Much has been said in regard to the relaxing of the original structures of the common law [...] We think this conclusion is unwarranted by the authorities when all of them are considered.")

[53] Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970* (1983), 26 Journal of Law & Economics, 163 (quoting Robert Bork).

[54] Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press. Acknowledging his debt with Director, Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, xv ("Much of what is said here derives from the work of Aaron Director, who has long seemed to me, as he has to many others, the seminal thinker in antitrust economics and industrial organization"). Also expressing gratitude for the antitrust project, William Letwin, *Law and Economic Policy in America: the Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, x.

author, Robert Bork, the antitrust practice at his time belonged to a legal context which was designed to dissolve many successful corporations of the United States.[55] The rules produced in such a context, according to Bork, ignored the fact that more efficient methods of doing business are as valuable to the public as they are to businessmen. Therefore, such rules reflected a "populist" hostility towards big businesses. Antitrust had been "invaded" by ideologies "foreign to its nature" and by such means brought to a crisis[56].

An interesting feature of such criticism was that it did not present itself in pure ideological terms. Rather, it appealed to logic. Antitrust basic premises were not only deemed incorrect; they were "mutually incompatible". Some of its doctrines preserved competition, while others suppressed it. Antitrust policy was "at war with itself" – as the author famously frames the "paradox" announced in the title of his book. Such war ends up reflected in a disagreement among antitrust professionals with regards to the most basic questions of the discipline: its goals and the vision of economic reality. Bork proposes a solution for each one of those disagreements.

As to the status of economics, the author believes that the cross between economics and law turns antitrust into a "hybrid policy science" whose reasoning differs from that of either discipline alone. Microeconomic theory itself is reported as a science: "were it not a *science*", Bork writes, "*rational* antitrust policy would be impossible". However, "as many other sciences", microeconomic theory is not "complete", while law requires a decision for every legal case. Since disputes must be decided, "law tends to arrive at basic answers before the right questions have been asked"[57]. In Bork's view, antitrust was "first and most obviously" law, and law made primarily by judges. However, it was also a set of continually evolving theories about the "economics of industrial organization". Finally, it was a "subcategory of ideology", a "microcosm" of larger movements of society, and one of an "exceptionally potent educative force".

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[55] One should perhaps consider that this context was also one of increasing concern about the loss of competitiveness of American industry and the influx of Asian products. Emphasizing the role of foreign competition (along with the change in the constituency of the Supreme Court) in the spread of Chicago's ideas, Eleanor M. Fox, *Against Goals* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2158.

[56] Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 418.

[57] Also in antitrust, the *non liquet* prohibition seems to play a central role in the creation of the legal universe. Regarding the theoretical meaning of the *non liquet* prohibition, Luiz Felipe Ramos, *Por Trás dos Casos Difíceis: A dogmática jurídica e a proibição da denegação de justiça* (2017), Curitiba, Jurua (arguing, with Niklas Luhmann, that modern legal dogmatics can only be accurately understood through its relations with the prohibition of denial of justice).

Antitrust appears unquestionably multifaceted in such description, an image that partially reflects the complexity of the discipline. When it comes to the goal of antitrust, Bork's answer is more straightforward. After all, he thinks the very *rationality* of antitrust policy depends on giving a "firm answer" to this question. And the answer follows his previous historical finding: the only legitimate antitrust goal is maximization of consumer welfare. The author draws this conclusion based on legislative history, on doctrinal reasons and on economic arguments. As to the former, now Bork adds to his earlier findings that not only the Sherman Act, but also the original Clayton Act and the Federal Trade Commission Act are primarily intended to protect consumers. Even the policy goal of the Robinson-Patman Act, although left unclear, shows "predominant concern for consumers", as the protection of small competitors was only "a means of protecting consumers from monopoly not based on efficiency".

The doctrinal reasons and economic arguments in favor of the "consumer welfare" goal deserve more careful attention. One of the features of Bork's doctrinal argument is the idea that antitrust laws are wholly prohibitory and passive in nature. Unlike other laws, antitrust laws would be unable to serve values that must be implemented by requiring or inducting affirmative conduct. In order to promote and protect small business, for instance, Congress should use more appropriate legislation such as tax benefits, subsidies and tariffs. This is revealing of Bork's theoretical reasoning regarding the nature of antitrust law in modern economies[58]. But his argument in favor of maximization of consumer welfare sheds light on deeper conceptions regarding law and the correspondent role of courts and legislators.

Bork's doctrine sustains that major distinctions of a body of law are drawn in accordance with policy ideas. He believes that "*courts should attribute to the legislature a policy intent which, because of the scope and nature of a body of law, makes that law effective in achieving its goals, renders the law internally consistent, and makes for ease of judicial administration*". Nevertheless, equally important is that courts behave responsibly

[58] To the extent that it resembles Bobbio's dichotomy between the "repressive" nature of law (e.g. Hans Kelsen) and its "promotional" function. See Norberto Bobbio, *Dalla struttura alla funzione. Nuovi studi di teoria del diritto* (1977), Milano, Edizioni di Comunità. Bork seems to ascribe here a repressive role for antitrust. Stressing the negative formulation of the Sherman Act, Hans Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (1954), Stockholm, Norstedt & Söner, 228 ("Some commentators have inquired why Congress did not choose to enact competition, so to speak, rather than to legislate against monopoly […] it is not the custom, or was certainly not in 1890, to impose positive action patterns on citizens. The rule is to prohibit reprehensible behavior").

"*for the integrity of the law and the lawmaking process",* as "*the process by which antitrust is made and applied determines its proper goal*". In order to avoid "empty" criticism of the courts for choosing the wrong goals – that is, criticism based on a set of personal preferences – one needs "*systematic developments of normative models of judicial behavior*"[59]. Such normative models consist of *"a system of understood constraints"* upon "*the values*" to be considered in legal fields, the "*sorts of choices*" that are proper to the judiciary and "*the methods*" by which they may reason from values to the decision of specific cases.

The defense of antitrust ultimate goal as a matter for legislative decisions leads to arguments in favor of an exclusive adherence to "consumer welfare": such exclusivity would give "fair warning", place "intense political decisions" in Congress, maintain the "integrity of the legislative process", require "real economic distinctions" and, finally, avoid "arbitrary or anticonsumer" rules. To exemplify his defense of consumer welfare as an overriding concern, Bork presents a series of features of antitrust law, such as the *per se* rule against cartels[60]. Such features do not face the incommensurability problem of values such as consumer welfare vs. small dealers. But they do demonstrate the ultimate goal of consumer welfare provides a common denominator by which gains in destruction of monopoly power can be estimated against losses in efficiency[61]. While defining the ultimate goal(s) of antitrust remains a legislative task, the means of judicially assessing the probable sizes of gains and losses based on the ultimate goal (consumer welfare) are provided by economic theory.

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[59] The inspiration for such models are clear in Bork's qualification: "while they cannot attain, will at least distantly approach the rigor of the descriptive models of basic economic theory". Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 72-73. Such approach is deemed to overcome the traditional problem of incommensurability. Although in some cases it will not be clear for a judge whether the more probable effect of the examined behavior is efficiency or restriction of output, "this sort of uncertainty is familiar to courts and inevitable whenever questions of degree arise". In any case, the choice "differs fundamentally from a choice between opposing values that have no common denominator". Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 85. For a comparison between antitrust's rule of reason and the constitutional proportionality test, see section III.II.II.

[60] A law that balances other values (e.g. protection of small business) against consumer welfare would have no role for a *per se* rule, since it requires examination of the effect upon the conflicting values and a balancing process in every case. Other features presented are the distinction between cartels and mergers, the distinction between mergers and intentional growth, the distinction between normal methods of competition and predation, and the cost-justification defense of the Robinson-Patman Act. Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 66.

[61] As famously modelled by Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs* (1968), 58 American Economic Review 18, 21.

And so are the boundaries of the policy designed: antitrust enforcement is not about choosing ultimate goals, such as deciding between consumer welfare and small firms[62]. It is about the effects of business behavior on an exclusively concerned consumers' well-being, being the latter what "permits consumers to define by their expression of wants in marketplace what things they regard as wealth". The concern is one limited to material prosperity, since antitrust "has nothing to say about the ways prosperity is distributed or used". The proposed method to understand those effects is economic theory or, more precisely, the "simple ideas" and models of economics. Bork knows that the *descriptive* models of competition and monopoly as developed by economists are not prescriptions for policy, since they "leave out too much". They do not cover all the situations where lawyers need to decide legal cases. Lawyers must think antitrust *normatively* as designed to preserve competition and destroy monopoly.

In a nutshell, the chore of antitrust would be the effort to "improve allocative efficiency without impairing productive efficiency so greatly as produce either no gain or a net loss in consumer welfare"[63]. It is not our focus now to examine the models which follow from such understanding, nor their shortcomings (some of them recognized by Bork himself)[64]. We could observe businessmen have no chart of perfect competition on their walls leading to strategic decisions – and Bork would answer the model represents the ultimate situation towards which economic forces tend to drive the firm, rather than the thoughts of management regarding its decision making[65]. Such would lead us to explore discussions such as the strategic orientation towards competitors, the ability of firms to

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[62] The concern with small firms nevertheless underpinned the passing of the Robinson-Patman Act, in 1936, and the Miller-Tydings Act, in 1937. It also supported decisions made by the Supreme Court of the United States in the 1960s (the so-called Warren Court) such as *Brown Show Co. v. United States* (1962) 370 U.S. 294.

[63] Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 91 (relying here upon the works of Frank Knight).

[64] See Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 95. Referring to The Antitrust Paradox as an "old economy" book, Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* (2018) Faculty Scholarship at Penn Law. 1985, 14-15.

[65] A similar counter-argument is presented against the common charge of unilaterality of the "rational approach" in economics. Although Bork would not hesitate to impute conscious profit maximizing to businessmen (despite their "adaptive technique" of talking vaguely about broad "social responsibility" and in spite of the "rules of thumb" they use to cope with uncertainty), he argues that price theory as used by antitrust does not require such assumption. Its validity comes instead from the success in predicting behavior, and for that it is enough to state that businessmen generally behave *as if* they were engaged in maximization. Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 120-121. As we will further notice, an "as if" reasoning was also used by Milton Friedman, *The Methodology of Positive Economics* (1953), in Essays in Positive Economics (1966), Chicago, University of Chicago Press.

develop "calculating agencies" or the unrealistic assumptions with regards to availability of information – but those are all issues for the following chapters. Our task here is to examine the argumentative strategy that underlies Bork's positions.

Firstly, one must identify precisely the reach of his conception of "maximization of consumer welfare" (or economic efficiency [66]). Having acknowledged some of the shortcomings of the microeconomic models, the goal of maximizing consumer welfare is defined as *the best practicable approximation* to a "limiting condition". Such condition is an ever-shifting allocation of resources in pursuit of a constantly moving "equilibrium point" (as we will see in further detail, the rate of output at which the marginal cost is equal to the marginal revenue). The models predict that a monopolist will find it profitable to "restrict output", since the offering of their product above the monopolistic optimal quantity would lead to a lower price of all their output. This leads to "the evil of monopoly" in antitrust perspective, that is, a gap between marginal cost and price that avoids equation between social costs and social desires, producing the so-called deadweight loss (or allocation inefficiency).

So far one can say that, in accordance with Bork, antitrust should improve the assignment of the available productive forces and material among the various lines of industry. It should try to equate social costs and social desires, whose ranking is expressed by the demand curve. But it should not do so as to impair another type of efficiency which composes "consumer welfare", otherwise such policy could not be considered "rational". This other type is related to the concept of productive efficiency, or to the effective coordination of the various means of production in each industry into such groupings as will produce the greatest result[67]. Measured in terms of consumer welfare, this is translated into "offering products or services that consumers are willing to pay for": in short, a firm's

[66] The equivalence is explicitly accepted in the epilogue published fifteen years later: Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 427 ("In a word, the goal is maximum economic efficiency to make us as wealthy as possible").

[67] According to Bork, the unsophisticated state of law's economic doctrines at the time prevented them from understanding that the infliction of injury upon rivals and even the agreed elimination of rivalry are not merely means of injuring the competitive process, but means by which productive efficiency is created and by which the forces of competition allocate resources. Because the law had not found ways of separating beneficial eliminations of rivalry and inflictions of injury from the detrimental, "it has been forced to ignore the claims of productive efficiency", thus considering only one vector in a two-vector situation. Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 135. Also Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 405 ("Failure to consider productive efficiency – or, worse, the tendency to view it as pernicious by calling it a 'barrier to entry' or a 'competitive advantage' – is probably the major reason for the deformation of antitrust's doctrines").

efficiency is shown by its success (although not necessarily by its profitability)[68]. Since antitrust problems can be framed in terms of allocative inefficiency and productive efficiency, one needs to decide what to do when the restriction of output shifts income from consumers to the monopoly and its owners (who in this reasoning are also deemed to be a class of consumer). Bork's answer is: antitrust should be concerned with *total* wealth, or the result of producers' *and* consumers' surpluses/losses. It should not try to choose between "two groups of consumers" – a choice that should be made by the legislature[69].

At this point it becomes clear that the whole analysis is based on a very specific concept of competition (which the jargon of the field requires not to be confused with "competitors"[70]). Fortunately, one does not need to elucubrate what kind of concept that would be, since Bork himself quickly addresses the point[71]. Initially, the author infers that the competition "model" of statutes like the Clayton Act derives from economics "rather than sociology or political science". Then he discusses four meanings of competition (competition as rivalry, as absence of restraint, as lack of influence in market price and as

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[68] Bork observes that a firm may be profitable also "because it forms a cartel, merges to monopolistic size, or employs predatory tactics successfully". Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 105-106. Defining efficiency as "competitive effectiveness", 192 ("the most efficient firm is simply the firm that has, without collusion or predation, experienced the most success in the marketplace").

[69] The test based on total output means that consumers are viewed "as a collectivity" and "interpersonal comparisons" are avoided. Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 395.

[70] See *Brown Shoe Co. v. United States* (1962), 370 U.S., 294, 320. Compare, in the European context, with the "not only" formulation in *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* (2009) ("[TFEU 101], like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such"). Arguing that the "dogma" of protecting competition (and not competitors) ignores considerations of justice, Louis B. Schwartz, "*Justice" and Other Non-Economic Goals of Antitrust* (1979), 127 University of Pennsylvania Law Review, 1076-1078. Raising the caveat that "Congress is actually free to protect any class of firms if it wants to – for slogans, even if popular among antitrust lawyers, do not actually have the status of Constitutional law". Tim Wu, *After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice* (2018), CPI Antitrust Chronicle, 8. For a formulation of the jargon, "the purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest". *Spectrum Sports, Inc. v. McQuillan* (1993) Supreme Court of the United States, 506 U.S. 447. Observing that the terms "competition" and "competitors" are not mutually exclusive, *United States v. Visa U.S.A., Inc., et al.* (2003) United States Court of Appeals, Second Circuit. 344 F.3d 229 ("Without doubt the exclusionary rules in question harm competitors. The fact they harm competitors does not, however, mean they do not also harm competition"). In the words of the DOJ's Merger Guidelines, "(...) the interests of rival firms often diverge from the interests of customers, since customers normally lose, but rival firms gain, if the merged entity raises its prices (...)".

[71] Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 58-61.

the existence of fragmented industries and markets) before discarding them as bad guides for antitrust policy. The meaning that survives the Borkean test presents competition as "a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree"[72]. Clearly, this definition is co-dependent with a definition for "consumer welfare"[73]. Competition as an antitrust goal becomes a mere derivation of another goal. Such strategy is not only intriguing for logical reasons, but it is meant to directly justify decision criteria, as in Bork's analysis of the *Procter & Gamble* case:

> *"Because the Court implicitly accepted the definition of 'competition' as the number and comfort of competitors, the illegality of the merger was a foregone conclusion. Had 'competition' been viewed as a shorthand phrase for consumer welfare, the Court would have had to ask some additional questions"*[74]

Fifteen years after publishing those ideas, Bork would praise, in a new edition of his book, the course taken by antitrust law since 1978[75]. Although he relates his former pessimism to a "serious underestimation of the power of ideas", Bork concedes that the decisive cause for the change in route was a modification in the composition of the Supreme

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[72] A shorter version of the same statement is at Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 51.

[73] It is not hard to find cases in which the correspondence competition-consumers is stablished. In explaining the so-called "quick approach", the Court of Appeals stated that "If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely *impairs competition*, then the restraint is presumed unlawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to *harm consumers* or identify some *competitive benefit* that plausibly offsets the apparent or anticipated harm" *Polygram Holding, Inc. v. Federal Trade Commission* (2005) United States Court of Appeals, District of Columbia Circuit. 416 F.3d 29 (our emphasis). Also *Broadcom Corp. v. Qualcomm, Inc*. (2007) United States Court of Appeals, Third Circuit. 501 F.3d 297 ("The primary goal of antitrust law is to *maximize consumer welfare by promoting competition* among firms. Private standard setting advances this goal on several levels.")

[74] *Federal Trade Commission v. Procter & Gamble Co.* (1967), 386 U.S. 568, quoted by Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 255. For other cases in which the definition of competition leads to the specific result, see Bork's analysis of *United States v. Arnold, Schwinn & Co.* (1967) 388 U.S. 365 and of *Associated Press v. United States* (1945) 326 U.S. 1. in Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press ("neither here nor in any other vertical restraint case did the Court ever explain why such restraints are destructive of competition. They are only 'obviously' so if the Court is defining competition as the complete freedom of the outlet. But that is a definition of competition not keyed to consumer welfare. Indeed, the definition's only criterion – the freedom of the dealer – seems designed simply to destroy contractual obligations. The Court's reasoning is unsatisfactory because the meaning of 'competition' has not been thought through", 284 / "The *Associated Press* decision rests largely, then, on a confusion between two meanings of 'competition'. Justice Black improperly equated the word with access to a particular source of supply rather than with effectiveness of rivalry in the general marketplace", 340).

[75] Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, i-xviii.

Court from the Warren Court towards one with a "better and more sympathetic understanding of the business world"[76]. Such new majority had also a new body of available antitrust scholarship, the so-called Chicago School.

Bork has often been considered one of the most orthodox representatives from the Chicago School, but one can easily verify that some of his positions actually reflect common traits from the school[77]. For our purposes here, one of those noteworthy traits was a "breathtaking contraction in the scope of antitrust policy". With that expression, Richard Posner (another famous representative of Chicago School) refers to a practical consequence of the ideas attributable to Aaron Director decades before: placing unilateral conduct beyond the reach of antitrust law, a contraction that could be generalized to vertical integration[78]. At least this was the furthest that the School dared to go in terms of advising public policy, if Posner is right that "it is unlikely that they regarded even price fixing, let alone oligopoly, as a serious problem"[79].

Such contraction of antitrust scope is manifest in the Chicago School's ideas regarding classic unilateral conducts. Such analyses imply that monopoly power cannot be in general obtained or enhanced by unilateral action such as tie-in, resale price maintenance and predatory pricing. As to the former, it is believed not to be a *rational* method for firms to obtain a second source of monopoly profits[80]. Equally, resale price maintenance would

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[76] The period (1953 – 1969) in the history of the Supreme Court of the United States under the leadership of Earl Warren is known for its (politically) liberal inclination and its judicial activism. Framing the overcoming of the Warren Court inclinations by Chicago School in terms of a conflict between an intentional and an evolutionary vision, William H. Page, *Ideological Conflict and the Origins of Antitrust Policy* (1991), Tulane Law Review Association vol 66 n. 1, 67 ("Adherents of the intentional vision influenced the Court in its interpretations and had their own victories (…) Because the market was itself a legal artifact, there was nothing sacrosanct about its common-law framework (…) This view of the role of antitrust was to achieve ascendancy in the waning years of the New Deal and dominated antitrust interpretation in the Warren Court until it was displaced by the Chicago School's version of the evolutionary vision.")

[77] See Richard Posner, *The Chicago School of Antitrust Analysis* (1979), 127 University of Pennsylvania Law Review 925, 926-928. For Posner's own views and slight disagreement with Bork, see Richard Posner, *Antitrust Law: An Economic Perspective* (1978) Chicago, The University of Chicago Press. See also the second edition, which meaningfully excludes the expression "an economic perspective" from the title: Richard Posner, *Antitrust Law* (1976, 2nd 2001), Chicago, the University of Chicago Press.

[78] One can look at quantitative data to verify whether such purpose was achieved. In 1977 there were 1611 investigations in the U.S. In 1989, the number was 638. A virtual absence of cases related to vertical restraints during the Presidencies of George W. Bush and Ronald Regan is also commonly recognized. See Massimo Motta, *Competition Policy: Theory and Practice* (2004), Cambridge, UK. And Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?* (2009) 42 University of California Davis Law Review.

[79] See See Richard Posner, *The Chicago School of Antitrust Analysis* (1979), 127 University of Pennsylvania Law Review 925, 932.

[80] See *Jefferson Parish Hospital District No. 2 v. Hyde* (1984) Supreme Court of the United States, 466 U.S. 2. ("The ultimate decision whether a tie-in is illegal under the antitrust laws should depend upon the

not be a *rational* means of distribution if its effect is to provide dealers with monopoly profits[81]. Finally, selling below cost in order to drive out a competitor would be unprofitable even in the long run and *irrational* as a desire to eliminate competition[82].

Like in Bork's book[83], the argument on the rationality of antitrust policy ends up playing an essential role in the ideas of Chicago School. But Posner is able to provide some more insights as to where such belief in rationality comes from. It is not, he writes, on the basis of an antipathy to government intervention that Director's antitrust analysis are

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demonstrated economic effects of the challenged agreement. It may, for example, be entirely innocuous that the seller exploits its control over the tying product to 'force' the buyer to purchase the tied product. For when the seller exerts market power only in the tying product market, it makes no difference to them or their customers whether he exploits that power by raising the price of the tying product or by 'forcing' customers to buy a tied product. . . On the other hand, tying may make the provision of packages of goods and services more efficient. A tie-in should be condemned only when its anticompetitive impact outweighs its contribution to efficiency.") But see *Eastman Kodak Co. v. Image Technical Services, Inc***.** (1992) Supreme Court of the United States, 504 U.S. 451. ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.' [...] contrary to Kodak's assertion, there is no immutable physical law—no 'basic economic reality'— insisting that competition in the equipment market cannot coexist with market power in the aftermarkets. In sum, Kodak's theory does not explain the actual market behavior revealed in the record. Respondents offer a forceful reason why Kodak's theory, although perhaps intuitively appealing, may not accurately explain the behavior of the primary and derivative markets for complex durable goods: the existence of significant information and switching costs.")

[81] See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (2007) Supreme Court of the United States, 551 U.S. 877. ("[...] in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution, which, like any other cost, the manufacturer usually desires to minimize.... A manufacturer has no incentive to overcompensate retailers with unjustified margins.")

[82] See *Brooke Group v. Brown & Williamson Tobacco* (1993) Supreme Court of the United States ("First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs [...] The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices [...] If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market. Because relying on tacit coordination among oligopolists as a means of recouping losses from predatory pricing is 'highly speculative,' Areeda & Hovenkamp 711.2c, at 647, competent evidence is necessary to allow a reasonable inference that it poses an authentic threat to competition. The evidence in this case is insufficient to demonstrate the danger of Brown & Williamson's alleged scheme"). With explicit reference to Chicago School, *United States v. AMR Corp., American Airlines Inc.* (2003) United States Court of Appeals, Tenth Circuit. 335 F.3d 1109 ("Scholars from the Chicago School of economic thought have long labeled predatory pricing as implausible and irrational . . . Post–Chicago economists have theorized that price predation is not only plausible, but profitable, especially in a multi-market context where predation can occur in one market and recoupment can occur rapidly in other markets. Although this court approaches the matter with caution, we do not do so with the incredulity that once prevailed [Because it is uncontested that American did not price below AVC for any route as a whole, we agree with the district court's conclusion that the government has not succeeded in establishing the first element of *Brooke Group,* pricing below an appropriate measure of cost.]").

[83] See, for all, Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 117 ("To abandon economic theory is to abandon the possibility of a rational antitrust law").

developed. Rather, they were the product of an attempt to see antitrust policy through the lens of price theory. This means replacing Harvard School's ideas of industrial organization, including its "eclectic forays into sociology and psychology", by the definitions and logical structure of economic theory [84]. Instead of "the microscopic examination of the idiosyncrasies of particular markets", the "powerful simplifications of economic theory": profit maximization, demand curve and, of course, *rationality.*

The claim for a rational antitrust is, above all, a methodological one. It is about limiting the sources of the discipline to an economic view. While Posner sees an increasing convergence between Chicago and Harvard schools, it is true that as early as in 1979 he presents some important qualifications to Chicago School's ideas. Some of them, such as the lack of sufficient concern to strategic behavior, are claimed to have a great potential for antitrust development throughout the following decades[85]. Whether or not the shortcomings of Chicago School have impacted the discussion on what Bork has called the "ultimate choice" for antitrust – that is, the definition of its goal(s) – is a question we will address in the following section.

I.I.III. A CONTEMPORARY DEBATE

Among the remarks added in 1993 to "The Antitrust Paradox", Bork observes that a consumer welfare goal was finally "by and large" adopted by the courts[86]. The best evidence

[84] In mid-1960s, a strong paradigm in the Antitrust of the United States was the so-called "Harvard School", whose main representatives were Carl Kaysen and Donald Turner. Also known as "structuralists", Harvard scholars were mainly concerned with the prevention of excessively concentrated market structures. Such concern was based on a causal understanding of the relationships between the structure, the conduct and the performance of the market. In concentrated markets, it would not be sufficient for antitrust authorities to adopt behavioral remedies. Such a position would be greatly criticized by authors associated with the Chicago School, which gave centrality to the notion of efficiency. As we have seen, those postulated a minimum control over economic concentrations, a diminished importance to entry barriers and the essentially beneficial nature of vertical restrictions. See Calixto Salomão Filho, *Direito Concorrencial* (2013), São Paulo, Malheiros, 39-74 and Roberto Augusto Castellanos Pfeiffer, *Defesa da concorrência e bem-estar do consumidor* (2015), São Paulo, Editora Revista dos Tribunais, 98-152.

[85] For a critical view, see Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (2005), Cambridge, Harvard University Press, 9. ("The so-called 'post-Chicago' antitrust of the 1980s and 1990s reclaimed a concern with strategic behavior, put more rigor into its definition, and tried to raise the level of antitrust concern. Nevertheless, the most visible impact of that movement remains the Supreme Court's 1992 Kodak decision, which held that a nondominant firm can have antitrust market power vis-à-vis its 'locked in' buyers (…) probably been the most useless and harmful antitrust decision of the Rehnquist Court, which typically has not been expansive in its interpretation of the antitrust laws.")

[86] Paradigmatically, see *Continental T.V., Inc. v. GTE Sylvania Inc.* (1977) Supreme Court of the United States, 433 U.S. 36 ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These 'redeeming virtues' are implicit in every

for such would be that courts "now customarily speak the language of economics rather than pop sociology and political philosophy"[87]. About twenty-five years later, it is not hard to notice that, among academics, the consumer welfare model still receives qualifications in at least four (non-mutually exclusive) ways: (i) by disputes on the meaning of "consumer welfare" for antitrust purposes; (ii) by developments of the welfarist standard at its margins; (iii) by explicit opposition to or deviation from the consumer welfare ideal and (iv) by taking the concept of competition and its meaning for antitrust more cautiously.

With regards to the first qualification to the consumer welfare model, i.e. the dispute on the meaning of "consumer welfare" (i), one is expected to readdress the classic work of Robert Lande[88]. Apart from its historiographical effort, such article is deemed to have changed the terms of the debate on the goals of antitrust from an issue of economic vs. noneconomic values (efficiency vs. populism) to a dispute in about which economic value should be dominant (efficiency vs. consumer welfare)[89]. Our "snapshot" of the current discussion, however, will address this discussion somewhat obliquely, by taking a more recent article by Lande and comparing it to others that remain closer to a Borkean view.

Not only the traditional legislative historical approach, Lande writes in his recent work[90], but also a "textualist" analysis of Antitrust laws shows that economic efficiency was

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decision sustaining vertical restrictions under the rule of reason [...] In sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*"). Quoting the then recently-published "The Antitrust Paradox", *Reiter v. Sonotone Corp.* (1979) Supreme Court of the United States 442 U.S. 330.

[87] Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 427.

[88] See the section I.I.I. and Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged* (1982) 34 Hastings Law Journal 65. What lies behind his contend with Robert Bork is the difference between total welfare, which takes into account the surplus of producers in the relevant market, and the consumer/purchaser welfare, which regards only the surplus for purchasers in a relevant market as important.

[89] Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged* (1982), 34 Hastings Law Journal 65 ("this Article will argue that Congress passed the antitrust laws to further economic objectives, but primarily objectives of a distributive rather than of an efficiency nature"). Arguing for the change of the debate's terms, among others, John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct in The Goals of Antitrust* (2013) 81 Fordham Law Review, 2439 – 2444. For the change as reflected in antitrust cases, see *Leegin Creative Leather Products, Inc. v. PSKS, Inc* (2007) 551 U.S. 877; also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp* (1993) 509 U.S. 209. Arguing that the debate in Europe is still one between "different visions of competition", in contrast to the total welfare/consumer welfare dichotomy that prevails in the United States, Roger Blair, Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2509 – 2512.

[90] Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice* in *The Goals of Antitrust* (2013) 81 Fordham Law Review.

not an important concern at the time of their promulgation. Allegedly based on the method defended by Justice Antonin Scalia[91], Lande's textualist analysis relies on elements like the definition of key terms in dictionaries, or the history of the period[92]. And he concludes that the purpose of antitrust statutes was to prevent firms from stealing from consumers by charging them supracompetitive prices. The author normatively defends as the goal of competition policy, supposedly embraced by the 2010 Merger Guidelines and in cases such as *Microsoft*[93], the elimination of practices that artificially restrict the choices that the free market would have provided. He names it the "consumer choice" approach (not to be confused with the *maximization* of consumer choice)[94].

Based on a former version of these ideas[95], Wright and Ginsburg situate Lande's "consumer choice" standard as the latest challenge to the welfarist understanding of antitrust[96]. However, with support in some Borkean views[97], they reject the consumer choice as either unnecessary or misleading. On the one hand, by ignoring that quality-adjusted

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[91] The "textualist", "fair reading" or "plain meaning" approach, although developed by Scalia in articles like "*A Matter of Interpretation: Federal Courts and the Law"* (1997), had arguably not been used by Scalia himself to analyze relevant antitrust terms.

[92] The interests for popular literature like dictionaries is also a characteristic of the history of concepts as developed by Reinhart Koselleck, *Einleitung* in Otto Brunner, Werner Conze, Reinhart Koselleck, *Geschichtliche Grundbegriffe, Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (1972). Cf. Luiz Felipe Ramos, Tobias Werron, *Concorrência como um conceito histórico-sociológico: trazendo variação para a "evolução do antitruste"* in Celso Campilongo, Roberto Pfeiffer, *A evolução do antitruste no Brasil* (2018), São Paulo, Singular, 199.

[93] See *United States v. Microsoft Corp.* (2001) United States Court of Appeals, District of Columbia Circuit. 253 F.3d 34. ("Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it [...]")

[94] As Lande further explains, normally there is no difference between a choice approach and a price approach. The former includes price considerations because price is an important choice variable for consumers. It also includes efficiency, since those can affect choices. Nonetheless, the consumer choice approach arguably has a heightened concern with non-price dimension which makes a significant difference in specific contexts, like cases in markets with little or no price competition, conduct that impairs consumer's decision-making ability and markets where firms primarily compete through choice competition. See Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2391-2397.

[95] Robert H. Lande, Neil W. Averitt, *Using the 'Consumer Choice' Approach to Antitrust Law* (2007), Antitrust Law Journal, vol. 74.

[96] Joshua D. Wright and Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice* in *The Goals of Antitrust* (2013) 81 Fordham Law Review. Previous challenges would have been the ones presented by Robert Pitofsky, *The Political Content of Antitrust* (1979) 127 University of Pennsylvania Law Review 1051 or by Maurice Stucke, *Reconsidering Antitrust's Goals* (2012), 53 Boston College Law Review 551.

[97] For a perhaps more explicit position in favor of total welfare (but accepting consumer welfare as a "second best" standard), Roger Blair, Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2541.

prices have been part of the industrial organization toolkit since the early 1900s, and that nothing in the microeconomic theory requires antitrust to underweight non-price dimensions of competition, the consumer choice commands a "new paradigm" where no revolution is required. On the other hand, by rejecting economic analysis of consumer preferences as the fundamental guiding principle of antitrust, such standard incurs in "fatal flaws": (a) it shifts the focus of antitrust analysis from efficiency to misleading proxies like the number of firms on offer in a market, ignoring why certain restraints arise in a particular market, (b) and it presumes illegality to be imposed upon a broad range of business conduct, based on conclusions about welfare which are not justified either by theory nor by evidence.

Alan Meese observes that economic theory can frame the debate on "consumer welfare" in a way that might influence the normative outcome. His own view is skeptical of the partial equilibrium trade-off model which informs both Bork's [98] and Lande's perspectives. Such paradigm, brought about by Oliver Williamson in the late 1960s upon the partial equilibrium framework developed by Alfred Marshall in the nineteenth century, ascertains the impact upon total welfare of a merger that both confers market power and results in productive efficiencies. Meese believes that the partial equilibrium's graphical apparatus[99] does not generate an accurate description of economic reality, as it intentionally ignores the impact of the transaction on production costs and output upon other markets. According to the author, antitrust analysis should be reframed so as to recognize such impact on consumers in other markets, as well as the possibility that subsequent (although not "timely" in the Guideline's sense[100]) entry will mitigate any market power.

Another group of authors (ii) do not quite dispute the meaning of "consumer welfare", but rather try to develop the consumer welfare thesis at its margins. Louis Kaplow[101] presents an attempt to compute both the consumer and producer surpluses, putting a weight on producer surplus that is lower than that on consumer surplus, but still

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[98] Noting Bork was not the first to equate "consumer welfare" with "total welfare", Alan J. Meese, *Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2204 (quoting Arnold C. Harberger, *Monopoly and Resource Allocation* [1954], 44 American Economic Review 77).

[99] See section I.III.II.

[100] U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (2010), 29 ("In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect").

[101] Louis Kaplow, *On the Choice of Welfare Standards in Competition Law* in Daniel Zimmer, *The Goals of Competition Law* (2012), Edward Elgar, Cheltenham, 10.

significantly greater than zero. In a somewhat counterintuitive approach, he tries to demonstrate that, assuming consumer welfare is an objective, antitrust scrutiny should be tougher where the initial price elevation is low and progressively weaker as the initial price elevation is larger. The author finally suggests removing any redistribution goal through competition law and substituting it through the tax and transfer system.

Unsatisfied with the debate over antitrust goals, Jonathan Baker believes the antitrust community's pursuit of a unitary goal is "asking too much" from the discipline[102]. In other legal fields, judges are not asked to specify or apply legal rules in order to advance a unitary goal. The author thus defends a "qualified" consumer welfare standard, meaning that antitrust institutions should adopt a consumer surplus standard in general, but allow firms to capture increased producer surplus if those gains are large enough and the lost consumer surplus is small.

Also demonstrating some dissatisfaction with the consumer welfare debate (which he deems to be "trivial"), Herbert Hovenkamp defends that the version of economic welfare promoted by antitrust is one of allocative efficiency. In his view, it means antitrust's task is to ensure that markets are competitive and that firms do not face unreasonable obstacles to attain productive efficiency. In sharp contrast to the volume and apparent complexity of academic debate, courts apply a consumer welfare test that embraces only two propositions, according to Hovenkamp[103]: (i) immediate cost savings to producers or long-run gains do not serve as an antitrust defense, as long as a conduct produces unambiguous consumer losses in the form of short-run reduced output or higher prices and (ii) producer gains resulting from efficiency may become relevant in "hard cases", when a practice has ambiguous effects on consumers such as harming some of them and benefiting others.

John Kirkwood adds the perspective of exploited "small, competitive suppliers"[104] to the equation. At first, his argument emphasizes shortcomings of the total welfare standard: its adverse distributional impact – increasing inequality of wealth in the country – and the exploitative feature of the transfer of wealth from consumers to producers. Moreover, such

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[102] Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2178-2180.

[103] Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2477 – 2479.

[104] John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2426.

standard ignores the satisfaction people derive from the perception that the legal system is fair. Kirkwood subsequently sustains that the goal with the widest support in antitrust is the *protection* of consumers from anticompetitive conduct, framing it in terms there are different from *maximizing* consumer welfare[105]. And the author notices that the analogous goal in a buy-side case (when suppliers are the victims of anticompetitive conduct) is to "stop conduct that creates market power on the buying side, transfers wealth *from suppliers to buyers*, and does not provide suppliers with offsetting benefits"[106].

In the third group from our broad classification, we find some authors who defend goals that either reject or deviate from the consumer welfare approach (iii). Eleanor Fox seems to oppose to the very debate on antitrust goals altogether as "misleading"[107]. In its place, she proposes an answer on which there is alleged consensus in developed countries: the objective of "robust markets". Such objective is to be achieved through safeguarding an environment that creates the "right incentives" and "a mix of business freedom, rules and standards". The normative contentiousness avoided at this level should be brought in concrete cases and categories, developed according to "perspective and assumptions" – notably free-market assumptions – instead of misleading goals.

A similarly suspicious view on the "antitrust goals" debate is provided by David Hyman and William Kovacic. The authors assume antitrust laws were created with "strategic ambiguity"[108], that is, a multiplicity of aims which can hardly provide clear direction for policymaking. Therefore, it would be more profitable to look at the role of public agency design in the dynamics of antitrust, specially at the institutional forces and constraints under which antitrust agencies operate on a day-to-day basis.

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[105] Implying that antitrust enforcement may actually reduce the welfare of consumers when welfare derives from high prices, like the case of "harmful" products (such as cigarettes) or status goods (whereby high prices contribute to the prestige of the product). John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2466 – 2468.

[106] John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2428-2429.

[107] Eleanor M. Fox, *Against Goals* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2159.

[108] David A. Hyman and William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2166.

Laura Parret[109] offers a non-American perspective of the debate, discussing many of the goals assumed by EU competition law throughout the last century. Goals like promoting market integration and protecting economic freedom[110] seem to be fairly particular to the European context. But other aspects of the EU's "multiple personality", such as fostering industrial policy, small and medium-sized enterprises, or fairness, are also defended in other areas of the world. Notwithstanding important institutional differences[111], the focus of current European antitrust policy apparently converges with the United States: consumer welfare (often quoted alongside efficiency) and the corresponding intensified move to a so-called "more economic approach"[112] after 2004 with the decentralization of competition authorities.

The perspective chosen by Harry First and Spencer Waller is mostly institutional. Their main concern is with regards to an increasing technocratic feature of antitrust, a system "captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability"[113]. Among the elements that indicate such democracy deficit in the antitrust realm, at least in the United States[114], are the judicial exercise of legislative power, the limited use of jury and the hostility to private litigation. A

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[109] Laura Parret, *The multiple personalities of EU competition law: time for a comprehensive debate on its objectives* in Daniel Zimmer, *The Goals of Competition Law* (2012), Edward Elgar, Cheltenham. Despite its "multiple personalities", one could argue that European competition law has a "DNA", Ariel Ezrachi, *EU Competition Law Goals and The Digital Economy* (2018), Oxford Legal Studies Research Paper No. 17/2018, 4 available at https://ssrn.com/abstract=3191766 (stating the goals of European Competition law centre around and are primarily consistent with consumer welfare, but are not limited to it).

[110] The concern regarding economic freedom can be traced back to the ordoliberal school, or the Freiburg School. Such School appears in the 1930s as a reaction to both the economic failure of Weimar Republic and the economic conception of Nazism. An effective plurality of choice is regarded as essential for the process of freedom of choice and for the discovery of the best market options. Calixto Salomão Filho, *Direito Concorrencial* (2013), São Paulo, Malheiros, 42-45.

[111] Blair and Sokol observe that Europe has been less receptive to the economic analysis of law among its law professors, and more welcoming among its economists. The driver of economic analysis in Europe has therefore been DG competition and the courts, rather than legal academy. See Roger Blair, Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2512 – 2515.

[112] On this topic, see José Maria Arruda de Andrade, *Reflexões sobre o* more economic approach *no direito concorrencial europeu* in Celso Campilongo, Roberto Pfeiffer, *A evolução do antitruste no Brasil* (2018), São Paulo, Singular, 105-118.

[113] Harry First, Spencer Weber Waller, *Antitrust's Democracy Deficit* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2547.

[114] The authors relate the European Modernization Initiative in 2004 to a narrowing of antitrust's "democracy deficit" in Europe, Harry First, Spencer Weber Waller, *Antitrust's Democracy Deficit* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2566 – 2567 (in terms of commitment to more transparency, accountability, private litigation, and aggregating small claims through collective and representative actions).

parallel trend, which historically does not need to overlap technocracy[115], is the *laissez-faire* enforcement, regarded as a near abolition of antitrust without having to engage the political sphere. This is conveyed through a rule of reason that, despite being the default standard, is hard to be administered by courts, as well as through an error cost analysis which tends to underweight the benefits of "getting it right" in favor of the costs of "getting it wrong".

Dina Waked provides a range of antitrust goals that could be taken into account in developing countries. Pursuing dynamic efficiency (or technological progress) shifts the focus from consumers and producers to innovation, but makes antitrust a hostage of the disagreement about which market structure (competitive or monopolist) in fact encourages firms to innovate[116]. Protecting small businesses, although still endorsed by modern American statutes and several European countries, is often equated to a "tax" on consumers which guarantees that smaller businesses remain in the market[117]. The focus on international competitiveness (or creating national champions) might be a counterbalance to neoliberal policies, but its successful examples (e.g. Japan and South Korea) were conditional, temporary and limited to only a few forms of competition[118]. Reducing poverty through driving prices down and eliminating barriers for basic necessities seems appealing as a policy framework; nonetheless, many authors argue that developmental or redistributional goals should be left to other government actions[119]. Finally, the idea of promoting fairness,

[115] An example of technocratic antitrust in favor of more enforcement instead of laissez-faire is considered to be the later New Deal and the early EU competition enforcement. See cases such as *United States v. Socony-Vacuum Oil Co.* (1940) Supreme Court of the United States, 310 U.S. 150 and *United States v. Aluminum Co. of America* (1945) United States Court of Appeals for the Second Circuit, 148 f.2d 416. For a description of the New Deal era focused in the figure of Thurman Arnold, who headed the Antitrust Division, see Spencer Weber Waller, *Thurman Arnold: Biography* (2005), New York University Press, New York.

[116] Dina I. Waked, *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices* (2015), in Seattle University Law Review, vol. 38, 945, 966-968. In a demonstration of the enduring power of neoclassical economics in antitrust, the standard is considered "a complicated goal for antitrust enforcement" because "economic theory has not successfully integrated the innovation dimension into general equilibrium theory".

[117] Dina I. Waked, *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices* (2015), in Seattle University Law Review, vol. 38, 968-973.

[118] Dina I. Waked, *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices* (2015), in Seattle University Law Review, vol. 38, 974-975.

[119] Dina I. Waked, *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices* (2015), in Seattle University Law Review, vol. 38, 977.

equality and justice can be considered a normative superior, but it holds the problems of interpreting vague terms that are not supported by clear definitions[120].

For reasons of consistency and predictability, Waked herself defends a one-goal approach for developing countries: "development and growth"[121]. As she builds her argument, two questions are addressed: (a) How is growth generated? and (b) How to formulate an antitrust policy compatible with such goal? As to the former, the author observes economic models and empirical studies which identify the centrality of technological change and innovation for generating growth. As to the latter, however, the lack of empirical evidence eludes an ultimate winner in the debate between Schumpeterians and Darwinians[122] on how to achieve dynamic efficiency and encourage innovation. Like Bork had observed, economic theories often "leave out too much" and law needs to meet answers as soon as cases are successfully presented[123].

Finally, a couple of articles are of particular interest to the present work. Those in the fourth and last group in our categorization offer an (iv) attempt to take "competition" into direct consideration, apart from other goals that antitrust might eventually have. Nevertheless, their somewhat hesitant argumentation – perhaps except for a couple of authors of so-called New Brandeis School[124] – contrasts with the relevance that such goal is expected to have in *competition* policies. Indeed, outside of academic arena, promotion of competition often appears as one of the main self-declared goals of antitrust policy, both as a means to achieve other goals and as an end in itself[125].

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[120] Dina I. Waked, *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices* (2015), in Seattle University Law Review, vol. 38, 977-979.

[121] Dina I. Waked, *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices* (2015), in Seattle University Law Review, vol. 38, 985.

[122] Roughly, in Waked's reconstruction, those in the Schumpeterian camp consider monopoly power a necessity to generate innovation. On the other side, those in the Darwinian camp argue that innovation is stimulated in competitive markets, because each firm fears its products will be rendered obsolete by another firm's innovation.

[123] See section I.I.II.

[124] See section III.II.I.

[125] International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies* 9 (2007), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf; International Competition Network, *Competition Enforcement and Consumer Welfare — setting the agenda 14* (2011), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf; Dina I. Waked, *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices* (2015), in Seattle University Law Review, vol. 38, 983. Dina Waked refuses to discuss "promotion of competition" in her review of antitrust goals, since it is "a description of a market structure, i.e., a means to achieve an end and not an end result

Daniel Zimmer believes that competition law aims to protect the competitive process. However, instead of defining such process, the author explains that competition "requires that there is (actually or potentially) more than one player in the market: 'competition' and 'monopoly' are mutually exclusive"[126]. Moreover, the preservation of the requisites of the competitive process may not be considered as a final goal of competition law. For that purpose, the author defends the protection of the "opposite side" of the market – be it buyers, be it sellers – against cartels or dominant firms.

Maurice Stucke assumes an "effective competitive process" as a means to achieve other objectives[127]. In 2012, he observes there is no satisfactory comprehensive answer for the seemingly basic question: *What is competition?* The common reference made by policy-makers to low prices and high-quality products, for instance, cannot suffice if one considers the effects are inconsistent and so incapable of defining competition[128]. In a (likely) scenario of rationally bounded firms and rationally bounded consumers, competition emerges as an evolutionary trial and error process. "Like any complex system", it is "incompressible", or "impossible to account for the system in a manner that is less complex than the system itself". In 2013, Stucke recommends that courts and agencies in developed countries recalibrate antitrust's legal standards and enforcement to better promote consumer welfare, taking

itself". Dina I. Waked, *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices* (2015), in Seattle University Law Review, vol. 38, 945, 951. Defending antitrust protects more than efficiency and consumer welfare, *Atl. Richfield Co. v. USA Petroleum Co.* (1990), 495 U.S. 328, 360 "in its haste to excuse illegal behavior in the name of efficiency," of casting "aside a century of understanding that our antitrust laws are designed to safeguard more than efficiency and consumer welfare, and that private actions not only compensate the injured, but also deter wrongdoers." (Justice Stevens. dissenting).

[126] Daniel Zimmer, *The basic goal of competition law: to protect the opposite side of the market* in Daniel Zimmer, The Goals of Competition Law (2012), Edward Elgar, Cheltenham, 489.

[127] Maurice Stucke, *What is competition?* in Daniel Zimmer, *The Goals of Competition Law* (2012), Edward Elgar, Cheltenham, 28. But see Maurice Stucke, *Reconsidering Antitrust's Goals* (2012), 53 Boston College Law Review, 569 (the competitive process fails as an antitrust goal because "it simply shifts the debate to a larger, unresolved issue, namely defining an 'effective competitive process'"). Also Maurice Stucke, *Should Competition Policy Promote Happiness?* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2580 – 2585.

[128] Similarly, John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2427 ("It is not possible to avoid this debate by resorting to the proposition that the purpose of antitrust is to preserve competition or protect the competitive process. Those terms are not self-defining, they were not defined by Congress, and they cannot be used to evaluate behavior with mixed effects without specifying either the effect or effects that should count or the legal rules or standards that should be applied in making the determination"). Also on the intricate relation of competition and its effects, Dina I. Waked, *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices* (2015), in Seattle University Law Review, vol. 38, 945, 951 (For some, promoting a competitive market is desirable because of its effect on lower prices in terms of allocative efficiency; yet for others, it is desirable as it leads to more dynamic efficiency. Pursuing competition as an antitrust objective necessarily contains a hidden presumptive goal that is not spelled out *ex ante* and thus fails at being a proper guiding objective policy)

consumer surplus as an incidental byproduct of a competitive process that promotes economic opportunity and freedom.

Barak Orbach adds a historical perspective to such view. He observes that neither the U.S. Congress in 1890 nor the Supreme Court in the late 1970s had a clear concept of competition[129]. However, until the introduction of the consumer welfare standard in the mid-1960s, antitrust had competition as its uncontroversial goal, as demonstrated by a report of the Attorney General's National Committee and several antitrust cases decided by courts[130]. Being the goal of consumer welfare a source of confusion and controversy in antitrust, the author suggests a "nuanced, dynamic, and imperfect" antitrust regulation that takes back the concept of competition as an "economic concept" that develops over time.

The above-sketched snapshot of the current debate on antitrust goals reveals an academic discussion that is far from a "by and large" consensus. First, there is dispute on the concept of consumer welfare itself: whether it means consumer choice, surplus or total surplus in a relevant market, or otherwise includes impact upon other markets. There have also been attempts to develop the goal of consumer welfare at its margins by putting only a weight on producer surplus, differentiating easy and hard antitrust cases, or including the perspective of suppliers. Taking into account differences between the U.S., Europe and developing countries, others have suggested alternative goals such as market integration, reducing poverty or stimulating development and growth. Overall, the whole debate leaves us today with no comprehensive definition of the most popular goal among antitrust agencies and statutes: protection/promotion of competition.

Another feature coming out of the debate is that the discussion on antitrust goals is still a function from the most influential economic ideas of each period. In such sense, the main challenges to the Borkean perspective have come from authors who essentially speak the same (legal-economic) language of their opponent. This is especially clear in the framing of Lande's famous criticism as one that has changed the terms of the debate on the goals of antitrust from an issue of economic vs. noneconomic values to a dispute about which

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[129] Barak Orbach, *How Antitrust Lost its Goal* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2267-2275.

[130] One of the given examples is Warren in *United States v. E.I. du Pont de Nemours & Co.* (1956) Supreme Court of the United States, 351 U.S. 377 ("If competition is at the core of the Sherman Act, we cannot agree that it was consistent with that Act for the enormously lucrative cellophane industry to have no more than two sellers from 1924 to 1951. (...) The public should not be left to rely upon the dispensations of management in order to obtain the benefits that normally accompany competition.")

economic value should be dominant. If it is fair to assume both the initial years of Sherman Act and the Chicago School were selections within an "evolutionary view"[131], the evolution of antitrust itself seems to be based on a limited range of variation.

As will be further explored in this thesis, those two main findings might not be disconnected. The difficulty to define competition as an autonomous antitrust goal can be a by-product of the lack of support coming from economic theory. In the earlier years of antitrust, competition was negatively defined as an *absence*: the neoclassical absence of "market coercion". In the highest years of Chicago School, competition became a *derivation* of another goal*:* competition as a "shorthand phrase" for consumer welfare. Finally, in the recent debate, despite important advances, competition still carries a considerable degree of *indetermination*: conceived as a "lost goal", as a "complex system" or as the "contrary of monopoly".

This framework provides enough reason to look for other sources of useful antitrust knowledge: first, other geographies (Brazil); later, other disciplines.

I.II. ANTITRUST AND COMPETITION IN BRAZILIAN LEGAL DISCOURSE

I.II.I. IS THERE AN ANTITRUST DOGMATICS? THREE CHALLENGES

A well-known American legal philosopher has noticed that the decision to stimulate competition is one that a community might accept despite making "life much more dangerous"[132]. In a brief passage from his main book on the legal system[133], the German sociologist Niklas Luhmann adds an intriguing comment onto the legal privilege of causing harm to others. In the dynamics of competition, he observes, it is possible that the performance of a firm will result in substantial losses to a competitor, without the former being held responsible for it. The condition for such non-liability is that whoever causes the

[131] William H. Page, *Ideological Conflict and the Origins of Antitrust Policy* (1991), Tulane Law Review Association vol. 66 n. 1, 67. Associating an "evolutionary" comprehension of competition back to Friedrich von Hayek, Dietmar J. Wetzel, *Soziologie des Wettbewerbs. Eine kultur- und wirtschaftssoziologische Analyse der Marktgesellschaft* (2013), Wiesbaden, Springer VS, 40.

[132] Ronald Dworkin, *Taking Rights Seriously* (1977, 1978) Massachusetts, Harvard University Press, 10.

[133] Niklas Luhmann, *Das Recht der Gesellschaft* (1993), Frankfurt am Main, Suhrkamp Verlag, 465.

damage provides an appropriate economic justification[134]. Nonetheless, and here is the interesting point, the kind of economic justification that is accepted for the harms caused by competition is one that is much more difficult for jurists to assimilate than those underlying classical legal institutes such as contract or property.

One of the aims of this section is to inquire some roots of such difficulty. There are characteristics of antitrust which bring oddness to the legal world, especially to the lawyer immersed in the tradition of European continental law. Much of this lawyer's professional toolkit is still composed by the instruments of legal dogmatics, whose main lines were drawn in the nineteenth century, after the appropriation of preexisting semantics[135]. One of the notions appropriated by legal dogmatics was the "prohibition of denial of argumentative series' starting points", which arises modernly in the eleventh century through the work made on the texts of Justinianeus Digest in Bologna. These texts had authority, not in the sense that they were not questioned, but because they were accepted as an indisputable basis of law and subjected to a technique characterized by grammatical and philological gloss.

Another important notion for the modern development of legal dogmatics – and especially for the epistemological attempt to develop a "dogmatic science of law" – was the

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[134] As the FTC once stated, "competition, which is always deliberate, has never been a tort, intentional or otherwise. . . If firm A through lower prices or a better or more dependable product succeeds in driving competitor B out of business, society is better off, unlike the case where A and B are individuals and A kills B for B's money. In both cases the 'aggressor' seeks to transfer his victim's wealth to himself, but in the first case we applaud the result because society as a whole benefits from the competitive process". In *Re E.I. du Pont de Nemours & Co*., 3 Trade Reg. Rep. However, there is a difference between diverting a competitor's income through aggressive competition and raising rival's costs without appropriate justification – sometimes cooperation is deemed necessary for an effective competition. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*. (1985) Supreme Court of the United States. 472 U.S. 585. ("In considering whether the means or purposes were anticompetitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other [...] thus the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer good will in exchange for a perceived long-run impact on its smaller rival.") But see *Verizon Communications v. Law Offices of Curtis V. Trinko* (2004) Supreme Court of the United States. 540 U.S. 398 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct.*")

[135] *Cf.* Carlos E. Alchourrón, Eugenio Bulygin, *Introducción a la metodologia de las ciências jurídicas y sociales* (1975, 3rd reprint 1998), Buenos Aires, Astrea, 90. This brief history of dogmatics is based on the works of Raffaele De Giorgi, *Scienza del diritto e legitimazione* (1979; 1998), Bari, Pena Multimedia; Tercio Sampaio Ferraz Jr., *Função social da dogmática jurídica* (1980), São Paulo, Revista dos Tribunais; and Zuleta Puceiro, *Paradigma dogmático y ciência del derecho* (1981), Madrid, Editoriales de derecho reunidas. It partially retakes the reconstruction made in Luiz Felipe Ramos, *Por Trás dos Casos Difíceis* (2017), Curitiba, Juruá.

notion of "system". With the school of natural law, European legal theory begins to be elaborated from premises whose validity rests on rational generality. Conceived as a means of organization originated in the fields of astronomy and music, a system is a way to ensure and ground knowledge against contingency and according to requirements of certainty.

With the methodological conversion operated by Karl von Savigny in the nineteenth century, such system is expected to be based on positivity[136]. Legal "science" now assumes the task of explaining the internal rationality of positive law, organizing the legal matter into a system in which the principles of positive law constitute the (undeniable) premises from which each of the legal abstractions derives. One of the classic developments of Savigny's conversion is provided by the early Rudolph von Jhering, in whose thought legal "science" assumes the role of decomposing legal rules in simple definitions. Such simple definitions were to enable the subsequent reconstitution of legal rules in a broadened and magnified law: the "legal alphabet". Jurisprudence as "legal science", in this construct, is born in practice and meant to return to practice[137].

Until Hans Kelsen closes the "Kantian cycle" in legal theory – a cycle started with Savigny – legal dogmatics stabilizes as a system founded on positivity and oriented to the resolution of practical problems. However, a sufficiently complex description of modern legal dogmatics seems to have to consider at least one additional factor: the prohibition of denial of justice[138]. This legal duty to decide all cases (also known as *non-liquet* prohibition) determines in a decisive manner the characteristics and function of modern legal dogmatics. In modern society, the legal system operates between two margins. One is positive law, that is, law as product of decisions that cannot be denied by legal communications. The other is

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[136] See Karl von Savigny, *System des heutigen römischen Rechts* (1849), translated by Jacinto Mesía and Manuel Poley, *Sistema del derecho romano actual* (1878), Tomo I, Madrid, F. Góngora y Compañia Editores, 29 (assuming that the "common conviction of the people" is the place where positive law lives).

[137] Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (1883) translated by José Ignacio Coelho Mendes Neto, *A dogmática jurídica* (2013), São Paulo, Ícon.

[138] While Savigny himself associated the existence of this duty with the "very nature" of judicial functions, the duty to decide will appear, in Kelsen's best known work, as a norm "which does not necessarily have to exist". Another classic of legal positivism which acknowledges the contingency of the prohibition of denial of justice is Herbert Hart, who understands this duty as a primary rule that may or may not exist with the function of "reinforcing" a rule of judgment. Whatever the interpretation attributed by legal theories, the fact is that the prohibition of denial of justice looms as a pervasive implied evidence in modern law. Karl von Savigny, *System des heutigen römischen Rechts* (1849), translated by Jacinto Mesía and Manuel Poley, *Sistema del derecho romano actual* (1878), Tomo I, Madrid, F. Góngora y Compañia Editores, 159. Hans Kelsen, *Reine Rechtslehre* (1934, 2nd ed. 1960) translated by João Baptista Machado, *Teoria Pura do Direito* (1985; 7a ed. 2006), São Paulo, Martins Fontes, 132. H. Hart, *Concept of Law* (1961), translated by Antônio de Oliveira Sette-Câmara, *O Conceito de Direito* (2009), São Paulo, Martins Fontes, 125.

precisely the prohibition of denial of justice. On the one hand, legal texts admit interpretation, producing a series of normative possibilities for the interpreter. On the other hand, the concrete and contingent case must always be decided. There is need for criteria which relate each of the different relations of law enforcement (positive law - compulsory case decision) to the others. A "third margin" is required[139].

As such third margin, legal dogmatics performs the function of expanding the legal uncertainty compatible with the margins, controlling the possibilities of decision in a system that must decide every case. Within legal dogmatics, not every decisional alternative is possible: only variations that respect the margins of the legal system are to be considered. Legal dogmatics commonly takes the form of conditional programs (if "x" then "y") plenty of abstract concepts ("x" is usually a general category and not a specific individual, action or object). By doing so, it tries to combine the legal need of consistency (equal cases should be decided equally) with adaptability to a complex environment[140].

But what to do when legislation requires the jurist to take into account the effects of a legal decision? What if a discipline anchors some of its decision-making criteria on the effects of certain behaviors? And what if such effects are measured according to economics, which does not have a duty to decide all cases, and thus presents only *probably correct* answers for *most of* the cases?[141] Such kinds of questions pose three main challenges to Brazilian contemporary antitrust, complexities that the jurists of the country have tried to

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[139] This is what is defended in Luiz Felipe Ramos, *Por trás dos casos difíceis: a dogmática jurídica e a proibição da denegação de justiça* (2017), Curitiba, Juruá (while observing the existence of a dogmatic approach to legally relevant decisions that are not immediately pressed by the *non liquet* prohibition: a "peripheral dogmatic"). For an example of the need of a third margin in antitrust, see Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 368 ("The importance of this removal of the requirement of market power is not that it makes the law irrational – the entire theory of tying arrangements as menaces to competition is completely irrational in any case – but rather that *it makes the irrationality of the law unconfinable*. It becomes impossible, on any terms but those which the law is currently unwilling to accept, to distinguish illegal tie-in sales from any other sales", emphasis added).

[140] Such ideas will be retaken in sections III.II.II. and III.II.III.

[141] Some of those questions resemble a debate that took place in German legal theory in the 1970s. See Niklas Luhmann, *Rechtssystem und Rechtsdogmatik* (1974), Stuttgart, Kohlhammer Urban-Taschenbücher (discussing the role of "effects" in legal dogmatics and defending that future in this context is only relevant as a "generalization of the past"). The project of legal dogmatics in Brazil, deemed to be a Civil Law country, is arguably influenced by the dogmatics of "Rechtswissenschaft". It is out of the scope of the present research to inquiry to what extent such project was implemented in the country, since it suffices to know the ideal typical characteristics of legal dogmatics to identify the challenges for antitrust.

address. The encounter of its Civil Law roots with an increasingly international antitrust doctrine makes Brazil a privileged spot for observing legal tendencies in the new century[142].

The first challenge for a dogmatics of antitrust is the legal duty to consider effects. In this regard, article 36 of the Brazilian antitrust statute (Law 12.529/11) stablishes the following[143]:

> *Art. 36. **The acts** which under any circumstance have as an objective or **may have the following effects** shall be considered violations to the economic order, regardless of fault, even if not achieved:*
>
> *I - to limit, restrain or in any way injure free competition or free initiative;*
>
> *II - to control the relevant market of goods or services;*
>
> *III – to arbitrarily increase profits; and*
>
> *IV - to exercise a dominant position abusively.*

The rules applied to merger control also require the examination of potential effects[144]:

> *Art. 88. The following shall be submitted to Cade by the parties involved in the operation of acts of economic concentration in which, cumulatively: (...)*
>
> *§ 5 The concentration acts involving elimination of competition in a substantial portion of the relevant market**, which could create or strengthen a dominant position or that can result in the domination***

[142] Antitrust is not the only challenge to conventional legal dogmatics in Brazil. Constitutional doctrine, especially its emphasis on argumentation and on balancing constitutional principles, also presents tensions with conditional programs constituted by abstract concepts. As much as they have points of intersections (for example, between the "rule of reason" and the "*Verhältnismäßigkeitsgrundsatz*"), it seems however that the challenges posed by antitrust are of a special nature. See more on section III.II.II.

[143] Law 12.529/11, available at http://www.cade.gov.br/assuntos/internacional/legislacao/law-no-12529-2011-english-version-from-18-05-2012.pdf/view (our emphasis).

[144] Law 12.529/11, available at http://www.cade.gov.br/assuntos/internacional/legislacao/law-no-12529-2011-english-version-from-18-05-2012.pdf/view (our emphasis). The predictive character of merger analysis is not particular of Brazil: it is also clear in the words of the DOJ Merger Guidelines (2010): "(…) Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not (...)".

> ***of the relevant market of goods or services*** *shall be prohibited, except as set forth in § 6 of this Article.*
>
> *§ 6 The acts referred to in § 5 of this Article may be permitted, provided they are within the limits strictly necessary* ***to achieve the following objectives:***
>
> *I - cumulatively or alternatively:*
>
> *a) increase productivity or competitiveness;*
>
> *b) improve the quality of goods or services; or*
>
> *c)encourage efficiency and technological or economic development; and*
>
> *II - a relevant part of the resulting benefits are transferred to consumers.*

Legal texts are subject to interpretation, but positive law cannot be disregarded. Brazilian antitrust statute seems to require that legal dogmatics observes the future[145]. Effects and objectives, after all, are events expected to occur. In order to develop legal decisional criteria, Brazilian jurists would need to build concepts that deal with the prospect effects of business conducts or mergers in the market. Which conditional programs could a judge rely on to decide whether an act "controls a relevant market of goods" or "improve the quality of goods or services" and, therefore, is legal or illegal?

Writing about a former version of Brazilian antitrust statute, Fábio Ulhoa Coelho observed that "*Brazilian antitrust law could not distance itself from the world tendency to consider, in the application of punitive measures, all the effects of the anticompetitive practice, effectively beneficial or effectively harmful*" [146]. According to this author, competition could not be taken as an "abstract value", but in concrete reference to the effective improvement of employment level, technological development and better consumer service. Ulhoa Coelho embraces the challenge of considering effects in the

[145] Observing that Economic Law in general is much oriented by consequences, Celso Campilongo, *Ruptura com mitos e superação de obstáculos: direito, economia e mercado (Prefácio)* in Fernando Herren Aguillar, *Direito Econômico: do direito nacional ao direito supranacional* (3rd. 2012), São Paulo, Editora Atlas, xxii.

[146] Fábio Ulhoa Coelho, *Direito antitruste brasileiro* (1995), São Paulo, Saraiva, 24 (our translation – the referred antitrust statute was the Law 8,884/94).

application of antitrust law and expands it to several features of the economic reality, without necessarily providing the criteria for decisions based on such expansion.

Another Brazilian antitrust scholar, Paula Forgioni binds the consideration of effects with a concern of legal certainty, demonstrating that such concern has existed since legal violations started to be defined according to the effects of a practice. Decisions that are justified on grounds of "*the search for efficiency and increase of the level of effective competition in the market*" are associated with the "*political character of the statute*"[147]. Forgioni identifies a relevant aspect of this first challenge for an antitrust dogmatics: the invitation to observe the future comes with a price for legal certainty. Her solution is to understand antitrust closer to politics.

Calixto Salomão Filho pursues a different strategy: trying to interpret the "effects" in terms of the "intention" of the agent. "*The effects, as we have seen, are an element for determination of intention*", the author writes. Here we have a concept which legal dogmatics – think of concepts such as guilt or fraud – is more comfortable with. But in order to derive an intention from the effect, one has to bear in mind that "*its potentiality is sufficient to be able to presume the intention of a rational agent acting in the market*"[148]. The solution ends up not being as dogmatically conditional as it appears: after all, "potentiality" is still a concept that requires some intimacy with the future.

The need to dialogue with economics is the second challenge for the development of an antitrust dogmatics. One is stimulated to find economic models according to which the decision-maker would be able to foresee effects. Those models are not located in what we traditionally think as "positive law", that is, they are not a product of any legally controlled decision. To some extent, the second challenge is a by-product of the first, as the legal

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[147] Paula Forgioni, *Os Fundamentos do Antitruste* (1998; 9ª ed. 2016), São Paulo, Editora Revista dos Tribunais, 13 (our translation).

[148] Calixto Salomão Filho, *Direito Concorrencial* (2015), São Paulo, Malheiros, 477 (our translation). With regards to the "intent" in connection with the "attempt" offense, Justice Holmes: "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. . . . But when that intent and the consequent dangerous probability exists, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." *Swift & Co. v. United States* (1905) 196 U.S. 375, 396. Understanding otherwise, *United States v. Microsoft Corp.* (2001) United States Court of Appeals, District of Columbia Circuit. 253 F.3d 34. ("in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct")

requirement to consider effects stimulates the jurist to look for models to predict what can occur in the market.

As it happens to be common in other countries, one of Brazilian antitrust handbooks resulted from a joint effort between a professor of economics and a law professor[149]. Also revealing the relevance of economics, another author argues that the "*relevant norms to the preservation of competition in the market cannot be applied in abstract*". "*It is always necessary*", da Fonseca defends, "*to analyze the concrete case, following the parameters and methods of the economics*"[150]. While this description is accurate, one is forced to remember, with Jhering, that although legal concepts are born and expected to return to practice, they usually pass through very remote regions, where some of the most beautiful legal discoveries are made[151].

Abstraction is a correlate to legal dogmatics. Economic theory, on the other hand, is "*instrumental to a certain economic policy*" and the fluid normative text of antitrust could be "*aligned with the most diverse economic views*"[152]. Once again, Paula Forgioni identifies the policy character as a central feature of antitrust, although economic science is deemed to be an essential instrument in "*the hands of the jurist*".

Calixto Salomão Filho offers a criticism regarding the exclusivity of economic analysis in antitrust. When it tries to analyze the function of law, writes Salomão Filho, economics attributes to the legal enforcer an economic rationality "*without proposing any empirical background for such attribution*". When it attempts to provide a direction for antitrust, economics "*imputes to the law the role of a mere spectator of economic life, one that must eliminate transaction costs in order to maximize efficiency*"[153]. The use of economics, in this view, seems to be not as reprehensible as its monolithic imperialism. Like Forgioni, Calixto appears to imagine a different use of economics "in the hands of the jurist".

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[149] Gesner Oliveira, João Grandino Rodas. *Direito e Economia da Concorrência* (2004), Rio de Janeiro, Renovar.

[150] João Bosco Leopoldino da Fonseca, *Lei de proteção da concorrência* (2001), Rio de Janeiro, Forense, 65 (our translation).

[151] Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (1883) translated by José Ignacio Coelho Mendes Neto, *A dogmática jurídica* (2013) São Paulo, Ícone, 139.

[152] Paula Forgioni, *Os Fundamentos do Antitruste* (1998; 9ª ed. 2016), São Paulo, Editora Revista dos Tribunais, 164 (our translation).

[153] Calixto Salomão Filho, *Direito Concorrencial* (2013), São Paulo, Malheiros, 53 (our translation).

The third complexity faced by antitrust dogmatics is one of a methodological nature: many of antitrust decisional criteria were created by judges in a Common Law environment, and not as a jurist-made categorization based on the positive law of a specific country. Moreover, many of them are a product of the "rule of reason"[154], whose "consecration" was deemed to be one of the main purposes of the Brazilian antitrust statute, in the words of the rapporteur of the correspondent bill of law[155].

Once again, the country's jurists do not ignore such challenge. Salomão Filho points out to a delicate coexistence between legal concepts and logical-economic criteria, identifying the "rule of reason" with the less positivist theoretical currents of the *Wertungsjurisprudenz*[156]. Notwithstanding, his comprehensive treatise has one of the clearest self-conscious statements of a functional equivalent to legal dogmatics:

> *"It is not the purpose of this book to deal comprehensively with competitive practices. The real intention is to insert the most important of them in the general analysis of anti-competitive conduct, seeking to deduce a coherent legal theory to explain and discipline them. The behaviors here treated, therefore, do not exhaust the possible forms of acts tending to the domination of markets. However, it is hoped that they will constitute the major categories in which much, if not most, of these acts may be directly or indirectly encompassed"*[157].

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[154] As famously framed by Justice Brandeis, "the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition" *Board of Trade of City of Chicago v. United States* (1918) 246 U.S. 231. For an itinerary of the "rule of reason", see René Joliet, *The rule of reason in antitrust law: American, German and Common Market Laws in Comparative Perspective* (1967), Liége, Faculté de Droit. Also American Bar Association, *The rule of reason* (1999), Section of Antitrust Law, Monograph 23. See more in section III.II.II.

[155] Congressman Ciro Gomes, rapporteur of Bill of Law n. 3937/2004, pointed out that a practice is not an antitrust violation if it "promotes economic efficiency and consumer welfare, and whose benefits cannot be cumulatively obtained in any other way that implies less restriction or harm to free competition and compensates for the restrictions caused to competition, and should be shared between its participants and consumers or end-users" (our translation).

[156] Calixto Salomão Filho, *Direito Concorrencial* (2013). São Paulo, Malheiros, 81-82, footnote 10.

[157] Calixto Salomão Filho, *Direito Concorrencial* (2013), São Paulo, Malheiros, 458 (our translation). Compare with the Borkean enterprise: "The entire attempt of this book is to demonstrate that correct antitrust rules require only basic economics and they are capable of easy and precise application by courts. In this instance the Court had only to note the difference between partnerships and cartels (which is the difference between ancillary and naked restraints, which is in turn the difference between eliminations of rivalry essential to economic integration and efficiency, and eliminations of rivalry whose sole object must be the restriction of

Forgioni addresses such methodological issue by emphasizing how important it is to make the goals of an antitrust policy explicit. She provides the example of the definition, by European Union, of a 30% market share criteria as an indication of antitrust concerns in vertical agreements. A similar definition in Brazil would "*decrease the uncertainty arising from the amplitude of the terms of Law 12.529/11*"[158]. Once again, the author is sensitive to concerns of legal certainty and to the contribution that "the hands of jurist" can provide to antitrust. Instead of leaving all criteria to be decided on a case-by-case analysis, she proposes transparency and legal distinctions[159].

This brief overview should suffice to demonstrate that Brazilian antitrust scholars are aware of the challenges faced by an antitrust legal dogmatics. A discipline compelled to observe effects in markets, to dialogue with economics and to produce many of its criteria through a judge-made rule of reason should have a hard time developing an abstract and systematic conceptualization, let alone one that is deferential both to positive law and to the prohibition of denial of justice. The way that those authors attempt to face such challenges include auspicious avenues and recognized difficulties. Notwithstanding both its potentialities and shortcomings, this thesis will from now on refer to Brazilian antitrust "dogmatics" as a legal *doctrine.* The next step of our work is to observe how such doctrine addresses our main research issue: the convergence and divergence of antitrust and competition in their imbrications with antitrust goals.

I.II.II. GOALS AND COMPETITION IN BRAZILIAN ANTITRUST DOCTRINE.

To keep symmetry with our analysis in section I.I., this work observes Brazilian antitrust goals and competition also in three "snapshots": (i) the first deals with the origins

output)". Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 277 (Writing about *United States* v. *Topco Associates, Inc.,* 405 U.S. 596, 610 (1972)).

[158] Paula Forgioni, *Os Fundamentos do Antitruste* (1998; 9ª ed. 2016), São Paulo, Editora Revista dos Tribunais, 20 (our translation).

[159] The need for explicitness is emphasized by Bork not only at the level of goals, but also in the "operative" differences: "The Justices feel that this sort of case is different from the garden variety price-fixing ring, and they are right. The law should have the resources to make that felt difference explicit and operative". Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 278. However, the author knows how hard it can be to find differences for every possible case. See Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 356 ("I can offer no single bright line that disposes easily of all cases, dropping them neatly into one category or the other. Reflection suggests that no such line exists. But the factors that do control are sufficient to offer the degree of certainty and predictability the field requires.")

of antitrust in Brazil (1938-1946), considering its two first legislative statutes and briefly the constitution of 1946; (ii) the second examines the so-called conversion of Brazilian antitrust in "modern antitrust" (1985-1996); (iii) finally, the third snapshot addresses perspectives in the current debate on antitrust goals in Brazil.

The Brazilian doctrine on competition can be traced back to a work published in 1939 regarding the "union among competing firms"[160]. Ferreira de Souza was a politician and professor of law from the Northeast of Brazil (Rio Grande do Norte). He was a state representative (1933), a federal deputy (1934-1937) and a Brazilian senator (1946-1955). As we will see, he was also responsible for the legal treatment of competition under the Constitution of 1946.

In his book, Ferreira de Souza studies the linguistic, sociological and economic roots of competition – roots that we shall consider in the next chapter. Our focus now is the analysis of the meaning of a then recently-approved Law Decree which dealt with the phenomenon of competition. With regards to competition, the Decree 869/1938[161] stablished the following explicit references:

> *Art. 1 The crimes against the popular economy, their guard and their employment will be punished in the form of this law.*
>
> *Art. 2 These are crimes of this nature: (...)*
>
> *III - to promote or participate in a consortium, agreement, adjustment, alliance or merger of capital, with a view to* preventing or hindering*, for the purpose of arbitrarily increasing profits,* competition *in production, transport or trade; (...)*
>
> *V – to sell goods below cost price in order to* prevent competition*; (...)*
>
> *VIII - to exercise the functions of management, administration of more than one company or company of the same branch of industry or commerce in order to* prevent or hinder competition*;*

In contrast to Brazilian current legislation, competition appears as a direct reference to some of the stablished crimes. For example, predatory pricing is currently described as "selling goods or providing services *unjustifiably* below cost" (Law 12,529/11 art. 36, § 3o, XV), while *free* competition now appears as only one of the organizing concepts of article 36's caput. In 1938, the crime was to sell goods below cost price specifically with the aim

[160] Jose Ferreira de Souza, *Uniões de Emprezas Concorrentes* (1939), Rio de Janeiro.

[161] Our translation. The Decree does not have provisions only of an antitrust nature, nor are those which mention "competition" the only items which could be considered within antitrust. In fact, one of the crimes stablished in the Decree was to "transgress" official price lists of goods – almost the opposite of what is currently understood as an antitrust concern. Others, like "withholding or stockpiling raw materials", could still describe an antitrust violation.

of preventing *competition* (not qualified as "free"). The early reference to the issue of the interlocking directorate, with the specific concern of protecting competition, is also noteworthy. Such enduring preoccupation would play an important role in the recent criticism of so-called "capitalism of ties"[162] in Brazil.

On the other hand, an agreement that prevents or hinders competition was only qualified as a crime when it had a "purpose of arbitrarily increasing profits". Souza's assessment of the Decree is inspired by the notion that "*often the cartel produces good results for the public and the nation"*. He quotes Carvalho de Mendonça as follows: *"If it* [the cartel] *degenerates into abuse, with the greedy exaggerations of all monopolies, making the product inferior and raising the price, the public power could repress it, first of all verifying the monopoly's odious character*"[163]. In this view, the contrary of competition is not cartel, but monopoly – and it is not always the case that the former (cartel) leads to the latter (monopoly).

Correspondingly, the legislative treatment of the "crimes against popular economy" is not regarded by Ferreira de Souza to be an "absolute" one. Instead, the author considers it to have been tempered with "softness". He acknowledges no direct and systematic fight against cartels, but arguably a criminalization of the *intent* of cartel organizers[164]. The elements of the crime are deemed to be three: (i) participation in the cartel; (ii) avoiding or hindering competition; and (iii) aiming the arbitrary increase of profits. A combination amongst competitors without the specific intent of arbitrarily increasing profits is therefore considered not to be illegal. According to this view, a cartel can be a contractual agreement that disciplines – without destroying – competition. In such "competition agreements", unfair competition is replaced by a limited competition in which each competitor knows that its "life does not depend on the death of others".

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[162] See section II.II.III.

[163] Jose Ferreira de Souza, *Uniões de Emprezas Concorrentes* (1939), Rio de Janeiro, 115 (our translation – quoting Carvalho de Mendonça).

[164] Jose Ferreira de Souza, *Uniões de Emprezas Concorrentes* (1939), Rio de Janeiro, 118 - 166. The author notices the difficulty of evaluating such intentions, given the absence of a precise criterion and the indeterminacy of facts. He is supportive of an administrative jurisdiction composed by "experienced men in economic and legal issues" (an early reference of what would be the CADE in the future), instead of letting the facts to be analyzed by a judge, or by the National Security Court. See page 127 of the book.

Another attempt to build a distinction within the scope of the Decree is provided by Nelson Hungria[165], the jurist in charge of writing the legislation. According to Hungria the relevant distinction was not between two types of cartels, but between two types of monopolies. There would be a "national" monopoly, responsible for the defense of Brazilian interests, and the monopoly "harmful to the popular economy", which is guided only by private interests. Only the second sort, since it causes losses to the population in general, was covered by the scope of the Decree. The idea was to stablish "competition" and prevent "monopoly", combating abuse, fraud and speculation.

Resisting blockage of competition is a goal ascribed to the Decree also by Francisco Campos[166], the Ministry of Justice and Internal Businesses who signed the legislation. The protection of "free competition" was deemed as a necessary element for the industrial and commercial development of the country. Another objective of the Decree was to protect the popular economy, as a means of enabling economic reserves necessary to the expansion of business and industry. In short, the goals of the legislation were subordinated to the capitalistic industrialization of the country.

Following the explicit reference of the Decree, the doctrine around Brazilian first antitrust legislation deals with competition as a goal of the recently-stablished policy. Hungria seems to face competition as the absence of monopoly, especially desirable if the type of monopoly is harmful to popular economy. Campos subordinates "free competition" as a means to the end of industrial and commercial development of the country. Ferreira de Souza provides an extensive analysis of the concept of competition, but his final proposal seems to be fostering a specific type of competition: the limited competition – which is distinguished from "free" competition and can include even cartelized arrangements.

Only in 1945 another Decree of Law, known as "Malaia Law", would deal with antitrust issues. This time, the Decree 7.666/1945 made antitrust its sole concern. Interestingly, however, now the word "competition" in the sense of market competition is absent from the legislation[167]. The illegalities are framed in terms such as "contrary to the

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[165] See Mario André Machado Cabral, *Estado, Concorrência e Economia: Convergência entre Antitruste e Pensamento Econômico no Brasil* (2016), PhD Dissertation, University of São Paulo, 71-83.

[166] Again, Mario André Machado Cabral, *Estado, Concorrência e Economia: Convergência entre Antitruste e Pensamento Econômico no Brasil* (2016), PhD Dissertation, University of São Paulo, 61-71.

[167] It appears with the meaning of "public bid" in art. 14 and of "public tender" in art. 28. "Free competition" would reappear in the Constitution of 1946.

interests of national economy" and "acts harmful to public interest". The concern with the supply of the market and with the price of products is maintained as a priority in the new legislation.

According to its promoter, Agamemnon Magalhães[168], "perfect" or "free competition" exists only when there are various sellers of a same product, having the consumer the freedom to acquire from each of them. With one or just a few sellers, competition becomes "imperfect". This is the case of an economy dominated by "trusts" and "cartels", especially (at least in the rhetoric of Magalhães) the international ones. Among the goals of antitrust legislation, one would find political and social stability, as well as avoiding economic inflation. Underlying such goals, the perennial concern of Brazilian early antitrust with national industrialization. Competition is viewed under the influence of the "perfect competition" theory and the caveats offered by the theory of "imperfect competition".

Finally, the Constitution of 1946 retakes the concern with competition and brings it to the constitutional level[169]. It stablished, in its art. 148, that "the law will repress any form of abuse of economic power, including unions or groupings of individual and social corporations, whatever their nature, which aim to dominate national markets, *eliminate competition*, and arbitrarily increase profits". The final wording is a proposal (n. 3245) from Ferreira de Souza with a minor amendment from Agamemnon Magalhães ("whatever their nature")[170]. In harmony with Ferreira de Souza's writing, not any kind of union between firms is unlawful, but only those which represent an "abuse" and aim to "dominate national markets, eliminate competition, and arbitrarily increase profits". As we will see later in this work[171], the use of "competition" instead of one of its historical forms, "free competition", is not meaningless for Ferreira de Souza: the competition protected from elimination could be interpreted as a "limited" one.

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[168] Cf. Mario André Machado Cabral, *Estado, Concorrência e Economia: Convergência entre Antitruste e Pensamento Econômico no Brasil* (2016), PhD Dissertation, University of São Paulo, 116-137 (Magalhães works with the concept of Joan Robinson in the book "The Economics of Imperfect Competition" [1933]).

[169] An earlier mention to competition – but to the other variant for competition in Portuguese language: "competição" – had already been made in the Constitution of 1937, art. 135: "The intervention of the State in the economic domain is only legitimated to ... introduce in the game of *individual competitions* the thought of the interests of the Nation, represented by the State".

[170] Cf. José Duarte, *A Constituição brasileira de 1946* vol. 3 (1947) Rio de Janeiro, 127-129.

[171] See section II.II.II.

Our second "snapshot" starts in 1985, with the end of the Military Dictatorship[172] in Brazil. A commission of jurists and economists[173] was formed to give new direction to the antitrust agency, the CADE. In January 1986, under Sarney's presidency, CADE was reconstructed in order to foster, in the words of its head, "the economic freedom without which pluralist society, fair social progress and political democracy could not exist"[174]. Notwithstanding the apologetic terms, the antitrust efforts stablished in the following years are deemed to have a more specific aim: the management of inflation through mechanisms other than direct price control[175].

A second Commission was formed in 1988[176] in order to operationalize what was about to be approved in the Brazilian Constitution with regards to antitrust. In its first draft, the Constitution included consumer protection and free initiative (but not free competition) as principles of economic order. In addition, the draft stablished that "the law will repress the formation of private monopolies, oligopolies, cartels and any other form of abuse of economic power". However, the draft was subject to amendment and its final text stablished only that "the law will repress the abuse of economic power aimed at dominating markets, eliminating competition, and arbitrarily raising profits." The exclusion of an explicit repression of monopolies, oligopolies and cartels is attributed to the idea, present in the arguments of those defending the amendment, that a modern economy was inheritably

[172] For an analysis of antitrust during the military period, see Pedro Henrique Navarrete, *As Origens do Sistema Brasileiro de Defesa da Concorrência: o CADE (1962-1994),* Master Dissertation, Federal University of Rio de Janeiro. Just after the coup, the activity of CADE, created in 1962, was restricted to business controversies in the internal market, instead of focusing in international cartels or trusts. CADE's antitrust activity was obfuscated by other organs of industrial policy, such as the CIP (Conselho Interministerial de Preços) and the SUNAB (Superintendência Nacional de Abastecimento). Its first conviction would only occur in 1974, when Pepsi-Cola was denounced by Coca-Cola in the "bottle war".

[173] Antonio Evaristo de Morais Filho, Clovis Cavalcanti Filho, Fabio Konder Comparato, João Geraldo Piquet Carneiro and Luiz Gonzaga Belluzo Filho formed the Commission, some of whom produced also legal doctrine. See Iagê Zendron Miola, *Law and the Economy in Neoliberalism: the Politics of Competition Regulation in Brazil* (2014), dissertation presented to the "Renato Treves" International PhD Program in Law and Society, 194.

[174] Pedro Henrique Navarrete, *As Origens do Sistema Brasileiro de Defesa da Concorrência: o CADE (1962-1994),* Master Dissertation, Federal University of Rio de Janeiro, 196 (our translation).

[175] Iagê Zendron Miola, *Law and the Economy in Neoliberalism: the Politics of Competition Regulation in Brazil* (2014), dissertation presented to the "Renato Treves" International PhD Program in Law and Society, 197.

[176] Alberto Venancio Filho, Carlos Francisco Magalhães, José Inácio Gonzaga Fransceschini and Washington Peluzo Albino de Souza, most of whom also produced legal doctrine. See Iagê Zendron Miola, *Law and the Economy in Neoliberalism: the Politics of Competition Regulation in Brazil* (2014), dissertation presented to the "Renato Treves" International PhD Program in Law and Society, 200.

oligopolistic[177]. In any case, the final wording is more compatible to the European repression of "abuse" than to the American control of "monopolization".

The second Commission was not successful in approving a new antitrust legislation. A new law would only come into force in 1991, under Collor's presidency, as a result of the efforts from the Executive-Secretary to attend a demand from the Ministry of Economy: finding "capitalist mechanisms to avoid prices getting out of control"[178]. The Law was criticized both by those who feared the enlargement of administrative-penal categories and by those who feared CADE would be emptied due to the absence of immediate enforceability. After the enactment of the Law in 1991, and with the failure of the stabilization plans, Collor encouraged CADE's head to foster "competition protection" instead of "price control".

In 1993, Isabel Vaz published a book with a detailed examination of competition[179]. Although aware of its broad social manifestations – "sports, arts and sentiments" – her analysis focuses on the grammatical meaning, the economic aspect and the legal insertion of competition. In line with Ferreira de Souza, she argues that the word "competition" loses its general ambiguity when considered in the economic context, as it avoids the idea of assistance and help to mean instead only dispute, rivalry or fight. Nevertheless, the contribution from economic science in the study of competition is qualified as "stagnant"[180], for two reasons: the disregard of the "means of competition" (advertising, marketing and selling strategies) and the exclusivity of the pathological angle, that is, the focus on economic illicit and not on the description of the "phenomenon of competition". With regards to the legal insertion of competition, Vaz defends that the preservation of free competition is more important in the constitutional hierarchy than the repression of abuses of economic power,

[177] Iagê Zendron Miola, *Law and the Economy in Neoliberalism: the Politics of Competition Regulation in Brazil* (2014), dissertation presented to the "Renato Treves" International PhD Program in Law and Society, 188.

[178] Iagê Zendron Miola, *Law and the Economy in Neoliberalism: the Politics of Competition Regulation in Brazil* (2014), dissertation presented to the "Renato Treves" International PhD Program in Law and Society, 213 (the Executive-Secretary was Tercio Sampaio Ferraz Jr., a legal scholar, who captained the initiative along with José Del Chiaro).

[179] Isabel Vaz, *Direito econômico da concorrência* (1993), Rio de Janeiro, Forense, 20-23.

[180] Isabel Vaz, *Direito econômico da concorrência* (1993), Rio de Janeiro, Forense, 45-48.

and that the constitution seeks not only to repress abusive forms of economic power: it is intended to achieve an efficient model of competition[181].

Finally, the law enacted in 1994, under Itamar Franco's presidency, closes the cycle of the establishment of so-called "modern" antitrust in Brazil. In fact, its provisions still include concerns such as excessive prices – a major concern of the president himself – and with employment. As we have mentioned in a previous topic, writing in 1995 Ulhoa Coelho defends that "there is no common sense, nor can the law defend competition as an abstract value, to the detriment of effective improvement of employment levels, technological development, better customer service, etc."[182]. However, the architects of the law managed to enact a legislation which would allegedly be applied in greater alignment with the antitrust in developed countries[183]. In 1996, Fransceschini wrote that the basic ideological principle to guide the interpretation of Law 8.884/94 was "economic efficiency"[184]. Based on CADE's report from 1996 and on its decisions, Proença defends that Brazil adopted competition as a means "of avoiding the increase of the economic power of a certain foreign company, or, to increase the scale of business, or to increase efficiencies in consumer protection etc."[185]

More than a legislation, it is commonly argued that the antitrust culture in the country gained in sophistication, with increasing support in economic theory. Legal scholars interested in antitrust have indicated the (asymmetrical) dialogue between antitrust theory and practice, on the one hand, and economic science, on the other[186]; economists claimed

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[181] Isabel Vaz, *Direito econômico da concorrência* (1993), Rio de Janeiro, Forense, 101.

[182] Fábio Ulhoa Coelho, *Direito antitruste brasileiro* (1995), São Paulo, Saraiva, 24.

[183] Notwithstanding relevant procedural differences, including the much commented post-merger review, which would be changed only with the current Antitrust Law in 2012.

[184] José Inácio Gonzaga Franceschini, *Introdução ao Direito da Concorrência* (1996) São Paulo, Malheiros Editores, 21 (mentioning the rule of art. 20, par 1st – "the conquest of the market resulting from a natural process founded on the greater efficiency of the economic agent in relation to its competitors does not characterize the illicit foreseen in subsection II" – although the author himself seems to favor that the purpose of the defense of competition is "univocal": the defense and viability of the greater principle of "free competition", 19).

[185] José Marcelo Martins Proença, *Concentração empresarial e o direito da concorrência* (2001), São Paulo, Editora Saraiva, 40 (our translation).

[186] See, for instance, Luis Fernando Schuartz, *Quando o bom é o melhor amigo do ótimo. A autonomia do direito perante a economia e a política da concorrência* (2007), Revista de direito administrativo, v. 1, 97. Regarding the conversion of antitrust economics in "source" of Brazilian competition law (and arguing its corresponding "deconstitutionalization"), Luis Fernando Schuartz, *A desconstitucionalização do Direito de Defesa da Concorrência* in Cláudio Pereira de Souza Neto; Daniel Sarmento; Gustavo Binenbojm (Org.) *Vinte Anos da Constituição Federal de 1988* (2009), Rio de Janeiro, Lumen Juris.

the dependency of antitrust on the economic analysis[187]. Although there is a tendency of emphasizing the impact of economics in antitrust since the 1990s[188], one finds research suggesting that the influence can be traced much further back in time.[189] There is also a doctrine in Brazil defending that economics should not be the only source of antitrust[190].

The current debate on antitrust goals, our third "snapshot", builds upon a legislation (Law 12,529/11) which repeats the Law of 1994 in its declaration of objectives. Both statutes refer to the Constitutional principles of "freedom of initiative, free competition, the social function of property, consumer protection and the repression of abuse of economic power" (article 1 of the Law). Such constitutional framing of the ultimate principles of Brazilian antitrust policy conforms the ideas of the country's antitrust doctrine with regards to antitrust goals.

Paula Forgioni equates the goals of antitrust to its function, which varies with the legal system and historical moment[191]. Therefore, she argues that there is no real consensus around allocative efficiency as the ultimate antitrust goal. The antitrust law is regarded as instrumental for a specific economic policy, and competition itself as an instrument for a greater good – guaranteeing everyone a dignified existence, according to the dictates of social justice:

> *"The big question is to create and to preserve, in the constitutional dictates, an environment in which firms have effective incentives to compete, to innovate and to satisfy the demands of the consumers; to protect the competitive process and to prevent markets from being fossilized by agents with a high degree of economic power."*[192]

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[187] For example, Mario Possas, *Limites normativos da análise econômica antitruste* (2009), Revista do IBRAC, v. 16, 235-272.

[188] See, for all, Cesar Mattos, *A revolução do antitruste no Brasil* (2003), São Paulo, Singular.

[189] See Mario Andre Machado Cabral, *Estado, Concorrência e Economia: Convergência entre Antitruste e Pensamento Econômico no Brasil* (2016), PhD dissertation, University of São Paulo.

[190] Besides authors like Forgioni and Salomão Filho, a criticism of antitrust "economization" in Brazil can be found in José Maria de Arruda Andrade, *Economicização do Direito Concorrencial* (2014), São Paulo, Quartier Latin.

[191] Paula Forgioni, *Os Fundamentos do Antitruste* (1998; 9ª ed. 2016), São Paulo, Editora Revista dos Tribunais, 162 – 191.

[192] Paula Forgioni, *Os Fundamentos do Antitruste* (1998; 9ª ed. 2016), São Paulo, Editora Revista dos Tribunais, 189 (our translation).

Notwithstanding its role as an instrument of economic policy, antitrust should not be seen as a "flexible" instrument for implementation of "any" economic policy. This is the remark emphasized by Ana Frazão[193], who notices that the opposite understanding would lead to a reductionism equivalent to the one of economic analysis with regards to antitrust goal(s). Instead, antitrust goals must be understood in the context of other constitutional principles of economic order. Competition, in turn, is an "instrument" to achieve the several constitutional goals, "not always easy to harmonize". And antitrust has to be in constant dialogue with objectives such as the protection of consumer, the fostering and protection of innovation and the fight against corruption.

Vinícius de Carvalho argues that fighting the abuse of economic power is the "medium", and ensuring free competition and consumer protection is the primary "purpose" of competition law. The principle which organizes the whole system is "freedom to compete", which indirectly favors the interest of the consumer, of competing firms and of the nation. Guaranteeing free competition ceases to be an end in itself, and becomes a means to obtain beneficial results which are associated with it, and which are based on constitutional principles.

With regards to the application of economic theory to antitrust in Brazil, Pereira Neto and Casagrande[194] state that not all manifestation of economic power should be repressed: only those abusive behaviors of dominant firms are of concern to antitrust. The underlying economic concern in Brazil is not total welfare, but consumer welfare. This is the meaning pursued by CADE according to the legal rule and principles, notably the principle of consumer protection.

The authors analyze each of the constitutional principles of economic order that inform Brazilian antitrust[195]. "Free initiative" determines that individuals and legal entities can carry out any economic activity, provided that legal requirements are attended. "Free competition" regards the protection of the dispute between agents in the market without being hindered by the state or the economic agents themselves. The "social function" of

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[193] Ana Frazão, *Direito da Concorrência: Pressupostos e perspectivas* (2017), São Paulo, Saraiva, 46-52.

[194] Caio Mário da Silva Pereira Neto, Paulo Leonardo Casagrande, *Direito Concorrencial: Doutrina, Jurisprudência e Legislação* (2016), São Paulo, Editora Saraiva, 36.

[195] Caio Mário da Silva Pereira Neto, Paulo Leonardo Casagrande, *Direito Concorrencial: Doutrina, Jurisprudência e Legislação* (2016), São Paulo, Editora Saraiva, 25-30.

property imposes a set of conditions to its exercise, including the defense of competition. "Consumer protection", finally, is indirectly defended by antitrust, as the disputes between firms lead to the decrease of prices, expansion of alternatives and development of new and better products and services.

Roberto Pfeiffer defends that there are no *a priori* goals for antitrust. But he chooses to emphasize the protection of consumers as the one most traditionally related to antitrust in Brazil[196]. The early references of Brazilian antitrust to the "popular economy" could be translated into modern terms, according to this view, as "consumer protection". Analyzing Brazilian current antitrust law, the author observes that: (i) art. 1 includes consumer protection among its principles; (ii) the damage to consumers is considered in the dosimetry of the sanction for an antitrust violation (art. 45, V); (iii) a merger which restricts competition can only be approved if its efficiencies are passed on to consumers (art. 88, II, 6º). According to Pfeiffer, the Antitrust Law is not directly concerned with the consumerist relation, having no power to solve individual conflicts, but it is immediately concerned with the well-being of the collectivity of consumers:

> *If consumer protection is achieved in an indirect manner, the consumer's well-being, understood as the specific interest of the final economic recipients of the product or service that makes up the relevant market, is a direct objective, inasmuch as its protection determinates the performance of competition authorities"*[197]

As soon as in the first pages of his "legal theory of economic power", Calixto Salomão Filho states that "the old times of antitrust law, centered on market rationality, are gone"[198]. Such diagnosis is connected to his view on the goals of antitrust. According to the author, the belief in only one objective for antitrust law – "a certain economic result based on principles of rational functioning of the market" – can only result from two simplifications. First, that the effects of private economic power are limited to the manufacturer-consumer relationship. Secondly, that economic theory is capable of

[196] Roberto Pfeiffer, *Defesa da concorrência e bem-estar do consumidor* (2015), São Paulo, Revista dos Tribunais, 100-151.

[197] Roberto Pfeiffer, *Defesa da concorrência e bem-estar do consumidor* (2015), São Paulo, Revista dos Tribunais, 151 (our translation).

[198] Calixto Salomão Filho, *A Legal Theory of Economic Power: Implications for Social and Economic Development* (2011), Edward Elgar, Cheltenham, vi.

predicting results and identifying the most efficient result in the consumer-manufacturer relationship.

The center of economic law, in Salomão Filho's doctrine, should be "effective choice" and "access to information". The state is expected to "act energetically" in order to ensure the existence of choice. And that means intervening in structures of power so as to create choice and inclusion for individuals, and in market structures so as to stimulate the consumer to look for truly diversifies alternatives. This will only take place if there is a real process of information diffusion and discovery of the best alternatives. Choice must be guaranteed not only between products, but also between technological patterns and patterns of production[199].

In antitrust, Calixto goes on, one should surpass perspectives that claim to foster "consumer protection", but are unconfident in comparison and choice as means of protecting the interests of consumers. Those perspectives tend to be tolerant with market power, in the name of efficiency, and thereby tend to harm consumer in the long run. A legal theory that embraces values – that is, one which expands positive economics – should go beyond the verification of economic effects and give priority to choice, itself as a value. The central organizing element of the market is the effective possibility of choice, which in Calixto's construct has also another name: "competition"[200].

The consequences of such perspective for antitrust analysis are multifold. Vertical mergers must not have as their sole objective the concentration of information, which leads to limiting the variety of products, restricting output, etc. Parallel behavior of oligopolies, when done consistently in only one direction, eliminates competition by domesticating the price war. Predatory pricing should be assessed not in terms of the abuse of future prices or recovery of losses, but in view of an eventual predatory strategy of eliminating the competitor from the market. The requisite of sharing benefits of a merger with consumer can only be achieved by the protection of the competitive system.

Such protection of the competitive system is not justified merely by the protection of the consumer. According to Salomão Filho, antitrust is concerned with "all the participants

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[199] Calixto Salomão Filho, *A Legal Theory of Economic Power: Implications for Social and Economic Development* (2011), Edward Elgar, Cheltenham, 75-88.

[200] Calixto Salomão Filho, *A Legal Theory of Economic Power: Implications for Social and Economic Development* (2011), Edward Elgar, Cheltenham, 146.

in the market"[201]. It means that the interests of competitors and consumers, instead of conflicting, are seen as reciprocally instrumental. This is the reason why the Brazilian Constitution, in article 170, and Law 12.529/11, in article 1, would stablish as principles of antitrust both the free competition and consumer protection. Consumer protection is a goal of antitrust as much as is the free competition, understood as the competitive system and not a specific type of competitor nor a specific market structure.

Based on our third "snapshot", Brazilian antitrust doctrine on antitrust goals could be reframed in the following words. Leaving aside an eventual reductionism to economic analysis, antitrust serves as an instrument of economic policy. It is not a flexible instrument, however, since antitrust enforcers must observe other constitutional principles, notably the principles of economic order. Among those, "consumer protection" is regarded as the one most traditionally connected to antitrust in Brazil. Still, the interests of competitors and consumers, instead of conflicting, are reciprocally instrumental. Consumer protection is a goal of antitrust as much as is the free competition.

Taken together, the three "snapshots" from Brazilian antitrust doctrine are revealing about its progressions and potentials. Since its early years – aided by a statute that, differently from the original Sherman Act, expressly mentioned the word – there were attempts to define competition[202]. It was conceptualized as "limited" competition, as an "absence" (of monopolies which are harmful to popular economy) or as "free" competition (necessary to industrial development). In the 1990s, there was an effort to overcome the pathological angle, which faces competition only through the lens of economic illicit, and look at an efficient model of competition as a constitutional superior. More recently, competition was conceived as an "instrument", a "protection" of the market dispute or as effective "possibility of choice". An interesting feature is that, despite the increasing use of economic models, much of the doctrine relies on legal-constitutional arguments when defining antitrust goals.

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[201] Calixto Salomão Filho, *Direito Concorrencial* (2013), São Paulo, Malheiros, 80 – 83.

[202] Regarding the difficulty to conceptualize competition, Tercio Sampaio Ferraz Junior, *Direito da concorrência: sua função social nos países desenvolvidos e em desenvolvimento in* João Grandino Rodas*, Direito econômico e social: atualidades e reflexões sobre direito concorrencial, do consumidor, do trabalho e tributário* (2012), São Paulo, Revista dos Tribunais, 64-65 (our translation: "this led the doctrine to assert that legislation presupposes competition as a real phenomenon, but its conceptual determination contains no normative element. On the contrary, any attempt to define conditions, modes of action and effects runs the risk of narrowing its legal applicability. Therefore, rather than legally defining the principle of competition by a conceptualization of competition, literature has been directed towards an understanding of the principle as a consequence of freedom of initiative as an aspect and one of the extensions of individual freedoms").

Hence, competition is mostly not viewed through excessively apologetic lenses, as the multiplicity and even some ambiguity of its effects are identified. There seems to be a Brazilian tradition of approaching competition as a nuanced concept, which in different periods and contexts included authors such as Ferreira de Souza, Isabel Vaz and Salomão Filho. The complexity of competitive structure is a clue that one could find in those texts, especially in the notion that competition aggregates *both* the interests of competitors and consumers. At such stage, antitrust doctrine could benefit from a careful thought regarding the specific (social) form and (social) function of competition. As we will argue throughout this work, in order to do so, one would need to investigate the contributions from other social sciences to the matter. For now, our attention will be driven to how the debate on antitrust goals reflects in the practice of the Brazilian antitrust agency.

I.II.III. GOALS AND COMPETITION IN CADE'S CASE LAW

The assessment of antitrust goals should include variable sources, since they are not always uniform[203]. An important source, for its proximity to the creation of decisive distinctions, is antitrust case law. This work will focus on the period of enactment of the current Brazilian antitrust statute, which came into force on May 29, 2012. Our target is to observe how antitrust goals are perceived by decision-makers in charge of antitrust cases in Brazil ("Commissioners"). An additional interest is on how "competition" is defined in such cases and which distinctions are produced. We examined all the decisions of Brazilian antitrust authority ("CADE") in conduct cases – cartels and unilateral practices – from 2011 to 2013. Such period was chosen due to the interest raised by its major institutional changes. CADE's Tribunal was now allowed to focus on judging anticompetitive conducts and on proceeding to pre-merger (instead of post-merger) analysis in complex cases. With regards to merger control, we assessed whether the guidelines released by CADE in 2016 have compatible goals with the analyzed cases.

We proceeded as follows. Based on the sources explored in the previous sections, we prepared a list of non-exhaustive nor mutually-exclusive keywords that represent each a

[203] For a work which finds dissonance between the predominant scholarship and recent antitrust cases – and between the former and the support of voters with regards to antitrust enforcement, see John B. Kirkwood, Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 Notre Dame Law Review 191 (2008), 211–36.

goal in contemporary antitrust[204]. Subsequently, we examined all CADE's votes on conduct cases (unilateral and collusive conducts)[205] in the designated period and attached one or more keywords to each decision. Although such is an unavoidably interpretative approach, it is also a controllable one to the extent that we indicate all decisions upon which we are drawing conclusions. Furthermore, at this point we attempt to be as deferential as possible to CADE's own interpretation of the pursued goal(s)[206]. Such evaluation will be complemented with a qualitative analysis of the most significant decisions from our research standpoint.

Our data shows that the most commonly pursued goal during the period was "competition" (or its variation "free competition", as stablished in the Brazilian Constitution). It was pursued in 65 cases[207]. The second most common goal was "protection of competitor(s)", appearing in 40 cases[208]. The latter should not be interpreted as a deviation

[204] In alphabetical order: allocative efficiency; competition; competition process as a goal; competition process as a means; competitive prices; competitiveness in international markets; consumer choice; consumer surplus; consumer welfare; democracy; economic efficiency; economic freedom; efficiency; fairness & redistribution; industrial policy; market integration; prevent firms from stealing consumers; privatization and market liberalization; producer surplus; productive efficiency; progress & development; protection of small business; protection of competitors; protection of market; protection of the "opposite side" of the market; public interest; reducing poverty; robust markets; total surplus (consumer + producer); total welfare (considering other markets).

[205] The work of gathering such cases was facilitaded by AJDC's archives, but can be replicated by looking at official diaries published during the period. Our focus on conducts is due to the limited scope of this section. Decisions regarding antitrust practices, especially unilateral conducts, tend to be more explicit about the goals pursued. Nevertheless, there is much interest on expanding this research to merger cases.

[206] A different research proposal, with at least as much interest as the one we conducted, would be to compare the ostensive goal of selected decisions with the goal actually pursued – based on the adopted decisional criteria and results. For example, a decision which claims to promote "competition" might in fact most likely promote some industrial policy.

[207] 08012.004520/1999-50, 08012.002764/2009-59, 08012.005610/2000-81, 08012.007412/1999-93, 08012.000478/1998-62, 08012.005495/2002-14, 08000.011516/1994-72, 08012.006431/1997-31, 08012.004702/2004-77, 08012.006439/2009-65, 08012.001099/1999-71, 08700.000783/2001-35, 08012.001271/2001-44, 08012.006923/2002-18, 08012.009834/2006-57, 08012.010215/2007-96, 08012.007301/2000-38, 08700.000547/2008-95, 08012.003745/2010-83, 08012.008735/2007-39, 08012.004596/2004-21, 08012.006253/2005-82, 08012.008741/2007-96, 08012.003779/2010-78, 08012.002440/2005-97, 08012.009534/2006-78, 08012.008733/2007-40, 08012.008737/2007-28, 08012.008740/2007-41, 08012.006762/2009-39, 08012.007203/2009-46, 08012.002112/200-88, 08012.001046/2003-70, 08012.001305/2003-62, 08012.003368/2004–34, 08012.001792/2007-97, 08012.003035/2008-39, 08700.003447/2008-11, 08012.007885/2008-14, 08012.008143/2008-06, 08012.011124/2008-59, 08012.011935/2008-50, 08012.007204/2009-91, 08012.003884/2010-15, 08012.008031/2008-47, 08012.008736/2007-83, 08012.009866/2008-14, 08012.004993/2009-16, 08012.006748/2009-35, 08012.006755/2009-37, 08000.009391/1997-17, 08012.004039/2001-68, 08012.006271/2009-98, 08012.008738/2007-72, 08012.007205/2009-35, 08012.011027/2006-02, 08012.008224/1998-38, 08012.008501/2007-91, 08012.011668/2007-30, 08012.010576/2009-02, 08012.003874/2009-38, 08012.000841/2011-51, 08012.012420/1999-61, 08012.001503/2006-79, 08012.006450/2000-97.

[208] 08012.001099/1999-71, 08700.000783/2001-35, 08012.008735/2007-39, 08012.004596/2004-21, 08012.006253/2005-82, 08012.008741/2007-96, 08012.003779/2010-78, 08012.002440/2005-97, 08012.002440/2005-97, 08012.009534/2006-78, 08012.008733/2007-40, 08012.008737/2007-28,

of Brazilian antitrust from the general knowledge that antitrust protects competition and not competitors[209]. None of the cases in which competitors were "protected" required explicit trade-off with competition as a general principle. In fact, many of them were cases in which medical associations were accused of "harming the commercial development of rivals"[210] or "creating difficulties to the operation of competitors"[211] due to alleged exclusivity imposed to associated physicians. The very same practice was often deemed as a violation of "competition".

Third in line came out to be the goal of "consumer welfare", with 19 appearances[212]. Its recurrence is predictable from what we learned in the previous sections – and reinforced by the fact that other goals, such as "competitive prices" and "preventing firms from stealing consumers", also demonstrate concern for consumers. Nonetheless, one could expect more explicit references in the execution of a policy that claims to favor consumer interests[213]. Such is even more intriguing provided that we attributed general mentions in favor of consumers to a concern with "consumer welfare", given the elasticity of such term. The next

08012.008740/2007-41, 08012.006762/2009-39, 08012.007203/2009-46, 08012.002112/200-88, 08012.001046/2003-70, 08012.001305/2003-62, 08012.003368/2004 – 34, 08012.001792/2007-97, 08012.003035/2008-39, 08700.003447/2008-11, 08012.007885/2008-14, 08012.008143/2008-06, 08012.011124/2008-59, 08012.011935/2008-50, 08012.007204/2009-91, 08012.003884/2010-15, 08012.008031/2008-47, 08012.008736/2007-83, 08012.009866/2008-14, 08012.004993/2009-16, 08012.006748/2009-35, 08012.006755/2009-37, 08012.004573/2004-17 e 08012.007149/2009-39, 08012.006271/2009-98, 08012.008738/2007-72, 08012.007205/2009-35, 08012.010576/2009-02, 08012.001503/2006-79.

[209] On the contrary, there are many examples sustaining the distinction: "the defense of competition must protect society in general and consumers in particular, not a competitor, or group of competitors, in a given market", SDE, *Lucia Curti Guedes v Petrocoque Indústria e Comércio S.A* (2011) - 08012.004520/1999-50. See footnote 70.

[210] Commissioner Eduardo Pontual, *Sindicato Nacional das Empresas de Medicina de Grupo – SINAMGE v. Unimed da Caçapava – Cooperativa de Trabalho Médico* (2013) - 08012.006271/2009-98, 1665.

[211] Commissioner Ricardo Ruiz, *SDE ex-officio v. Unimed Nordeste Goiano* (2013) - 08012.007205/2009-35, 275.

[212] 08000.011516/1994-72, 08012.000444/2002-98, 08012.001099/1999-71, 08012.005969/2009-96, 08012.001271/2001-44, 08012.009834/2006-57, 08012.010215/2007-96, 08012.007301/2000-38, 08700.000547/2008-95, 08012.002959/1998-11, 08012.003745/2010-83, 08012.004039/2001-68, 08012.004573/2004-17 e 08012.007149/2009-39, 08012.010576/2009-02, 08012.000841/2011-51, 08012.012420/1999-61, 08012.001503/2006-79, 08012.006450/2000-97.

[213] CADE's Horizontal Merger Guidelines, on the other hand, assures a privileged status to the economic welfare of consumers. See CADE, *Horizontal Merger Guidelines* (2016), 8. See also [45] in the same document: "for an efficiency to be considered as compensating likely negative effects to collective welfare (…) a relevant part of the benefits [of the merger] should be transferred to consumers".

most often mentioned goals were "competitive prices", in 12 cases[214], "public interest" in 10[215] and "efficiency" in 8[216].

5 cases attempted to "prevent firms from stealing consumers"[217] and "protection of the market" was chased in 4 cases[218]. "Allocative efficiency"[219], "economic freedom"[220] and "consumer choice"[221] appeared in 3 cases each, whereas "competition process as a goal"[222], "competitiveness in international markets"[223], "productive efficiency"[224] and "progress & development"[225] were pursued in 2 cases each. One can notice that the various goals directly attached to "efficiency", despite having a fair amount of mentions in CADE's decision, do not top among antitrust agency's self-conceived goals in Brazil.

Present in only one case each, we found the following goals: "competition process as a means"[226], "consumer surplus"[227]; "democracy"[228]; "economic efficiency"[229], "industrial policy"[230], "protection of small business"[231], "protection of the 'opposite side' of

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[214] 08012.004520/1999-50, 08012.006059/2001-73, 08012.0006768/2000-78, 08012.007412/1999-93, 08012.000478/1998-62, 08012.004702/2004-77, 08012.006439/2009-65, 08012.006923/2002-18, 08012.010215/2007-96, 08012.007301/2000-38, 08700.000547/2008-95, 08012.002959/1998-11.

[215] 08012.004520/1999-50, 08012.002764/2009-59, 08012.001271/2001-44, 08012.009834/2006-57, 08012.003745/2010-83, 08012.004039/2001-68, 08012.004573/2004-17 and 08012.007149/2009-39, 08012.010576/2009-02, 08012.001503/2006-79.

[216] 08012.006439/2009-65, 08012.006923/2002-18, 08012.009834/2006-57, 08012.004472/2000-12, 08012.003745/2010-83, 08012.004039/2001-68, 08012.004573/2004-17 and 08012.007149/2009-39.

[217] 08012.001271/2001-44, 08012.006923/2002-18, 08012.004472/2000-12, 08012.004039/2001-68, 08012.011027/2006-02.

[218] 08012.000792/1999-16, 08012.007301/2000-38, 08700.000547/2008-95, 08012.004472/2000-12.

[219] 08012.000921/2000-53 (although here the concern was more incidental and related to the allocation of public resources in identifying the cases likely to generate convictions), 08012.010215/2007-96, 08012.010215/2007-96.

[220] 08012.005495/2002-14, 08000.011516/1994-72, 08012.006431/1997-31.

[221] 08012.006439/2009-65, 08012.005969/2009-96, 08012.001271/2001-44, 08012.005524/2010-40.

[222] 08001.000852/99-21, 08012.004472/2000-12.

[223] 08012.004472/2000-12, 08012.011027/2006-02.

[224] 08012.009834/2006-57, 08012.004039/2001-68.

[225] 08012.006439/2009-65, 08012.004472/2000-12.

[226] 08012.006439/2009-65.

[227] 08012.004702/2004-77.

[228] 08012.001271/2001-44.

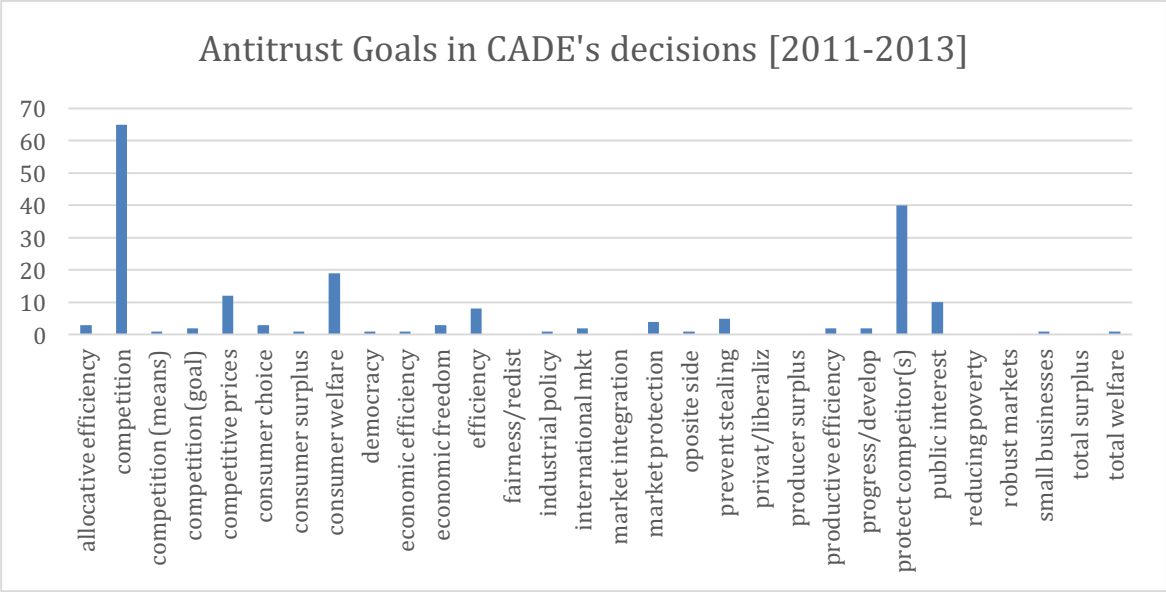
[229] 08012.011027/2006-02.

[230] 08012.011027/2006-02.

[231] 08012.004039/2001-68.

the market"[232] and "total welfare (considering other markets)"[233]. None of the cases pursued "fairness & redistribution", "market integration", "privatization and market liberalization", "producer surplus", "reducing poverty", "robust markets" or "total surplus (consumer + producer)" as a goal. As we can see, all the goals usually discussed by academics as possibilities for developing countries – such as "progress & development" or "reducing poverty" – are among the least quoted by the Brazilian antitrust authority.

The graph below summarizes our findings:



Clearly, Cade's case law is no exception to antitrust's centenarian ability of conciliating a variety of goals. In most cases, the declared goals were announced as self-evident objectives, with no attempt (aside from a few exceptions[234]) to verify eventual restrictions to a potentially competing goal. As a confirmation also of the reports from antitrust authorities around the world[235] – but in sharp contrast to the academic prevailing

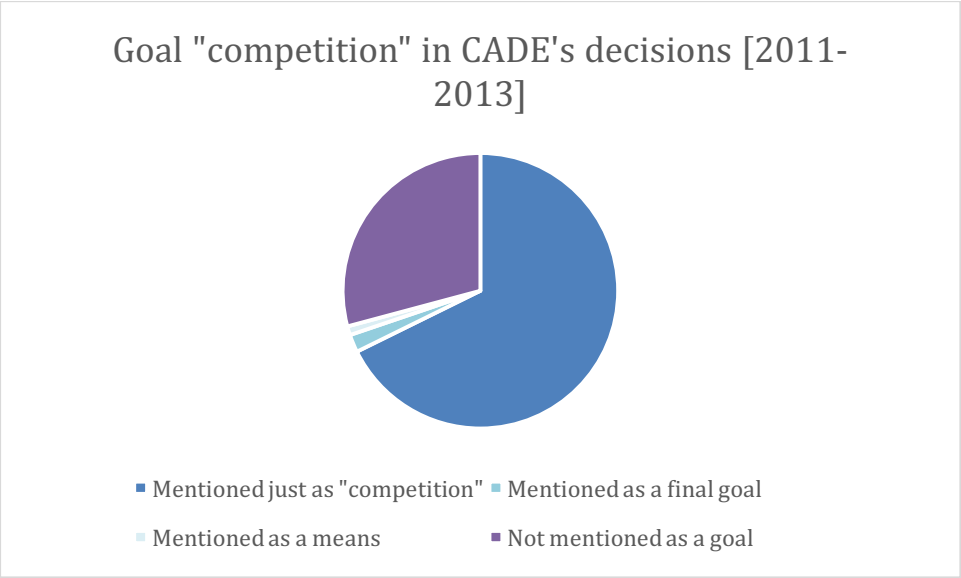
[232] 08012.003874/2009-38.

[233] 08012.011027/2006-02.

[234] In a case about an alleged practice of predatory pricing in the market of Hydroxyethylcellulose, for example, Commissioner Carlos Ragazzo stablished the difference between antitrust fight against predatory pricing, which aims to preserve free competition, and commercial defense against dumping, which aims to protect the national market. *Union Carbide Química Ltda. V. Alípio Gusmão dos Santos, and others* (2011) - 08012.007412/1999-93, 2068. See also Ana Frazão, *ANP and MPF/SP v. Several gas stations* (2013) - 08012.004472/2000-12, 1629 ("Several business practices that, despite creating damages to consumers and even to competitors, come out to be incapable of affecting the competitive dynamic of the market, are immune to antitrust control")

[235] See footnote 125.

international debate – competition appears as the main goal of Brazilian antitrust policy. Such contrasting views between agencies, on one side, and scholars[236], on the other, seem to result in a case law which is plentiful on references to "competition", but at the same time silent or obscure as to its conceptual delineation. As defended throughout this work, a consideration of competition (social) form and (social) function could help to diminish such discrepancy.



Despite being often raised as a decisional criterion, "competition" does not necessarily appear as an all-or-nothing concept. In some cases, CADE perceived it more like a scale with different degrees. A process that investigated an alleged cartel among gas stations in the city of Guapore[237], for example, indicated an "effective competition" equated to a "price war". But the same case considered as a "competitive market" one in which prices are similar, while margins are raising and falling. Finally, a state of "more competition" was related to measures that CADE had no jurisdiction to take, but only recommend, such as changing urban statutes that prohibit gas stations in supermarkets and malls. Based on such remarks, one can envisage at least three levels of competition in CADE's scale: a

[236] An eventual provincialism doesn't seem to be a reason for such incongruity. The ranking of quotations in CADE's decisions during this period indicates a high level of internationalization of antitrust sources. Hebert Hovenkamp was quoted 8 times, one of which jointly with Phillip Areeda. Massimo Motta, 3 times. Hans Friedrisczick/Larts-Hendrik Höller, Louis Kaplow, the Brazilian Luis Schuartz, Mario Monti, the Brazilian Priscila Brólio Gonçalves and Thomas Krattenmaker were quoted twice each. Many other scholars were quoted only once during the whole period, including Brazilians Ana Nusdeo, Calixto Salomão Filho, César Mattos, Eros Roberto Grau/Paula Forgioni, Fabio Medina Osorio, Francisco Amaral, Ivo Teixeira Gico Junior, João Bosco Leopoldino da Fonseca, Jose Carlos Barbosa Moreira, José Carneiro da Cunha, Maria Helena Diniz, Nagib Slaibi Filho, Paulo Furquim de Azevedo, Tiago de Barros Correia and Victor Calvete.

[237] Carlos Ragazzo, *MP/RS* v. *Auto Abastecedora Visentin and others* (2011) - 08012.005495/2002-14, 1648-1652.

"competitive" market, an "effectively competitive" market and a market with "more competition"[238].

Competition in CADE's case law has also assumed a great deal of synonyms. It has been equated, for instance, to "individual negotiations"[239], "free negotiation of price of goods and services"[240], "independent elaboration of a selling strategy"[241], "effective independent action (…) seeking to do better than the other"[242], "individual possession and offering of different sets of products"[243], "independent development of commercial strategies"[244] and to a "legally protected good"[245]. While some remarks resembled Adam Smith's suspicious view with regards to meetings among competitors[246], others accepted the existence of relations, contacts and meetings between rival firms that were legal[247]. Some related competition to "natural market mechanisms"[248] which form prices, whereas "perfect competition" was categorized by others as a model in which "prices tend to be similar"[249].

Often perceived as a goal for antitrust, competition is also an empirical reality that needs to be constructed in each case. A possible measure for such construction is sending official letters to market players. An example can be found in a case that discussed an alleged imposition of exclusive dealing by firms which provide temporary workers[250]. In addition to

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[238] Contrast with the assertion that "the Sherman Act imposes no duty on firms to compete vigorously". *In re Text Messaging Antitrust Litigation* (2015) United States Court of Appeals, Seventh Circuit. 782 F.3d 867.

[239] *CIEFAS v. SOBED-CE and Sociedade Cearense de Radiologia* (2011) - 08000.011516/1994-72, 711.

[240] Ana Frazão, *ABRIVE v. Several Insurance Companies* (2013) – 08012.008224/1998-38, 8925.

[241] Ricardo Ruiz, *SDE v. Fecombustíveis; Luiz Gil Siuffo Pereira* (2011) - 08012.006431/1997-31, 362.

[242] Olavo Chinaglia, *Abrabe and Cervejaria Kaiser v. Ambev* (2012) - 08012.006439/2009-65, 881-886.

[243] Marcos Verissimo, *ABTA v. ECAD and others* (2013) - 08012.003745/2010-83, 6526.

[244] Ana Frazão, *Polícia Civil do DF v. Several bakeries* (2013) - 08012.004039/2001-68

[245] Alessandro Octaviani, *SDE v. KLM and others* (2013) - 08012.011027/2006-02, 221.

[246] Eduardo Ribeiro, *Juízo de Direito da 3VC-RS v. gas stations* (2013) - 08012.010215/2007-96, 6461. The famous quote from Adam Smith goes as follows: conversations between people of the same trade end *"in a conspiracy against the public, or in some contrivance to raise prices".* Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations (1776; 1905),* London, Cannan ed., 124-125.

[247] Carlos Ragazzo, *SDE v. Peróxidos do Brasil and others* (2012) - 08012.004702/2004-77, 108.

[248] Carlos Ragazzo, *SDE v. Peróxidos do Brasil and others* (2012) - 08012.004702/2004-77, 127.

[249] Elvino Mendonça, *MP/GO v. Sindiposto/GO and others* (2012) - 08012.000444/2002-98, 634.

[250] *Sindeprestem v. Tática, Sellan and others* (2011) - 08012.000792/1999-16, 628-629.

the available data, Commissioner Elvino Mendonça deemed important to know about the "perception" of competitors with regards to the alleged coercion. He ended up finding no confirmation of such coercion. Most frequently, decisions imagined the behavior of consumers to design a specific competition within the facts of a process. In an alleged cartel in gasoline retail market[251], CADE considered that gas stations compete more intensively in a ratio of 10km. Such is because the "standard consumer" usually fills its vehicle with 40 liters of gasoline and the average consumption is 10km/l.

In at least one case, the subtle plurality of methods gave way to a clearer clash between paradigms of competition. This was a case involving a program of Retail Price Maintenance ("RPM") by SKF in Brazil. Three positions could be sketched from the votes in CADE. We name the first an *economic* approach, which goes as follows. The concepts of antitrust law are "indeterminate" and "broad". Such "conceptual amplitude" requires attention to the specific conditions of the concrete case. One of such conditions is the incapacity of a practice, due to the lack of market power, to alter the "usual operation of the market" [252]. The second position expresses a *legal-dogmatic* view. The distinction "promoting competition/ hindering competition" [253], deemed as an ultimate decisional criterion for antitrust, suffers from "extraordinary" vagueness. One needs "specific boundaries" that can be understood by judges, obeyed by businessmen and assimilated by lawyers[254].

Finally, one of the Commissioners found that the perception of rivalry in the market could not result from a "strictly limited, mathematical calculus". One should verify the

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[251] Ana Frazão, *MP/CE and DECOM v. Sindipostos and others* (2012) - 08012.000998/1999-83, 1702.

[252] Olavo Chinaglia, *PROCON-SP v. SKF do Brasil* (2013) - 08012.001271/2001-44, 939-943. The vote from Commissioner Cesar Mattos in the same case is arguably also aligned with such economic view. One could say that economic view is also the predominant one in Brazilian merger control. However, see CADE, *Horizontal Merger Guidelines* (2016), 27. ("the use of HHI will be relativized (…) in cases in which the level of concentration does not reflect the real competitive dynamics").

[253] This "binary code" of antitrust has its roots in the famous quote representative of the rule of reason: See Brandeis' formulation on footnote 154. However, it is not to be confused with "enables monopoly/ avoids monopoly", a different binary code. See *Verizon Communications v. Law Offices of Curtis V. Trinko* (2004) Supreme Court of the United States. 540 U.S. 398 (The 1996 Act is in an important respect much more ambitious than the antitrust laws. It attempts *'to eliminate the monopolies* enjoyed by the inheritors of AT&T's local franchises.' […] Section 2 of the Sherman Act, by contrast, seeks merely to prevent *unlawful monopolization.* It would be a serious mistake to conflate the two goals. The Sherman Act is indeed the 'Magna Carta of free enterprise' […] but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.)

[254] Marcos Verissimo, *PROCON-SP v. SKF do Brasil* (2013) - 08012.001271/2001-44, 11.

"history of the relations between the firms". Accordingly, he introduced a view that is much neglected in current antitrust, an approach we label *sociological*:

> "(…) *the market is interpreted, always, through the lenses of an economic theoretical bias. In addition, it is part of a social creation. From the ontological perspective, using the lessons from Pierre Bourdieu, we know that, through a reflexivity process, social structures are, at the same time, structured and structuring"*[255]

It is time for antitrust doctrine to acknowledge it can benefit from a combination of such perspectives. Pressed by the circumstances of decision-making and having competition as a prominent goal, the antitrust agency has developed interesting and creative distinctions. However, one cannot say the result is a clear concept of competition applied coherently across antitrust decisions. There is much to learn from those decisions, but doctrinal works must care about the balance between legal coherence and social adequacy. One eye to how the concept was legally developed in the past (internal world), but the other eye to how other disciplines and the modern imaginary conceives competition (external world).

I.III. "EXTERNAL" SOURCES

I.III.I. WEALTH MAXIMIZATION: FROM POLITICAL PHILOSOPHY TO ECONOMIC ANALYSIS

Confirming the potential of antitrust to represent a "microcosm" of larger movements[256], the economic approach to law has spread to several other disciplines[257]. The expansion raised interest for a normative justification and a general philosophical basis of such approach. Under such widened light, the discussions on the "goals" of antitrust would reach beyond-discipline arguments. Chicago School, for example, is known to have defended as the exclusive goal of antitrust adjudication the maximization of consumer welfare. It is also famous for having claimed to apply economic analysis more rigorously than its predecessors. But economics has had impact on antitrust doctrine much before

[255] Vinicius Carvalho, *PROCON-SP v. SKF do Brasil* (2013) - 08012.001271/2001-44, 847 (our translation). It is not our intention here to exaggerate the relevance of this quotation for resolution of the case. Nevertheless, it is a clear indication of the Commissioner's open spirit to other social sciences and a suggestion of a path yet to be explored by antitrust.

[256] See footnote 765.

[257] For an overview, see Richard Posner, *The Economic Approach to Law* (1975) 53 Texas Law Review, 758 – 759.

Chicago School[258]. One would be misguided to believe that such claims cover every ambition of the movement. The really innovative aspect of the School was the notion that "wealth maximization" provides a firm basis for a normative theory of law in general[259].

Situated in such context, Posner's argument starts by distinguishing wealth maximization from utilitarianism. The latter would hold that the moral worth of an action is to be judged by its effect in promoting aggregated happiness, or "the surplus of pleasure over pain", whereas the former is based on the "production for others". Thus defined, utilitarianism is accused of many problems: it does not exclude the possibility that A may know B's preferences better than himself (paternalism); it pushes the boundary of the relevant population "as far out as possible", which is attainable "*only by making lots of people miserable (those of us who would have to make room for all the foreigners, sheep, etc.)*"; and it lacks a method for calculating the effect of a decision or policy on the total happiness. Utilitarianism is also deemed to be too close from seeking to equalize incomes, as long as one assumes both that (a) every individual is alike in the responsiveness of their happiness to income and (b) the diminishing marginal utility of money income. Finally, it leaves room for "moral monstrousness", or the "readiness to sacrifice the innocent individual on the altar of social need".

On the other hand, as Posner frames it, wealth maximization encourages and rewards "traditional virtues" ("Calvinist" or "Protestant") and capacities associated with economic progress. While the utilitarian must ascribe value to behavior such as envy and sadism (because they are "common sources of personal satisfaction"), lawfully obtained wealth is created by "doing things for other people" (or by offering them advantageous trades). The individual must understand and appeal to the needs and wants of others, and therefore wealth maximization also fosters empathy and benevolence. It is clear that Posner's view could benefit from a more complex understanding of the social forms he is trying to grasp[260], but

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[258] See William E. Kovacic, Carl Shapiro. Antitrust Policy, *Antitrust Policy: A Century of Economic and Legal Thinking* in *Journal of Economic Perspectives,* (2000), vol. 14, n. 1. Before, Herbert Hovenkamp, *Antitrust policy After Chicago* (1985), Michigan Law Review v. 84, 218 ("*Antitrust policymakers did not first develop an 'economic approach' in the late 1970s or early 1980s. They simply changed economic models"*).

[259] Cf. Richard Posner, *Utilitarianism, Economics and Legal Theory* (1979), 8 J. Leg. Stud. See also Richard Posner, *The Ethical and Political Basis of the Efficiency Norm* in Common Law Adjudication (1980) 8 Hofstra Law Review 487.

[260] For example, the classic discussion on the thesis of "*deux commerce*", Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?* In Journal of Economic Literature (December 1982), Vol. XX., 1465 ("Commerce is here seen as a powerful moralizing agent which brings many nonmaterial improvements to society even though a bit of hypocrisy may have to be accepted into the bargain".)

that is an issue for the next chapter. Now, we need to know what exactly he means by the "wealth" that is to be maximized.

Wealth is defined as "the value in dollars or dollars equivalents" of everything in society. The way to measure it is by quantifying what people are willing to pay for something or, if they own it, what they demand in money to give it up. Whenever someone is able to purchase something for any sum less than the most they would be willing to pay for it (the "surplus"), they maximize their own wealth. This poses the issue of monopolies, so relevant for antitrust, at the center of Posner's reasoning. First, the wealth-maximization principle requires "the *initial vesting* of rights in those who are likely to *value* them the most" (but not the *transfer* to the person who *enjoys* them most)[261]. The inefficiency of monopolies argues for parceling out rights "*in small units to many different people in order to make the costs of assembling the rights into a single bloc large enough to confer monopoly power prohibitive*". Secondly, the inexistence of serious problems of monopoly is constitutive for solving the "measurement problem" of utilitarianism: only in markets without such problems a voluntary transaction can be deemed to increase the wealth of the society.

The expansion of "wealth maximization" to legal fields other than antitrust presents both risks and opportunities. Since much criticism of such development has been produced in the last decades, we would also like to highlight the opened prospects. In the context of searching for a normative justification and a general philosophical basis for the maximization goal, the proposal of reducing political philosophy to economics had to present itself in philosophical terms. On its broader version, wealth maximization needs to be justified as a good foundation for law in general and, on a second move, for each new field it attempts to enter. As it often happens with humans in life, travelling to new places might lead one to question some old habits at home. Something similar can happen to the economic

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Another interesting discussion would be that Posner refers to virtues which, according to Max Weber, were in the origins of capitalism, without addressing the long-term (and less optimistic) aspects of Weber's analysis. Max Weber, *Die protestantische Ethik und der 'Geist' des Kapitalismus* traduzido por José Marcos Mariani de Macedo, *A ética protestante e o "espírito" do capitalismo* (2004), São Paulo, Companhia das Letras.

[261] "In a system of wealth maximization, the fact that A has a greater capacity for enjoying a given amount of money than B affords no basis for taking money away from B and giving it to A. The transfer might increase the happiness of society but it would not increase its wealth". Richard Posner, *Utilitarianism, Economics and Legal Theory* (1979), 8 J. Leg. Stud. 103, 131 (emphasis added). In response to Dworkin's objection according to which the economic theory of law is "incomplete" (precisely because it is necessary to know how the initial rights in the resource allocation are assigned), Posner answers that "at worst, it [the objection] narrows the domain of the theory: it makes it a theory that the law seeks to optimize the use and exchange of whatever rights people start out with". Richard Posner, *Utilitarianism, Economics and Legal Theory* (1979), 8 J. Leg. Stud. 103, 108-109.

analysis of law: expanding to new legal fields might raise complexities that remained latent in the taken-for-granted world of antitrust.

Posner's thoughts received comments and criticism from several authors. We will analyze only those arguments which could be related to a normative basis of antitrust goals. Dworkin differentiates the "economic analysis of law", which poses wealth maximization at its center, and the "economists' analysis of law", which applies the notion of (Pareto) efficiency to legal contexts. He argues that the use of the words "economics" or "efficient", regardless of their precise economic meaning, led Posner and other authors to be misunderstood. While Pareto's efficiency is almost impracticable to trades that improve the position of both parties but adversely affects some third party (and so almost any widespread distribution meets the test)[262], the more practicable argument advanced by Posner – that goods are in hand of those who would pay more to have them – is morally irrelevant[263]. A decision that protects the workers of a noncompetitive industry might be utility-promoting, although not wealth-maximizing. Once one accepts Posner's view that utility is different from wealth, the latter loses its plausibility as a component of value: "*money or its equivalent is useful so far as it enables someone to lead a more valuable, successful, happier, or more moral life. Anyone who counts it for more than that is a fetishist of little green paper"*[264].

Posner could argue that wealth maximization, if not a component of value itself, leads instrumentally to other values, such as honoring individual rights, encouraging a variety of Protestant virtues and enabling impulses of people to create benefits for each other. As to the former, Dworkin observes that the willingness to "purchase" rights assumes ability to do so, and it might be the case that someone else other than the "natural owner" of the right is willing and able to pay more for it. For example, a personal inclination to do a less-profitable

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[262] Pareto optimality requires that no change in a distribution of resources can be made that leaves no one worse off and at least one person better off.

[263] Kronman adds that "there is something offensive" in the suggestion that the wealth of wealthy people "is a reason for giving them even more". He argues that "the principle of wealth maximization works to accentuate, rather than temper, nature's prior distribution of advantages and disadvantages" and so does not "mitigate the effects of the natural lottery". Anthony Kronman, *Wealth Maximization as a Normative Principle* in Symposium, 9 J. Leg. Stud. 191-253 (1980): essays by Dworkin and Kronman, response by Posner, 240-242. Posner's answer to that is: "Rawls's 'natural lottery' approach, which Kronman endorses without attempting to justify, commits the 'ambiguous sin' by treating virtually everything that distinguishes one individual from another as a moral accident and so pooling individual talents in the service of the state. Wealth maximization does not commit this particular form of the ambiguous sin". Richard Posner, *The Value of Wealth: a Comment on Dworkin and Kronman* in Symposium, 9 J. Leg. Stud. 191-253 (1980): essays by Dworkin and Kronman, response by Posner, 251.

[264] Ronald Dworkin, *Is Wealth a Value?* In Symposium, 9 J. Leg. Stud. 191-253 (1980): essays by Dworkin and Kronman, response by Posner, 200-201.

work can lead to the "purchase" of the individual right (in such case, one's own labor force) by someone who is willing to pay more and employ such force in a more profitable activity[265]. The other "instrumental values" are also dismissed: there is no specified metric for assuming that a society based on wealth produces more beneficial-for-others activity than a society that encourages a more direct altruism (on the contrary, the better someone is at personal wealth maximization, the greater the "surplus" – i.e. a net benefit to himself – of his acts).

Another line of criticism to Chicago School focuses on the efficiency norm and its information requirements. If efficiency has any validity as a norm, argues Rizzo, indirect effects must be considered[266]. But taking into account all effects stemming from an economic decision makes pursuit of efficiency impracticable. One would need to consider in a non-arbitrary way all the variables that enter into the domain of social wealth. It could mean to consider all goods for which people are willing to pay when buying a specific product at a certain price. Or it could mean to restrict the possible goods under consideration to a range of commodities, making the efficiency criterion a limited one. In an example close to antitrust, a partial-equilibrium maximization would not be so attractive if one was to think of every third-party effect (meaning here spillover effects in complementary and substitution markets) of a merger or a conduct[267]. But to think of courts maximizing wealth in the general-equilibrium sense makes the enterprise unmanageable.

In contrast to Posner, Coleman does not see the system of wealth maximization as an alternative efficiency criterion. It is instead a "characteristic of social states that enables them to be ranked by both the Pareto and Kaldor-Hicks criteria"[268]. Using the language of dollars, such system of wealth maximization turns incommensurable social states into comparable assets. However, it does not provide a good criterion for situations in which no prices exist, since two situations are compared solely in terms of how much in dollars they are able to

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[265] As a response to that argument, Posner argues that a worker could earn more if free, since its "incentive to work harder" would be greater if he works for himself. Richard Posner, *The Value of Wealth: a Comment on Dworkin and Kronman* in Symposium, 9 J. Leg. Stud. 191-253 (1980): essays by Dworkin and Kronman, response by Posner, 246. Dworkin replies that, outside Chicago economics, the world is economically and psychologically more contingent than such assumption.

[266] Mario J. Rizzo, *The Mirage of Efficiency* (1980), Hofstra Law Review Vol. 8, Iss. 3, 641 – 642.

[267] See Alan Meese's position in section II.I.III.

[268] Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization* (1980), Hofstra Law Review vol. 8, 526. The criterion is founded in Nicholas Kaldor, Welfare Propositions of Economics and Interpersonal Comparisons of Utility (1939) and J. Hicks, The Foundations of Welfare Economics (1939).

generate. The political morality of such (economic) analysis can be libertarian or utilitarian. However, it often cannot be both at the same time. A libertarian can justify a market transaction as a result of the exercise of individual freedom. But only a utilitarian can argue that efficiency is the fundamental goal of social policy – and admit coercive intervention in the market in order to pursue efficiency.

One can easily think of the consequences of such potential contradiction for the understanding of antitrust policies. The attempt of antitrust to emulate an ideal functioning of the market or the "but for" world[269] requires governmental intervention in the actual functioning of markets. To put it paradoxically, free market (or "free competition") requires intervention. While intervention is accepted in the name of "efficiency", one can rely on a utilitarian foundation of economic reasoning. But as justifications based on "efficiency" lose their attractiveness in public discourse, one needs to find alternatives. Bruce Ackerman noticed this challenge in the 1980s: "we must move beyond the analysis of single terms like efficiency; we must instead grasp the *system* of concepts by which lawyer-economists organize the legal world (...)"[270].

As some theorists of systems like to put it, one way to observe a system is by distinguishing it from its environment. Posner's effort to attach instrumental values to wealth maximization does not erase his initial remarks about the "boundaries" around those concerned in his morality. His system apparently excludes at least "sheep" and "foreigners". Those are not necessarily the boundaries of a reconstructed legal system influenced by the economic view, but the limits of economic reasoning in dealing with imperfect information and incommensurable values suggest boundaries need to be traced at some point. To grasp the system of concepts of lawyer-economists, as Ackerman suggested, might mean to understand what is at its environment, that is, what it excludes.

Another way to grasp a system, very popular among lawyers, is to focus on a principle that confers its unity. Closer to this strategy, ten years later Posner would acknowledge that wealth maximization is not "foundational"[271]. He argues that wealth maximization, pragmatically construed, is only instrumental. But as soon as such principle

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[269] See footnote 51.

[270] Bruce Ackerman, *Law, Economics, and the Problem of Legal Culture* (1986) in Duke Law Journal, vol. 1986, n. 6, 933.

[271] Richard Posner, *The Problems of Jurisprudence* (1990), Massachusetts, Harvard University Press, 387.

is set aside, one might keep asking: what is left to justify the economic analysis of law? If wealth maximization is not a good foundation, and utilitarianism or efficiency are no longer in vogue, what does justify the extensive use of economics to address legal issues?

Those remarks encourage us to look at some overlooked characteristics of the legal-economic approach. One clue was given by Posner in 1975, when he argued that "it is no surprise that in a world of *scarce* resources, waste is regarded as *immoral*"[272]. Such relation between scarcity and morality would be made more explicit in 1979:

> *"Dworkin and Kennedy are incorrect that the source of the rights exchanged in a market economy is itself external to the wealth-maximization principle. The principle itself ordains the creation of a system of exclusive rights, one that, ideally,* will extend to all valued things that are scarce*, not only real and personal property but the human body and even ideas"*[273].

The clues offered by Posner touch a notion that is also captured by Coleman in his insightful text. To be sure, the insight here is quite simple: since the wealth-maximization system depends on the existence of prices, the mechanism which leads to the need for prices is required to function. Such latent mechanism has the name of *scarcity:*

> *"The point is that for the proponent of wealth maximization, the elimination of scarcity is necessarily a bad thing. In fact, whether abundance is good or bad, it is contingently so"*[274].

Thus, scarcity helps to explain the persistent interest of jurists in economics, after the decline of foundational reasons like wealth maximization. After all, economists have been developing instruments, models and theories about the allocation of scarce resources, while jurists deal daily with resources made scarce by the legal procedure (only some parties having the *right* to a disputed object). Antitrust itself could be framed as a discipline of the disputes over scarce resources. The decision to block a merger is also the decision to prevent an economic group from immediately accessing (scarce) productive resources. A dismissed

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[272] Richard Posner, *The Economic Approach to Law* (1975) 53 Texas Law Review, 777.

[273] Richard Posner, *Utilitarianism, Economics and Legal Theory* (1979), 8 J. Leg. Stud. 103, 125.

[274] Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization* (1980), Hofstra Law Review vol. 8, 524.

charge of unilateral conduct might result in the right to sell under specific conditions to consumers, obtaining access to their (scarce) money.

Notwithstanding the persistent interest on economic tools[275] for dealing with scarcity, the relaxation of the wealth-maximization exclusivity has a methodological impact that cannot be ignored. When economic reasons are not the only ones at stake, the economic instruments are no longer exclusive, nor is the economist answer always the best one. Of course, at the current stage, it would be tragic to dismiss the experience of economics in addressing scarcity. Only the way to approach it can be less a monolithic lesson than a bilateral influence.

I.III.II. SCARCITY: FROM ECONOMIC ANALYSIS TO LAW AND ECONOMICS

The notion of scarcity is an inescapable element for the study of antitrust. To be sure, basic microeconomics[276] credits much of its whole reasoning to this notion. The typical view holds that, under conditions of scarcity (on material resources, time, energy etc.) one should perform an action (or an additional level of an action) if and only if its benefits exceed its costs. "Should" here is, of course, a controversial word: it means either that (i) one can make useful predictions by assuming people *as if* they made cost-benefit calculation[277], or that (ii) rationally bounded people *could* achieve their goals more efficiently *if* they thought in cost-benefit terms[278].

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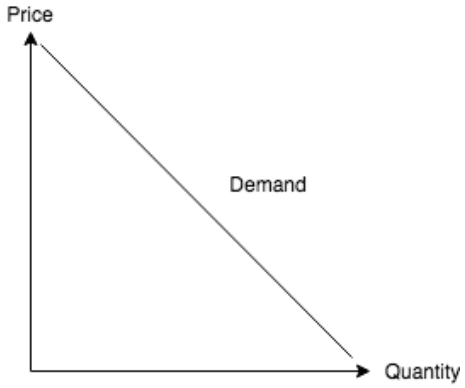
[275] Reporting examples of such interest at Brazilian law schools, Rafael Zanatta, *Desmistificando a Law & Economics: a receptividade da disciplina Direito e Economia no Brasil* (2012), available at https://www.researchgate.net/publication/266344891_Desmistificando_a_Law_Economics_a_receptividade_da_disciplina_Direito_e_Economia_no_Brasil, 44-45.

[276] An effective introduction, which serves as a general guide for the first half of this section, can be found in Robert H. Frank, *Microeconomics and Behavior* (2006, 9th ed. 2015), New York, McGraw-Hill Education. See also Hal Varian, *Intermediate Microeconomics: a modern approach* (1987, 8th ed. 2010), W.W. Norton & Company, New York.

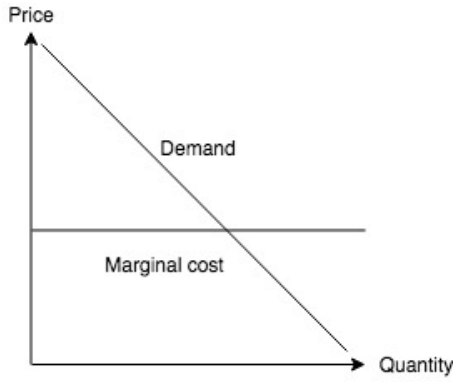
[277] Milton Friedman, *The Methodology of Positive Economics* (1953), in *Essays in Positive Economics* (1966), Chicago, University of Chicago Press, 3-16 ("Positive economics is in principle independent of any particular ethical position or normative judgments (…) its task is to provide a system of generalizations that can be used to make correct predictions about the consequences of any change in circumstances").

[278] Richard Thaler, Sendhil Mullainathan, *Behavioral Economics* in Neil Smelser, Paul Bates, *International Encyclopedia of the Social and Behavioral Sciences* (2001) ("Economics traditionally conceptualizes a world populated by calculating, unemotional maximizers that have been dubbed Homo Economicus […] The behavioral economics research program has consisted of two components: 1. Identifying the ways in which behavior differs from the standard model. 2. Showing how this behavior matters in economic contexts").

Even more problematic is the task of identifying what can be considered a cost and what is a benefit in a specific decision. Each person faces the choice of buying or not a product and at which quantity. Such decision is made in face of other existing products and limited money (economists talk of "indifference curves" and "budget constraints"). The idea is that people would want more of almost everything which could be supplied at a price of zero – or without money scarcity. Generally, consumers want more of a good as it becomes less expensive. Thinking of the "cost" as the price of the product, and the "benefit" as the satisfaction it provides, the demanded quantity of a product falls as its price rises.

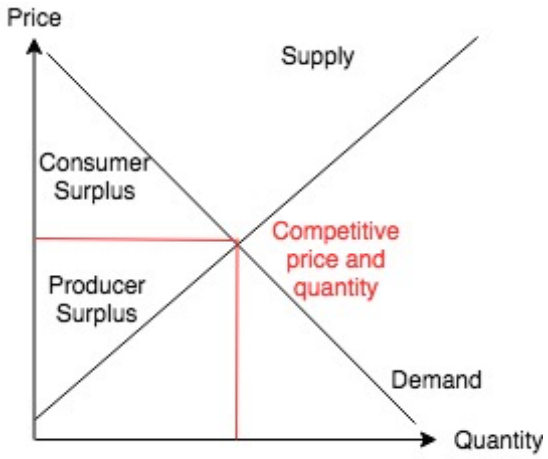


The market demand is obtained by the addition of individual curves horizontally (thus carrying on the assumptions on "indifference" and "budget constraints" that generates individual curves). In a graph with price on its vertical axis and quantity on its horizontal axis, the market demand can be represented as a downward curve (whereas the supply curve would go upward). The marginal cost is the cost to produce an additional unity of the product, and can be represented by the following curve:



The price at which the demand and the marginal cost curves intersect is called the equilibrium price. Equilibrium prices allegedly ration *scarce* supplies to the users who place the highest value on them. If the price of a product is set at the equilibrium point, every consumer that would be willing to pay more for the product is benefited by "consumer

surplus". The total consumer surplus can be approximately represented by the area between the demand curve and the market price.



Such statement relies on the assumption consumers enter the marketplace with well-defined preferences. This is only one of the concepts of the "rational choice" theory[279] that subsidizes antitrust partial equilibrium model. According to such model, a merger can be considered efficient if it increases produce surplus more than its higher prices reduce consumer surplus. Considering a competitive market in which price is equal to average cost (AC), a merger can lower the cost of making a product from AC_1 to AC_2 and therefore create a "rectangle of cost saving". Due to increase in market power and its effects on prices (from P_1 to P_2), the merger also creates a "deadweight loss triangle", representing the products that are no longer produced although consumers are willing to acquire them for an above-cost price. Williamson's tradeoff model recommends comparing the rectangle and the triangle as an "antitrust defense"[280]:

[279] Other important assumptions are complete information and the cost-benefit action itself. For an overview on the rational choice theory and its impact in different social sciences, see Andreas Diekmann, Thomas Voss, *Die Theorie rationale Handelns. Stand und Perspectiven* in *Rational-Choice-Theorie in den Sozialwissenschaften. Anwendungen und Probleme* (2004), Munich, Oldenbourg, 13-29.

[280] See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs* (1968), 58 American Economic Review 18, 707.

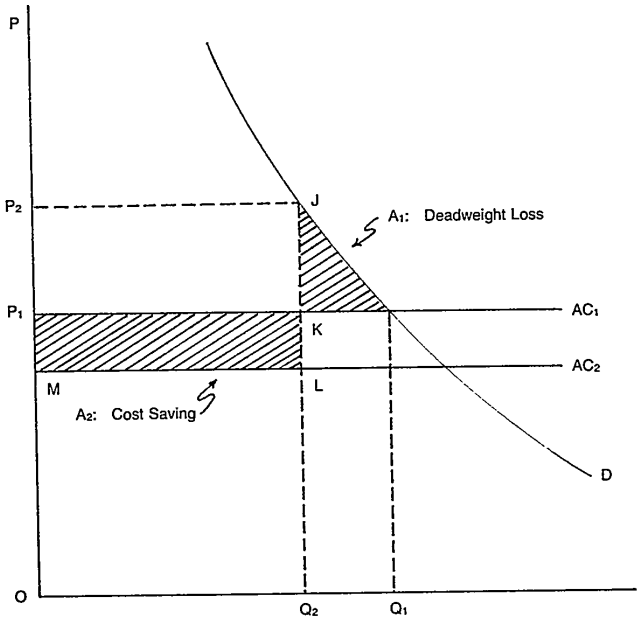


Figure 1

Allegedly profit-maximizing firms in a given market with scarce resources act as competitors of each other. Competition has been theorized in basic microeconomics as a scale that changes over time, not as an all-or-nothing concept. One degree of the scale, highly theoretical, is perfect competition[281]. The existence of perfect competition is defined by at least four conditions: a standardized product, price-taker firms, free exit and entry, and perfect information for both firms and consumers. The predictions of the competitive model, although roughly met in only a few markets, are deemed to be useful in the interpretation of several others.

Profit maximization in the short run would imply a price which is equal to short-run marginal cost on the rising portion of its curve. In short-run competitive equilibrium, a price equated to marginal cost cannot be decreased or increased. In case of decrease, no firm would be willing to respond, since it wouldn't be rational to sell below marginal cost. In case of increase, there would be no consumer left willing to pay more for the product. In the long-run equilibrium, output is produced at the lowest possible unit cost and the seller is paid only the (economic) cost of producing the product.

[281] Its backgrounds can be found in Augustin Cournot, Recherches sur les principles mathemátiques de la théorie des richesses (1838), and William Jevons, Theory of Political Economy (1871). Cf. Luiz Felipe Ramos, Tobias Werron. *Concorrência como um conceito histórico-sociológico: trazendo variação para a "evolução do antitruste"* in Celso Campilongo, Roberto Pfeiffer, *Evolução do antitruste no Brasil* (2018), São Paulo, Singular, 200.

The extreme opposite of the scale is the situation in which a single seller of a product with no close substitutes serves the entire market. This is how monopoly can be defined from an economic standpoint. Having significant control over price, the monopolist does not face the perfectly competitive burden of losing all its sales in the event of a slight price increase. Its demand curve is not a horizontal line like the one of an individual firm in perfect competition, but follows the downward slope of the market.

Defining substitutes and identifying consumer reaction to increasing prices is not a task that can be done with precision of a hard science. But supposing the monopolist acts as a profit-maximizer capable of calculating costs and benefits, it will weight the benefits of expanding output against the corresponding costs. On the elastic portion of the demand curve, the monopolist maximizes profit by expanding output until marginal cost equals marginal revenue. The output level finally chosen is lower than it would arrive by using the criterion of a competitor (and so deemed to be less "efficient"). Such is because in a competitive scenario an individual firm believes its additional sales will not affect the price, whereas additional sales by a monopolist cause price to decline.

Economists are aware that both perfect competition and perfect monopoly are ideal types. Competition in real markets – those that are neither perfectly competitive nor "perfectly" monopolized – is located at some point between the extremes of the scale. Several instruments have been used in order to grasp the actual dynamics of such competitive situations, in which the outcomes of one's own choices depend on the choices made by others. Throughout the last century, one could rely on the Cournot model (each duopolist treats the other's quantity as a fixed number), the Bertrand model (each oligopolist assumes rivals will continue charging their current prices), the Stackelberg model (one firm knows the other is a Cournot duopolist) or the Chamberlin model (a large number of producers are close, but imperfect, substitutes for one another).

In the last decades, models based on game theory have proliferated in trying to explain competitive relations in real markets [282] and have permeated Post-Chicago

[282] An early clue was given by Thomas Schelling, *The Strategy of Conflict* (1980), Cambridge, Harvard University, 77 and 160 ("The problem of limiting warfare involves not a continuous range of possibilities from most favorable to least favorable for either side; it is a lumpy, discrete world that is better able to recognize qualitative than quantitative differences, that is embarrassed by the multiplicity of choices, and that forces both sides to accept some dictation from the elements themselves […] If the essence of a game of strategy is the dependence of each person's proper choice of action on what he expects the other to do, it may be useful to define a 'strategic move' as follows: A strategic move is one that influences the other person's choice, in a manner favorable to one's self, by affecting the other person's expectations on how one's self will

antitrust[283]. In a specific application, Green and Porter[284] used works in game theory showing the possibility of firms in an industry to form a self-policing cartel and maximize their joint profits. They examined an industry in which (i) there is stability over time, (ii) output quantity is the only decision variable which firms can manipulate, (iii) information about the industry and its environment is public and (iv) information to monitor a cartel is imperfectly correlated with firm's conduct. Under such conditions, episodes in which price drops sharply, remains low for some time, and then sharply rises again, can be interpreted as playing an essential role in the maintenance of an ongoing scheme of collusive incentives. With demand uncertainty, firms will act monopolistically while prices remain high and will adopt Cournot behavior when prices fall.

Game theory is also heavily present in the literature discussing the impacts of leniency programs. Reviewing such literature, Miller[285] observes that its findings are ambiguous. Some have found that leniency may destabilize cartels, since conspirators cheat on the cartel while applying for leniency or exploit the policy to raise rivals' costs in subsequent periods. Others have discovered leniency may stabilize some types of collusive arrangements and encourage new cartels to form. Moreover, it suggests that antitrust authorities have incentives to overrepresent enforcement capabilities so as to foster leniency by making firms anticipate only short-lived cartel profits. Miller himself develops a theoretical model of cartel strategies and applies it to information reports issued over twenty years in the United States. The results are consistent with enhanced cartel detection and deterrence capabilities stemming from leniency, given that the number of cartel discoveries increases around the date of leniency introduction and then falls below pre-leniency levels.

Those are only a couple of examples regarding the application of game theory in antitrust studies. What remains to be emphasized is that both the neoclassic models of

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behave"). One year later, an overview of the potential impact of strategic behavior analysis to antitrust can be found in Steven Salop, *Strategy, Predation and Antitrust Analysis* (1981) Federal Trade Commission, Bureau of Economics ("Neither blind structuralism nor tautological efficiencies analysis is sufficient for designing economically rational antitrust policy. It is hoped this volume will contribute to the further development of the middle road", 40). From now on, this section is no longer guided by the didactic Robert Frank's book.

[283] For the foundations of Post-Chicago antitrust economics, see the works from Jean Tirole, *The Theory of Industrial Organization* (1988) and Drew Fudenberg, Jean Tirole, *Non-Cooperative Game Theory for Industrial Organization: An Introduction and Overview* (1989) in Richard Schmalensee, Robert Willig, *1 Handbook of Industrial Organization 259.*

[284] Edward Green and Robert Porter, *Non-cooperative Collusion under Imperfect Price Information* (1984), Econometrica, Vol. 52, n. 1.

[285] Nathan Miller, *Strategic Leniency and Cartel Enforcement* (2009), The American Economic Review vol. 99, n. 3.

competition and the influxes from game theory presuppose the idea that resources are scarce. The perception that the behavior of one competitor depends on the behavior of others offers renovated light to the understanding of scarcity. The access to scarce goods, which reduces scarcity (for some people), leads to increase of scarcity (for others)[286]. The successful seller has access to the money their competitor also tries to access. The consumer has access to a good which is scarce (with all the famous qualifications[287]) to everyone else. One needs to access a good because it is scarce, and the result of this access is scarcity. Scarcity is the effect and motive for the access. Such state of affairs could be described as a result of the "market" or the "invisible hand". But the perception of concrete relations that influence who accesses the good and who is deprived from it leads to a *social* perception of scarcity. And this also means: perception of relations that can be *regulated*[288]. The relevance of law for creating incentives (motives) and modulating consequences (effects) of relations under scarcity cannot be underestimated.

How does such legal treatment of scarcity relate to another centenary body of communications dealing with scarce resources – that is, with economics? Price theory offers instruments to look at the world from a specific standpoint and eventually declare that world to be "irrational" [289]. It is subject to a use of "Economic Analysis of Law", in the meaning

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[286] Describing this situation as a paradox, Niklas Luhmann, *Die Wirtschaft der Gesellschaft* (1988), Frankfurt am main, Suhrkamp, 98-100. And noticing that, while scarcity prevails in the *internal* dynamics of competition, excess of resources must prevail in the *external* comparison – otherwise competitors would not engage in competition, since too many participants would accumulate failures. Niklas Luhmann, *Ebenen der Systembildung – Ebenendifferenzierung* (1975, 2014), Unveröffentlichtes Manuskript, 26-28.

[287] Distinguishing between "private consumption goods" (which can be parceled out among different individuals in a way that individual A can exclude the use of individual B) and "collective consumption goods" (of which each individual's consumption leads to no subtraction from any other individual's consumption), Paul Samuelson, *The Pure Theory of Public Expenditure* (1954), The Review of Economics and Statistics, vol. 36, n. 4, 387-389. Considering exclusion (the ability to deny potential users goods or services unless they meet the terms and conditions of the vendor) and jointness of use (when consumption by one person does not preclude its use of consumption by another person) two essential defining characteristics in distinguishing between private and public goods, Vincent Ostrom, Elinor Ostrom, *Public Goods and Public Choices* (1977) Workshop in Political Theory and Policy Analysis, Indiana University (the authors define a public good as "a good or service subject to joint use or consumption where exclusion is difficult or costly to attain" but acknowledge that a "pure public good" is only an extreme case of a scale. "Common pool resources", for example, are goods whose exclusion is infeasible but whose use by any one user precludes use of some fixed quantity by other users). Noticing that any private appropriation of common pool resources results in a monopoly of its use, Calixto Salomão Filho, *Teoria crítico-estruturalista do direito comercial* (2015) São Paulo, Marcial Pons (defending that market is not a good instrument to organize exchange of common pool resources, since "price is a bad regulator of scarcity").

[288] Also here, Niklas Luhmann, *Die Wirtschaft der Gesellschaft* (1988), Frankfurt am main, Suhrkamp, 177-179.

[289] See section I.I.II. On "perfect competition" as a concept that allows one to judge the "efficiency" of a policy, George J. Stigler, *Perfect Competition, Historically Contemplated* (1957) 65 The Journal of

that was given by Guido Calabresi. Such rationality is not exactly individual nor firm-specific: it is systemic rationality, that is, a rationale provided by the economic system. Focusing on scarcity of money, one dismisses other possible functions of competition and concentrates only on what is economically decisive. This was the contribution of part of the Chicago School to antitrust: to look at contemporary decisions through the lens of an economic theory and to qualify as irrational those that did not correspond to its theoretical assumptions.

An alternative approach, named "Law and Economics" by Calabresi, refers to a bilateral relation between the disciplines whose examination can result in changes in economic theory rather than in the way legal reality is described[290]. The prototypical example of a "Law and Economics" view was the one presented in Ronald Coase's early article "The Nature of the Firm"[291]. Rather than ignoring the relationships that are not entirely market or contractual, Coase acknowledged the existence of firms and brought a change in economic theory. He did not treat firms as something irrational, as one could do based on an economic theory according to which markets were costless. The undeniable existence of firms was explicated as the result of comparing, in a context of scarce resources, the costs of markets with the costs of nonmarket command structures. Many other legal structures are believed to be explained with the same reasoning, as would become clear in the broader view of "The Problem of Social Cost"[292].

Political Economy, 14. ("we wish the definition to capture the essential general content of important markets, so the predictions drawn from the theory will have wide empirical reliability. And we wish a concept with normative properties that will allow us to judge the efficiency of policies. That the concept of perfect competition has served these varied needs as well as it has is providential").

[290] Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (2016), Yale University Press, New Haven, 6. The studies of behavioral economics, which have only slightly impacted antitrust (see section III.II.I.), are closer to such approach. Connecting a bilateral notion of Law and Economics to a project of "reconstruction" of American Law, Bruce Ackerman, *Reconstructing American Law* (1984), Cambridge, Harvard University Press, 44 ("Rather than a hostile assault, 'law and economics' permits a vast enrichment of the conversational resources available to lawyers trying to make sense of the legal foundations of an activist state"). Opposing the Chicago School to Calabresi's "more interventionist" approach, Celso Campilongo, *Prefácio* in Antônio Maristrello Porto, Patrícia Sampaio, *Direito e economia em dois mundos: doutrina jurídica e pesquisa empírica* (2014), Rio de Janeiro, Editora GV, 13.

[291] Ronald Coase, *The Nature of the Firm* (1937), Economica, New Series, Vol. 4, N. 16. ("the operation of a market costs something and by forming an organization and allowing some authority [an 'entrepreneur'] to direct the resources, certain marketing costs are saved", 392). On this point, see Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (2016), Yale University Press, New Haven, 11-12. Naming Calabresi and Coase as pioneers in the field, Richard Posner, *The Economic Approach to Law* (1975), 53 Texas Law Review 757.

[292] Ronald Coase, *The Problem of Social Cost* (1960), Journal of Law and Economics, vol.3 ("The main advantage of a pricing system is that it leads to the employment of factors in places where the value of the product yielded is greatest and does so at less cost than alternative systems"). One could argue that the

But there is an additional insight in Coase's approach, one that is perhaps more important for our purposes: he noticed that command structures represented by firms might be employed not only where they were cheaper than markets, but also because people *liked* command structures[293]. The impacts, on current antitrust, of the idea that an economic arrangement can be protected for reasons other than its costs are not negligible. Such insight indicates that even "Law and Economics", with its bilateral treatment of scarcity, might not suffice for the purpose of understanding the legal protection of competition, since competition might be protected for reasons which are not economic. At least at the level of its doctrinal construction, antitrust has not fully enjoyed the power of this idea.

As we have seen in this section, models that take into account the interrelated strategic behavior of competitors provide potential tools for the implementation of antitrust policy. An extra challenge would be to do for competition what the simplified partial-equilibrium model has done for consumer welfare – i.e., to provide the nuances of a concept that explains decisional criteria potentially applicable in several cases. If competition is to be taken seriously as an antitrust goal that informs antitrust decisions, one needs a concept that matches the following requirements. It should be *normatively compatible* with antitrust statutes, in the sense that it cannot violate what lawmakers of a specific country decided to protect. One can reasonably expect such concept to be also *abstractly flexible* so as to apply to multiple cases without losing coherence. A third criterion could be added: antitrust's competition ought to be *socially sensitive* to what is generally believed to be competition's form in modern society and to the kinds of social problems that it is expected to address.

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belief market reacts, on its own terms, to costs created by legal decision, is not itself an argument pro-market. It can also be understood as a reason for avoiding overestimation of the economic consequences of government decision – which might be worthwhile and justified for non-economic reasons – since the market will always be able to react and minimize economic harms. For a possible implication of this interpretation, see Alan Devlin and Michael Jacobs, *Antitrust Error* (2010) 52 William & Mary Law Review 75 (challenging the contemporary mode of error analysis in antitrust law). But see Ronald Coase, *The Problem of Social Cost* (1960), Journal of Law and Economics, vol.3, 18 ("It is my belief that economists, and policy-makers generally, have tended to over-estimate the advantages which come from governmental regulation. But this belief, even if justified, does not do more than suggest that government regulation should be curtailed. It does not tell us where the boundary line should be drawn")**.** Arguing that Coase's point in "The Problem of Social Cost" is to emphasize the dominance of market decisions versus governmental decisions concerning the allocation of resources, George L. Priest, *Ronald Coase, Firms and Markets* (2014), Man and the Economy, 1(2), 144.

[293] See on this point Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (2016), Yale University Press, New Haven, 127.

In order to develop such a renewed concept of competition, one needs to go a step further in Chicago School's attempt to assess "what was really going on in the industry"[294]. Economics is an important but insufficient lens through which one is supposed to grasp the relevant facts of a case. Competition is one of those cases in which not only the relationship between Law and Economics is necessarily bilateral, but also "a combination of various disciplines, including economics, will be needed to explain the world as it actually is"[295].

I.III.III. COMPETITION: FROM LAW AND ECONOMICS TO LAW AND SOCIETY

If part of the influence of economists in legal analysis is attributable to their longstanding treatment of scarcity, one could ask whether the bilateral relation between law and economics assumes a specific trait in the field of antitrust. Antitrust lawyers and economists have united their efforts to enable decision-making in conditions of scarce resources in different markets. They also need to deal with scarcity of time, instruments and manageable information. But all of this seems to be common in many other legal fields to which Law and Economics has spread. What could be special about antitrust?

Antitrust is singular in the sense it deals with a social phenomenon that emerges itself as a means of dealing with scarcity: competition. Competition involves two or more players disputing access to a same scarce good. It is, of course, also a result of regulation and a social construct. Its incentives and circumstances are highly conformed by law and by an economic-oriented administration. But in addition to being regulated, competition emerges[296]. Why do individuals and firms compete with each other instead of cooperating

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[294] George L. Priest, *The Limits of Antitrust and the Chicago School Tradition* (2009), in Journal of Competition Law & Economics, 00(00), 5.

[295] Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (2016), Yale University Press, New Haven, 5-6. Somewhat similarly, Ackerman: "If the lawyer-economist hopes to answer the positive and normative questions posed by his very existence, he must himself transcend the limits of modern economics", Bruce Ackerman, *Law, Economics, and the Problem of Legal Culture* (1986) in Duke Law Journal, vol. 1986, n. 6, 940. Also "(…) fields like anthropology, sociology, and sociolinguistics. However alien their methods may seem to the economist, *these* are the disciplines that lawyers must consult if they hope to gain perspective on the potential contribution the lawyer-economist offers to the development of American legal culture", 942. Equating a "Law and Society" approach to "sociolegal studies", José Reinaldo de Lima Lopes, Roberto Freitas Filho, *Law and Society in Brazil at the Crossroads: A Review* (2014), The Annual Review of Law and Social Science 10, 98. Specifically about antitrust, Eleanor M. Fox, *The Battle for the Soul of Antitrust* (1987) 75 California Law Review 917, 918 (our emphasis): "Each alliance asserts that its approach helps consumers. Each can make a reasonably good case that its approach to economics advances the interests of consumers. Indeed, in most of the interesting cases, economics is indeterminate. The real battle is not about where correct economics leads. Rather, it is about fundamentally different views *concerning law and society*".

[296] On this point, see Ronald S. Burt, *Structural Holes: The Social Structure of Competition* (1992), Cambridge, Harvard University Press, 4 ("Competition is a relation emergent, not observed. The structural

or fighting? How come competitors tend to see themselves as deservers and not as circumstantial owners of a disputed good?

To view competition as a social form that emerges in society implies looking beyond its assumed economic effects and specific regulation. It implies grasping the social characteristics of competition that, once present – despite or because regulation and incentives –, enables the modern imaginary to recognize a phenomenon as a "competitive" one. While this approach will not be able to explain a self-sufficient criterion for antitrust decision-making, it endorses a respectful deference for a social phenomenon that pervasively emerges in modern society.

One could hardly grasp competition in such contours without embracing contributions from other disciplines besides law and economics. As we have suggested, this is necessarily more than a Law and Economics enterprise, this is a Law and Society task. The good news is that such a move is not completely strange to antitrust history. In fact, the tradition of antitrust presents some relevant examples of interdisciplinary curiosity.

In the United States, one could exemplify with names such as Louis Brandeis and Thurman Arnold. The former was an eminent jurist and associate justice on the Supreme Court of the United States (1916-1939) who favored the "study of economics and sociology and politics which embody the facts and present the problems of today"[297]. The latter was a professor at Yale Law School and the head of Antitrust Division of the Justice Department hired by Franklin Roosevelt in 1938[298]. Both had singular biographies and, to the extent that matters to our work, particular approaches on antitrust.

Despite not having written any "systematic treatise on sociology"[299], Brandeis "passion for facts" influenced his approach to controversial antitrust issues. The lens through which he saw the relevant realities that could influence legal decisions were fairly multifaceted. They were economic *and* something else referred by a not very precise notion

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hole in which competition develops are invisible relations of nonredundancy, relations visible only by their absence (...) Competition is an intense, intimate, transitory, invisible relationship created between players by their visible relations with others").

[297] Louis Brandeis, *The Living Law* (1916), Illinois Law Review, February, 16.

[298] See Spencer Weber Waller, *Thurman Arnold: Biography* (2005), New York University Press, New York, 45-110.

[299] Charles Beard, *Introduction* in Alfred Lief (org.) *The Social and Economic Views of Mr. Justice Brandeis* (1996), Florida, Gaunt, xix.

of "social"[300]. With regards to antitrust, Brandeis believed the illegality of a combination did not lie "in its effect upon the price level", but "in the coercion thereby effected". Such coercion derives from "the limitation of freedom by agreements which narrow a market", or "by organized boycott", or "by the coercive power of rebates, which constitutes unlawful restraint"[301]. Such view resembles the struggle against "market coercion" identifiable since the Sherman Act[302]. But it adds that such coercion is not to be recognized through its "effects upon prices".

Another remarkable clue comes from the connections traced by Brandeis between competition and the notion of efficiency[303]. Deemed as "the hope of democracy", efficiency should not be attached to monopolies just because competition involves waste. While the wastes of competition are "negligible", the efficiency of trusts are such as from which "the community has gained substantially nothing". Brandeis sees efficiency as an important value, but questions exactly the empirical argument that attaches it to monopolies. Correspondently, the policy of regulating competition is seen as a "constructive policy", whereas the policy of private monopoly is "destructive"[304].

The view of regulating competition as a constructive policy leads to the question: what is competition, in Brandeis' view, and why is it socially relevant? In a formulation that confronts a profit-maximizing assumption, Brandeis believed that "the man of the future will

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[300] See, for example, Louis Brandeis, *Dissenting Opinion (New State Ice Company vs. Liebmann)* in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press, 158 – 159 ("The economic and social sciences are largely uncharted seas. We have been none too successful in the modest essays in economic control already entered upon (…) there must be power in the States and the nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs"). Also Louis Brandeis, *Dissenting Opinion (Liggett Company vs. Lee - 1933)* in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press, 172 (A more comprehensive answer should, however, be given. The purpose of the Florida statute is not, like ordinary taxation, merely to raise revenue. Its main purpose is social and economic). In the same case, 177: "it flows from the broader right of Americans to preserve, and to establish from time to time, such institutions, social and economic, as seem to them desirable (…)".

[301] Louis Brandeis, *Manufacturers in Cooperation* in Alfred Lief (org.) *The Social and Economic Views of Mr. Justice Brandeis* (1996), Florida, Gaunt, 84.

[302] See section I.I.I.

[303] Louis Brandeis, *Shall we Abandon the Policy of Competition?* In Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press, 105. See also Louis Brandeis, *The Solution of the Trust Problem* in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press, 131 ("competition is never suppressed by the greater efficiency of one concern. It is suppressed either by agreement to form a monopoly or by those excesses of competition which are designed to crush a rival").

[304] Louis Brandeis, *Competition,* in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press, 116.

think more of giving Service than of making money"[305]. The same principles that glories scientific advances, for example in the medical world, should be recognized in the realm of businesses[306]. Competition means to give "better service": "it is not competition to resort to methods of the prize ring, and simple 'knock the other man out'". That, Brandeis notices, would be "killing a competitor". Competition consists in "trying to do things better than someone else"[307].

This approach on competition was connected to a broader understanding of American social structure and ideals. The United States are viewed by Brandeis as a country whose corporations were no longer owned and managed by a small group of individuals. Huge corporate mechanisms now separated ownership from control and removed "many of the checks which formerly operated to curb the misuse of wealth and power"[308]. Burdens like the application of higher license fees to owners of multiple stores, for example, had a purpose that was "broader and deeper" than protecting competition. Their goal was to make "equality of opportunity" possible, to avoid "converting independent tradesmen into clerks" and to maintain "the resources, the vigor and the hope of the smaller cities and towns"[309]. Such goal is deemed to be compatible with a "widespread belief" that the prosperity of the past did not come from big business, but "through the courage, the energy, and the resourcefulness of small men"[310].

Thurman Arnold is another example of a multidisciplinary mind with substantial dedication to antitrust – although his ideas would differ, and sometimes contradict, the ones from Brandeis. Moreover, his trajectory illuminates the nuances and distinctions between academic life and governmental service. First as a professor at Yale, Arnold joined the realist

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[305] Louis Brandeis, *An Interview* in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press, 40.

[306] Louis Brandeis, *The Democracy of Business* in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press, 142.

[307] Louis Brandeis, *Competition,* in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press, 115.

[308] Louis Brandeis, *Dissenting Opinion (Liggett Company vs. Lee - 1933)* in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press, 169.

[309] Louis Brandeis, *Dissenting Opinion (Liggett Company vs. Lee - 1933)* in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press, 171.

[310] Louis Brandeis, *Dissenting Opinion (Liggett Company vs. Lee - 1933)* in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis (1935),* New York, The Viking Press, 178.

movement and understood antitrust as part of the "folklore of capitalism". Later as chief of Antitrust division, he managed the symbolic dimension of antitrust so as to contest the "bottlenecks" which avoided consumers from getting all the benefits of economic efficiencies.

The realist professor saw antitrust laws as a "myth" and a "massive moral philosophy"[311]. Antitrust legislation is deemed to have played an important role in the capitalistic mythology[312] of the United States. Such mythology is depicted as "very simple"[313]: the major divinity is American Businessman; the devil is Governmental Interference; and a minor divinity is the American Scholar who emulates business corporation. Antitrust serves as an "occasional legal ceremony" that treats great industrial organizations like individuals. When someone like Rockefeller violates the mythology and folklore which picture what a businessman was supposed to do, it is because he did not have the scruples suggested by a world that was supposed to be composed of competing individuals[314]. Antitrust was therefore part of the adaptation of individualism to a highly organized society.

The antitrust enforcer sounded less skeptical. A couple of years later, Arnold's view of the function of the Sherman Act was to "maintain the economic background" essential to any social or legislative program in a democracy. Antitrust was not remotely about protecting small, inefficient firms. Its role is to guarantee that efficiencies do not get lost in the "bottlenecks" of monopoly and cartels. Such efficiencies – in a view that anticipates modern antitrust – should be passed on to consumers[315].

Dealing with the need to overcome both New Deal policies that hindered competition and private informal efforts to adhere to informal codes of "fair competition"[316], Arnold used the "folklore" in his favor. "The very essence of competition", he writes, is "getting better

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[311] Thurman Arnold, *The Folklore of Capitalism* (1937), Washington, Yale University Press, 221.

[312] A similar terminology would be employed more than 80 years later to explain competition and capitalism in the United States: Jonathan Tepper, Denise Hearn, *The myth of capitalism: monopolies and the death of competition* (2019), New Jersey, Hoboken.

[313] Thurman Arnold, *The Folklore of Capitalism* (1937), Washington, Yale University Press, 35 – 37.

[314] Thurman Arnold, *The Folklore of Capitalism* (1937), Washington, Yale University Press, 4.

[315] Thurman Arnold, *The Bottlenecks of Business* (1940), New York, Reynal & Hitchcock, 4.

[316] Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold* (2004), 78 St. John's Law Review, 577.

of the other fellow". In the competitive game, a "referee" is constantly necessary[317], and this should not be different in times when individualism gives place to industrial organization. Arnold linked antitrust to consumer interest, not necessarily as translated by a legal-economic theory, but as it is felt by each family in its budget. Therefore, he gained support from consumers which did not actually hate big business, but wanted to participate in the benefits stemming from new forms of economic organization[318].

The influence of social thought on antitrust, as illustrated by figures like Brandeis and Arnold, are not of a precise disciplinary contour. Brandeis' passion for facts were enough to isolate the "market coercion" from a specific effect upon prices, but his insightful notions about competition seemed to be mixed with a crusade against "bigness". Arnold's realist background helped him to use the "folklore" of treating organizations as individuals in favor of antitrust policies, but his definition of competition remained in a metaphorical level. The same degree of indistinctness cannot be ascribed to an article published in 1971. In the paper[319], Louis Stern explicitly attempts to observe "antitrust implications" of a sociological view on competition. To be sure, his objective is to analyze the effect on the public interest of the various combinations between the elements of competition, conflict, and cooperation. Such topic is regarded as to potentially impact antitrust policy.

Competition in the marketplace is defined, "sociologically", as a form of opposition "based on scarcity, indirect, and impersonal, in which a third party controls the goal or object" [320] . While competition is "object-centered", conflict is "a form of personal opposition", since the organization is not "directed toward the object but rather toward the opponent"[321]. Cooperation, in turn, is defined as "joint striving" or "the process of coalescing with others for a good, goal, or value of mutual benefit"[322].

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[317] Thurman Arnold, *The Bottlenecks of Business* (1940), New York, Reynal & Hitchcock, 122.

[318] In the description of a case in which General Motors was convicted: "It was as if the playbook for the Antitrust Division came from Arnold's own writings. It was an ad hoc regulatory solution to address a pressing societal need dressed up in law enforcement terms to satisfy the folklore of the times". Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold* (2004), 78 St. John's Law Review, 589.

[319] Louis W. Stern, *Antitrust Implications of a Sociological Interpretation of Competition, Conflict, and Cooperation in the Marketplace* (1971) 16 Antitrust Bulletin.

[320] Louis W. Stern, *Antitrust Implications of a Sociological Interpretation of Competition, Conflict, and Cooperation in the Marketplace* (1971) 16 Antitrust Bulletin, 511.

[321] Louis W. Stern, *Antitrust Implications of a Sociological Interpretation of Competition, Conflict, and Cooperation in the Marketplace* (1971) 16 Antitrust Bulletin, 514.

[322] Louis W. Stern, *Antitrust Implications of a Sociological Interpretation of Competition, Conflict, and Cooperation in the Marketplace* (1971) 16 Antitrust Bulletin, 514.

Such elements do not appear in a pure form in society, but being able to distinguish among them advances the question of which combinations can produce socially beneficial results. For example, too much cooperation among oligopolists is deemed to be socially unfavorable. As antitrust agencies tend to act in such cases, the reason is not so much it wants to preserve competition as it is to prevent too much cooperation or conflict. Would antitrust's role precisely be to avoid competition becomes conflict (e.g. "unfair competition") or cooperation (e.g. "tacit collusion")? This issue is formulated by Stern in functional terms:

> *"It is doubtful whether we can deal more effectively with antitrust problems without paying more explicit attention to a sociological analysis of competition, conflict, and cooperation. Such an analysis of market interactions helps distinguish among the three elements and may aid significantly in deciding when they are functional and when they are harmful to the public interest."*

Stern's work is the most explicit and developed attempt to bring a sociological contribution to antitrust. However, it has remained an unheard voice from a period in which the influence of Chicago's economics was still rising. Although such a project was not fully established in any country, we have reasons to believe sociology has impacted Brazilian antitrust in a particular way. In addition to being possibly mingled in the economic literature that influenced antitrust, many of the professionals who recently helped to enforce antitrust in the country transited academically in the field of legal sociology[323]. The intriguing frequency of legal sociologists in Brazilian antitrust regulation can be explained by three

[323] See Iagê Zendron Miola, *Law and the Economy in Neoliberalism: the Politics of Competition Regulation in Brazil* (2014), dissertation presented to the "Renato Treves" International PhD Program in Law and Society, 313-317. As Executive-Secretary of the Ministry of Justice, Tercio Sampaio Ferraz Jr., a legal philosopher with works on legal sociology, was in charge of the task of changing competition law into a capitalist mechanism that controls prices, with the decrease of state intervention in the beginning of the 1990s. Ferraz Jr. supervised in his PhD Paulo de Tarso Ribeiro, who would recruit José Reinaldo Lima Lopes (another legal theorist with experience in sociology) to the Economic Secretariat (SDE). Two other professors from USP that would join CADE, both as commissioners, are Ronaldo Porto Macedo and Celso Campilongo, the latter a professor of sociology of law. They are recent examples of a tradition that can be traced back to the nomination to CADE of Nestor Duarte, a legal thinker with works in legal sociology, in 1965. See http://www.cade.gov.br/acesso-a-informacao/institucional/autoridades-do-cade-desde-1963.pdf. Both Ferraz Jr. and Campilongo would have longstanding careers in antitrust as lawyers and consultants. Other professors who have a background in social sciences and also work with antitrust are Alessandro Octaviani and Calixto Salomão Filho, among others.

factors, according to Miola[324]: (i) professors in the department of legal philosophy of University of São Paulo law school tend to work close to economic issues, since São Paulo is a financial and industrial center; (ii) antitrust policy is interdisciplinary by its very nature and attracts academics open for the dialogue between law and social sciences; (iii) sociologists of law are often interested in 'legal novelties', including those whose main development is observed outside the Continental Europe axis.

Such an environment has been welcoming projects that approach antitrust from a non-economic perspective[325]. While they have had no direct impact on antitrust doctrine, those works provide different perspectives and illuminate often overlooked aspects of antitrust policy. The following chapter aims to contribute to this alternative project by retaking a concurrent – sociologically-based – discourse on competition since its origins. Whether it can also contribute to consolidate a meaning of competition eventually useful for antitrust is a question for the last chapter.

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[324] Iagê Zendron Miola, *Law and the Economy in Neoliberalism: the Politics of Competition Regulation in Brazil* (2014), dissertation presented to the "Renato Treves" International PhD Program in Law and Society, 315 (the first two factors suggested by Campilongo in an interview to Miola).

[325] One example is the above-quoted Iagê Zendron Miola, *Law and the Economy in Neoliberalism: the Politics of Competition Regulation in Brazil* (2014), dissertation presented to the "Renato Treves" International PhD Program in Law and Society. A recent in-depth work on antitrust coming from the social sciences – not from sociology, but from anthropology – is the work of Gustavo Onto, *Ficções Econômicas e Realidades Jurídicas: uma Etnografia da Política de Defesa da Concorrência no Brasil* (2016), PhD dissertation presented to the Museu Nacional, Universidade Federal do Rio de Janeiro (in an ethnographic effort to describe how the relation among competitors in the market is "conceived, visualized and constructed" by competition policy in Brazil). The interest in the group NECSO (Nucleus of Studies on Competition and Society), founded in 2016 at the University of São Paulo [https://necsousp.com/] , is also an indication of the openness in Brazilian antitrust academy to sociological influxes. See also Fernando Emanuel de Oliveira Mourão, *A figura do cidadão no direito da concorrência: uma análise de sociologia jurídica* (2001), Masters Dissertation in Sociology, University of São Paulo; Carlos Alberto Bello, *Autonomia frustrada: o Cade e o poder econômico* (2005), São Paulo, Boitempo Editorial; Tobias Werron, Luiz Felipe Ramos, *Why do we believe in (sociology of) competition*? (2017) available at https://necsousp.files.wordpress.com/2016/09/why-do-we-believe-in-sociology-of-competition_necso.pdf; Guilherme Teno Castilho Misale, Yan Villela Vieira, *Why (not) talk about the sociology of competition?* (2017) available at https://www.competitionpolicyinternational.com/wp-content/uploads/2017/08/Why-we-should-not-talk-about-sociology-of-competition.pdf; Luiz Felipe Ramos, Tobias Werron, *Concorrência como um conceito histórico-sociológico: trazendo variação para a "evolução do antitruste"* in Celso Campilongo, Roberto Pfeiffer, *A evolução do antitruste no Brasil* (2018), São Paulo, Singular; Marco Antonio Loschiavo Leme de Barros, *Sociedade, Direito e Concorrência: reflexões sociológicas sobre o sistema brasileiro de defesa da concorrência* (2018), Juruá, Curitiba.

II – COMPETITION AS A SOCIAL PHENOMENON

II.I. A CONCURRENT DISCOURSE ABOUT COMPETITION

II.I.I. CLASSICS OF POLITICAL ECONOMY AND PIONEERS OF A SOCIOLOGY OF COMPETITION

In order to outline the development of a discourse that treats competition as a social phenomenon, our story starts, like others, in the 18th century[326]. This is the phase of classical political economy (18th-19th century), when competition was seen as a procedure capable of motivating and disciplining competitors in the interests of consumers and, by extension, of society. The mandatory reference of this period is the classic work of Adam Smith[327]. In this book, "free competition" (in opposition to the medieval restrictions and regulations) is considered a means of disciplining "market price"[328] by the "haggling and bargaining" of buyers and sellers, preventing it from unduly exceeding its "natural price".[329] While the

[326] In his works about competition, Tobias Werron describes a history of this concept also starting from the 18th century. It is useful to follow him at this point, although the purposes of this thesis will recommend a slightly different periodization. Werron's focus, which is not so much ours, is on the emergence of a specific variant of competition as a "reflection formula" in late 19th century. We will follow Werron's path whenever it seems appropriate to sketch the origins and development of a sociological discourse on competition. See Tobias Werron, *Wettbewerb als historischer Begriff* in Ralph Jessen*, Konkurrenz in der Geschichte* (2014), Frankfurt am Main, Campus Verlag**,** also Tobias Werron, *Why do we believe in competition? A historical-sociological view of competition as an institutionalized modern imaginary* In E. Hartmann & P.F. Kjaer Competition, Special Issue of Distinktion (2015) Scandinavian Journal of Social Theory. For the antecedents and origins of the concept before the 18th century, see Kenneth Dennis, '*Competition' in the History of Economic Thought* (1975), Oxford, Faculty of Social Studies, 1-53 (with references that range from Aristotle to the mercantilists, passing through Roman civil law and scholastic writers). See also sections 2.1. and 2.2. from Oles Andriychuk, *The Normative Foundations of European Competition Law* (2017), Cheltenham, Edward Elgar (on the ancient roots of the economic concept of competition and the ideas of economic competition before the late 18th century).

[327] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776; 19 05), London, Cannan ed. Nevertheless, the book does not emerge in a vacuum. While reacting to the mercantile logic, physiocrats had already enunciated several of the elements which would be used in the classic liberal thinking. Authors like James Stewart and Thomas Mortimer had anticipated some of Adam Smith's ideas a few years before the publication of his masterpiece. Overall, one could agree with Kenneth Dennis, following Schumpeter's argument, according to whom Smith's great achievement was in synthesis, not analysis – being "competition" precisely the "connecting principle" of his system. Kenneth Dennis, *'Competition' in the History of Economic Thought* (1975), Oxford, Faculty of Social Studies, 88-89.

[328] Market price being "the actual price at which any commodity is commonly sold", which is regulated "by the proportion between the quantity which is actually brought to market, and the demand of those who are willing to pay the natural price of the commodity, or the whole value of the rent, labour, and profit, which must be paid in order to brig it thither". Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776; 1905), London, Cannan ed., 58.

[329] A commodity is sold for its natural price when its price "is neither more nor less than what is sufficient to pay the rent of the land, the wages of the labour, and the profits of the stock employed in raising, preparing, and bringing it to market, according to their natural rates". Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776; 1905), London, Cannan ed., 57. Competition occurs also at the buyer's side, as long as the quantity of commodity falls short of the effectual demand, and thus result in market prices "more or less above the natural price". Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776; 1905), London, Cannan ed., 58.

natural price equals to "the price of free competition", the "price of monopoly" is the highest which can be obtained by the seller.[330]

In such construction, the consumer was seen as a representative of the interests of the "public"[331]. Smith's view related the idea of "public" in the sociopolitical meaning (largely a synonym for "society"/ "community") to the specific public of the market, "the consumer". Market competition appears as a process that serves the interests of consumers at the expense of producers and, by favoring the consumers, promotes the welfare of society at large. For example, if competition between traders increased by means of reducing the time of non-paid apprenticeship, "*the trades, the crafts, the mysteries, would all be losers*" but "*the public would be a gainer, the work of all artificers coming in this way much cheaper to market*".[332] Contrariwise, conversations between people of the same trade end "*in a conspiracy against the public, or in some contrivance to raise prices*"[333]:

> *"It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.*
>
> *A regulation which obliges all those of the same trade in*

[330] The monopolists are those who sell their commodities much above the natural price, by keeping the market constantly understocked. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776; 1905), London, Cannan ed., 63 (Smith makes a claim against monopoly stating that large organizations leaders lacked the motive, the ability and the necessary stimulus to day-to-day operations).

[331] There were, of course, antecedents of this idea. In the common law case *Darcy v. Allen* (1603), one reads as the explanation for the invalidity of a royal grant by patent ""[t]he Queen was deceived in her grant; for the Queen, as by the preamble appears, intended it to be for the *weal public*, and it will be employed for the private gain of the patentee, and for the prejudice of the *weal public*". An early antitrust case would stablish that "the essence of the law is injury to the public". *United States v. Trenton Potteries Co*. (1927) Supreme Court of the United States, 273 U.S. 392. For a more recent statement, *Image Technical Services, Inc. v. Eastman Kodak Co.* (1997) United States Court of Appeals, Ninth Circuit. 125 F.3d 1195 ("Antitrust law seeks to promote and protect a competitive marketplace for the benefit of the public."). Equating, in the Brazilian context, consumer to "society in general", Vinicius Marques de Carvalho, Process 08012.001271/2001-44 (*Procon-SP* v. *SKF do Brasil Ltda.* [2011], CADE).

[332] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776; 1905), London, Cannan ed., 124-125.

[333] In Brazil, one could still read, as late as in 2013, the following defense argument in an antitrust case: "It is more than natural that the people who came together to form the plaque to run for the Union's elections, when met to discuss the elections, would also discuss the prices they were practicing each time there was an increase in the refineries" reproduced by Commissioner Eduardo Pontual Ribeiro in Process 08012.010215/2007-96 (*Juizo de Direito da 3ª VC – RS* x *Several gas stations in Caxias do Sul*).

a particular town to enter their names and places of abode in a public register, facilitates such assemblies. It connects individuals who might never otherwise be known to one another, and gives every man of the trade a direction where to find every other man of it.

A regulation which enables those of the same trade to tax themselves in order to provide for their poor, their sick, their widows and orphans, by giving them a common interest to manage, renders such assemblies necessary"[334].

In the early 19th century, the semantics of "free competition" consolidates and the figure of consumer is more frequently referred to. Apart from the classical liberal economists,[335] this development is evident in the dictionaries of the time[336]. With a clearly favorable-view of competition, the ninth edition of the *Brockhaus Konversations-Lexikon* from 1843 states that competition is "the father of effort, skill and invention".[337] Also resembling Smith's ideas, consumers appear in a dictionary from 1858 as the profiteers of free competition: "*the restriction of competition leads to disadvantage of consumers through the privilege of producers*".[338] Roughly at the same time, the definition of the interests of

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[334] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776; 1905), London, Cannan ed. 130-131. Correspondingly, the author advances a statement according to which a better government of trade is not disciplined by corporation, but by customers: *"*An exclusive corporation necessarily weakens the force of this discipline. A particular set of workmen must then be employed, let them behave well or ill. It is upon this account, that in many large incorporated towns no tolerable workmen are to be found, even in some of the most necessary trades. If you would have your work tolerably executed, it must be done in the suburbs, where the workmen, having no exclusive privilege, have nothing but their character to depend upon, and you must then smuggle it into the town as well as you can*."* (131).

[335] Most notably, David Ricardo conceptualizes market as a locus in which competition operates unrestricted. Although endorsing Smith's ideas about competition, Ricardo was mostly interested in an approach that would become usual only later (in the neoclassical period): seeing competition as an analytical *abstraction* that would help to explain how equilibrium was to be reached. The author mentions the role of competition in equalizing rates of return amongst similar factor of productions, while suggesting that machinery and labor are in competition. Also wages should be left to the "free competition of the market" in David Ricardo, *On the Principles of Political Economy and Taxation* (1817/1821, 2001), Ontario, Kitchener, 67 ("These are then the laws by which wages are regulated, and by which the happiness of far the greatest part of every community is governed. Like all other contracts, wages should be left to the fair and free competition of the market, and should never be controlled by the interference of the legislature").

[336] See footnote 92.

[337] Brockhaus Conversations-Lexikon (9th 1843), Bd. 3, 598. Cf. Luiz Felipe Ramos, Tobias Werron. *Concorrência como um conceito histórico-sociológico: trazendo variação para a "evolução do antitruste"* in Celso Campilongo, Roberto Pfeiffer, *Evolução do antitruste no Brasil* (2018), São Paulo, Singular, 199.

[338] Pierer Universal-Lexikon (4th 1858), 229. Cf. Luiz Felipe Ramos, Tobias Werron. *Concorrência como um conceito histórico-sociológico: trazendo variação para a "evolução do antitruste"* in Celso Campilongo, Roberto Pfeiffer, *Evolução do antitruste no Brasil* (2018), São Paulo, Singular, 199.

such consumer expands: it starts to be depicted as greater than just aiming at reduced prices for the same products and as also including the appreciation of subtle differences in the quality of products.[339]

After having received harsh criticism both by part of the socialist thinking and by a conservative reaction to classical theory,[340] competition came to be passionately defended by some authors during the 19th century. G.P. Scrope saw in competition "*the soul of industry, the animating spirit of production, the ever-present, all all-pervading elastic principle, which like the power of gravitation on the atmosphere and ocean fills every vacuum in the market of exchanges*". Fréderic Bastiat gets to the point of identifying competition with the rule of democracy, or even with "*the most progressive, the most egalitarian, the most universally leveling of all the laws to which Providence has entrusted the progress of human society."*[341]

After the second half of 19th century, however, the ambivalent effects of competition started to be increasingly emphasized. John Stuart Mill himself considered competition as a source of productive efficiency, but casted doubts on its normative status: "*I do not pretend that there are no inconveniences in competition, (...) but if competition has its evils, it prevents greater evils"*[342]. Francis Edgeworth, in the "Dictionary of Political Economy",

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[339] James Cooper, Notions of the Americans. Picked up by a Travelling Bachelor (1833) ("The unobstructed commerce of the United States admits of importations from all quarters, and of course the consumer is accustomed to gratify his taste with the best articles. A French duke might be content to use a French knife or a French lock; but an American merchant would reject both: he knows that the English are better"). Cf. Luiz Felipe Ramos, Tobias Werron. *Concorrência como um conceito histórico-sociológico: trazendo variação para a "evolução do antitruste"* in Celso Campilongo, Roberto Pfeiffer, *Evolução do antitruste no Brasil* (2018), São Paulo, Singular, 199.

[340] See Kenneth Dennis, *'Competition' in the History of Economic Thought* (1975), Oxford, Faculty of Social Studies, 137-158.

[341] See Fréderic Bastiat, *Harmonies économiques* (1850) translated by W. Hayden Boyers, *Economic Harmonies* (1996), New York, Foundation for Economic Education, 284-316. The author also writes that "it is this law of competition that brings one by one within common reach the enjoyment of all those advantages that Nature seemed to have bestowed gratis on certain countries only. It is this law, also, that brings within common reach all the conquests of Nature that men of genius in every century pass on as a heritage to succeeding generations, leaving still to be performed only supplementary labors, which they exchange without succeeding in being remunerated, as they would like to be, for the co-operation of natural resources".

[342] John Stuart Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (1848, 7th. 1909), London, Longmans, Green and co. Nevertheless, he considers competition a necessary stimulus, at least at his time, "and no one can foresee the time when it will not be indispensable to progress". At the same period, the ambivalent effects of competition would be recognized in a decision from the New York Supreme Court in 1876, Judge John Clinton Gray: "I do not think that competition is invariably a public benefaction; for it may be carried on to such a degree as to become a general evil". James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis,* 1880 – 1918 (1989), in Ohio State Law Journal vol. 50 n. 2, 324 (noting that particular states like New York and

sustains that "*the general presumption in favor of competition may be outweighed in particular cases by the disadvantages which have been noticed*"[343]. Another feature of this period is the recognition of competition phenomenon in areas which are not strictly economic. In the Brockhaus "Konversationslexikon" one finds that "*competition generally means competition between multiple people (for example, a prize, a work position, etc.), but also, and particularly, competition in economic life*."[344]

Alongside other factors[345], such intellectual drifts seem to have favored the emergence of a concurrent discourse about competition. If not as a systematic and steady tradition, one can finally notice theoretical undertakings which were not dedicated to draw links between competition and economic effects. Instead, they observed competition empirically as a particular and comprehensive social phenomenon. In spite of their very different theoretical backgrounds, it is possible to affirm that the two pioneering contributions for a sociology of competition have been those of Charles Cooley and Georg Simmel.

Dated in several aspects – it is enough to mention his racist thesis regarding the natural inaptitude of Latin peoples for competition[346] – but a precursor in so many others, Cooley's text on interpersonal competition explicitly points out, as early as in 1894, to a

Missouri became very active centers of state antitrust legislation and adjudication). Also on the other side of Atlantic, Edwin Seligman said at the founding convention of an American society of economists in the 1880s: 'Competition is not in itself bad. It is a neutral force which has already produced immense benefits, but which may, under certain conditions, bring in its train sharply defined evils'. See William Letwin, *Law and Economic Policy in America: the Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, 71 – 76.

[343] Francis Y. Edgeworth, *Competition and Regulation* in Robert Palgrave, *Dictionary of Political Economy* (1910), London, 378-380.

[344] Brockhaus Konversations-Lexikon (1883). Cf. Luiz Felipe Ramos, Tobias Werron. *Concorrência como um conceito histórico-sociológico: trazendo variação para a "evolução do antitruste"* in Celso Campilongo, Roberto Pfeiffer, *Evolução do antitruste no Brasil* (2018), São Paulo, Singular, 200.

[345] At the same period, academic theories of competition were developed in different disciplines within social sciences. On the one hand, the neoclassical economic theory builds the concept of (perfect) competition, used both for developing equilibrium models and for advancing scientific ambitions in the realm of economics. For its grounds, see footnote 281. On the other hand, developments in the social sciences help to generalize and to deepen views on competition, such as the distinction between an individualized "public" and an emotionally driven "mass". See Gabriel Tarde, The Public and the Crowd (1898) in Terry Clark, On Communication and Social Influence. Selected Papers edited with an Introduction by Terry N. Clark (1969). Cf. Luiz Felipe Ramos, Tobias Werron. *Concorrência como um conceito histórico-sociológico: trazendo variação para a "evolução do antitruste"* in Celso Campilongo, Roberto Pfeiffer, *Evolução do antitruste no Brasil* (2018), São Paulo, Singular, 198.

[346] Although with more subtlety, he seems to be followed at this point by Edward Alsworth Ross, *The Principles of Sociology* (1920), New York, The Century CO, 189 (arguing that South Americans "inherit an ideal of sensitive aristocratic pride and have little experience of competitive sports").

broad approach on the phenomenon: "*I propose to discuss personal competition with no special reference to industry or commerce, but rather with a view to the part that it plays in social life as a whole, and to the effect it has upon the character and happiness of men*"[347]. Thus, the author presents a highly abstract concept: competition is any selective process capable of comparatively defining (although in a relatively blind and anarchic way) the position of an individual in society without having to resort to a statutory predetermination. Interpersonal competition indicates for each individual his place in the social system.[348] According to Cooley, in the late nineteenth century this could be achieved in an environment of freedom, even though controlled by certain "moral forces".

Such approach refrains, to some extent, from addressing specific considerations regarding the "efficiency" or other economic effects of the competitive process. In fact, both status (based on fixed, generally hereditary rules) and competitive selection could result, from a utilitarian point of view, in positive or negative results. Only competition, however, allows one to see "*in my opponent a man like myself, acting from motives which I recognize as worthy, and acknowledging a like worthiness in me*".[349] Cooley sees in the open and egalitarian process of competition a certain type of social relation that hinders (contrary to what one could imagine) the outcropping of feelings such as hatred and envy. Competition forces one competitor to observe the other, to anticipate his purposes and methods, to interpret his thoughts from words and actions, and finally to see his own life from a new point of view.

It is indeed a sympathetic approach to this type of social relation, albeit different from some classic perspectives on the topic. Cooley does not regard competition as a natural state of men – and cooperation, by contrast, as something irregular or artificial. Instead,

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[347] Charles Cooley, *Personal Competition: Its Place in the Social Order and Effect Upon Individuals; With Some Considerations on Success in Sociological Theory and Social Research: Being Selected Papers of Charles Horton Cooley* (1894), Economic Studies 4, No. 2., 164 (our emphasis).

[348] Cooley does not fail to notice the existence of individuals who, according to such logic, could be "displaced", since they do not adapt to the competitive superstimulus. The author associates these individuals with a finer and more irritable temperament, which leads them to adopt "extravagant social views" and produce "literature of a pessimistic character". Nonetheless, the solution for those would not be "less competition", but rather a type of competition more apt to discriminate different aptitudes and careers. Charles Cooley, *Personal Competition: Its Place in the Social Order and Effect Upon Individuals; With Some Considerations on Success* in *Sociological Theory and Social Research: Being Selected Papers of Charles Horton Cooley* (1894), Economic Studies 4, No. 2., 221.

[349] Charles Cooley, *Personal Competition: Its Place in the Social Order and Effect Upon Individuals; With Some Considerations on Success in Sociological Theory and Social Research: Being Selected Papers of Charles Horton Cooley* (1894), Economic Studies 4, No. 2., 211.

competition is seen as a process that could ultimately lead to the "higher level" of cooperation, as long as competitors perceive the existence of common interests among them. Such cooperation would also have to find limits. Four years after the promulgation of the Sherman Act[350], Cooley noted the multiplication of industrial corporations and the formation of trusts, although he did not see on the horizon that competition would disappear. In the author's view, the problem of regulating large associations would be something to be faced in the future.

The detachment from some classic economic ideas became clearer in a book published in 1918. In this work, Cooley rejects the hypothesis from the Mandeville bees' fable – and in many other theoretical constructs since the "invisible hand" – according to which "private vices", or the search for self-interest, result in benefits for society.[351] The author states that "*a social system based on this doctrine deserves to fail*". His criticism was directed not only at the bias of the economist perspective in view of the complexity of human nature, but pointed to its invalidity even in the economic field: "*it is false even as economics, and we shall never have an efficient system until we have one that appeals to the imagination, the loyalty, and the self-expression of the men who serve it*"[352]. Correspondingly, competition could be as positive as a destructive process, depending on the level of loyalty involved, on the understanding of underlying rules, on the nobility of disputed objects, and on how competitors are prepared for the dispute.

Simmel's works approach competition from an equally comprehensive perspective. Not only does he consider its publicly visible manifestations, but he also sees competition in "*countless interactions of family life as in erotic relationships, in everyday conversations as in attempts to convince friends, in friendship and in activities designed to satisfy personal vanities*."[353] In all these instances, competition would manifest itself in its specific social

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[350] But before the institutionalization of antitrust, which would happen only around 1903, according to Hans Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (1954), Stockholm, Norstedt & Söner, 560-563.

[351] Bernard Mandeville, *The fable of the bees or private vices, public benefits* (1732) ("thus every Part was full of Vice, yet the whole Mass a Paradise"). Although many historians wanted to see in this work an anticipation of his ideas, Adam Smith himself was critical of the opinion of Mandeville. See Kenneth Dennis, '*Competition' in the History of Economic Thought* (1975), Oxford, Faculty of Social Studies, 46.

[352] Charles Cooley, *Social Process* (1918), New York, Charles Schriber's Sons, 135-136.

[353] Georg Simmel, *Soziologie der Konkurrenz* (1903), *Neue Deutsche Rundschau* XIV, 1013. In Simmel's comprehensive work, competition appears as one of the forms of "socialization", that is, one of the forms by which the individuals develop a unity based on a common interest that is realized within the realm of

conformation, perhaps Simmel's main contribution to the understanding of the matter - the presentation of its *indirect* form[354].

Just as the cosmos needs love and hate, society needs a combination of association and competition. "Pure" competition[355] is characterized as a contest in which the participants seek favors, attention or material resources from a third party (in economy, the consumer) without devoting energy to their adversary. In an approach that initially seems to be in line with that of the classical economists, Simmel understands competition results in added value from the social point of view. And such happens precisely insofar as the subjective motives and means are directed towards the generation of objective values – that is, expanding from the parties in dispute.[356]

Such relative indifference towards subjectivity (which makes competition comparable to logic, to Law and to monetary economy) enables kind personalities to join the hardness of competition with the certainty of doing nothing wrong. On the other hand, the ruthlessness of competition is compensated by a moral instinct of justice (valid both for the winner and for the defeated) according to which the success in a competitive contest corresponds to the own forces employed by the subjects. Interpreted by the author as a reflection of deep tendencies in modern life,[357] the relation between subjectivity and

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such unity. Competition materializes economic interest, as well as does a planned organization of production. See Georg Simmel, *Soziologie. Untersuchungen über die Formen der Vergesellschaftung* (1908; 5 ed. 1968), Berlin, Duncker & Humblot, 5-7.

[354] The indirect character of competition is also recognized in antitrust cases. See *Monsanto Co. v. Spray–Rite Service Corp* (1984) Supreme Court of the United States. 465 U.S. ("there is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a 'contract, combination . . . or conspiracy' between the manufacturer and other distributors in order to establish a violation. Independent action is not proscribed.")

[355] As we will observe later in this work, Simmel identifies the existence of another type of competitive dispute, in which there is direct reference to the rival: for example, in the attempt of stealing the competitor's wife. Although still involving a third party, one could say that competition here is not "pure". These cases would differ from a traditional struggle justified by the struggle itself, as in cases of revenge or dispute whose victory appears as an idealized end. Georg Simmel, *Soziologie der Konkurrenz* (1903), *Neue Deutsche Rundschau* XIV, 1010.

[356] Georg Simmel, *Soziologie. Untersuchungen über die Formen der Vergesellschaftung* (1908; 5 ed. 1968), Berlin, Duncker & Humblot, 222 (emphasizing that such connection between objective and subjective aspects is precisely the absent aspect of a religious dispute).

[357] Insofar as it is able to combine the pure objectivity of the process, whose results are due to the facts and not to the personalities involved, with personal responsibility, since the success in the dispute depends on the use of individual energies. Such combination would be in line with times in which material culture had gained unprecedented independence, as well as the subjective consciousness of modern man had been deepened: the consciousness that his soul belongs only to himself. See Georg Simmel, *Soziologie der Konkurrenz* (1903), *Neue Deutsche Rundschau* XIV, 1023, Georg Simmel, *Soziologie. Untersuchungen über die Formen der Vergesellschaftung* (1908; 5 ed. 1968), Berlin, Duncker & Humblot, 231-232.

objectivity is nonetheless never perfectly harmonious or symmetrical: neither the whole (objective social result) nor the parts (subjective motives) would content themselves with assuming the role of mere means for a greater purpose.

Like Cooley, Simmel identifies a socializing effect of competition[358]. Its emphasis is placed, however, on the third party whose resources or favors are disputed. At this point emerges his famous statement, according to which competition reaches what for countless times "only love manages to conquer"[359]: not only to connect to the third targeted in the dispute, identifying its weaknesses and strengths, but also to discover his deepest desires even before he becomes aware of them. Also similarly to Cooley, Simmel associates the progressive competitive feature of society with the emptying of general traditional norms. The author likewise connects this expansion of competition to liberalism (opposing the chance principle to the equality principle) and to the reduced space for feelings such as envy and bitterness.

Compared to the American sociologist, though, Simmel draws more specific conclusions regarding the relationship between competition and the social meaning of legal norms directed to competitive behavior. Indeed, Simmel introduces a powerful explanation for the emergence of legal rules that regulate competition – and for the relative lack of rules to punish it. According to the German author, legal rules seek to eliminate from competition what, from a social point of view, could not be even considered as part of the phenomenon. Such reasoning is valid for a damage directly caused to others without an objective social justification (usually formulated in utilitarian terms). And it also applies to arrangements

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[358] More broadly, he states that an opposition of elements can usually be the only means by which a unity of unbearable personalities is made possible. Interestingly, norms and rules are frequently present in such unities, and that includes the situation of pure fighting. Georg Simmel, *Soziologie. Untersuchungen über die Formen der Vergesellschaftung* (1908; 5 ed. 1968), Berlin, Duncker & Humblot, 189, 200-202.

[359] Georg Simmel, *Soziologie der Konkurrenz* (1903), *Neue Deutsche Rundschau* XIV, 1012. Georg Simmel, *Soziologie. Untersuchungen über die Formen der Vergesellschaftung* (1908; 5 ed. 1968), Berlin, Duncker & Humblot, 217. In comparison to Emile Durkheim, Albert Hirschman argues that Simmel is more successful with his "effusiveness" and "vivid images" in convincing the reader that certain characteristics of market society contribute to social integration. Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?* In *Journal of Economic Literature* (December 1982), Vol. XX, 1472. Love is not always exactly the case, however. See *United States v. Andreas* (2000) United States Court of Appeals, Seventh Circuit, 216 F.3d 645 ("For many years, Archer Daniels Midland Co.'s philosophy of customer relations could be summed up by a quote from former ADM President James Randall: 'Our competitors are our friends. Our customers are the enemy.'")

between competitors that eliminate the very condition of competing[360]. Precisely because of justifications that refer to an objective benefit for third parties, pure competition is less "legally prohibited" than other types of fighting.

Colley's and Simmel's works enable one to identify a "contra-discourse" to political economy when it comes to competition.[361] Either by identifying an "acknowledgment of worthiness" in the opponent, a "socialization" with the third party and a "moral instinct of justice" in the results, competition produces effects which are not only economic. Although not leading to a coherent body of sociological production, they anticipated works that would equally observe competition as a social phenomenon.[362] In the 1970s, such kind of interest

[360] Georg Simmel, *Soziologie. Untersuchungen über die Formen der Vergesellschaftung* (1908; 5 ed. 1968), Berlin, Duncker & Humblot, 229-230. Simmel quotes the example of "concurrence déloyale" (unfair competition) from the French Civil Code, which presently can be legally differentiated from antitrust illicit. When it comes to cartelizing behaviors, he understands they would differ from other types of common restrictions in the sense that they are directed not to the position of competitors (enabling the weak to compete) but to the objective purpose *of the enterprise* (thus, not to the third). See Georg Simmel, *Soziologie. Untersuchungen über die Formen der Vergesellschaftung* (1908; 5 ed. 1968), Berlin, Duncker & Humblot, 226-227 (citing as examples the adjustment between booksellers to set a limit of discount, or an agreement between shopkeepers on what time to close their stores). The exactly same example would materialize more than one hundred years later in Brazilian bookstore market, with firms trying to react to financial difficulties with a common limitation of discounts to 10%. See https://www1.folha.uol.com.br/ilustrada/2018/11/crise-das-redes-saraiva-e-cultura-expoe-problemas-de-gestao-no-setor-livreiro.shtml

[361] Philippe Steiner comes to a similar conclusion after analyzing the French tradition that would lead to the study of the "system of gifts and counter-gifts", a set of transactions that feed, produce, and reproduce solidarity among individuals, but do so through a social commerce which differs from mercantile commerce (although articulated to it). Starting from the question of whether "competition does indeed provide a social mechanism capable of transforming self-interested behavior into a socially beneficial outcome," Steiner notes that the answer provided by the Saint-Simonians would be negative, since for those only a new religion could achieve such an outcome. Comte himself rejected political economy and the principle of competition, albeit using a not fully explained concept of "healthy competition". While for Comte altruism and selfishness would be instincts of a different nature, the British Herbert Spencer sees them as behaviors of the same *continuum*, presenting the surprising concept of "altruistic competition" in which each competitor seeks his own share of altruistic satisfactions. One notices here the emergence of a highly abstract concept of competition, capable of selecting access to any scarce resource, including an occasional "good": altruism itself. The formulation of a counter-discourse to political economy would advance with Durkheim, according to whom both selfishness and altruism resulted from a work that society exerts on itself. Altruism would be tantamount to solidarity – an inheritance of Comte's idea that the division of labor means a form of solidarity – and competition would correspond to a process that ignites mercantile passions to the point of generating an anomie situation (which could only be braked by a renewed and modern morality). With Mauss, sociological research is further shifted from the anthropological and philosophical question inherited from Comte and Spencer. It starts to use terms such as interest and disinterest, obligation and freedom (instead of categories such as selfishness and altruism). At this point – the "second Durkheimian program" – the presentation of a political counter-discourse to political economy takes shape. *Cf.* Philippe Steiner, *Altruísmo, egoísmo e solidariedade na Escola Durkheimiana* in Alexandre Masella et alii, *Durkheim 150 anos* (2009), Argumentum Editora and Philippe Steiner, *Comte, altruism and the critique of Political Economy* (2015), Gemass Working Paper.

[362] Meanwhile, other authors have sparsely dealt with the topic of competition. Emanuele Sella differentiates the historical forms of competition (for example, "free competition") from the phenomenological process of competition ("immanent over time and general in space"). Emanuele Sella, *La Concorrenza I* (1916), Torino, Fratelli Bocca. Defining competition as broadly as "the seeking of the favor of certain individuals or bodies with reference to a single desirable object by two or more persons", which resembles

becomes part of several intellectual efforts aimed at presenting renewed views on economic relations. Beforehand, two influential works would be produced – as well as a "missing link".

II.I.II. THE 1940S: ONE "MISSING LINK" AND TWO INFLUENTIAL WORKS

In a book exclusively dedicated to competition,[363] the German sociologist based in Denmark begins with the diagnosis that classical political economy had dealt normatively with competition as a *principle* and not empirically as a social *relation*. Theodor Geiger defines competition as "separately common striving", whose results to common welfare, in contrast to what is often sustained by liberalism, would be non-verifiable. Such type of relation is "separately" in the sense that, contrary to fighting, competitors avoid one another, but also "common", as long as they move "side-by-side"[364] (in the pursue of the "same object") and not – once again in contrast to fighting – against each other.

Although Geiger dedicates the first half of his book to developing abstract models of competition, his empirical perceptiveness exposes the phenomenon to a variability of forms (among which some very interesting such as the "one-sided" competition, the "absolute" or "relative excluding" competition, the "distancing" competition, etc.). The multiplicity is present even if one takes a single competitive relation as an example: a competitor might pursue an object for an existential purpose, while the other wants to achieve the very same object in order to gain more prestige.

"race rather than fighting", Edward Alsworth Ross, *The Principles of Sociology* (1920), New York, The Century CO, 181-193/208-221. Assuming a likewise socially broad observation of competition (in sports, market, erotic relations etc.), Max Weber defines competition as "peaceful struggle", and struggle as the social relation in which the action of one's own will is oriented against the resistance of the other. Max Weber, *Wirtschaft und Gesellschaft* (1922, 2006), Paderborn, Voltmedia GmbH, 47. Treating competition as a general (not only economic) social principle and as a fact whose emergence is not in the power of men to decide, Leopold von Wiese, *Die Konkurrenz vorwiegend in soziologisch-systematischer Betrachtung* in Deutsche Gesellschaft für Soziologie (DGS), *Verhandlungen des 6. Deutschen Soziologentages vom 17. bis 19. September 1928 in Zürich: Vorträge und Diskussionen in der Hauptversammlung und in den Sitzungen der Untergruppen* (1929), Tübingen, Mohr Siebeck, 15-35. Karl Mannheim too spoke of competition as a broad social phenomenon, although focusing in the intellectual field: Karl Mannheim, *Die Bedeutung der Konkurrenz im Gebiet des Geistigen* in *Verhandlungen des Sechsten Deutschen Soziologentages vom 17. Bis 19. September 1928 in Zürich* (1929), Tübingen, Mohr.

[363] Theodor Geiger, *Konkurrence: en sociologisk analyse* (1940), translated by Gert J. Fode, *Konkurrenz. Eine soziologische Analyse* (2012), Frankfurt am Main, Peter Lang.

[364] Yet, if competitors are not aware of each other (unconscious competition), *the relation between them is missing*. Theodor Geiger, *Konkurrence: en sociologisk analyse* (1940), translated by Gert J. Fode, *Konkurrenz. Eine soziologische Analyse* (2012), Frankfurt am Main, Peter Lang, 14 ("A side view of the others is essentially the competitive relation".).

One of the models designed by Geiger deserves special attention from the present work: the regulated or institutionally excluding competition[365]. Such kind of competition is either limited or hindered by social rules produced by the state (heteronomous regulation) or by the competitors themselves (autonomous regulation). In a path that is similar to Simmel's, the prohibition of competition adulteration (e.g. destroying a work-instrument of a competitor) is faced as no real obstacle to competition, but as an avoidance of the transformation of competition into fighting.[366] Hence, such prohibition differs from the limits imposed *within competition*: for instance, the ban of overtime labor in competition between workers.

In *extensive* regulation, some methods usually forbidden in social life are allowed. Differently from Simmel, Geiger does not explain such specificity of competition with an attachment to utilitarian reasons. He offers a consideration that resembles Cooley's concern with "the preparation of competitors for dispute": in Geiger's book, methods are allowed because there is a "social order" by which individuals know how others act in certain typical situations and how one can act on this basis without violating public opinion. Regulation can also be *restrictive*, when it is directed towards the standards (e.g., the restriction of consulting material in a legal exam), and not to the effects (e.g., the solution of the legal issue with allowance of all possible literary aids). In any case, the concept of competition itself does not offer an indication of which methods should be allowed or prohibited – one can only suggest if such methods are appropriate or inappropriate from a "typically competitive" point of view.

No special place is conferred to economy all along such conceptualization. Yet, Geiger does concede that the principle of competition was not permeating other spheres of cultural life with the same intensity as it did in the economic field. After all, competition is seen as the "dynamic vehicle of progress in modern economic life" – which does not guarantee progress by itself – even when it is not simple a competition for financial profit

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[365] Theodor Geiger, *Konkurrence: en sociologisk analyse* (1940)*, translated by Gert J. Fode, Konkurrenz. Eine soziologische Analyse* (2012), Frankfurt am Main, Peter Lang, 66 and ss. The concept of "regulated competition" is also present in Max Weber, *Wirtschaft und Gesellschaft* (1922, 2006), Paderborn, Voltmedia GmbH, 47.

[366] Quite close to this view, McCulloch had argued for a distinction between "fair" competition (in which workmen do not try to "forcibly prevent others from working") and "violent" or "illegal" means to restrict the supply of labor. However, according to the economist, any attempt to maintain either wages or profits above or below their natural levels would be futile "in the long run". See Kenneth Dennis, *'Competition' in the History of Economic Thought* (1975), Oxford, Faculty of Social Studies, 145.

(as in the Stachanow-Systems). Assuming the task of describing competition within economy as a form of relation,[367] Geiger compares the middle-age long-time relations based on trust between sellers and consumers to the instantaneous processes between sellers and anonymous consumers of his time. Such consumers belong to the triadic form of competition, as Simmel had noted before, but their faces become increasingly amorphous. In the liberal capitalist market (where the technical possibilities of production overcome the demand), not only competitors supply a given market of *potential* consumers but they also *stablish* new markets in which to compete.

In such circumstances, monopoly and competition are not in opposition to each other.[368] Each seller seeks an assortment differentiation – in Geiger's words, a "small monopoly"[369] – for itself, and does so through a strategic and dosed insulation. While in the atomistic model every seller would sell an equivalent product, real markets present a heterogeneous scale of small and infinite variants (also of quantitative price). In such a scale, only "monopolists" compete with each other, that is, only those who compete attempt to break the atomistic chain through achieving a special position in the market. If all the sellers were to reach their income limit – in an equilibrium state between supply and demand – competition would cease. In Geiger's thinking, the idea of an atomistic seller front remains

[367] Theodor Geiger, *Konkurrence: en sociologisk analyse (1940), translated by Gert J. Fode, Konkurrenz. Eine soziologische Analyse* (2012), Frankfurt a.M, Peter Lang, 69-150.

[368] Theodor Geiger, *Konkurrence: en sociologisk analyse* (1940), translated by Gert J. Fode, *Konkurrenz. Eine soziologische Analyse* (2012), Frankfurt a.M, Peter Lang, 149-152 (stating that the "fiasco" of American Antitrust would illuminate the lack of "logic" [almost forty years before Bork's "paradox"!] in the opposition between free competition and monopoly formation. Geiger also implies that, given the technical and organizational structures of big firms, the limitation of concentration led to limit the methods through which better prices were made possible in the past). Interestingly, the very argument that efficiency depended upon scale of production and choice of technology had been used in the first decades of 19th century to criticize the "principle of private competition". Kenneth Dennis, *'Competition' in the History of Economic Thought* (1975), Oxford, Faculty of Social Studies, 150 (quoting Edmunds as a conservative critic of classical theory). Building on an observation of courts and administrative boards to examine the criterion of competition fairness as "whether the practice contributes in the long run to supplying the consumer with the greatest abundance of goods wares or services at the lowest cost" (but not relating it to a particular size of the firm), Edward Alsworth Ross, *The Principles of Sociology* (1920), New York, The Century CO, 184.

[369] Arguing that product rivalry is actually a sign of competition, Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 187 (First, product rivalry introduces so many variables that the stability of oligopolistic peace becomes impossible. Second, product rivalry is just as capable of eating away profits above the competitive level as is price rivalry. Third, product rivalry is a prominent feature of industries that are obviously not concentrated in structure).

important for the mechanism of price equilibrium, but not to competition itself and so not as well to ambitions of technical and economic progress[370].

At this point, one might have noticed that some of Geiger's thoughts will be present in different sides of the debates regarding competition from the 1970s onwards. However, his work seems to be a more or less forgotten link in this history of ideas. This is partially explained by the fact it was not translated from Danish into other languages until very recently. He is not quoted by neoliberals, by critics of neoliberalism nor by most of those who tried to advance more nuanced views regarding competition in the last decades[371] – even though his conceptualization efforts are potentially fruitful, especially for the latter. Contrariwise, two other works written in the 1940s would end up being explicit links for later developments.

One of them is the attempt of Karl Polanyi to avoid strict separation between themes of economic and of sociological research.[372] The author does not accept the usual long-run considerations of economic theory, since they would have taken market system for granted, while it has only been (partially) present as an institutional structure of a specific time. Relying on historical and anthropological research, Polanyi observes that economy, as a rule, is submerged in social relationships. The utopian idea of economic liberalism to set up a

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[370] Curiously, the argument against atomism had already appeared in a famous dissent of Justice Holmes at U.S. Supreme Court. According to Holmes, the logical effect of the majority's opinion condemning the merger in that case would "disintegrate society so far as it could into individual atoms". See *Northern Securities Co v. United States* (1904), 193 U.S. 197, 411.

[371] One of the recent exceptions is the work from Nicole Holzhauser, *Konkurrenz als Erklärungsansatz im Werk Theodor Geigers: Untersucht am Beispiel der sozialen und wirtschaftlichen Konkurrenz als Triebfeder des Strukturwandels der Öffentlichkeit* (2015), available at https://www.researchgate.net/publication/270584779 (arguing that, according to Geiger, social competition would be the fundamental principle to explain social dynamics). Resulting from a research group in Kiel which had Geiger's works as a basis of understanding: Eugen Buss, *Der Wettbewerb: eine rechtssoziologische Untersuchung* (1973), Tübingen, J.C.B. Mohr (presenting the sociologic perspective on competition as a conduct-oriented one, in contrast to the economic point of view which focuses on performances and structures, 176).

[372] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944), New York, Rinehart & Company. Breaking the "inconvenient peace" with economists allegedly proposed by Talcott Parsons. *Cf.* Michel Callon. *Introduction: the embeddedness of economic markets in economics* (1998) in The Sociological Review (Special Issue: Sociological Review Monograph Series: The Laws of the Markets), Ed. vol. 46: S1, 4. But see Talcott Parsons; Neil Smelser, *Economy and Society: a Study in the Integration of Economic and Social Theory* (1956) New York, The Free Press ("subject to the above qualifications, processes *within* the economy and even over its boundaries may be primarily economic and hence subject to analysis in terms of economic theory within the appropriate parametric limitations. But institutional *change in* the economy, however – indeed in any social system – *cannot* be primarily an economic process, because institutional structure is a phenomenon of value patterns and social integration, not simply of the interplay of economic factors", 305).

self-adjusting market implies annihilating the "human and natural substance of society", through its transformation into commodities. As long as all elements of industry – including labor and land – become comprised in market economy, "*instead of economy being embedded in social relations, social relations are embedded in the economic system*"[373].

Such "great transformation" had its historical birthplace in the Industrial Revolution, England. Differently from other societies also limited by economic factors, the nineteenth-century civilization chose to base itself on the principle that conforms the self-regulating market system: that is, on profit. Optimistic as it appears in Smith's thinking or deterministic as it may be in Ricardo's system, there was nothing natural about laissez-faire – it was enforced by the state. Its consequence was a "satanic mill" formed in the industrial towns of England, with their "slum dwellers" and families "on the road to perdition". The history of nineteenth-century civilization was the history of the non-planned attempts to protect society (and capitalistic production itself) against such a mechanism. Such a process was much related to the aspects focused in this retrospective: competition discourse and the state rules related to it.

Since neither long-distance nor local markets are essentially competitive, only the emergence of internal or national trade competition would lead to the acceptance of competition as a general principle of trading. Mercantilism broke down the barriers separating these two types of noncompetitive commerce and cleared the way for a national market. The instrument for the nationalization of the market and creation of internal commerce was the territorial state. However, such state intervention needed to deal also with the connected dangers of monopoly. The free entrance of buyers and sellers would harm the expectations of the former buyers and sellers and the market could become "a prey to the monopolist". As a result, according to Polanyi, "it was the traditional feature of regulation, not the new element of competition, which prevailed"[374].

Examples abounded. By the end of the 1873-86 Depression, Germany had established protective tariffs and a general cartel organization. The United States subsidized

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[373] Karl Polanyi, *The Great Transformation* (1944), New York, Rinehart & Company, 57. In addition to land and labor, money is also an element that "according to the empirical definition of a commodity" is not a commodity. Although "the commodity description of labor, land, and money is entirely fictious", "the fiction of their being so" became "the organizing principle of society". Karl Polanyi, *The Great Transformation* (1944), New York, Rinehart & Company, 72-75.

[374] Karl Polanyi, *The Great Transformation* (1944), New York, Rinehart & Company, 66-67.

long-range railway building and developed the formation of trusts[375]. While protectionism helped to transform competitive markets into monopolistic ones, economic liberals advocated restrictions on the freedom of contract and on laissez-faire. "*The right of trusts, cartels, or other forms of capitalistic combines, to raise prices*", although eventually justified by the principle of laissez-faire, was by "*consistent liberals from Lloyd George and Theodore Roosevelt to Thurman Arnold and Walter Lippmann"* subordinated to a demand for a free competitive market. In other words, if the needs of a self-regulating market were deemed incompatible with the demands of laissez-faire, the economic liberal would prefer – "*as any antiliberal would have done*" – the methods of regulation and restriction.

As antitrust legislation sprang from the demand of freedom of trade, the only economic principle those liberals could maintain without contradicting themselves was that of the self-regulating market.[376] However, they did not succeed in reestablishing freedom. And that happened as a result of the liberals' own efforts to avoid reform involving planning regulation or control – which were then employed by the confessed enemies of freedom to abolish it altogether. As Polanyi observes at his time, even the degeneration of freedom into "*a mere advocacy of free enterprise*" was "*reduced to a fiction*" by the reality of trusts and monopolies. The result of the liberal efforts to reestablish free enterprise was that big businesses installed in several European countries and in brands of fascism[377].

In the other trench, the development of competition would likewise be criticized, but now in its theoretical appearance. The Austrian economist and philosopher Friedrich von Hayek concentrates his criticism in the "so-called" theory of perfect competition. Its great mistake would have been to assume as a fact a *status quo* that the classic view had conceived, instead, as a result (or approximate result) of a competitive process[378]. For example, the

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[375] Arguing that the Sherman Act would encourage corporate consolidations as an alternative to cartels, Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer, 13 ("Far from stopping the trusts, the Sherman Act actually seemed to encourage the great flurry of corporate consolidations. This may have occurred because the Sherman Act was ineffectual or under-enforced. But more likely the Sherman Act actually contributed to the great merger wave by encouraging firms to seek mergers as an alternative to cartels").

[376] Karl Polanyi, *The Great Transformation* (1944), New York, Rinehart & Company, 149. As seen in section i.iii.i., "free market" often paradoxically requires intervention.

[377] Karl Polanyi, *The Great Transformation* (1944), New York, Rinehart & Company, 257.

[378] Friedrich Hayek, *Individualism and Economic Order* (1948), Chicago, University of Chicago Press. The author initially endorses an idea of competition that is quite close to its "direct" form ("Perhaps it is worth recalling that, according to Dr. Johnson, competition is 'the act of endeavouring to gain what another endeavours to gain at the same time'").

knowledge regarding the wishes and desires of consumers and about the lowest cost at which a commodity can be produced (which are assumed to be known by producers or sellers) can only be discovered through the process of competition. Therefore, the theory of perfect competition does not really deal with what could be called competition. "*Especially remarkable*", writes Hayek, "*is the explicit and complete exclusion from the theory of perfect competition of all personal relationships existing between the parties*".[379]

The question to be answered by a "competitive society" would be: how to build institutional arrangements that attract to a particular task those unknown persons who are specially suited to that particular task? In actual life, competition serves "to teach us who serve us well" (which grocer or travel agency, store or hotel, doctor or solicitor, etc.). And such is performed in a context of continuous changing data. Ultimately, competition is about spreading information, creating economic unity and coherence, as well as creating the views about what is best and cheapest.

The necessary difference between commodities and services should not lead one to talk about "defects" of competition. Interestingly for our work, the conclusions derived from the theory of perfect competition are deemed as not useful to guide policy. Those conclusions often lead in the long-run to the "approval of anti-social practices" and to the "support of monopoly" on behalf of a demand for an "orderly competition"[380]. The achievement of competition should be judged in comparison not to an unachievable ideal, but to the situation as it would exist if competition were prevented from operating[381].

In a later work, Hayek would label competition as a "discovery process", or as "*a procedure for discovering facts which, if the procedure did not exist, would remain unknown or at least would not be used*"[382]. Once again, he criticizes the "perfect competition" approach as one that assumes competition "has already performed its function". Competition

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[379] Friedrich Hayek, *Individualism and Economic Order* (1948), Chicago, University of Chicago Press.

[380] Nevertheless, Hayek states that "a monopoly based on superior efficiency, on the other hand, does comparatively little harm so long as it is assured that it will disappear as soon as anyone else becomes more efficient in providing satisfaction to the consumers". Friedrich Hayek, *Individualism and Economic Order* (1948), Chicago, University of Chicago Press.

[381] Thus, a paradigm of the "but for" competition, as we will see in section III.II.I. See also footnote 51.

[382] Friedrich von Hayek, *Wettbewerb als Entdeckungsverfahren* (1968), Kiel, Institut für Weltwirtschaft.

should, instead, discover which things are goods, which goods are scarce, and how scarce or valuable they are. "*Market order*", he continues, "*cannot legitimately be said to have definite objectives*", since it is a "*spontaneously created order*". However, such spontaneous order could help to realize a number of individual objectives which are not known in its totality.[383] Much more important than a possible role in the progress of available technology, and particularly relevant in underdeveloped societies, competition discovers the still unknown possibilities where it was previously limited[384].

Such remarks led Hayek to conclude his work with some political statements about wages of labor. The practical utility of his ideas would also be extensively claimed, in the 1970s, by the politicization of economic conceptions of the market discussed under the heading "neoliberalism". In turn, Polanyi ideas would impact both the denounces of "neoliberalism"[385] and other nuanced views about competition that appear at the same period.

II.I.III. THE LAST FORTY YEARS: SOCIOLOGICAL APPROACHES TO ECONOMICS

The last phase of this story extends from the 1970s to the present days. During this period, one witnesses the emergence of the "New Economic Sociology", of the "Neoinstitutionalism" and of the "Theory of Fields". Several authors have dedicated a sociological approach to economic competition, partly as a reaction to a perceived "economic imperialism".[386] Either as a conceptual development of Polanyi's insights or, as

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[383] Friedrich von Hayek, *Wettbewerb als Entdeckungsverfahren* (1968), Kiel, Institut für Weltwirtschaft, 7-9 (the author uses "order" instead of "equilibrium" because it "has the advantage of allowing us to speak meaningfully about the fact that order can be realized to a greater or lesser degree, and that order can also be preserved as things change").

[384] Friedrich von Hayek, *Wettbewerb als Entdeckungsverfahren* (1968), Kiel, Institut für Weltwirtschaft, 14-15.

[385] For example, Stiglitz: "The advocates of the neoliberal Washington consensus emphasize that it is government interventions that are the source of the problem; the key to transformation is 'getting prices right' and getting the government out of the economy through privatization and liberalization (…) Their perspective represents a misreading of history, as Polanyi effectively argues". Joseph Stiglitz, *Foreword* in Karl Polany, *The Great Transformation: The Political and Economic Origins of Our Time* (1944, 2nd ed 2001), Boston, Beacon Press, xii. See, from the same author, Joseph Stiglitz, Globalization and its discontents (2002). Other relevant denounces of neoliberalism come from David Harvey, A Brief History of Neoliberalism (2005); Richard Münch, Akademischer Kapitalismus. Über die politische Ökonomie der Hochschulreform (2011), and Wolfgang Streeck, Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus (2013).

[386] Beckert notes the "new economic sociology" arises, in part, as a reaction to the expansion of the rational choice approach to fields that were hitherto a domain of sociology. At the same time, however, the author recognizes that new developments within economics have made the discipline more sensitive to the institutional conditions of market exchange (e.g. new institutional economy and behavioral economics). Jens

we argue, also as a latent link to Geiger's nuanced view, those works are all somehow connected to the 1940s.

In the text often considered as a "founding manifesto" of the so-called New Economic Sociology,[387] Granovetter offers a particular approach regarding competition in the economic sphere. His starting point is a criticism of what the author deems to be an idealistic view of perfect competition[388]. Recovering Adam Smith's passage about the "conspiration against the public"[389], Granovetter identifies in the ideal of "perfect competition" the prerequisite of social atomization. According to the author, nothing guarantees that personal economic interest is sought by chivalrous means in the market. Therefore, the alleged discipline of competitive markets would not necessarily mitigate the existence of fraud[390] or recourse to force. The problem of the production of trust in daily economic life, in such a "Hobbesian" scenario, remained open. This is the issued addressed by Granovetter through the concept of "embeddedness".

Beckert, *The Great Transformation of Embeddedness. Karl Polanyi and the New Economic Sociology* (2007), MPIfG Discussion Paper 07/1, Cologne, Max Planck Institute for the Study of Societies Cologne.

[387] Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness* (1985) in Mark Granovetter, Richard Swedberg, *The Sociology of Economic Life* (2011), Westview Press. See Nadya Araujo Guimarães, André Vereta-Nahoum, *Apresentação: Explorando os sentidos sociais da economia* (2017) Tempo Social v. 29, Universidade de São Paulo, 2 (labeling Granovetter's article, along with White's and Burt's works, as a "seminal study")

[388] Partially echoing, thus, Hayek's criticism. See section II.I.II. Such idealist view is, according to Hirschman, the main reason why pro-market economists have not been able to develop the argument about market effect of social integration, since such an argument can not be made in relation to an ideal market with perfect competition. Other reasons would be the attempt to emulate the rigor and precision of the natural sciences and the contempt for sociological concepts about capitalism. Therefore, in face of the evident ties that are formed in real markets, classical economists would denounce "conspiracies against the public", while others would diminish the relevance of these empirical evidence by presenting imperfect competition as something close to its ideal. Thus one of the epigraphs of this thesis. Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?* In *Journal of Economic Literature* (December 1982), Vol XX, 1473. Introducing imperfect competition as an intermediate state between pure monopoly and pure competition, Talcott Parsons; Neil Smelser, *Economy and Society: a Study in the Integration of Economic and Social Theory* (1956) New York, The Free Press, 144. Situating the "omnipresent and everywhere imperfect" competition between the extremes of "perfect competition" and "dominant player", Ronald S. Burt, *Structural Holes: the Social Structure of Competition* (1992), Cambridge, Harvard University Press, 7 ("Competition is imperfect to the extent that any player can affect the terms of any relationship. Oligopoly, the extent to which multiple players together dominate a market, is an insufficient answer. The central question for imperfect competition is how players escape domination, whether it is domination by the market or domination by another player")

[389] See section II.I.I.

[390] As observed by Rosa, actually only those who are publically in position to compete can play a role in corruption in the long-run. Hartmut Rosa, *Wettbewerb als Interaktionsmodus. Kulturelle und sozialstrukturelle Konsequenzen der Konkurrenzgesellschaft*, (2006), Leviathan 34, Nr. 1, S., 91.

Inspired by Polanyi, such concept would suffer its own "great transformation",[391] as its renewed use fails to link to the institutional regulation of markets. Assuming a plurality of meanings, the "mysterious substance" of embeddedness fails to identify the problems of social coordination actors face in the market, among which the problem of competition. Competition and its moderation through regulation, barriers to entry and product differentiation reflects a fundamental coordination problem where (i) while some actors seek to create structures that protect them from pure price competition (ii) others seek to modify the competition rules in force. One can find here a connection between Geiger's "three-phased" and "regulated" types of competition. Regulation intermediates the social dispute which constitutes competition observed from a sociological point of view.

While having the merit of pointing to the absence of any closer consideration of competition-specific regulation, Beckert's criticism of Granovetter's analysis does not accuse an equally important concern. Perhaps impressed by the fact that self-regulating economic structures are "politically appealing to many"[392], Granovetter's criticism of competitive markets eventually failed to inquire about social problems possibly *addressed* by competition. It occurs so as if taking distance from the neoliberal conception of competition should necessarily lead to neglect a much older and multifaceted concept.[393] The contribution of another "founding father" of the New Economic Sociology does not seem to incur the same misconstruction.

In Harrison White's mirror, producers see themselves, not consumers.[394] But the mirror is not of Harrison White: as an external observer, the author avoids imposing an *a*

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[391] Jens Beckert, *The Great Transformation of Embeddedness. Karl Polanyi and the New Economic Sociology* (2007), MPIfG Discussion Paper 07/1, Cologne, Max Planck Institute for the Study of Societies Cologne.

[392] Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness* (1985) in Mark Granovetter, Richard Swedberg, *The Sociology of Economic Life* (2011), Westview Press.

[393] Tobias Werron expands such diagnosis to every "premature conclusions regarding the role and legitimacy of competition in modernity" as well as to those which see "the expansion of competitive forms just as an outcome of the recent rise of neo-liberal market ideology". Tobias Werron, *Why do we believe in competition? A historical-sociological view of competition as an institutionalized modern imaginary* (2015), Distinktion, Scandinavian Journal of Social Theory, 204. To some extent, also Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (1984) Frankfurt am Main, Suhrkamp, 524 ("Wichtige Ordnungsbegriffe des 18. und 19. Jahrhunderts wie Nutzen, Kosten und *Konkurrenz* werden heute oft rückblickend als Ausdruck eines übertriebenen, individualistischen Liberalismus *diffamiert*" emphasis added).

[394] *Cf.* Harrison White, *Where do markets come from?* (1981), American Journal of Sociology, Volume 87, Issue 3, November; See also Eric M. Leifer, Harrison C. White, *A Structural Approach to Markets* in M. Schwartz, M. Mizruchi (1988), New York, Cambridge University Press.

priori characteristic to the erratic and conflicting behavior of companies in a given market[395]. *"Markets are defined by self-reproducing clicks of firms, and not the other way around"*. Markets are produced as companies make their decisions and identify their own "niches" based on the observation regarding the behavior of all other producers. Notably, it means: in the observation of the volume/price *ratio* that each of these producers places in a point of the scale of a viable market. The volumes and incomes, suggested to the observer by this context, function, in turn, as a guide for the next period of production. It therefore acquires a certain character of self-fulfilling prophecy. In order to be able to fulfill such prophecy, producers need not to imagine the "mysterious" preference of the consumer. Instead, they observe the behavior (price and relative quality) already adopted in the market.

White's proposal echoes classic theoretical intuitions about the socializing role of competition[396], as well as Geiger's insight about the scale of unique positions within a viable market.[397] It advances, nevertheless, in important respects. By illustrating the behavior of firms in the market, the mirror metaphor suggests the functioning of competition in contemporary economic circumstances. Firms need to deal with an uncertain future. The information required for supposedly maximizing and efficient behavior is not available[398]. Hence, the agents choose to refer to the existing productive structures, through more accessible data than the econometric curves. In Leifer's and White's synthesis: "*reproducibility, rather than efficiency, is the main issue*". The question of reproducibility arises along with that of *ex post* interdependence between competitors – that is, with the actual existence of a competitive scenario, although sometimes limited by some "blocking action".[399]

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[395] Followed at this point by Ronald S. Burt, *Structural Holes: the Social Structure of Competition* (1992), Cambridge, Harvard University Press, 4 (competition is a relation emergent, *not observed*).

[396] Se section II.I.I. (Cooley and Simmel).

[397] Such niche-defining strategy would also echo in Callon's statement that "the very nature of competition is to make competition rare." Michel Callon. *Introduction: the embeddedness of economic markets in economics* (1998) in The Sociological Review (Special Issue: Sociological Review Monograph Series: The Laws of the Markets), Ed. vol. 46: S1. They all reverberate Chamberlin's monopolistic competition and to some extent Robinson's imperfect competition theories.

[398] Which is recognized by the DOJ's Merger Guidelines (2010): "(…) Businesses often cannot easily determine the profit-maximizing price, and may do so through trial and error (...)"

[399] Harrison White, *Identity and Control: How Social Formations Emerge* (1992; 2nd ed. 2008), Princeton, Princenton University Press. It is interesting to notice that the relationship between efficiency and competition was already present in the discussions among defendants and opponents of the major trading companies in the 17th century: Kenneth Dennis, *'Competition' in the History of Economic Thought* (1975),

To this extent, White's approach carries an attempt to immerse neoclassical theory into a sociological view of markets, following Polanyi's paces. Unlike neoclassical theory, the emphasis is put on the markets of production and not on exchange.[400] Markets are seen as real structures and not as an analytical device which allows inferences about economy. The impact of this approach to antitrust is yet to be explored, specially if White is correct when affirming that antitrust "seems to shape the concepts more than does microeconomic theory". To remain now with one suggestion given by White himself, assumptions about the market share of firms in a concentrated market could be replaced by an explicit theory of market formation. Other implications for antitrust could be imagined[401].

In a nutshell, while Granovetter criticizes the atomistic view of the market, White's view specifically addresses the relation between producers. An attempt to provide a more general approach – one which combines the sociology of competition with a theory of modern society – is offered by Pierre Bourdieu. In his view[402], the economic field distinguishes itself from other fields because of its sanctions and because conducts can present themselves *publicly* as having the aim of maximizing individual material profit[403]. Its agents are the firms[404] which determine the structure of the field and the state of the forces exercised upon the set of firms that produce similar goods (consumers have only minimal interaction).

The forces related to an agent depend on its strategic market assets and its participation on the unequal distribution of capitals. Those guarantee an advantage in competition and the possibility of exercising pressure over dominated firms. The dominant firm becomes an obligatory reference point: a small number of powerful companies are

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Oxford, Faculty of Social Studies 39-40 (noticing that they missed "some alternative calculus which centered upon the idea of efficiency in production, not in exchange"). Fligstein and Dauter believe that one way to progress in the matter of the social structures of markets is precisely to question efficiency. Neil Fligstein, Luke Dauter, *The sociology of Markets* (2007), translated by Cristiano Fonseca Monteiro, *A sociologia dos mercados* (2012), Cadernos CRH, vol. 25, n. 66, 485. See also 497 and ss.

[400] See Richard Swedberg, *Markets in Society* in N. Smelser, R. Swedberg, *Handbook of Economic Sociology* (2005), Princeton, Princeton University Press, 250, n. 1, 244.

[401] See chapter III of this thesis.

[402] Pierre Bourdieu, *Le champ économique* in *Actes de la Recherche en Sciences Sociales* (1997), translated by Suzana Cardoso and Cécile Raud-Mattedi, *Política & Sociedade* (2005), v. 4, n. 6.

[403] Nevertheless, they might prefer to adopt the "adaptive technique" mentioned in footnote 65.

[404] Which can be themselves viewed as fields. Pierre Bourdieu, *Le champ économique* in *Actes de la Recherche en Sciences Sociales* (1997), translated by Suzana Cardoso and Cécile Raud-Mattedi, *Política & Sociedade* (2005), v. 4, n. 6, 42-43

capable of actively transforming (and not only passively adapting to) a market situation. They have the initiative in terms of price changing, introduction of new products and actions of distribution and advertisement. Interestingly, competition between firms often assumes the form of a competition over the state power and for the advantages assured by different interventions from the state (an insight that might be important in contexts like the Brazilian case of society[405]).

Bourdieu's approach is general enough not to limit the observation of competition to the economic field[406]. In a former work, the author had differentiated the system of (cultural) industry from the field of scholarly production. While in industry each competitor seeks to achieve the largest possible market, in the scholarly arena competition would be for cultural recognition granted by the group of peers who are at the same time "privileged customers and competitors"[407]. Hence, competition for the monopoly of scientific legitimacy would include different strategies: the mutual recognition of legitimacy between those who are not in direct competition (for example, theoreticians and empiricists), the symbolic annexation

[405] See section II.II.III.

[406] Pierre Bourdieu, *Le marché des biens symboliques* (1971) translated by Sergio Miceli, *A economia das trocas simbólicas* (1987), Rio de Janeiro, Ed. Perspectiva. The idea of explaining market logics which are different from those theorized by economists would have a marked presence in the new economic sociology and in the sociology of trade that develops thereafter. In the French tradition, one could retrieve it back to Mauss, according to whom certain exchange phenomena, although they reflect a different regime than the mercantile trade, nevertheless are still "economic markets". In the transactions that integrate the systems of gifts, one verifies a perpetual economic – although little material – excitation. The relations of exchange created by antique populations to satisfy mutual interests are linked to what he describes as "one of the permanent secrets of their wisdom and solidarity", namely, "to oppose without massacring each other" (one should notice that the notion of "opposition without massacre" also approximates the socializing effect that Cooley and Simmel had found in competition). See Marcel Mauss, *Essai sur le don* (1925), translated by Paulo Neves, *Ensaio sobre a dádiva* (2003) Presses Universitaires de France. In Bourdieu, it is possible to identify the phenomenon of exchange as something abstract enough to encompass economic and symbolic interests that are connected to each other. The gift would be a type of behavior capable of connecting these two fields (economic and symbolic) by enabling a symbolic gain which comes from donation. On the one hand, the connection with the world of interested behavior is maintained. On the other hand, it would be possible to overcome the economic approach according to which the gift presupposes, even without a self-conscious calculation, the return of something of the same matter. As Callon notes, the action becomes calculable to the *observer* that is able to reconcile the disinterested subjective experience with the form of a counter-gift whose return can be reasonably anticipated. See Michel Callon. *Introduction: the embeddedness of economic markets in economics* (1998) in The Sociological Review (Special Issue: Sociological Review Monograph Series: The Laws of the Markets), Ed. vol. 46: S1, 14.

[407] Pierre Bourdieu, *Le marché des biens symboliques* (1971) translated by Sergio Miceli, *A economia das trocas simbólicas* (1987), Rio de Janeiro, Ed. Perspectiva, 105.

practiced by the great theoreticians, and the excommunication based on the questioning of authority and the scientific qualification of competitors[408].

A careful look regarding the consumer side could enable also other observations[409]. One good example is given by Phillipe Steiner based on the works of Karpik.[410] The French sociologist calls attention to the existence of a consumer who seeks the "good" product, one that matches his "taste" and reveals his "good taste". There are *market* goods that are also *cultural* goods (like music, wine, clothes, movies and a great number of services). While it is true that such a view reflects a tradition that has also been used in White's construction of the mirror – namely, Frank Knight's and Edward Chamberlin's studies of modern forms of market competition – more cautious attention to consumer behavior enables additional refinement of the "mysterious consumer". On the one hand, the uncertainty of modern markets personifies in the entrepreneur the capacity to face situations in which the calculation of risks is impossible. On the other hand, the differentiation of products suggests new opportunities to avoid price competition. It is now possible to speak of competition among *valuation devices*, not simply among producers. Those devices include personal or professional networks, names or brands, guides and critics, rankings and marketers.[411]

These last considerations suggest competition does not only cope with uncertainty but also formats the demand. According to Michel Callon, competition can only emerge in a highly structured industry. This means competition, defined as a situation where a group

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[408] Pierre Bourdieu, *Le marché des biens symboliques* (1971) translated by Sergio Miceli, *A economia das trocas simbólicas* (1987), Rio de Janeiro, Ed. Perspectiva, 172.

[409] This is not to say that Bourdieu has completely neglected observations from the consumer side. On the contrary, he advances an interesting hypothesis regarding the homology between the space of producers and the space of consumers. Quoting Simmel, he notices that the pressure by a dominant producer over his competitors is exercised by the mediation of the field – that is, as an "indirect" conflict. Producers occupying a specific position in the structure of a specific capital meet clients occupying homolog positions in the social space. Pierre Bourdieu, *Actes de la Recherche en Sciences Sociales* (1997), translated by Suzana Cardoso and Cécile Raud-Mattedi, *Política & Sociedade* (2005), v. 4, n. 6, 45.

[410] See Philippe Steiner, *Altruísmo, dons e trocas simbólicas* (2016), São Paulo, Editora Unesp. The attention to specific characteristics of consumers are to be included in a long tradition that can be traced back to the efforts, in the early 19th century, on expanding the definition of the interest of consumers. See footnote 339.

[411] Here is important to confront the studies on the figure of the intermediates, such as market critics and Law School rankings. See Ezra Zuckermann, *The Categorial Imperative: Securities Analysts and the Illegitimacy Discount* in *American Journal of Sociology 104* (1999), 1398-1438 and Michael Sauder, *Third Parties and Status Systems. How the Structures of Status Systems Matter* in *Theory and Society 35* (2006) 299-32. The understanding of intermediates and comparisons as a social practice on which competition relies is an important feature of Werron's contribution to the sociology of competition, as we will see in section II.III.III.

of firms produce identical or related products, is not a starting point, but rather an ending point that appears only when the technical options have already been structured. It is a process in which "calculating agencies" capture a demand they have helped to (re)define, with apparatus capable of integrating the calculations of other agencies into their own calculations[412]. Therefore, they contribute to define – to *perform* – the market as a dynamic process[413], with no need for individuals to become, themselves, *homo economicus* capable of performing mental calculations of a maximizing nature.

Finally, some authors during the last decades have attempted to refine the diagnostic of an "economization of society"[414] through the use of sociology of competition. The principle of competition (and not economic rationality) would have transcended the frontier of the economic sphere as far as to dominate the formative institutions and structures of modern society as a whole[415]. As a consequence, competition would have effectively been transformed from a means to an end in itself. When such transformation happens, some authors sustain competition does not produce social integration, as Cooley and Simmel thought, but "problematic, counterproductive dynamics"[416]. The pervasive phenomenon of competition would have spread to areas as different as sports, online dating, universities, art, talent shows, etc.[417]

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[412] Michel Callon. *Introduction: the embeddedness of economic markets in economics* (1998) in The Sociological Review (Special Issue: Sociological Review Monograph Series: The Laws of the Markets), Ed. vol. 46: S1. In Bourdieu's view, the modern theory of industrial organization transfers to the level of the firm the model of the individual decision as a result of a calculus oriented to the maximization of profit. Pierre Bourdieu, *Actes de la Recherche en Sciences Sociales* (1997), translated by Suzana Cardoso and Cécile Raud-Mattedi, *Política & Sociedade* (2005), v. 4, n. 6, 30.

[413] For an empirical example in the market of the Chicago Board Option Exchange, see Donald Mackenzie, Yuval Millo, *Constructing a Market, Performing Theory: The Historical Sociology of a Financial Derivatives Exchange* (2003), American Journal of Sociology, vol. 109, n. 1.

[414] For an example of such diagnostic using systems theory, see Laurindo Dias Minhoto; Guilherme Leite Gonçalves. *Nova ideologia alemã? A teoria social envenenada de Niklas Luhmann* (Jul/Dez 2015), São Paulo, Tempo Social, vol. 27, n. 2 ("we will try to indicate possibilities for the negative use of systems theory as a critical model - a marker of trends of functional dedifferentiation that are articulated with the *imperialist economic rationality of neoliberalism*, in particular, the tendency towards the formation of different 'industries' in different spheres of contemporary social life" – our translation)

[415] Hartmut Rosa, *Wettbewerb als Interaktionsmodus. Kulturelle und sozialstrukturelle Konsequenzen der Konkurrenzgesellschaft*, (2006), Leviathan 34, Nr. 1, S., 91. The expansion of competition was also suggested by Michel Foucault, *Naissance de la biopolitique* (1979), translated by Eduardo Brandão, *Nascimento da biopolítica* (2008), São Paulo, Martins Fontes, 203.

[416] Dietmar J. Wetzel, *Soziologie des Wettbewerbs. Eine kultur- und wirtschaftssoziologische Analyse der Marktgesellschaft* (2013), Wiesbaden, Springer VS, 219.

[417] See empirical examples in Pascal Duret, *Sociologie de la compétition* (2009), Armand Colin (arguing that the criticism of competition should consider the links between competition and a model of society

As this section has shown, Granovetter aligns with those who criticize the social atomization presupposed in the ideal of perfect competition. But his use of the concept of "embeddedness" fails to identify the problems of social coordination involved in competition, as well as the social problems that competition addresses. White advances in recognizing the relevance of mutual observation between producers to the reproducibility of markets. Also focused on the production side, Bourdieu offers a broader approach on competition that could be employed in non-economic fields. Finally, authors like Karpik, Steiner and Callon focused on consumers and valuation devices to understand how markets are formed and performed.

Producers, intermediates and consumers shape the constellation that is commonly known as competition. Bourdieu was right to search for competitive dynamics in other social fields beyond economy: as authors like Rosa have observed, competition is a pervasive phenomenon of modern society. Yet, it is not easy to interpret the reasons for such pervasiveness. Firstly, one should not confuse a centennial organizing element like competition with its neoliberal scarecrow. Moreover, the argument of society's economization/"competitionalization" often overlooks the fact competition has been implemented only in a limited way within its alleged hatcher: the economic sphere.

This thesis aims offering a further nuance to such debate. It will consider a specific social form that seems to best grasp the concept of competition in a limited empirical context: antitrust law. The sociology of competition as recouped in this chapter will be helpful in the delimitation of such a concept, especially in the path traced by the two following insights: (i) competition is not merely a principle (an ideal) or a negative statement (a "but for" world), but a constellation stablished by concrete relations and (ii) it performs functions which are not reducible to economic effects. Before we have the chance to further develop these ideas, we should explore the characteristics of the phenomenon of competition in the context of our geographic emphasis: Brazil.

based on solidarity or care); Dietmar J. Wetzel, *Soziologie des Wettbewerbs. Eine kultur- und wirtschaftssoziologische Analyse der Marktgesellschaft* (2013), Wiesbaden, Springer VS (with empirical work on sports, online dating, universities and financial market); Markus Tauschek, *Kulturen des Wettbewerbs: Formationen kompetitiver Logiken* (2013), Münster, Waxmann (with the project of presenting empirical work between competition euphoria and competition criticism).

II.II. COMPETITION IN THE BRAZILIAN SOCIAL THOUGHT

II.II.I. SINCE COLONIAL TIMES? MONOPOLIES AND THE "OTHER SIDE"

Now it should be well-defined that a parallel discourse on competition has emerged from sociological works since the end of 19th century. The purpose of this section is to assess whether such discourse had any resemblance in the knowledge on competition produced in Brazil. In order to do so, we will look back to the origins of our economic structure and face a classical interpretation of its legacy. According to a development of such view, the strongest economic roots of the country are to be found less in competition than in its "other side": the monopoly.

By the end of the 16th century, half of the Brazilian 60-thousand-population was European. The most relevant economic activity at the time was the production of sugar, concentrated in the states of Bahia and Pernambuco. The Northeast of Brazil, where those states are located, was the region that showed the highest levels of income[418]. Brazil was the world's largest producer and exporter of sugar. The internal social hierarchy, down from the slaves up to the mill lords (*senhores de engenho*), was also structured by the sugar cane plantations[419]. But an influential interpretation holds that the ultimate reasons for our economic and social configuration were not to be found inside the Brazilian territory.

According to this view, the "discoveries" were essentially a chapter of the history of European commerce[420]. Commerce was the reason for the initial Portuguese contempt for American territory, in contrast to the prestige of Eastern territories that harbored important commercial opportunities. In America, it was insufficient to advance trading posts with a

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[418] Harold Johnson, *The Portuguese Settlement of Brazil, 1500-1580* in Leslie Bethell, *The Cambridge History of Latin America vol. 1* (1984) Cambridge, Cambridge University Press, 285. ("In contrast to these areas of settlement which, apart from Rio de Janeiro, were either declining or barely holding their own, the last quarter of the century was for Bahia and Pernambuco a period of unqualified success: these captaincies were to become the focal points of Brazil in the next century", 281)

[419] As portrayed by Schwartz, "society crystallized with white Europeans at the top, tan-coloured people of mixed race receiving lesser esteem, and black slaves considered, like the dark *panda* sugar, to be of the lowest quality". Stuart Schwartz, *Plantations and peripheries, c. 1580-c.1750"* in Lesle Bethell, *Colonial Brazil* (1987), Cambridge, Cambridge University Press, 67.

[420] Caio Prado Jr., *História econômica do Brasil*. (1945, 11 ed., 1969) São Paulo, Brasiliense (chapter 2). The "drive" or "meaning" of colonization in Brazil is a topic of a former work, Caio Prado Jr., *Formação do Brasil contemporâneo: colônia* (1942, 2008), São Paulo, Brasiliense.

limited number of individuals in charge of the business, its administration and defense. It was necessary to create a settlement capable of supplying and maintaining the trading posts.

Initially – the story goes – the only products that mattered were the spontaneous, extractive products. They were construction woods or dyeing elements, such as Brazilwood. Those did not require more than trading posts to be commercialized. Later, however, the vast territories of the American tropics started to be occupied. And in contrast to more temperate climates in America, the tropical territories would only attract Europeans interested in leading the production. Only exceptionally Europeans would come as workers.

Another distinctive element between the colonization in temperate – and more European-like – territories, and tropical territories such as Brazil, was the scale of the enterprise. In the tropics, the agrarian exploration would be made in large scale, with huge productive units like farms, mills and plantations. Each unit would host a relevant number of workers subordinated to the owner. Many of them were slaves taken from Africa, a particular feature of the modern world that Portugal sadly pioneered.

Thus, the tropical colonies took a quite different path compared to the colonies in the temperate zone. The latter was a sewer for Europe's demographic excesses, a reconstitution in the new world of an organization and a society similar to the original. In the formers, a whole new society would emerge, one whose commercial character permeates the combination of slave work and production of valuable goods. The essence of Brazilian formation, in Prado Jr's words, was to sell "sugar, tobacco, other few goods; later, gold and diamond; and in the future cotton and coffee". Brazilian society and economy were organized with an external objective: the interests of European commerce[421].

Oriented to the exterior as it was, such economic and social model had its internal correspondence. Beyond external dependence, that status of colony created "internal power structures". This is the main thesis of Salomão Filho[422]. Influenced by classic authors like Caio Prado Jr. and Celso Furtado, the author observes that Brazilian economy in colonial

[421] It is worth noting that the transactions with the European commerce were intermediated by a bilateral monopoly: since commerce with countries other than Portugal was prohibited, Brazil had a single buyer for its export products and a single seller for the goods coming from Europe. Paula Forgioni, *Os Fundamentos do Antitruste* (1998; 9ª ed. 2016), São Paulo, Editora Revista dos Tribunais, 90 – 91.

[422] Calixto Salomão Filho, *Monopolies and Underdevelopment: From Colonial Past to Global Reality* (2015), Edward Elgar, Cheltenham.

times had two monopolized or oligopolized "dynamic sectors": one concentrated in primary products or low-technology goods for export; the other in durable consumer goods to be consumed internally by the higher income segments of the population.

Hence, Salomão Filho switches the key of primary focus from the external commerce to the structures of economic power and the income distribution accompanying them. Those structures are presented as the main (internal) causes of underdevelopment. Monopolies are deemed to have a "triple draining effect", meaning that they drain resources and concentrate income (i) from the consumer, (ii) the labour force and (iii) other dependent economic sectors. "The central problem of colonial legacy", therefore, "is not primarily in international trade structures, but rather in internal structures of economic power". In contrast to Prado Jr, such structures might not always be linked to external economic and commercial interests.

In the reconstitution of Salomão Filho, the economies of colonies are distinguished by the existence of a single crop or of a single extractive product for export. The role fulfilled by monopoly and extractive activity (and even subsistence activity) is to allocate wealth in the hands of the dominant economic player in the given period. And the dominant player, either a private or a state actor, was always a monopoly. Even after the colonial period, the economies would continue to be dominated by large extractive interests, now transformed into large industrial interests. There would remain not much room for small entrepreneurship, whether agriculture or manufacturing.

Although helping to consolidate the power of large *latifundia* owners, the sugarcane cycle did not create a national economic unit. The mill (or *engenho* – the sugar cane farm) is deemed to have been economically "self-sufficient". As slave work was used both in sugarcane plantations and in food crops, no regional flux of commerce is considered. The export activity was as synonym for exported monopoly. "In its shadow", continues Salomão Filho, "nothing thrived, neither the consumer nor any complementary industry, continually constituted by subsistence economies dependent on the major exporter establishment".

The role of slavery in this context was to allow that the monopolistic regime expanded the monopolist price premium beyond the consumer market. Being agriculture the main activity, the accumulation depended on obtaining a premium on invested capital. Slavery created a class of slave traders, which contributed to the "debilitating" trend of demand as an autonomous driving force of development processes. As Alencastro puts it,

the dealers from the Portuguese metropolis combined the advantages of an oligopsony in buying sugar, with the ones of an oligopoly in the supply of slaves[423]. In addition to not generating income, slavery is deemed to have prevented that income was formed in other sectors, since slaves were used also in the support and maintenance of the mills. Slave labor and private monopoly power were intertwined.

The insertion of the monopoly in the state apparatus was done in Latin American colonization since the beginning. The metropolis led the formation of the monopoly and the colonial state was formed to protect monopoly interests. Moreover, the colonial domination had as its main objective enabling commercial domination. Its main objective was trade, not territorial interests. In the story developed by Salomão Filho, monopolies were also *internal* structures that drained colonial economy, resources and society[424].

Both "external commerce" (Prado Jr.) and "monopolies" (Salomão Filho) are probably among the most powerful explanations for Brazilian economic and social enduring structures. Nevertheless, this topic wishes to read such diagnosis through the lens of methodological caveats from economic historiography. We refer to the debate on the role of pre-conceptions and fact-discovery in the work of an (economic) historian. Being aware of such caveats often leads one to inquiry what is on the "other side" of economic explanations.

On an attempt to answer to the question "what is history?", Edward Carr states that history is a process of continuous interaction between the historian and its facts. Such interaction is also an endless dialogue between the present and the past[425]. The 19th century, in this view, was a "great time for the facts". History consisted in the compilation of the greatest possible number of irrefutable facts. Such fetishism about facts was complemented by a fetishism about documents. According to Carr, though, even if found in document, the fact has to be "processed" by the historian before use. Interpretation is the "live blood" of history.

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[423] Luis Felipe de Alencastro, *O trato dos viventes. Formação do Brasil no Atlântico Sul* (2000), São Paulo, Companhia das Letras, 37.

[424] Naturally, monopolies were themselves an expression of an international configuration. The year 1630 is allegedly the apogee of the *engenho* regime also because never again Brazilian planters would be as free from foreign competition. See Stuart Schwartz, *Plantations and peripheries, c. 1580-c.1750"* in Lesle Bethell, *Colonial Brazil* (1987), Cambridge, Cambridge University Press, 74.

[425] Edward Carr. *What is history?* (1961) translated by Lúcia Maurício de Alverga, *Que é história?* (3. ed 1982) São Paulo, Paz e Terra.

In the specific realm of economic history, an aspect of the relation between facts and interpretation takes the form of an "irony of scholarship"[426]. Economic historians criticize economic theorists for using oversimplified models in their analysis. However, the formers adopt the same assumptions – for example, the assumption that firms produce only a single product – in their historical works. According to Fogel, theory and mathematics have always been embedded in the writings of economic history, but in the past such theorizing was made implicit.

The "division of labor"[427] between economic theorists and economic historians might not be as clear as it seems. The economist is concerned with building models, while the economic historian asks whether such theorizing is true when applied in earlier times or other places. Economic history offers a sense of variety and flexibility of social arrangements, since models are likely to be partial in scope and limited in applicability. But the latter organizes incomplete perceptions about the economy, telling causal stories with the help of a few central principles.

In this sense, "international commerce" and "monopolized structures" compose two sides of a theory that organizes *a* story of Brazil's economic origins. However, they might not be *the* only story to be told. One might want to depict Brazilian economic origins with more variety and flexibility than the causal stories organized by those central principles are able to portray. Behind such nuanced perspective, other structuring phenomena could emerge.

One might be curious enough, for example, to ask how competition was structured since the early times of Brazilian economy. This means setting aside for a while the lens that tend to view competition always as a negative element: an absence or a mere ideology. Hopefully, such path might lead to an understanding of the structure, the functions and dysfunctions of competition in peripheral contexts, adding a renewed perspective to the overall sociological discourse on competition.

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[426] Robert William Fogel, *The Specification Problem in Economic History* (1967), Volume XXVII, number 3, 291.

[427] Robert M. Solow, *Economic History and Economics* (1985), The American Economic Review, vol. 75, n. 2, 331.

An interesting clue is provided by Fragoso and Florentino. They postulate an interpretation for the relative Portuguese "delay" in 18th century that does not explain it as an incapacity of following the European capitalist destiny. Archaism is deemed to be a social project[428]. Tracing it back in time, the Portuguese aristocracy had implemented a policy that was opposed to the constitution of monopolistic mercantile companies. Such policy might have been the reason for the failure of the General Company of Commerce in Brazil, in the 17th century[429]. There was a tacit alliance between the noblemen and small dealers, as a means to prevent the growth of merchants and to bar the economic modifications that they could eventually promote.

The Permit from 1785, which ordered that all the factories and manufactures existing in the colony were extinguished, provides an idea of the degree of development reached at the time[430]. Moreover, the colonies were able to develop an important subsistence economy, with production for the internal market. They generated internal accumulation circuits and diversified food production, not only export agriculture[431]. Archaism as a project depended indeed on the appropriation of colonial incomes. But more than creating a monoculture and export system, the colonization aimed at reproducing a highly differentiated hierarchy. Such stratification was ultimately based in slavery, that is, in relations of power.

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[428] João Fragoso, Manolo Florentino. *O arcaísmo como projeto. Mercado Atlântico, sociedade agrária e elite mercantil no Rio de Janeiro, c. 1790-1840* (1993), Rio de Janeiro, Diadorim, 27. Arguing that the colonization of the American land departed from the first-century bourgeois and commercial norms of Portuguese imperialism, as it revived the methods of aristocratic and agrarian self-colonization applied in Portugal to the territory reconquered by the Moors, Gilberto Freyre, *Casa-Grande & Senzala* (1933, 51st ed. 2006), Global, São Paulo, 275.

[429] Arguing that those companies [Companhia Geral do Comércio do Brasil (1649), Companhia do Maranhão (1678), Companhia Geral do Grão-Pará e Maranhão (1755) and Companhia de Pernambuco e Paraíba] are characterized by the official initiative and the preponderant role of the State, unlike the English and Dutch companies, which housed individuals under the sovereign's aid, Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (1958, 5a ed. 2012), São Paulo, Globo, 259.

[430] The text covered "all the factories and manufactures of gold and silver, of velvet, bright, satins, taffeta, or any other quality of silk; of belts, bib and brace, breeches and shorts of cotton, (...) or of any other quality of woven fabrics of wool (...) or of gold, silver or silk, cotton, linen or wool, mixed and woven with one another, but also of cloth, and the factories and the manufacture of hats, all abolished and extinct (...)". See Isabel Vaz, *Direito econômico da concorrência* (1993), Rio de Janeiro, Forense, 61.

[431] This is the main controversy with the author Fernando Novais, whom Fragoso and Florentino consider to be a developer of the ideas of Caio Prado and Celso Furtado. See João Fragoso, Manolo Florentino. *O arcaísmo como projeto. Mercado Atlântico, sociedade agrária e elite mercantil no Rio de Janeiro, c. 1790-1840* (1993), Rio de Janeiro, Diadorim, 24.

Correspondingly, Schwartz notices an agricultural hierarchy according to the export possibilities of the crops[432]. The best lands were given to export crops like sugar-cane or tobacco. Marginal lands would be used by subsistence farming, especially growing manioc. Cattle raising, for internal consumption or for export, would be carried out on land unsuited for export crops.

Something similar happened to the social structure that followed the colonial economy. Instead of a black-white distinction, one may refer to a "hierarchy of colour". Mullatos tended to receive a comparatively preferential treatment at one end of the scale, although such treatment would be accompanied by prejudice against them as inconstant, sly, and uppity[433]. Africans stood at the other end; and the *crioulos* between them. The *forros* or *administrados,* native Brazilians placed under the tutelage of colonists, were legally free but treated almost equally to slaves[434]. Though created by slave-owners, there are indications that such distinctions were maintained by the colored population. Schwartz mentions the rivalry between Africans and *crioulos* in militia units as an example of such maintenance.

A comparable hierarchy was observed among agriculturalists[435]. Sugar planters and cane farmers were almost invariably white. Tobacco farmers were nearly always white. Manioc farmers, in turn, included *pardos, mestizos* and free blacks. The role of women in colonial society was also quite complex[436]. It is true that there was a rigid double standard of female chastity and constancy and male promiscuity. Women were also expected to devote to the life of an obedient daughter, submissive wife, and loving mother. But many women assumed the role of household head in their widowhood or because of desertion. Because of Portuguese laws of inheritance, women were found as plantation owners, *lavradores de cana,* and owners of urban real estate.

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[432] Cf. Stuart Schwartz, *Plantations and peripheries, c. 1580-c.1750"* in Lesle Bethell, *Colonial Brazil* (1987), Cambridge, Cambridge University Press, 99-100.

[433] About the "inferiority complex" of *mullatos*, see also Gilberto Freyre, *Casa-Grande & Senzala* (1933, 51a ed. 2006), Global, São Paulo, 537.

[434] Cf. Stuart Schwartz, *Plantations and peripheries, c. 1580-c.1750"* in Lesle Bethell, *Colonial Brazil* (1987), Cambridge, Cambridge University Press, 137.

[435] See Stuart Schwartz, *Plantations and peripheries, c. 1580-c.1750"* in Lesle Bethell, *Colonial Brazil* (1987), Cambridge, Cambridge University Press, 100.

[436] Stuart Schwartz, *Plantations and peripheries, c. 1580-c.1750"* in Lesle Bethell, *Colonial Brazil* (1987), Cambridge, Cambridge University Press, 142.

Such hierarchies and rivalries permit an idea of the features conforming competition that were early accumulated in Brazilian social structure. More than an economically or naturally [437] determined monopoly, there were relations of power conforming the possibilities of competition in the country. Personal relations were the principal factor which motivated society and held it together. And such relations were based on the extended family and kin groups, on shared social status and goals, as well as on common economic interests. State and society, in this context, were linked to ensure the survival of the colony and the economic dominance of the groups which controlled Brazil's exports.

II.II.II. THE PHENOMENON OF COMPETITION: A "MYTH" IN THE TROPICS?

An outlier in the Brazilian intellectual landscape, a book published in 1939 dedicated substantial paragraphs to the study of competition as a social phenomenon[438]. The view which emerged from those pages was different, in important regards, from the works published in other countries decades earlier[439]. Characteristics of the country's economic and social landscape might help to explain the singularity of this early Brazilian study on competition.

The principles of liberalism, especially individualism and free competition, reverberated into Brazilian political commitments since the 1830s and 1840s[440]. After Independence, successive Finance Ministers of the country claimed to defend classic

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[437] Arguing that the *latifundia* were a result of the type of agriculture crop, despite of the "democratic concerns" of the metropolis. Paulo Mercadante, *A consciência conservadora no Brasil* (1965) Rio de Janeiro, Editora Saga, 43 (retrieving the norm of the *Ordenações,* according to which donations of sesmarias should be limited to the capacity of each concessionaire to exploit, so that "no larger lands were given to a person than he reasonably appeared to be able to enjoy"). Identifying the relations of power, on the other hand, 44 ("The senhor de engenho kept the military organization, was able to confront the savage, and surpassed the small owner in armed struggles".) Gilberto Freyre argues that only *plantation* and slave colonization would have been able to withstand the "enormous obstacles that arose to the civilization of Brazil by the European", Gilberto Freyre, *Casa-Grande & Senzala* (1933, 51a ed. 2006), Global, São Paulo, 323-324 (also arguing that everything was left to private initiative: the installation costs, military defense charges, but also the privileges of command and jurisdiction over huge lands). Defending that private initiative in the hereditary captaincies in Brazil was a "greenhouse initiative", without the trace of autonomy – almost rebellion and defiance of the state – of future industrial capitalism, Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (1958, 5a ed. 2012), São Paulo, Globo, 135.

[438] Jose Ferreira de Souza, *Uniões de Emprezas Concorrentes* (1939), Rio de Janeiro.

[439] See the contributions from Cooley and Simmel in item II.I.I.

[440] Referring to a "breeze" of liberalism since the opening of the ports in 1808, Isabel Vaz, *Direito econômico da concorrência* (1993), Rio de Janeiro, Forense, 63-71 (following Furtado, she argues that Visconde de Cairu was the main interpreter of an extreme economic liberalism in Brazil – in contrast to A. Hamilton, in the United States, who vocalized an industrialization promoted by positive state action).

liberalism[441]. Such enthusiasm could be explained by the prevailing economic forces at the time. While in Europe liberalism served as as instrument of the industrial bourgeoisie, in Brazil it was used by landlords against colonial restrictions. The majority of the Parliament was inclined to free-exchange, supportive of export of agricultural products and imports of manufactured articles – the interests of the two most powerful classes in Brazilian territory.

But the predominance of farmers and large traders importing industrialized products did not lead to a linear or conflict-free environment. A clear example of the emerging disputes can be found in Pernambuco: the conflict between the "Barão de Boa Vista", compromised with the concentration of financial and land ownership, and the "Praia", seeking to make the State an agent of multiple, small and medium Brazilian owners[442]. The struggle between "free trade" and protectionism of "national industry" exposes the complexity of Pernambuco society in post-independence and its correspondence with the broader political and business discussion of the country.

Institutions played an important role in addressing such conflicts and interests. Brazilian legislation of the 19th century facilitated appropriation of land by the large plantation-owners who had stablished in colonial times. Landowners became oligopsonists in local labor markets and supporters of public investments, since their market power enabled the appropriation of the benefits of infrastructure facilities[443]. Land policy was a way through which institutions contributed to the persistence of inequality over the long run, also because it influenced the regional distribution of labor by limiting access and raising land prices[444].

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[441] See Heitor Ferreira Lima, *História do pensamento econômico no Brasil* (1976), São Paulo, Companhia Editora Nacional, 82-89 (presenting a parliamentary debate in the First Reign, which included some of the main personalities of the time, such as Clemente Pereira, Campos Vergueiro, Bernardo Pereira de Vasconcelos, Lino Coutinho and others).

[442] Izabel Andrade Martins, *Monarquia, empreendimentos e revolução: entre o laissez-faire e a proteção à 'indústria nacional' – origens da Revolução Praieira* (1842-1848) in Izabel Andrade Marson, Cecília de S. Oliveira, Monarquia, *Liberalismo e Negócios no Brasil: 1780-1860* (2013), São Paulo, Editora da Universidade de São Paulo, 253-270.

[443] Nathaniel H. Leff, *Economic Retardation in Nineteenth-Century Brazil* (Aug., 1972), in *The Economic History Review,* vol. 25, n. 3, 491-502 (arguing that even in a country with abundant resources of land, "rapid population increase which permits a continuing situation of 'unlimited' labour supply may not be consistent with generalized economic development", 503).

[444] Cf. Stanley L. Engerman, Kenneth L. Sokoloff, *Factor Endowments, Inequality, and Paths of Development among New World Economies* (2002), Cambridge, New World Economies, 21 (arguing that societies that began with more extreme inequality were more likely to develop structures that advantaged

The Land Law ("Lei de Terras") enacted in Brazil in 1850 determined the revalidation of old land concessions, the legalization of squatters' holdings, and the selling off of public lands (*terras devolutas*)[445]. As a result, individuals with special connections in local governments continued to usurp the public land. Smallholders who remained in their land, for example in the coffee zone of Sao Paulo, often could not earn a living with their production throughout the year and had to work part-time in large farms. The situation did not change after the proclamation of Republic in 1889, as landowners ignored legislation such as the one passed in São Paulo in 1900 aiming to regularize ownership titles.

The "ethos of plantation" was also present in the railroad sector[446]. According to Mattoon, "railroads gave paulistas more than a new means of transportation" – their creation "brought people together in defense of their interests". In an eloquent example, when the prominent Brazilian entrepreneur Barao de Mauá[447] attempted to control part of a railroad in Sao Paulo, there was immediate reaction from the local farmers, who organized with the president of the province measures to avoid the outsider. They viewed Maua as a "foreign element" and a potential threat of enhancing competition in the control of the railroad business.

A similar pattern was observed in the nineteenth century in the financial system. In Brazil, a few banks dominated highly concentrated financial sectors, often with either formal

members of elite classes by providing them with relatively more political influence or access to economic opportunities).

[445] See Irineu Carvalho Filho, Renato Colistete, *Education performance: was it all determined 100 years ago? Evidence from São Paulo, Brazil* (2010), MPRA Papers (including their own work in the literature expanded since Engerman and Sokoloff's piece, 4-5). Comparing such reality with the experience of the United States, where the Homestead Act of 1862 made land free in plots suitable for family farms to all those who settled and worked the land for a specified period, and immigration policies attracted "a broader base of participants to compete in the commercial economy". Stanley L. Engerman, Kenneth L. Sokoloff, *Factor Endowments, Inequality, and Paths of Development among New World Economies* (2002), Cambridge, New World Economies, 20-21.

[446] Cf. Robert Mattoon, *Railroads, coffee, and the growth of big business in São Paulo, Brazil* (1977) Hispanic American Historical Review 7 (2), 292-294. But showing that the contribution of railroads in Brazil was not one in which the export sector was favored over the other sectors of economy, since it fostered the disproportionate growth of the internal sector of the economy in the second half of the nineteenth century: William Summerhill, *Order against progress. Government, foreign investment and railroads in Brazil, 1854-1913* (2003). Stanford, Stanford University Press, 154-156 ("Export growth in Brazil was overshadowed and surpassed by the rise of the internal market, which was greatly facilitated by the increase in the supply of transport that railroads made possible").

[447] Maua himself did not follow liberal economic theories, judging them impractical among us and prejudicial to Brazilian interests. Heitor Ferreira Lima, *História do pensamento econômico no Brasil* (1976), São Paulo, Companhia Editora Nacional, 112.

or informal links to the government[448]. Companies needed to submit their statutes for government approval and entry was limited[449]. Once again, institutions evolved in a way as to restrict access to opportunities, to advantage members of the elite and to preserve relative inequality. Instead of offering opportunities to a broad spectrum of population to obtain loans and invest savings, the banking system became a reserve of the wealthy elite.

In the end of 19th century, landowners began to lose absolute control over economic policy[450]. The conflicts between federal government and coffee producers under Campos Sales' funding loan in 1898 are an expression of such change. From 1891, with Rodrigues Alves as Minister of Finance of Floriano Peixoto, to 1906, with Rodrigues Alves as President, the "São Paulo branch" of economy prevails. It is supposed to mean restriction to protectionism, to financial manipulations and to interest guarantees. After 1906, however, the central idea will be to guarantee the domestic market to Brazilian production, with Alberto Torres (1865-1919) as its great interpreter[451].

In the following decades, Brazil would witness a process of industrial diversification (import substitution), first as a simplified phenomenon and later as one capable of changing the dynamic factor of our income creation[452]. A comparison of 1914 between wholesale

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[448] Cf. Stanley L. Engerman, Kenneth L. Sokoloff, *Factor Endowments, Inequality, and Paths of Development among New World Economies* (2002), Cambridge, New World Economies, 32 (arguing that the banking system in the United States was characterized by numerous, relatively small banks with extensive competition and great flexibility).

[449] Aldo Musacchio, *Experiments in financial democracy. Corporate governance and financial development in Brazil, 1882-1950* (2009), Cambridge, Cambridge University Press.

[450] Showing that as from 1879 – a fact evidenced by a tariff imposed that year – an own thinking is articulated by the producers to invest against the alliance between importers and farmers of exportable products and to set a protectionist directive, averse to the dominant liberalism, Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (1958, 5a ed. 2012), São Paulo, Globo, 575.

[451] Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (1958, 5a ed. 2012), São Paulo, Globo, 597 (quoting senator João Pinheiro [1903]: "This free-trade deal is a story of unemployed bachelors who, as parasitic consumers, are horrified by the price increase of our production, which, however, saves those who work. And, moreover, they should drop from being consumers and enter the class of producers, since we have a lot of land there that needs to be worked on").

[452] Cf. Celso Furtado, *Formação Econômica do Brasil* (32a ed. 2005), São Paulo, Companhia Editora Nacional, 194. ("It is easy to see the growing importance that internal demand will achieve as a dynamic element in this stage of depression. By maintaining domestic demand more firmly than the external one, the sector that produced for the domestic market now offers better investment opportunities than the export sector. As a consequence, a practically new situation in the Brazilian economy was created, which was the preponderance of the sector linked to the domestic market in the process of capital formation"). But see Carlos Manuel Pelaez, *A balança comercial, a grande depressão e a industrialização brasileira (1968),* Revista Brasileira de Economia 2, 15-47. Arguing that the coffee policy was probably not as central to the recovery from depression as Furtado stated, nor as insignificant as Pelaez concluded, Albert Fishlow, *Origens e consequências da substituição de importações no Brasil* (1972), Estudos Econômicos v. 2 n. 6, 29.

white cloth prices for the making of shirts shows that Brazilian prices were substantially lower than the imported item. The reason was the "great competition" between the national factories[453].

By the time when the book from Ferreira de Souza is published, classic liberal ideas were still influential[454], but severely challenged by manifestations against the theory of free competition. Some institutional reflexes of the dispute were the Decree n. 19,739 (1931), which prohibited the imports of machinery/equipment for certain segments of the industry and the Tax Reform (1934), which raised the average import duty by 15%. Since 1930, the industrial bourgeoisie, along with middle classes, mobilized to displace agrarian oligarchies of their hegemonic position. The Estado Novo (1937-1945), an authoritarian regime ruled by Getúlio Vargas, advocated the state as an agent of economic policy. In 1939, the industrial sector already employed 9,5% of the economically active labor force and accounted for 17,4% of the total added value of Brazilian economy[455].

Against this background, Ferreira de Souza begins his book noting that economists and jurist do not usually attempt to define "competition"[456]. From an etymological point of view, the Portuguese word "concorrência" derives from "concurrere", or "cum" + "currere", which means running together with others towards the same place. It means both "fighting" and "agreeing", "combating" and "cooperating".

From an economic perspective, however, competition loses the immediate meaning of "agreement" and embraces only the notion of "fight" or "opposition". At this point starts the criticism of Ferreira Souza against a narrow view on competition: in economics, only

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[453] Albert Fishlow, *Origens e consequências da substituição de importações no Brasil* (1972), Estudos Econômicos v. 2 n. 6, 18.

[454] For an illustrative example, see the press in Sao Paulo at the time. Although divided by the agrarian perspective, it agreed in that free commerce should guide economic policy and that individualism was an undeniable principle. The agrarian project was based on the thesis of "comparative advantages" allegedly formulated by theoreticians like Adam Smith and Ricardo. Free competition would enable each country to specialize, producing whatever brought "comparative advantages" – whether natural (agricultural, mineral, pastoral, etc.) or acquired (industrial) advantages. Part of the press defended that Brazil should take full advantage of the "natural advantages" and continue the mono-export economy. But this view was not shared by the majority of liberals in São Paulo, identified with utilitarian ideas and less critical of industrial protectionism. See Maria Helena Capelato, *Os Arautos do Liberalismo: Imprensa Paulista 1920-1945* (1989) Editora Brasiliense, 49.

[455] Simão Davi Silber, *Política econômica; defesa do nível de renda e industrialização no período 1929/1939* (1973), Master dissertation presented at Fundação Getúlio Vargas, Rio de Janeiro, 57.

[456] Jose Ferreira de Souza, *Uniões de Emprezas Concorrentes* (1939), Rio de Janeiro, 3 and ff.

secondarily would competition mean "coincidence" – the "economic harmony" of the world. Important to Ferreira de Souza (quoting Emanuele Sella) is the idea that competition should not be considered merely an element of price formation. After all, adopting such a restricted notion would mean confusing competition with "free competition", which is only one of its modalities or historical forms.

When attention is driven to the works of jurists, the element of scarcity becomes evident. Quoting Enzo Gueli, Ferreira de Souza defines competition, from a legal point of view, as the coexistence of various economic activities aiming the same goal, which they cannot reach to the same extent since the "mass of business" cannot grow "at will". Or, more generally, competition is the reciprocal relation between people that, employing the same means, aim at a goal that not everyone can achieve. The "phenomenon" of competition requires three identities between competitors: of time, of object, and of market. In all those identities, scarcity prevails.

Ferreira de Souza acknowledges competition's most accurate environment is the "exchange arena", or commerce. He also recognizes its main function is to determine price, since through competition the law of supply and demand manifests itself. Nevertheless, like authors such as Cooley and Simmel had done before, Ferreira de Souza indicates that the phenomenon of competition can be observed in several activities, not only in the economic realm. Attentive to its social forms, the author argues that competition presupposes the possibility of a struggle "for the preference of a third party".

Competition is presented as having two forms: (i) "free" or "universal" and (ii) "limited". The former refers to individuals that unboundedly negotiate to attract the public and to put competitors away. Such a form reflects the transposition to other fields of the Darwinian natural selection of the strongest, a notion deemed "exaggerated"[457] even in the realm of biology. Quoting Adolfo Weber and, once again, Emanuele Sella (the author of *La Concorrenza* is an undeniable influence) Ferreira de Souza observes that an absolutely free regime had never existed. On the other hand, the second form, "limited competition", is characterized by restrictions imposed either by the state or by competitors themselves, who

[457] Jose Ferreira de Souza, *Uniões de Emprezas Concorrentes* (1939), Rio de Janeiro, 12 - 13.

agree to discipline their competitive behavior. Here, law is not a "blind instrument" of the economic fact, but one that controls it for the sake of public interest.

The thesis of Ferreira de Souza is that free competition leads to an unbearable situation among manufacturers and sellers. Instead of producing a regime of "fair price" and guaranteeing "justice" in the transactions, it makes spiteful enemies of businessmen. They excessively develop selfish instincts, losing the *ethos* of their professional activity. The hunger for the elimination of a competitor leads to the defeat of the poorest, the least powerful or the least inclined to dishonest wiles. Competition in its "free" or "universal" modality becomes a "myth"[458] – one which promises distributive justice, or selection of the most adapted, but produces injustices and selfishness in the long run.

Such a view is reinforced by the observation of the economic structure. Economy at the time demanded large capital for industrial and commercial enterprises, greater risks and machinery. It attended enlarged consumer markets, which were increasingly international. The production was more and more a mass production, with its assumed need for large establishments. In other words, everything led to concentration, or to the largest possible amount of resources in the same enterprise. As unions and coalitions better responded to the demands of industrial and commercial progress, the "individualistic prejudices"[459] inherited from the French Revolution, Ferreira de Souza believes, could be overcome. Accordingly, the excesses of free competition could be avoided, as long as human solidarity was carefully considered.

In such a context, the contrary to competition is not cartel, but monopoly[460]. Cartel is a contract whereby two or more competing companies, maintaining their autonomy, discipline the reciprocal fight. By establishing conditions for each respective business, during a certain period of time, a cartel aims at obtaining a greater or more secure economic result. Monopoly exists, on the other hand, where there is no competition: where the state or a private entity dominates a whole economic activity, or one of its branches, therefore excluding the possible rivals. A cartel has not necessarily a monopolistic goal – actually,

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[458] Jose Ferreira de Souza, *Uniões de Emprezas Concorrentes* (1939), Rio de Janeiro, 23 (quoting Gino Arias).

[459] Jose Ferreira de Souza, *Uniões de Emprezas Concorrentes* (1939), Rio de Janeiro, 27.

[460] This is precisely the opposite to what Geiger would sustain one year later. See section I.I.II. (arguing that "monopoly and competition are not in opposition to each other").

competition survives despite the cartel, not only among the members, but also among the non-cartelized parties. Competition does not disappear with cartel, it is "mitigated, smoothed, humanized"[461].

It is not a coincidence that Ferreira de Souza wrote such words at that time. Brazil is considered by the author to be particularly suitable for those ideas. In contrast to other countries, it did not have a corporative tradition to fear[462]. Emerging as an independent nation just after the victory of political and economic individualism, it mimetically guaranteed professional freedom without historical guilds to surpass. The government was the one to actually promote mandatory cartels, under the form of quasi-state entities, trade unions, cooperatives or covenants. Examples were the public "Instituto de Açúcar e Alcool" (Sugar and Alcohol Institute), the lard and *xarque* trade unions, the freight agreement among shipping companies, etc.

The suspicious view on free competition fits an environment where the defense of "free-exchange" came historically along with the support of export of agricultural products, however the land legislation enabled individuals with special connections in local governments to usurp the public lands. A context in which "individualism" was probably defended by the same local farmers who organized with the president of a province measures to avoid competition in the railway sector. An environment where "liberalism" was advocated by successive Ministries of Finance, while a few banks dominated a highly concentrated financial sector, often with either formal or informal links to the government.

The perspective for understanding such a reality is not one that optimistically embraces principles of liberalism, with no concern for its empirical contours. But it might be useful to look also beyond the perception that monopoly has been Brazil's pervasive original sin, enough to mark the country's entire economic and social development as a great misunderstanding. The present work is interested in exploring "the other side", or the social

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[461] Jose Ferreira de Souza, *Uniões de Emprezas Concorrentes* (1939), Rio de Janeiro, 48-49.

[462] About this point, see Sergio Buarque de Holanda, *Raízes do Brasil* (1936, 2016), São Paulo, Companhia das Letras, 86-89 (arguing that the organization of guilds in Brazil was hampered by the absorbing preponderance of slave labor, the hindering of commerce and a shortage of free craftsmen in most towns and cities: "any person with nobility 'smoke' could attain profits derived from the most humble work without degrading himself and without calming the hands. Spix and Martius had the opportunity to point out the radical incompatibility between this habit and the medieval principle of corporate masters, still alive in many places in Europe at the beginning of the last century"). Although not widespread, the guilds would be formally prohibited in Brazil by the Constitution of 1824 (article 179, XXV).

forms of competition that actually emerge in different contexts, instead of facing competition as an abstract principle or as an uncomfortable absence. It does not treat Brazilian competitive relations as an *a priori* mistake, but as realities that need to be understood before confronted.

In this regard, one can comprehend Ferreira de Souza's mild, complacent view on cartels as an expression of the flexibility – and ambiguity – of competition historical forms. Instead of a generalized indirect dispute for the favors of a third anonymous party, competition can emerge as a special relationship among specific competitors, with the blessing of the state. It might represent not only a dynamic relation between insiders, but also a boundary for outsiders. Like the farmers in São Paulo, competitors might see each other as a "man like myself" (to use Cooley's words), while such recognition excludes every other men and women.

II.II.III. Social forms in Brazilian self-descriptions

How are the historical insights from the previous sections – such as the move from "monopoly" as an overarching explanation towards the observation of competition, and from "competition" as an abstract principle towards its concrete expressions – to impact a "sociology of competition" in Brazil? This section starts to answer such question by observing old dictionaries.

Like German and unlike the English language, Portuguese has two different words to express the meaning of "competition": *concorrência* (Latin: concurrere) and *competição* (Latin: competition). Medieval Portuguese distinguished between them. While *concorrer* meant to flock to the same place ("E a ella [jndia] concorrem mujtos mercadores"), *competir* meant something closer to fighting ("foy preso per Carlos Rey de Napoles e de Cezilya, na batalha em que Conradino, seu competidor nos dittos Reynos foy morto")[463].

[463] Antônio Geraldo da Cunha, *Vocabulário histórico-cronológico do Português Medieval* (1984), Fundação Casa de Rui Barbosa.

Successive dictionaries in the first half of the 20th century would still confirm those meanings: *concorrência* as affluence and *competição* as rivalry[464]. It is ambiguous whether the affluence implied in the word *concorrência* meant dispute or cooperation. Two parties aiming the same goal could either share efforts or oppose each other. Only in *competição* the idea of opposition was clear: *competir* meant direct opposition between rivals. Curiously, it was *concorrência*, plenty of ambiguity, which gained the meaning of economic competition in the dictionaries of the second half of 20th century[465]. It is true, while doing

[464] *Novo Dicionario da Lingua Portuguesa* (5ª ed. 1939), W. M. Jackson, Rio de Janeiro, 621, 613. (**Concorrer**: Ter a mesma pretensão que outrem: concorrer ao lugar de escrivão. Ir com outrem. Afluir, ajuntar-se. **Competição**: Acto de competir. Luta: Rivalidade. **Competir***:* Pretender alguma coisa, simultaneamente com outrem. Rivalizar). Orlando Mendes de Morais, *Dicionário de Sinônimos* (1944) Rio de Janeiro, Editora Getulio Costa, (**Concorrência**: Afluência; porfia; frequencia. **Competir**: Rivalizar, caber, tocar.). Francisco Torrinha, Novo Dicionário da Língua Portuguesa (1946) Porto, Rua de Oliveira Monteiro, 304 (**Concorrer**: Ter a mesma pretensão de outrem; ir a concurso; afluir. **Competir:** Pretender uma cousa simultaneamente com outrem; rivalizar). Cândido de Figueiredo, *Dicionário da Língua Portuguesa* (1949) Livraria Bertrand. (**Concorrer**: Ter a mesma pretensão que alguém: concorrer ao lugar de escrivao. Ir com outrem. Afluir, ajuntar-se. **Competição**: Acto de competir. Luta; rivalidade.)

[465] Caldas Aulete, *Dicionário Contemporâneo da Língua Portuguesa* (1958), Rio de Janeiro, Delta (**Competir**: Concorrer na mesma pretensão com outro; rivalizar. **Concorrência**: Pretensão de mais de uma pessoa à mesma coisa. Afluencia simultânea de várias pessoas ou coisas para o mesmo ponto ou no mesmo lugar. *econ. Polit*. Oferta de produtos iguais ou semelhantes por diferentes produtores; rivalidade entre produtores ou entre negociantes, fabricantes ou empresários: sustentar a concorrência. **Concorrer:** Juntar-se para uma acao comum, para um fim comum, em uma opinião comum; cooperar, contribuir). Same in Caldas Aulete, *Dicionário Contemporâneo da Língua Portuguesa* (1964), Rio de Janeiro, Delta and Caldas Aulete, *Dicionário Contemporâneo da Língua Portuguesa* (1970), Rio de Janeiro, Delta. *Dicionário Escolar da Língua Portuguesa* (1965), (**Concorrência**: Afluencia, apresentação de propostas para um contrato; disputa; porfia, emulação. **Competição**: Ato ou efeito de competir, emulação, rivalidade, porfia). Antenor Nascentes, *Dicionario Ilustrado da Língua Portuguesa* (1972), Academia Brasileira de Letras, Rio de Janeiro, Bloch Editores. (**Concorrencia**: Ato de concorrer; afluência; qualidade de concorrente; pretensão de mais de um à mesma coisa; afluência simultânea de muitas coisas ou pessoas ao mesmo ponto; rivalidade entre produtores, fabricantes, empresários, comerciantes. **Concorrer.** Juntar-se (para um fim comum); cooperar, contribuir; afluir ao mesmo lugar, juntar-se no mesmo sítio; ir juntamente com outros; encontrar-se, convergir; disputar a outro ou outros uma coisa, procurando dar provas de ter mais direitos, mais aptidões, de apresentar mais vantagens. **Competição:** Ato ou efeito de competir; rivalidade, disputa, concorrência; certame esportivo. **Competir:** Concorrer na mesma pretensão com outro; rivalizar). Aurelio Buarque de Holanda Ferreira, *Dicionário da Língua Portuguesa* (1980), Editora Nova Fronteira (**Concorrência**. 1. Ato ou efeito de concorrer. 2. Competição, rivalidade. 3. Afluência de pessoas no mesmo momento para o mesmo lugar. 4. Confluência, concordância. 5. Disputa ou rivalidade entre produtores, negociantes, industriais, etc., pela oferta de mercadorias ou serviços iguais ou semelhantes. **Concorrer**. 1. Juntar-se [para uma ação comum]; contribuir, cooperar. 2. Acorrer, acudir, afluir [juntamente com outros] Concorreram todos ao comício. 3. Ter a mesma pretensão de outrem; competir: Concorreu com o velho amigo e foi eleito. **Competição**: 1. Ato ou efeito de competir. 2. Busca simultânea, por dois ou mais indivíduos, de vantagem, vitória, prêmio, etc. 3. Luta, desafio, disputa, rivalidade.) Aurelio Buarque de Holanda Ferreira, *Novo Dicionário da Língua Portuguesa* (2nd ed. 1986), J.E.M.M. Editores Ltda (adding a biological meaning and an interesting example: **Competição**. 4. Biol. Ger. Luta dos seres vivos pela sobrevivência, especialmente quando são escassos os elementos necessários à vida entre os componentes de uma comunidade. **Concorrência**. 6. Pesquisa que tem por fim a tomada de preços para compra e venda de materiais ou de serviços em grande escala: o governo abriu concorrência para a construção duma estrada.).

so, *concorrência* also meant rivalry and dispute. Nevertheless, it has never lost its meaning of "affluence", always implying the possibility of cooperation.

One can say that, from a sociological perspective, ambiguity has precisely been the enduring feature of competition in Brazil. Slavery deviated the energy of the Portuguese colonizer from producing objective values towards the exploration, transportation, and acquisition of slaves[466]. Economic energy was also conditioned by the nutrition in different areas of Brazil; favored by land distribution in São Paulo, hampered by monoculture in Rio de Janeiro and Northeast[467]. Slavery and monoculture were the forces which most affected Brazilian "social plastic"[468], a true observation also with regards to the social phenomenon of competition.

Gilberto Freyre provides a biological comparison to illustrate this point. If it is true that among domestic animals, softened by the relative lack of struggle and competition, the reproductive glands absorb more food; within a regime such as that of the slave-owning monoculture, the minority develops concern, mania, or erotic refinement. Sugar had indirect responsibility for such "ease" of Brazilian economic elite, requiring slaves, repelling polyculture. Luxuriance was also an important characteristic regarding the minority at *casa-grande* (the house of landowners), which was more individualistic and privatistic than collectivistic *senzalas* (the shelter of slaves)[469].

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[466] See Gilberto Freyre, *Casa-Grande & Senzala* (1933, 51st ed. 2006), Global, São Paulo, 79. Tracing the disrepute to business and manual labor – in favor of values that consecrated literate idleness – back to the rise to power of the Avi dynasty in Portugal of the fourteenth century, Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (1958, 5nd ed. 2012), São Paulo, Globo, 78. ("it was not the bourgeoisie that reneged on its position: it only accommodated itself to the ruling state, which surrounds it, and inwardly wedged its way of life").

[467] Cf. Gilberto Freyre, *Casa-Grande & Senzala* (1933, 51a ed. 2006), Global, São Paulo, 106. A similar opposition between "guanabaras" and "paulistas", with very different lens, appears in Faoro's analysis of the end of nineteenth century. The "Vale do Paraíba" is umbilically linked to credit provider, invoking government assistance, through the urban banker. The "oeste paulista" prospers as a rational enterprise, calculating costs and avoiding the dead weight of fixed capital. Later, Faoro argues that the former hosts a speculator industry, dependent on government stimuli and favors, while São Paulo hosts the liberal capitalist industry. Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (1958, 5a ed. 2012), São Paulo, Globo, 573-593.

[468] Gilberto Freyre, *Casa-Grande & Senzala* (1933, 51a ed. 2006), Global, São Paulo, 397.

[469] Freyre sees here a "deep fraternization of values and feelings" Gilberto Freyre, *Casa-Grande & Senzala* (1933, 51st ed. 2006), Global, São Paulo, 438. Much has been said about the conservative traits of Freyre's theory of "balanced antagonisms". However, it is true that Freyre writes about the richness of balanced antagonisms to Brazilian culture more in terms of potentiality than in terms of actual strength. See Gilberto Freyre, *Casa-Grande & Senzala* (1933, 51st ed. 2006), Global, São Paulo, 418.

Slavery and monoculture were forces conforming the possibilities of a competitive society in Brazil. They hampered the energy required from competitors to the production of objective values, while preserving, among the economic elite, individualistic traits[470]. The result was not a "natural inaptitude" for competition, as Cooley supposed, but a socially bounded form: a less-energized struggle within boundaries which excluded the former inhabitants of *senzalas*[471]*,* who could not see in their previous owners "*a man like myself*", to use Cooley's words.

Another classic of Brazilian social thought presented important elements that challenge the model of "pure" competition. Buarque de Holanda's first comments related to the topic are about the lack of cooperation among Brazilian productive labor. Brazilians would lack the capacity of free and lasting association between the entrepreneurial elements of the country. Even when men help each other, they would do so without a tendency for disciplined and constant cooperation. The material aim of common work would have less relevance than feelings and inclinations. Feelings and inclinations would be the factors leading an individual or a group of individuals to assist the neighbor of friends in need of assistance[472]. The ideas behind those comments about cooperation are also applicable to competition, as the following passage makes clear:

> *"Both competition and cooperation are behaviors oriented, albeit in different ways, towards a common material objective: it is first of all the relation to that goal that holds the individuals separated or united with each other. In rivalry, the opposite, as in the prestance, the common material has practically secondary meaning; what matters first is the harm or benefit that one party can do to the other".*[473]

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[470] A condition that resembles Senator Sherman's words justifying the antitrust statute in the United States: "*The law of selfishness, uncontrolled by competition"*. Congressional Record Senate (1890), 2457.

[471] See on this point Florestan Fernandes, *A integração do negro na sociedade de classes: vol.1 o legado da "raça branca"* (1964, 5th ed. 2008), São Paulo, Globo (documenting and interpreting the difficulties of black Brazilians to integrate into the "competitive societal order").

[472] See Sergio Buarque de Holanda, *Raízes do Brasil* (1936, 2016), São Paulo, Companhia das Letras, 89-90.

[473] Sergio Buarque de Holanda, *Raízes do Brasil* (1936, 2016), São Paulo, Companhia das Letras, 91 (our translation).

Instead of the common interest that Simmel ascribes to forms of socialization like competition, Buarque de Holanda (who had studied in Germany) observes that the person-to-person ties have always been the most decisive factor in Brazilian personalistic society. In order to obtain safe advantages in transactions with Iberian peoples, many merchants from other countries knew it was convenient to establish closer ties with them. This illustrates the rejection of all modalities of rationalization and, consequently, of depersonalization. Portuguese and Spanish people would be incapable of prevailing any form of impersonal and mechanical ordering over organic and communal relations, as are those based on kinship, neighborhood and friendship[474].

In such a context, the transition to industrial work would be especially critical. Institutions and social relations based on abstract principles are expected, in the industrial world, to substitute bonds of affection and blood. Where the patriarchal family predominates, like in Brazil, the crisis of adaptation of individuals to the social mechanism was especially sensitive due to the triumph of anti-family virtues as are those in the spirit of personal initiative and competition among citizens. According to Buarque de Holanda, the time of his writing was "the first time in history in which competition among citizens, with all its consequences, would be considered a positive social value". But it was also the time of the twilight of individual initiative, as new and different restrictions to the "competition fever" were arising with state expansion[475].

In Buarque de Holanda's famous expression, the Brazilian contribution for civilization would be the "cordial man". He is not a man with good manners, civility, but a legitimate expression of an extremely rich and overflowing emotive background. Some foreigners could have trouble penetrating this aspect of Brazilian life: the lack of knowledge of any interaction form that is not dictated by an emotive ethic. The author mentions as an example that "a Philadelphia businessman once expressed to André Siegfried his

[474] See Sergio Buarque de Holanda, *Raízes do Brasil* (1936, 2016), São Paulo, Companhia das Letras, 225-230.

[475] Cf. Sergio Buarque de Holanda, *Raízes do Brasil* (1936, 2016), São Paulo, Companhia das Letras, 250-251, 264-265 (mentioning, as an example of the positive view on competition, the criticism directed against the tendency of some governs to create vast social security schemes, since they leave little room for individual action and all kinds of competitions. As an example of the new restrictions imposed to competition, Buarque de Holanda mentions a book about the New Deal).

astonishment at seeing that in Brazil as in Argentina, to win a customer he needed to make him a friend"[476].

The Simmelian indirect dispute that creates an objective value is tensioned in Buarque de Holanda's historical reconstruction by person-to-person relations and by an emotive background. Both among businessmen and between those and consumers, the relations underlying the social form of competition in Brazil are not formal, contractual, distant. Of course, this has widely changed with the emergence of industrial cities in the country. Still, on the one hand, such emergence is distributed unequally in national territory and, on the other hand, recent economic data show that even in the heart of Brazilian business life personal relations keep stressing the competitive logic.

Personal relations, in Brazil, produce a social form of association which tells who is qualified to relate to whom: the stratum (*estamento*). In another classic of Brazilian social thought, Raymundo Faoro shows that the stratum in Brazil is aristocratic and bureaucratic. On the one hand, it presupposes "social distance" [477] and is originated in personal patrimonialism. On the other hand, it assumes the techniques of bureaucracy as "mere techniques"[478]. Next to the superior focus of power, the aristocratic and progressively bureaucratic administrative body stands over society, appropriating the economic opportunities to enjoy "the goods, the concessions, the positions", in a confusion between the public and the private sector. Personal patrimonialism becomes state patrimonialism[479]:

> *"The closure of the community leads to the appropriation of economic opportunities, which ends up in the monopolies of lucrative activities and public offices. As a result, conventions and lifestyles affect the market, preventing it from expanding its full potential of denying personal distinctions."*[480]

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[476] Sergio Buarque de Holanda, *Raízes do Brasil* (1936, 2016), São Paulo, Companhia das Letras, 257.

[477] Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (1958, 5th ed. 2012), São Paulo, Globo, 62.

[478] Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (1958, 5th ed. 2012), São Paulo, Globo, 825.

[479] Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (1958, 5th ed. 2012), São Paulo, Globo, 823.

[480] Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (1958, 5th ed. 2012), São Paulo, Globo, 62 (our translation)

Stratum and the rest of society are unknown and opposed to each other, although sharing the same country. The asceticism of self-effort, which is believed to lead to victory in the social world (not only in business, but also in culture and other fields), has been considered here a mediocrity incapable of ambitions aiming at glory. Glory is to collaborate with the state apparatus. Since its early times in Portugal, the Crown did not entrust the colonial enterprise to businessmen who were solely dedicated to profit and production, but to selected people close to the throne[481]. In the industrial state, private activity in large-scale organizations becomes an extension of the official bureaucracy. The dynamics of the open market, congenial to liberalism, change towards the administrative market, with selective political demands[482].

In addition to the *socially-bounded* and *low-energized* (Freyre), *personalistic* and *emotive* (Buarque de Holanda) competition, Faoro presents an *aristocratic* and *state-determined* social phenomenon. More intriguing, the author does so analyzing the history of Brazil since its supposed origins in Portugal, concluding the aristocratic and bureaucratic stratum is a longstanding reality. Capitalism, directed by the state, prevents in this story the autonomy of the firm, nullifying the sphere of public freedoms founded on free competition. Industrial activity, when it emerges, stems from stimuli, favors and privileges, with no autonomy for the individual enterprise that is rationally based on calculation and unscathed by governmental interventions[483].

Inspired by Faoro's work[484], Lazzarini has recently added his own view regarding the "owners of power". Those would be the ones who are inserted and articulated in a tangle of corporate ties between public and private actors. Such ties are constituted through interactions that take place in the domain of ownership and control instruments of firms. In

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[481] Cf. Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (1958, 5th ed. 2012), São Paulo, Globo, 142.

[482] See Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (1958, 5th ed. 2012), São Paulo, Globo, 831-833.

[483] Cf. Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (1958, 5th ed. 2012), São Paulo, Globo, 35-40.

[484] Sérgio Lazzarini, *Capitalismo de Laços: os Donos do Brasil e suas Conexões* (2011, 2nd ed. 2018), São Paulo, Bei Comunicação, 257.

this economic context, especially powerful are those that connect between distinct corporate groups[485].

A tangle between public and private actors is not an exclusivity of Brazil[486], but this is deemed to be a characteristic trait of the country's capitalism. Lazzarini calls it a "capitalism of ties"[487], which is a model based on the use of relationships to exploit market opportunities or to influence certain decisions of interest. These relationships might involve only private actors, but much of the corporate movement also involves governments and other actors in the public sphere. Ties are relations between social actors for economic purposes. They refer to valuable social relationships, a personal contact that is established to get some particular benefit in the future or a gesture of support aiming at something in return. Such reciprocal relationships are favored by strong personal ties: family contacts, for example[488].

Ties can produce both positive and negative consequences[489]. Alliances among competitors can be instruments of knowledge exchange, harmonization of productive operations and joint learning. Relations with the government could be a way of protecting a firm from an uncertain and unfavorable scenario. The agglomeration of owners (and their companies) in groups and consortia, often in partnership with government actors, allows a pooling of forces to play large-scales, longer-maturing projects. At the negative side, contacts allocate resources badly, favoring the interests of involved parties. They can also degenerate to cartels, through informal interactions or united shareholding positions. Finally, ties with government actors can be a tactic to obtain differentiated resources (notably, public capital), various types of protection and other advantages not available to less connected entrepreneurs.

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[485] See Sérgio Lazzarini, *Capitalismo de Laços: os Donos do Brasil e suas Conexões* (2011, 2nd ed. 2018), São Paulo, Bei Comunicação, 16.

[486] Sérgio Lazzarini, *Capitalismo de Laços: os Donos do Brasil e suas Conexões* (2011, 2nd ed. 2018), São Paulo, Bei Comunicação, 44.

[487] Sérgio Lazzarini, *Capitalismo de Laços: os Donos do Brasil e suas Conexões* (2011, 2nd ed. 2018), São Paulo, Bei Comunicação, 4.

[488] Sérgio Lazzarini, *Capitalismo de Laços: os Donos do Brasil e suas Conexões* (2011, 2nd ed. 2018), São Paulo, Bei Comunicação, 5.

[489] Cf. Sérgio Lazzarini, *Capitalismo de Laços: os Donos do Brasil e suas Conexões* (2011, 2nd ed. 2018), São Paulo, Bei Comunicação, 6-14.

Lazzarini observes the capitalism of ties through the lens of his data on Brazilian shareholder positions and economic events. The privatization occurred in Brazil, for instance, is showed as incapable to break connections of mutual interests based on enduring relationship networks[490]. "Clientelism" – a company supporting the politician who will then act in favor of his "client" – is explained against the background of the relational base of the capitalism of ties: one private actor becomes more influential than another one due to its particular relationships with the state (only specific ties, not the collective ones, allow private competitive advantages)[491]. The formation of economic groups, with increased points of interaction among players, the intertwining of councils and the corporate interweaving of owners are all analyzed through the lens of possible anticompetitive practices[492].

In the capitalism of ties, much of the value of political connections is the access they generate to scarce resources, mainly to financial capital. Empirical data show companies which donated more (while it was allowed by Brazilian law) to winning candidates obtained more loans than other firms. They would participate in industrial expansion initiatives promoted by the government or, unlawfully, be favored in public bids. Such firms are also those with the lowest economic performance (lower profit on assets, for example). Those who cannot survive on their own, by their own competence, base their strategies on political contacts that allow for differentiated opportunities[493].

If it is true that any economic relation, as Polanyi and Granovetter have shown, is embedded in society, the existence of strong social ties stresses the specific relation of competition. An overflow of interaction opportunities, including interaction with the state, challenges the "purity" of competition social form. Social barriers that limit those who are able to compete (and to be acknowledged as competitors) also pressures the idea of competition as an anarchical selective process opposed to status[494]. Those characteristics –

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[490] Sérgio Lazzarini, *Capitalismo de Laços: os Donos do Brasil e suas Conexões* (2011, 2nd ed. 2018), São Paulo, Bei Comunicação, 44.

[491] Sérgio Lazzarini, *Capitalismo de Laços: os Donos do Brasil e suas Conexões* (2011, 2nd ed. 2018), São Paulo, Bei Comunicação, 55.

[492] See Sérgio Lazzarini, *Capitalismo de Laços: os Donos do Brasil e suas Conexões* (2011, 2nd ed. 2018), São Paulo, Bei Comunicação, 89-146.

[493] See Sérgio Lazzarini, *Capitalismo de Laços: os Donos do Brasil e suas Conexões* (2011, 2nd ed. 2018), São Paulo, Bei Comunicação, 61-62.

[494] Such remarks, based on classics of Brazilian social thought, should indicate that those works do not lead necessarily to an idealized notion of market, as opposed to a demonized state. Arguing that such opposition is the best interpretation at least of part of our social thought, Jesse Souza, *A tolice da inteligência*

which are observed in Brazilian reality, but might not be limited to Brazil – suggest not only structural aspects of competition that are overlooked in the sociology of competition, but should also impact the analysis of competition's functions and dysfunctions.

II.III. FUNCTIONAL METHOD AND TRIADIC COMPETITION

II.III.I. CAUSALITY, FUNCTIONAL APPROACH AND SYSTEMS THEORY

The functional method is a controversial approach in the realm of both natural and social sciences. In the former, it allegedly has an "unfortunate history"[495]. In the latter, it has been subjected to "decades of controversy"[496]. Natural scientists argue that the forward-looking element of functional approach tends to a reversal of cause and effect, and that a functionalistic apprehension of nonhuman phenomena is an inadequate extension of paradigmatically human concepts. A spider does not construct a web *because* that web will enable it to capture the food, but because similar behavior of *other* spiders in the past enabled *them* to capture the food needed to survive[497].

Some initial qualifications on a functional approach will be needed to avoid such criticism. The first relevant to our work is the distinction between goals and functions[498]. A goal represents the direction of a behavior. A function is a consequence of something with a precise form. According to Wright, G is the goal of B if B *tends* to bring about G and if B occurs *because* it tends to bring about G. A function of FO, in its turn, is FU if FU is the consequence of the form FO and if FO is there because it does (results in) Z. Although the concept used in this work will need to go beyond such definition, the distinction goal/function is a necessary starting point.

Social scientists also have their own reasons to criticize the functional approach. Functional explanations usually claim that some social practice or institution has a

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brasileira (2nd ed. 2018), Rio de Janeiro, Leya, 91. One could remember that Thurman Arnold observed a similar pattern of gods and devils in the capitalistic mythology of the United States, see footnote 313.

[495] Larry Wright, *Teleological Explanations: An Etiological Analysis of Goals and Functions* (1976), Berkeley, University of California Press, 1.

[496] Harold Kincaid, *Assessing Functional Explanations in the Social Sciences* (1990), in Contributed Papers to proceedings of the Biennial Meeting of the Philosophy of Science Association, The University of Chicago Press.

[497] Larry Wright, *Teleological Explanations: An Etiological Analysis of Goals and Functions* (1976), Berkeley, University of California Press, 9.

[498] Cf. Larry Wright, *Teleological Explanations: An Etiological Analysis of Goals and Functions* (1976), Berkeley, University of California Press, 38, 74-81.

characteristic effect and that the practice or institution exists in order to promote such effect. Critics argue that functional studies lack adequate evidence or sufficient explanatory power, embody precarious analogy with natural selection and present socially conservative traits associated to Parsons' theory[499].

Yet, an older functionalist tradition is found in the legal realm. Functional approaches in legal theory can be traced back[500] to Ihering's *Der Zweck im Recht* (1877), with his claim that every legal rule owe its origin to a practical motive, being purpose the creator of the entire law[501]. The *Interessenjurisprudenz,* whose drive was to serve the practical ends of law by substituting the research and evaluation of life for the logic primacy, can also be inserted in a functionalist tradition [502]. Finally, in the same line one can introduce the *Wertungsjuriprudenz,* which after the Second World War censured the ethical neutrality of the judge and proposed the achievement of social goals[503].

Such theories set the ground for the formulation of legal figures such as the abuse of right, the misuse of power and the indirect business. What such figures have in common is exactly their dependence on a functional analysis of the legal behavior. One is invited to look at the goals pursued by the agent in a concrete situation (a contract, a unilateral act, etc.) and then compare those goals with the social function of the institute according to the legal order. Such analysis would capacitate one to verify eventual dysfunction(s) that characterizes illegality[504]. Functionalism presents thus a specific normative character, as a tool of observing dysfunctional (i.e. illegal) behavior.

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[499] Presenting the first three – and arguing that functionalism *is* testable with sophisticated models and statistical techniques, Harold Kincaid, *Assessing Functional Explanations in the Social Sciences* (1990), in Contributed Papers to proceedings of the Biennial Meeting of the Philosophy of Science Association, The University of Chicago Press.

[500] Suggesting the reconstitution, Fabio Konder Comparato, *Funções e disfunções do resgate acionário* in *Direito Empresarial: Estudos e Pareceres* (1995), São Paulo, Saraiva, 120.

[501] Rudolph von Ihering, *Der Zweck im Recht* (1877, 3. 1904), Leipzig, Breittopf und Gärtel, v.

[502] See Philipp Heck, *Begriffsbildung und Interessenjurisprudenz* (1932), Tübingen, Mohr, 3-4.

[503] Cf. Karl Larenz, *Methodenlehre der Rechtwissenschaft* (1965, 3. 1995), Berlin, Springer Verlag.

[504] See Fabio Konder Comparato, *Funções e disfunções do resgate acionário* in *Direito Empresarial: Estudos e Pareceres* (1995), São Paulo, Saraiva (presenting also the notion of "diverse functions", without working on the concept, 128). Associating the functional view with the emergence of mass society and new actors capable of pressure, Alessandro Octaviani, *A Bênção de Hamilton na Semiperiferia: Ordem Econômico-Social e os Juros da Dívida Pública Interna*, in José Conti; Fernando Scaff, *Orçamentos Públicos e Direito Financeiro* (2011), São Paulo, Revista dos Tribunais, 1183 (applying such perspective to financial law).

In the United States, "functionalism" is another name for the realist jurisprudence, the movement born at Columbia Law School but mostly developed at Yale in the first half of the last century. Functionalism was an attempt to understand law in its factual context and according to its economic *and social* consequences[505]. It did not mean a rejection of legal concepts, but the consciousness that those were not enough to predict legal decisions. In order to *increase* law's certainty and efficiency[506], one was required to go beyond legal rules and concepts and grasp the factual context of the dispute, the judges' idiosyncrasies and the lessons from social sciences. This last feature has always been the less developed one, given the difficulties of integrating law and social sciences[507].

Decades later, functionalistic approaches seem transmuted to a "uneasy marriage"[508] between law and economics. This is the case of the "Virginia School" and its attempt to incorporate public choice theory to the economic analysis[509]. This is also the case of "functional" frameworks which highlight the economic logic of a legal field – for example, corporate law – while remain wary of the tendency in economic analysis to neglect non-pecuniary motivations or to assume an unrealistic degree of rationality in human action.[510]

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[505] Cf. Laura Kalman, *Legal Realism at Yale 1927-1960* (2001), New Jersey, The Lawbook Exchange Ltd, 3. Framing the functional jurisprudence as a "new set of problems", Felix Cohen, *The Problems of a Functional Jurisprudence* (1937) Modern Law Review 1.1, 7 (arguing that functionalism exposes the emptiness of Bentham's utilitarianism, "by showing that the distinction between law and its consequences is purely arbitrary", 25-26). Naturally, also in the United States functionalism was not restricted to the legal field, reaching the domains of psychology, anthropology and sociology. It is worth noting that authors like Charles Cooley and E. A. Ross, who studied the phenomenon of competition, were also "functionalist" in their concern with the social process and their emphasis on selective processes related to the performance of a function. See Laura Kalman, *Legal Realism at Yale 1927-1960* (2001), New Jersey, The Lawbook Exchange Ltd, 16.

[506] Mainly concerned with efficiency, the legal realist and future trust-buster Thurman Arnold. Laura Kalman, *Legal Realism at Yale 1927-1960* (2001), New Jersey, The Lawbook Exchange Ltd., 10.

[507] The integration of law with the social sciences could be more precisely seen as a different, independent goal from functionalism. The realists supported the use of social sciences, but "did not know how to achieve integration in the classroom". Laura Kalman, *Legal Realism at Yale 1927-1960* (2001), New Jersey, The Lawbook Exchange Ltd, 93.

[508] Francesco Parisi, *Positive, Normative and Functional Schools in Law and Economics* (2004), European Journal of Law and Economics, vol. 18, n. 3, 5.

[509] Cf. Francesco Parisi, *Positive, Normative and Functional Schools in Law and Economics* (2004), European Journal of Law and Economics, vol. 18, n. 3, 10 – 12.

[510] See Reinier Kraakman et. al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2nd ed. 2009), New York, Oxford University Press, preface. ("our project in writing this book is […] to establish a framework for examining the law that is *at once economically grounded [i.e., functional],* and sufficiently capacious to accommodate the views of both sides on controversial issues of legal policy" – emphasis added)

Those are functional approaches that assimilate the factual context of economic analysis, but do not adventure in incorporating other social sciences.

In Brazil, one particularly powerful functionalistic influence has been the "socializing" yaw experimented by the French Private Law.[511] Translated into the Brazilian legal doctrine about property, such method would see function, in opposition to structure, as "*the concrete way* an institute or a right of particular and notorious morphological characteristics operates"[512] or, in a definition that seems to be closer to a "goal", as "the power to give to the object of property *a determined destination*".[513] Such statements lead to understanding function as a reduction of the choice range by a proprietor, operated by a modification of the concept of property.

This brief story of the functional approach shows an interesting contrast. While social and natural scientists regard functionalism with dubiousness, legal functionalism has a solid background and optimistic contemporary endeavors. It has challenged traditional legal dogmatics in the continental world with figures like the abuse of right. It has questioned classic case-book legal reasoning in the United States with the legal realism movement. Lately, functionalism lays behind invigorated legal trends like the Law and Economics and the social function of property. However, such trends appear reductionist in their consideration of only one type of function.

The path taken in the present work is embedded in the functionalistic tradition, but cannot be subsumed to any of its manifestations. In fact, it is a very specific one, due to three characteristics. First, it is not causal: this is not an empirical argument arguing that competition *causes* identified effects. Secondly, it is not indistinctly teleological: it assumes the difference between goal and function in the sense that the former can be a direction of a purposeful behavior (or policy), while the latter is an explanation for a specific social form. Clearly, antitrust policy has *goal(s),* while competition can only have *function(s)*. Finally, it is not theoretically monolithic: there is no assumed commitment with one specific theory or

[511] Carried out by authors like Léon Duguit, *Les transformations genérales du droit privé depuis le code Napoléon* (1912), Paris, Félix Alcan.

[512] Orlando Gomes, *A função social da propriedade* (1984) in Boletim da Faculdade de Direito de Coimbra: estudos em homenagem a A. Ferrer-Correia 2 (1989), 6.

[513] Fábio Konder Comparato, *Função social da propriedade dos bens de produção* in Revista de Direito Mercantil, Industrial, Econômico e Financeiro (1986) 63, 32.

specific set of assumptions. In this sense, we start from Niklas Luhmann's early critiques of previous sociological methods[514] and do not fully adhere to what seems to be the author's preferred approach.

It is hardly fulfilling to explain a social phenomenon by choosing only one of its possible effects. The acquisition of a specific product might change one's economic position, but could bring consequences in other spheres of social life. One can think on jewelry, which "functions" both as an investment and as an adornment. Moreover, the constellations of causes and effects are not static. To acquire a specific product has not the same meaning as it did decades before. An acquisition of gold carried different functions before and after the monetary standard was adopted.

If one is not satisfied with the effects-based explanation, why would they insist on a functional method? Our answer is: because it enables the constitution of a limited area of comparison. The functional approach structures complexity in the analysis of phenomena that are deemed to solve social problems. In Luhmann's words, function is a "*regulative scheme of meaning that organizes an area of comparison between equivalent performances*", wherein equivalence is "*an analytical and heuristic principle*".[515] Therefore, competition should be seen not as an invariable cause of determined consequences (or the other way around) but through a set of comparable causes and effects. The function of competition is "*a relation between several causes with each other or between several effects with each other*".[516]

In order to be able to compare functional equivalents, one must choose a relatively invariable reference point. Luhmann's preferred approach seems to be defining an abstract *problem* and comparing different *performances*: "*The question is not: Does A always (or with a given probability) result in B, but: are A, C, D, E, in their capacity to result in B, functionally equivalent?*"[517] By such means, the author is able to leave open the question

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[514] See Niklas Luhmann, *Soziologische Aufklärung 1* (1970; 6 ed. 1991), Opladen, Westdeutscher Verlag GmbH, 9-30.

[515] Niklas Luhmann. *Funktion und Kausalität*, in Soziologische Aufklärung 1. Aufsätze zur Theorie sozialer Systeme (1970), Opladen, Westdeutscher Verlag, 14-15.

[516] Niklas Luhmann. *Funktion und Kausalität*, in Soziologische Aufklärung 1. Aufsätze zur Theorie sozialer Systeme (1970), Opladen, Westdeutscher Verlag, 18.

[517] Niklas Luhmann. *Funktion und Kausalität*, in Soziologische Aufklärung 1. Aufsätze zur Theorie sozialer Systeme (1970), Opladen, Westdeutscher Verlag, 23.

whether "A" really results in "B", while understanding identity as order of other possibilities of being – "*Identität in diesem Sinne ist immer System*", identity is system.[518]

This route, which circumvents the notion of function as a manifestation of causality, leads Luhmann to avoid the separation between theory (as a statement of a causal law) and method (as a rule for proving such causal laws). His research presupposes instead a theoretical framework of *concepts*, according to which his comparative points would not be arbitrarily selected. In such framework, the setting of a "goal" has no rationality in itself: its rationality comes from system reference.[519] And so were settled some of the bases for one of the most complex theoretical constructions of the last century, which we will quickly summarize due to its relevance to our conceptualization of competition.

Instead of presupposing social order as something given (and then problematizing its defects), Luhmann tries to construct a theory that considers the normal as an improbable event, which nevertheless occurs with sufficient regularity[520]. The author looks at the dynamics and differentiation of modern society and asks: how is it possible? What is the basic operation of social systems? Although some other classics had posed similar questions, the search for those answers will lead Luhmann to his own starting point – or, more precisely, to his own difference[521].

In looking for the specific social element, Luhmann encountered some difficulties. Attached to humanistic philosophy, traditional sociology had viewed men or actions as components of society. But the complexity brought by such starting points would be infinite. Characterizing society as a group of human beings, with all its biological and psychic complexity, would also not clearly establish what is *not* part of society. This is why Luhmann choses another starting difference. Society, for systems theory, is the comprehensive set of all communications, which ultimately refers to the synthesis of three selections: information

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[518] Niklas Luhmann. *Funktion und Kausalität*, in Soziologische Aufklärung 1. Aufsätze zur Theorie sozialer Systeme (1970), Opladen, Westdeutscher Verlag, 25-26.

[519] See Niklas Luhmann. *Funktion und Kausalität*, in Soziologische Aufklärung 1. Aufsätze zur Theorie sozialer Systeme (1970), Opladen, Westdeutscher Verlag, 31-48.

[520] Niklas Luhmann, *Vorbemerkungen zu einer Theorie sozialer System* in Soziologische Aufklärung 33. Soziales System, Gesellschaft, Organisation (1981), Westdeutscher Verlag, 11-12.

[521] Niklas Luhmann, *Soziale Systeme. Grundriss einer allgemeinen Theorie* (1984), Frankfurt am Main, Suhrkamp, 93 and ff (as any experienced systemic researcher will notice, we are here dealing with the concept of "meaning", which relates to excess of reference to further possibilities of experiences and actions).

(*Information*), message (*Mitteilung*) and comprehension (*Verstehen*)[522]. What is not communication, is also not society.

Human beings as biopsychic systems are not part of society: they form as such its environment. Only communication communicates. And since communication doesn't know frontiers within modern society, one can only think of society as world society. Communication is an improbable event: if contingency is something which is neither necessary nor impossible (in short: something that could be different), communication is doubly contingent[523]. Alter and Ego expect what each other *might* expect. And each of them assumes the other expects what each *might* expect. This does not refrain Ego from being determined by Alter and vice-versa (as Parson had noticed), but it shows that every error becomes productive. This situation makes it possible for an (improbable) system to be (nevertheless) formed.

Society is difference: the difference system/environment. The social system is built upon communication. And society is differentiated[524]. In order to explain the functional differentiation of society, Luhmann applies Darwinian evolutionism to the communicative context. Functional differentiation is a modern evolutionary acquisition that replicates the system/environment distinction within the social system itself. One should not take evolution as improvement or as something that presupposes an end. It only indicates that random mutations occur, which may later be selected by the social system itself and stabilized, working as structures that can be observed by subsequent operations. The combination of systems theory with evolutionary theory does not result in the presentation of typical phases, but in the explanation of structural changes with the help of the distinction between variation, selection, and stabilization.

What does systems theory mean by the statement that system/environment distinction can be replicated within the social system? It means that other subsystems, operatively closed and cognitively open, are formed within the communicative system.

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[522] See Niklas Luhmann, "*Was ist Kommunikation?"* in *Soziologische Aufklärung 6* (1995), Wiesbaden, VS Verlag für Sozialwissenschaften, 109-120. Also Niklas Luhmann, *Einführung in die Systemtheorie* (2004). Heidelberg, Carl-Auer-Systeme Verlag, 288-314.

[523] Cf. Niklas Luhmann, *Soziale Systeme. Grundriss einer allgemeinen Theorie* (1984), Frankfurt am Main, Suhrkamp, 152.

[524] See Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (1997), Frankfurt a.M, Suhrkamp, 595-788.

Being social, these subsystems also contain only communication. They differ from each other, however, mainly by two characteristics: their function and their code. In Luhmann's version of systems theory, the function of each social system refers to a social problem with which each subsystem is monopolistically able to deal[525]. Code means the binarity that serves as a starting point for any operation of the subsystem. Binary codes are two-sided forms that facilitate the round-trip circulation between a value and its opposite. The value of binarity consists of the excluded third: either lawful or unlawful, either true or false. Binary codes are therefore empty formulas, which are complemented by programs which offer criteria for their application.

Social systems encompass not only the general level of communication, but also those of interaction and organization[526]. Interaction is a social system that is limited by communication between parties who are presented to each other at the same moment. Although it can be spontaneous and can appear as not referring to society, there is no interaction outside the society. For example, the conversation between seller and buyer during a fair is a societal event. Organizations are social systems that differentiate themselves between non-members and members, whose membership depends on a decision that can be reverted. While functional systems have in principle no motive to exclude[527], there are requests that an organization can make only for (included) members and not for (excluded) non-members. For example, the requirements to be fulfilled by the employees of a specific firm cannot be imposed over its consumers.

According to Luhmann, society is constituted by "autopoietic"[528] subsystems that produce their own operations, structures, timing and semantics. In modernity, it is characterized by the primacy of functional differentiation, whereas it does not abandon other

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[525] Cf. Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (1997), Frankfurt a.M, Suhrkamp, 745 and ff.

[526] See Niklas Luhmann, *Interaktion, Organisation, Gesellschaft. Anwendung der Systemtheorie in Soziologische Aufklärung 2. Aufsätze zur Theorie der Gesellschaft* (1975, 6 ed. 2009), VS Verlag, 9-24; Also Niklas Luhmann, *Organisation und Gesellschaft in Organisation und Entscheidung* (2000), Opladen, Wiesbaden, 380-416.

[527] The difference inclusion/exclusion has gained increasing relevance in the later stages of the development of the theory. See João Paulo Bachur, *Inclusão e exclusão na teoria dos sistemas sociais: um balanço crítico* (2014), Revista Brasileira de Informação Bibliográfica em Ciências Sociais – BIB, São Paulo, n. 73, 55-83.

[528] See Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (1984), Frankfurt am Main, Suhrkamp, 30-70. Niklas Luhmann, *Probleme mit operativer Schliessung* in *Soziologische Aufklärung 6* (1995), Wiesbaden, VS Verlag für Sozialwissenschaften, 13-25.

previous forms (segmental, center/periphery and stratification). Naturally, it does not mean such functional systems are autochthonous. Contrariwise, operative closure enhances interdependency. Also, it does not mean that one system is "blind" to the others. Observations are possible, since they occur as a construction of each system about its environment or about itself[529].

The phenomenon of competition poses an interesting challenge to this theoretical framework. Social scientists have found competition in several systemic contexts, not only in economics. Perhaps the most evident is the competition of political elites for the favor of voters.[530] Moreover, competition unites competitors in a reproducing social relation without forming a system. How to address competition in a way that copes with its pervasive character in modern society? How can the tools of systems theory be developed to carry out such an undertaking? This is our challenge for the next section.

II.III.II. FROM THE ENVIRONMENT'S STRUCTURE TO THE MULTIVALUED FUNCTION

In Niklas Luhmann's works, the phenomenon of competition was observed mainly with reference to the economic system[531]. Economy comprehends all the operations that develop with payment in money: payment is the "autopoietic" element of the system.[532] Modern economy speaks the language of money. As a symbolically generalized communication media, money ensures every action within economy has about the same meaning for the viewer as for the actors themselves. One who has a jewelry and receives money for it ends up not having the jewelry. An external observer can equally understand

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[529] See Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (1990), Frankfurt am Main, Suhrkamp Verlag, 68-121. Niklas Luhmann, *Ich sehe das, was Du nicht siehst* in *Soziologische Aufklärung 5* (1990), Opladen, Westdeutscher Verlag, 228-234.

[530] A well-known example is Joseph Schumpeter, Kapitalismus, Sozialismus und Demokratie (1950). Cf. Luiz Felipe Ramos, Tobias Werron. *Concorrência como um conceito histórico-sociológico: trazendo variação para a "evolução do antitruste"* in Celso Campilongo, Roberto Pfeiffer, *Evolução do antitruste no Brasil* (2018), São Paulo, Singular, 200.

[531] But see Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (1984) Frankfurt am Main, Suhrkamp, 521-525 (describing competition, in its capacity of favoring the immunization of society at a social level, generally as a situation in which the goal of a system can only be achieved at the cost of the goal of another system). Using a similar model of mutually sacrificing goals to define competition within antitrust, Oliver Black, *Conceptual foundations of antitrust* (2005), Cambridge, University Press, 8-10.

[532] See Niklas Luhmann, *Die Wirtschaft der Gesellschaft als autopoietisches System* (1984), in *Zeitschrift für Soziologie* (1984), vol. 13. N. 4, 308-327. Also Niklas Luhmann, *Ökologische Kommunikation. Kann die moderne Gesellschaft sich auf ökologische Gefährdungen einstellen?* (1985; 5ª ed. 2008), Wiesbaden, VS Verlag.

the transaction. The binary code "to have/ not to have" is interwoven with "to pay/ not to pay".

This duplicity is connected to the function attributed to the economic system. The function of economy, according to Luhmann, consists in linking each current distribution to a stable position in the future. In short: dealing with scarcity. Scarcity is produced by the operation of "access", namely, an operation which limits the possibilities of others to access the same good or service. But "access" is also motivated by scarcity. To the extent that some want to reserve for their future what others need or want in the present, economy deals with the relations between one scarcity – that of goods and services – and an artificial other, the scarcity of money. A fully monetized economy deals with two types of scarcity. Scarcity itself is codified.[533]

As we have seen in a previous section[534], one way of addressing the problem of scarcity is through competition.[535] Competition exists as long as two players cannot access the same good, service or money. Each competitor orientates its behavior towards other competitors. Those will likewise orient themselves towards their own competitors. Also in this context, oneself is the other of the other: each competitor looks at itself (its own costs and production data) and sees itself as a competitor of its competitors (through price and other relevant data).[536] This observation retakes the mirror's image from Harrison White[537] and clarifies it is not a narcissist one: the mirror reflects both the viewer and his context. Nonetheless, such process is deeply marked by double contingency. The information from a competitor's competitive strategy is never simply "transmitted" to the viewer. Instead, the

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[533] Niklas Luhmann, *Die Wirtschaft der Gesellschaft* (1994), Frankfurt am Main, Suhrkamp Verlag, 29, 197 ss.

[534] See section I.III.II.

[535] Luhmann is not clear here about the relation between scarcity and competition. We see such relation as a possible development of the author's own view on each of those concepts, as is suggested in Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (1984) Frankfurt am Main, Suhrkamp, 521.

[536] Price is not the only point of view which allows competition to be observed. Economic decisions can be oriented also by technologic development in a specific niche (a recent discovery, a new device). But such orientation is no more accurate than others when it comes to observing the future. Niklas Luhmann, *Die Wirtschaft der Gesellschaft* (1988), Frankfurt am main, Suhrkamp, 115.

[537] Interestingly, White recognizes Luhmann's sociological pioneering in Harrison White, *Identity and Control: How Social Formations Emerge* (2ª ed, 2008), Princeton, Princenton University Press, 337 ("Communications, and signaling more generally, are aspects of social structure/process rather than a matter of independent cognitions. All this reasoning was pioneered by Luhmann"). On the other hand, White's mirror is used in Luhmann's statements about the market in the economic system.

meaning and effects of a strategy are not immediately clear to the firm at the moment it needs to decide.

As the scenario of double contingency is repeated in each company's decision, one can expect the level of uncertainty to be extremely high. The mirror is turve. How to observe the observers? Callon has suggested that each company uses increasing calculation methods and aggregated data. Such methods and data help to set criteria for economic decisions, but the future remains non-observable. One cannot control the range of possibilities implied in the decision process of all his competitors, and cannot ultimately control the several factors on which business success depends[538]. For an observer, an economic action can by no means be considered "rational" with regards to the future. A competitor is only able to react in advance to data of the past.

A competitor's strategy can be either right or wrong. This is trivial: the strategy is right when the other's strategy is wrong, and it is wrong when the other's strategy is right. Both strategies can be naturally proven wrong in the face of a future that none can foresee (an overproduction, for example)[539]. An observer might refer to a third value in order to describe the rightness/wrongness of each strategy: risk[540]. Risk is a value that reflects the other two. Dealing rationally with such risky situations means neither efficiency nor maximization. It is all about being robust: that is, capable to survive one's and other's mistakes. In a complex economic system with not enough information or simple logic solution, uncertainty is transformed into risk. Rather than enhancing it[541], competition actually helps to structure risk[542].

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[538] See Friedrich Hayek, *The Use of Knowledge in Society* (1945), The American Economic Review Vol. XXXV, n. 4, 521. ("planning in the specific sense in which the term is used in contemporary controversy necessarily means central planning […] competition, on the other hand, means decentralized planning by many separate persons. The halfway house between the two […] monopoly").

[539] And that would probably not work as an excuse for antitrust purposes. See *United States v. Socony–Vacuum Oil Co.* (1940) Supreme Court of the United States 310 U.S. 150 (where major oil companies tried to address the fact that independent refiners were producing more gasoline than the market could absorb).

[540] An approach to risk in the systems theory can be found in Niklas Luhmann, *Soziologie des Risikos* (1991) Berlin-New York, de Gruyter.

[541] As we have seen, for an author like Ronald Dworkin, the decision of stimulating competition is one of those that can be accepted by a community despite of making life "much more dangerous". Ronald Dworkin, *Taking Rights Seriously* (1977, 1978) Massachusetts, Harvard University Press, 10.

[542] Here is how the ability to forecast an effect upon the future market was described in a famous antitrust case: "How accurately it could forecast the effect of present production upon the future market is another matter. Experience, no doubt, would help; but it makes no difference that it had to guess; it is enough

The double contingency of competition involves complexity and misunderstandings. Those conditions are handled in a way that is not the one developed by interactional and communicational systems. Interactive systems organize contingency by means of presence and simultaneity. Symbolically generalized communication media structure expectations in highly contingent scenarios. Neither direct communication nor interactions are involved in competition[543]. Double contingency is neutralized by competition's specific observational context[544].

Usually, one can react to a communication with a "yes" or a "no". The "no" might follow another "no", and the sequence of contradictions can become a conflict system[545]. With the absence of direct communication or interaction, competition avoids conflicts that would otherwise emerge. Two firms that fight for the same scarce resource (e.g. consumer's money) can dispute it without contact or communication with each other. One can evaluate the influence of others in the achievement of one's own goal without conflict, that is, by "purely" competing (in Simmel's wording). The consequence of such state of affairs is that competition avoids the difficulties, misunderstandings and length of interaction, but also its possibilities of control and certainty. Economic system is sensitive and responsive exactly as long as it saves interaction. The reaction to each economic event is an almost simultaneous response of many to the anticipated reactions of others.

Without communication or interaction, competition does not form systems. Which "place" could be reserved for it, then, in a systemic theory? Luhmann's answer seems to be:

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that it had an inducement to make the best guess it could, and that it would regulate that part of the future supply, so far as it should turn out to have guessed right." *United States v. Aluminum Co. of America* (1945) United States Court of Appeals for the Second Circuit. 148 F.2d 416.

[543] This is also true for oligopolies, Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 187. ("Since [if the theory is to stand up] the oligopolists must fly in formation *without communicating*, they must necessarily achieve a stability that reduces the variables and uncertainties each must take into account (…)" – emphasis added)

[544] See, in a different context (of explicit bargaining), Thomas Schelling, *The Strategy of Conflict* (1980), Cambridge, Harvard University, 70 ("each party's strategy is guided mainly by what he expects the other to accept or insist on; yet each knows that the other is guided by reciprocal thoughts. The final outcome must be a point from which neither expects the other to retreat; yet the main ingredient of this expectation is what one thinks the other expects the first to expect, and so on. Somehow, out of this fluid and indeterminate situation that seemingly provides no logical reason for anybody to expect anything except what he expects to be expected to expect, a decision is reached. These infinitely reflexive expectations must somehow converge on a single point, at which each expects the other not to expect to be expected to retreat")

[545] See Niklas Luhmann, *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie* (1999), Frankfurt am Main, Suhrkamp, 100.

competition is a structure of the environment[546]. One should bear in mind that the difference system/environment (which reproduces itself within the social system) is also reproduced also within subsystems such as economy. An "internal environment" of economy is therefore created by the system that takes part in the system. Each participant of the system (not only the competing ones) corresponds to one environment. Its "own" internal environment is precisely everything but him in the realm of economy.[547]

The internal environment does not vary arbitrarily, but it is also not a simple function of actions oriented towards ends. The paradox of scarcity is transformed here in a differentiation paradox: the system is both system and environment. To indicate such policontextural internal environment of economy, one could use the "market" name. However, competition is not the only possible economic structure. The system that deals with the scarcity paradox might be structured also in exchange or cooperation[548]. A centrally planned economy, for example, is generally organized as cooperation, and its prices provide information about the link between cooperation, exchange and competition.[549] Since it is possible to observe other observers through prices, one can speak of a "market economy".

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[546] Using (without quoting) the same expression of Herbert Simon, *Rational choice and the structure of the environment* (1956), Psychological Review, 63 (2), 129-138. In a more general formulation, competition would form a "semantic of unity" that fosters the amplification of contradiction, but not the "real unity" of autopoietic reproduction. See Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (1984) Frankfurt am Main, Suhrkamp, 524-525. Contrast with Simmel's view of competition as a "form of socialization" in section II.I.I.

[547] Even in modern times, one should not forget that "the realm of economy" excludes non-economical behaviors: one can still raise vegetables and eat them.

[548] In some situations, exclusive exchange or cooperation is precisely the harm to antitrust's competition. See *Standard Fashion Co. v. Magrane-Houston Co.* (1922) United States Supreme Court. 258 U.S. 346 ("The contract contains an agreement that the respondent shall not sell or permit to be sold on its premises during the term of the contract any other make of patterns [...] Both courts below found that the contract interpreted in the light of the circumstances surrounding the making of it was within the provisions of the Clayton Act as one which substantially lessened competition and tended to create monopoly"). In others, such exclusivity is not enough to harm competition *Tampa Electric Co. v. Nashville Coal Co.* (1961), Supreme Court of the United States. 365 U.S. 320. ("This is not to say that utilities are immunized from Clayton Act proscriptions, but merely that, in judging the term of a requirements contract in relation to the substantiality of the foreclosure of competition, particularized considerations of the parties' operations are not irrelevant. In weighing the various factors, we have decided that in the competitive bituminous coal marketing area involved here the contract sued upon does not tend to foreclose a substantial volume of competition").

[549] It might also be the case that the economy is provided with cooperation as a myth. Niklas Luhmann, *Die Wirtschaft der Gesellschaft* (1988), Frankfurt am main, Suhrkamp, 106 (explaining that there might be competition between companies for the supposed evaluation of a central office).

Thus, the contrary to market economy is not planned economy, but the economy of subsistence.[550]

To some extent, exchange or cooperation can be considered functional equivalents to competition. Such observation keeps us in the realm of what we have been calling Luhmann's preferred approach within the functional method. One refers to a specific problem (double contingency in market orientation or scarcity in modern economy) and compare different performances (interactional conflicts, cooperation/exchange). But competition poses additional challenges. Although competition does not form *systems*, it develops some kind of *unity* between competitors. Such unity can be observed in several contexts of modern society and its manifestations are not encompassed by any single system. A possible strategy to understand its pervasive character in modern society – a strategy that can be proved right or wrong in competition with others[551] – is to look closer at the different *problems* that such unity, or social form, is capable of addressing.[552]

Instead of analyzing *equivalent performances* based on a referential problem, one could focus on comparing *the multiple problems* addressed by competition.[553] At this point we start to refer to what mathematicians have called a "multivalued function".[554] Luhmann

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[550] Cf. Niklas Luhmann, *Die Wirtschaft der Gesellschaft* (1988), Frankfurt am main, Suhrkamp, 97.

[551] As a precursor of realism once stated, "the best test of truth is the power of the thought to get itself accepted in the competition of the market". Oliver Holmes in *Abram v. United States*, Supreme Court (1919).

[552] Legal scholars are also used to such movement, Noberto Bobbio, *Dalla struttura alla funzione. Nuovi studi di teoria del diritto* (1977), Milano, Edizioni di Comunità.

[553] The compatibility of such approach with Luhmann's early considerations should be clear from his own words: "Diesen bescheideneren Ansatz legt der Äquivalenzfunktionalismus nahe. Er verwendet diejenigen Ursachen oder Wirkungen, die aus lebenspraktischen oder theoretischen Gründen einen Brennpunkt des Interesses bilden, als funktionale Bezugsgesichtspunkte, das heißt: Er benutzt sie als konstanten Ausgangspunkt für die Frage nach äquivalenten Kausalbeziehungen." Niklas Luhmann. *Funktion und Kausalität*, in Soziologische Aufklärung 1. Aufsätze zur Theorie sozialer Systeme (1970), Opladen, Westdeutscher Verlag, 17. Also, 43 ("Die methodische Erweiterung kann durch Umdeutung des kausalwissenschaftlichen Funktionalismus in einen vergleichenden [mehrere mögliche Ursachen miteinander oder mehrere mögliche Wirkungen miteinander vergleichenden] Funktionalismus vollzogen werden"). Emphasis added.

[554] That is, a correspondence *f* which associates at least one member $y = f(x)$ in Y with each x in X and which associates at least two members of Y with some x in X. See Alex Oliver and Timothy Smiley, *Plural Descriptions and Many-valued Functions* (2005) Mind Association, vol. 114, 1048-1059. In the natural sciences, one can also find examples of multiple functions. The liver, for example, secrets bile, converts sugars, produces urea, etc. Key here is to differentiate functions – which explains why the liver is there – and accidents – even a liver can be served with onions in a human lunch. Larry Wright, *Teleological Explanations: An Etiological Analysis of Goals and Functions* (1976), Berkeley, University of California Press, 94. Finally, this is not a notion totally strange to antitrust. See *United States v. American Express Co.* (2016) United States Court of Appeals, Second Circuit. 838 F.3d 179 ("The simple transaction of gassing up a car by use of a credit

prefers to leave open the question of whether competition has the many favorable properties attributed to it. We agree it is an empirical question to be explored in different specific contexts. We also do not ignore that in such contexts competition can present as much dysfunctional properties as capabilities of addressing social problems. But this is not enough to prevent one from heuristically comparing the values of competition's multivalued function in modern society[555].

One could, of course, think of competition from the perspective of its expected economic effects. Theories could be developed to describe how competition, in principle, "disciplines" market price. Others could employ competition to work as an analytical abstraction that enables economic theorization (and scientific ambitions), such as the "perfect competition" theories. Our reasons for defending the possibility of such approaches are similar to those that lead us to reject their exclusivity. There is nothing intrinsic in competition that recommends a pure economic view of the phenomenon[556]. The curiosity about the non-economic social functions of competition can be illuminating both for sociology of competition (as it gives a clue about its pervasive emergence in modern society) and for antitrust (as it rehabilitates the goal of competition regardless of its economic implications).

The overview on sociological literature provided in this chapter opens some interesting possibilities for competition's multivalued function[557]. In a society that cannot

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card is enabled by a complex industry involving various commercial structures performing various essential functions.)

[555] It doesn't mean one will take every *effect* into consideration. Only actual functions – those who explain why an emerged social form is there – matter. For an antitrust attempt to consider non-economic effects, see *United States v. Brown University* (1993) United States Court of Appeals, Third Circuit. 5 F.3d 658 ("At trial, MIT maintained that Overlap had the following procompetitive effects: (1) it improved the quality of the educational program at the Overlap schools; (2) it increased consumer choice by making an Overlap education more accessible to a greater number of students; and (3) it promoted competition for students among Overlap schools in areas other than price. The district court rejected each of these alleged competitive virtues, summarily concluding that they amounted to no more than non-economic social welfare justifications [...] We conclude that the district court was obliged to more fully investigate the procompetitive and noneconomic justifications proffered by MIT than it did when it performed the truncated rule of reason analysis.")

[556] Acknowledging non-economic motives behind the Sherman Act, *United States v. Aluminum Co. of America* (1945) United States Court of Appeals for the Second Circuit, 1945. 148 F.2d 416. (Be that as it may, that was not the way that Congress chose; it did not condone "good trusts" and condemn "bad" ones; it forbade all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.)

[557] See sections II.I.I., II.I.II. and II.I.III. As in Luhmann's functional approach, multivalued function enables a heuristically based comparison that does not imply empirical statements between causes and effects.

resort to statutory predetermination, individuals might still want to know which activities they are expected to perform and which rewards (if any) they could expect from such activities. One way of indicating their place in the social system is through competition (Cooley). In a complex society, with so many possibilities of aspirations and positions, such selective procedure cannot be a trivial one. Quite the reverse, competition is a widespread and complex (in Cooley's words, "blind and anarchic") means to select which individual would perform each task and for which reward, not only in economy but in many areas of social life[558].

This is not to say competition is the only possible solution for the social problem of allocating individuals to different positions. However, it might be one that addresses other social problems (while it can also create some) at the same time. If it is true that competition forces one competitor to see his own life from a new point of view (Cooley), and to see the competitor as "a man like myself" (Cooley again), it should also be expected to play a role on keeping social problems resulting from hatred and envy under control. To what extent do we hate he/she who has offered us a new worldview? Which kind of envy does one feel about he/she who has joined a process of selection that was also opened to the loser? Doesn't the competitor become, after all, a part of myself?

The very fact that competitors seek a result that expands from the parties in dispute might indicate that competition could also help in the generation of objective values (Simmel). One of the values of competition function could be precisely adding to a dispute a social point of view. Competition triggers the discovering of new aspects of the disputed third, "even before it becomes aware of them". And while enabling the creation of value, it creates a specific kind of socialization between competitors and the third, a constellation that is different from any other social form.

Those kinds of statements might result from other researches that in that sense differ – but are not incompatible – with ours.

[558] Cooley was followed at this point by Edward Alsworth Ross, *The Principles of Sociology* (1920), New York, The Century CO, 181-182. Similarly, Wiese writes about the principle of competition as an experimental (or American) principle by which the position of an individual in society would be decided by a "race in the social arena". Leopold von Wiese, *Die Konkurrenz vorwiegend in soziologisch-systematischer Betrachtung* in Deutsche Gesellschaft für Soziologie (DGS), *Verhandlungen des 6. Deutschen Soziologentages vom 17. bis 19. September 1928 in Zürich: Vorträge und Diskussionen in der Hauptversammlung und in den Sitzungen der Untergruppen* (1929), Tübingen, Mohr Siebeck, 15-35.

Once again, although competition might not be the only means of generating objective values or creating social constellations, its multivalued function suggests that other social problems could be concomitantly addressed. Competition leads to possible answers for questions related to moral/justice requirements. Not only luck or inherited qualities, but the own force employed by the subjects in competitive dispute matters. Through such a procedure, competition might bring more participants to an otherwise limited dispute, especially those who would in principle tend to avoid the hardness of the process.

Even when it does not aim at any financial profit, competition has been praised as the "dynamic vehicle of progress in modern economic life" (Geiger). It goes without saying that it cannot guarantee any progress by itself. Any progress (however it is conceived) would depend that many other circumstances work at the same time. But another part of the sentence indicates a plausible candidate for the multivalued function: the enhancement of dynamicity. Whatever its final results might be, competition helps to challenge the social immutability of a given context. Competition could also be viewed as an important factor for reproducibility (and for the "robustness" of competitors). In market situations, the way that firms deal with uncertainty by referring to existing productive structures (White) suggests that relational competition, perhaps more than econometrics, contributes to the durability of a given market. Expanding it to other social contexts, competition helps the reproducibility of society.

Those examples might suffice to indicate that, when it comes to competition, more than one social problem is at stake. In two non-published works[559], Luhmann has offered an innovative contribution to the matter, explicitly presenting functions of competition that are not immediately economic. In accordance with the German sociologist, those functions would be: (i) complicating a conflict situation by directing the divergent interests towards a third party[560] with whom the interaction does not have to seek conflict (ii) to allow moral evaluation of such complex situation and then use it both for regulation and for the justification of behaviors, as what has been achieved in the competition appears to be a

[559] Niklas Luhmann, *Ebenen der Systembildung – Ebenendifferenzierung* (1975, 2014), Unveröffentlichtes Manuskript (stating, on the other hand, that competition cannot guarantee increased results, rationality of behavior or innovation) and Niklas Luhmann, *Ist Konkurrenz zu empfehlen?* (-) Unveröffentlichtes Manuskript.

[560] Interestingly for the present work, Luhmann's functional considerations about competition presuppose the triadic form, apparently overcoming the definition he presented in other works. See footnote 531.

deserved, justified possession and (iii) through complexity and moralization, to avoid or relieve conflicts between opponents that do not need do deny themselves in a reproducible society.

Similar to law, competition would be a device that can be expanded if society needs to allow greater potential of rejection and conflicts. But it can only do so if the level of the interaction systems is already sufficiently differentiated, so that the relationship with non-interacting parties can also be arranged through competition. Another requirement is that the social system should be functionally differentiated to a considerable extent so as the context in which one competes does not exclude interactions in other respects[561]. Perhaps competition is a candidate to take the place of a never-fulfilled promise of Enlightenment: the "principle of competition" offers a way of representing the *unity* of society as a *difference*.

One should not let the above remarks obscure that competition might bring at least as much "dysfunctions"[562] as "functions"[563]. The ambivalent effects of competition have been emphasized in social sciences at least since the late 19th century. Some enduring dysfunctions of competition have been noticed: (i) the hindering of other types of social forms and (ii) its homogenizing effects. As to the first, one can think "free competition" might lead to a greater or lower disruption of other types of social relations in which economic system is "embedded" (Polanyi, Ferreira de Souza), including cooperative ones,

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[561] This nicely relativizes Smith's idea that every interaction among competitors lead to collusion. See footnote 333.

[562] Still, dysfunctions are not accidental: they help one to explain why a specific form is there. For an attempt to raise a dysfunction as an antitrust defense, *National Society of Professional Engineers v. United States* (1978) Supreme Court of United States. 435 U.S. 679 ("the Society averred that the standard set out in the Code of Ethics was reasonable because competition among professional engineers was contrary to the public interest (...) competitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering. Moreover, the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare"). Nevertheless, the conclusion of the Court was that "we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition. In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable".

[563] For an approach that, also influenced by Simmel, decides to focus only on "functions" (of "social conflict"), rejecting dysfunctions, Lewis Coser, *The Functions of Social Conflict* (1964), New York, The Free Press, 8 (defining social conflict as "struggle over values and claims to scarce status, power and resources in which the aims of the opponents are to neutralize, injure or eliminate their rivals")

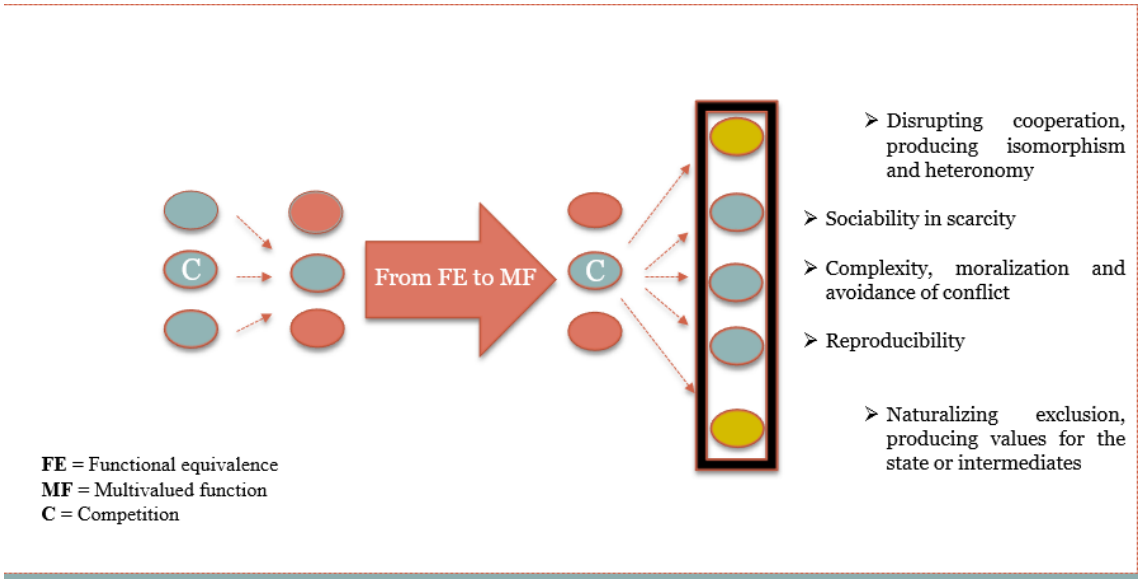
and therefore lead to other social problems[564]. As to the latter, researches on "isomorphism" (Meyer, Beckert) and on "heteronomy" (Bourdieu) indicate that competition can lead less to innovation than to standardization, with all the social problems related to it.

The study of the social structure of competition in Brazil suggested further dysfunctions. As it enables one to see the other as a "man like myself" and considers the "force employed by the subjects" in dispute, allowing a moral evaluation of its results, competition might help to naturalize and legitimate exclusion[565]. Being such a pervasive phenomenon of modern society, competition can be followed by widespread naturalized exclusion. Another dysfunction is related to modifications in the simple triadic figure of competition (competitor + competitor + consumer). When the state owns the disputed scarce resources, and in contexts where personal relations prevail, competition can also be a means of insidiously promoting interests which are not defined in a transparent democratic procedure. The same lack of objectivity might be present when intermediates play an important role in defining the dynamics of competition.

The move from a typical "functional equivalence" approach to the "multivalued function" approach can now be illustratively presented:

[564] Ross mentions the "ease of mind" as a condition of "mental and especially originative work" which cannot be realized "without security of tenure". Edward Alsworth Ross, *The Principles of Sociology* (1920), New York, The Century CO, 190 (using an example of the academic field, in a university whose policy was to displace mature scholars that proved unproductive: "the result was that professors dared not embark on a large and important research project which might not come to fruition for years, but busied themselves on a succession of small investigations which would yield something to publish every year". Thus, the 'efficiency policy' defeated itself).

[565] It doesn't seem to have been a Brazilian exclusivity. See Leopold von Wiese, *Die Konkurrenz vorwiegend in soziologisch-systematischer Betrachtung in Deutsche Gesellschaft für Soziologie (DGS), Verhandlungen des 6. Deutschen Soziologentages vom 17. bis 19. September 1928 in Zürich: Vorträge und Diskussionen in der Hauptversammlung und in den Sitzungen der Untergruppen* (1929), Tübingen, Mohr Siebeck, 28 (affirming that in an American metropolis the question for an opportunity to work is "what will you do?" and not "what were you before?" – as long as one "belongs to the white race")



The range of functions and dysfunctions here proposed as a heuristically based comparison help to explain the pervasive emergence of competition in modern society. Competition emerges in politics, education, sports and in other systems for its capability to address social problems which are common to all of them. As such range is not dependent on claims of efficiency or maximization, it also helps to justify the emergence of competition as an autonomous goal of antitrust. Yet, a competition which complexifies a conflictive situation, discovers new aspects of a disputed third or naturalizes exclusion is not *any* form of competition. In fact, we are dealing with a specific and historically-situated social form. The next section is dedicated to describing it.

II.III.III. TRIADIC COMPETITION, INDIRECT AUDIENCE AND THE BRAZILIAN MIRROR

To cope with the variety of competition phenomena, as well as with their corresponding discourse and theories throughout history, one needs more than a single concept[566]. The first on this list reflects an everyday-life understanding: competition appears here as a fight for scarce goods, in which one party can achieve its goal only at the cost of another's (or others'). One can think of the dispute between two farmers for a piece of land. Such *dyadic* constellations, where two or more parties try to acquire the same goal without

[566] For a partial presentation, in Portuguese, of these distinctions, see our Luiz Felipe Ramos, Tobias Werron. *Concorrência como um conceito histórico-sociológico: trazendo variação para a "evolução do antitruste"* in Celso Campilongo, Roberto Pfeiffer, *Evolução do antitruste no Brasil* (2018), São Paulo, Singular, 195-209.

necessarily interacting with third parties, could be called *direct* competition. Here, any attempt to acquire the desired good will provoke counter-action by the other competitor, leading to a direct fight between both competitors. Such "directness" makes these forms a close relative of another social form: the conflict.

If one adds a third party to the constellation, however, the dynamic of the competition should change[567]. As in other social realms, the third enables here a notable increase of complexity. While the classic occidental episteme was organized in binary terms, in which the third is thought only in terms of transition or connection to a higher unity, recent theories recognize in the "figure of the third"[568] a decisive role. This is the case of Niklas Lumann's cybernetic system logic and his attempt to overcome Aristotelian logic in conceptualizing a new approach to systemic paradoxes. One is no longer limited to oscillate between two sides of a distinction, but the distinction as such becomes a problem[569].

This is also the case of Simmel's understanding of dual relations as pre-social forms. The German professor of Philosophy viewed sociology as both the study of social interaction

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[567] Such is not to say that in one pole of the triadic structure one could not find more than one agent. For example, the situation called "boycott" in antitrust presents a plurality of firms acting together against a competitor. See *Fashion Originators' Guild of America v. Federal Trade Commission* (1941) Supreme Court of the United States. 312 U.S. 457. ("[...] a monopoly contrary to their policies can exist even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold. For as this Court has said, 'Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital.") *Associated Press v. United States* (1945) Supreme Court of the United States, 326 U.S.1. ("The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete [...] It is apparent that the exclusive right to publish news in a given field, furnished by AP and all of its members gives many newspapers a competitive advantage over their rivals."). Moving away from the "per se" prohibition of boycotts, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* (1985) Supreme Court of the United States, 472 U.S. 284. (The decision of the cooperative members to expel Pacific was certainly a restraint of trade in the sense that every commercial agreement restrains trade [...] When the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition).

[568] See Albrecht Koschorke, *Ein neues Paradigma der Kulturwissenschaften* in V.V.a.a, *Die Figur des Dritten: Ein kulturwissenschafliches Paradigma* (2010), Berlin, Suhrkamp Verlag, 9 - ss.

[569] On a less abstract level, the Luhmannian interest on the figure of the third becomes clear in specific systemic contexts, such as the legal treatment of conflicts and legal procedure. See Niklas Luhmann, *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie* (1999), Frankfurt am Main, Suhrkamp, 96 (making clear that law is not the only example: "*Das Beispiel des Rechtssystems steht hier für viele andere"*). See also Niklas Luhmann, *Legitimation durch Verfahren* (1969; 2nd 1975), Hermann Luchterhand Verlag, Darmstadt, 59-74. Arguing that such observation of the "third" was not constitutive of Luhmann's theory on a whole (in opposition to Simmel's), Joachim Fischer, *Der lachende Dritte* in V.V.a.a, *Die Figur des Dritten: Ein kulturwissenschafliches Paradigma* (2010), Berlin, Suhrkamp Verlag, 198-199.

(relational sociology) and of the forms of socialization (formal sociology). In his construction, triadic forms are such that would not be possible with two elements, and which either exclude more than three elements or turn them into a quantitatively extension that does not alter the form-type. They appear, of course, only as approximate spatial forms in which one could exemplify geometrical theorems regardless the immense complexity of reality.

In Simmel's thinking, triadic constellations could lead to three different arrangements. One would include the figure of the *mediator/arbitrator*, an outside potency that unifies a common relation of isolated elements, like the state alliance in defense from a common enemy. Other would be summarized by the expression *divide et impera*, meaning the third deliberately incites a conflict between the other two parties in order to gain a dominant position. In between, we would have competition as an example of a triadic arrangement[570] according to which the third (*tertius gaudens*) benefits from the dispute of the other parties without necessarily provoking a conflict: it is sufficient that the two parties have a certain difference, foreignness and qualitative dualism, being hostility only a special (though the most common) case.

Competitors are forced to direct their efforts to those who provide the attention and appreciation needed to acquire the desired good. One could think, initially, of the struggle between two suitors for the favor of a beloved person. Here, a "pure"[571] form of competition can take place, where there is no contact between competitors but they devote their energy exclusively to winning the favor of the third party. What we have here, therefore, is not a dyadic, but a *triadic* constellation[572]; and not a direct fight, but an *indirect* struggle[573].

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[570] Georg Simmel, *Soziologie. Untersuchungen über die Formen der Vergesellschaftung* (1908; 5 ed. 1968), Berlin, Duncker & Humblot, 134-143.

[571] Georg Simmel, *Soziologie der Konkurrenz* (1903), Neue Deutsche Rundschau XIV; Georg Simmel, Soziologie. *Untersuchungen über die Formen der Vergesellschaftung* (1908; 5 ed. 1968), Berlin, Duncker & Humblot, 200 - ss.

[572] The triadic character of competition reflects in the fact that the coordinated activity of a parent and its wholly owned subsidiary is not seen as a cartel, but as an activity of a single enterprise for antitrust purposes. See *Copperweld Corp. v. Independence Tube Corp*. (1984) Supreme Court of the United States, 467 U.S. 752. For the flipside situation in which a unitary vehicle (NFLP) does not mischaracterize the independent operation of thirty-two teams, *American Needle, Inc. v. National Football League* (2010) Supreme Court of the United States, 560 U.S. 183.

[573] It is easy to realize that the indirectness is lost when merged firms are able, for example, to recapture costumers after a price increase. See, in DOJ's Merger Guidelines (2010), "As a result of this recapture phenomenon, a merged firm, acting independently to earn the most profits it can, will choose higher prices than its two component firms did before the merger, if those firms were significant competitors to each other before the merger. The loss of competition that arises as a result of this effect is what is meant by a

The energy saved by avoiding a direct fight can be used to connect to the third party. Sometimes, as in the case of the rivals for love, the third party can be an individual person. However, in the cases most characteristic of modern competition, the third party is less tangible: it consists of anonymous voters, newspapers readers or consumers – those "mysterious" strangers who own the merchant's money in Kafka's story[574]. Nonetheless, it is the latter relation we saw Simmel comparing to love, as the orientation to the third party sensitizes the competitors to its needs and interests, "even before it becomes aware of them". The struggle of the producers for the consumer assures the latter an almost complete independence from the individual supplier (which naturally does not mean independence of suppliers as a whole) and thus allows consumers to make their purchase as a fulfillment of their claims regarding the quality and price of the goods. This is a specific *type of indirect* competition: competition for an *audience*.

Although not specified by Simmel himself, this variant of competition is implied in one of his statements, according to which "*modern competition, which is characterized as the struggle of all against all, is at the same time the struggle of all for all*". Here one gets in touch with the pervasive modern struggle *for* the attention and favor provided by a third party that consists of a potentially large number of anonymous and absent others. In contemporary times, it is worthy asking: how does this type of competition emerge and stabilize, considering that the involved parties, given the spatial distance between them, cannot immediately see and hear each other?

On the most general level, the answer is: competitors and third parties need modern communication technologies to become aware of and interact with each other. Based on this insight, three elements can be added to the Simmelian model of "pure" competition[575]. First, one can observe that between competitors and audience there are *intermediate figures* (market analysts, for example) who observe, compare and evaluate the offerings from the competitors and articulate expectations of the audience[576]. Second, there are *public*

'unilateral' anticompetitive effect, that is, an effect that does not depend on the firms in the market acting interdependently".

[574] Franz Kafka, Der Kaufmann (1913), Cf. Luiz Felipe Ramos, Tobias Werron. *Concorrência como um conceito histórico-sociológico: trazendo variação para a "evolução do antitruste"* in Celso Campilongo, Roberto Pfeiffer, *Evolução do antitruste no Brasil* (2018), São Paulo, Singular, 197.

[575] As it is done by Tobias Werron, *Wettbewerb als historischer Begriff in* Ralph Jessen*, Konkurrenz in der Geschichte* (2014), Frankfurt am Main, Campus Verlag.

[576] For examples of antitrust cases in which intermediate figures play an important role, see *United States v. Visa U.S.A., Inc., et al.* (2003) United States Court of Appeals, Second Circuit. 344 F.3d 229 ("The

communication processes amongst competitors and their audience that make the observation of intermediates accessible to both sides, competitors and their audiences. And third, the modern audience (or "public") is a historically relatively new figure – emerging since the 18th century – with specific characteristics; most notably, the modern public *is imagined* not just as a "mass" of people but as consisting of individuals *able to make their own decisions*.[577]

Such competition is thus doubly indirect: not only do competitors avoid devoting immediate energy to their adversary, but they are also largely prevented from directly accessing their audience. The audience, or public, as such cannot be contacted or wooed: it is an *imagined* collective which as a whole remains fundamentally unknown and whose preferences cannot be but roughly estimated. At the same time, it is this fundamentally fictitious quality of the public that implies the possibility of a universal audience ("struggle for all") and thus points to a potential of this modern type of competition to develop into *global* competition.

At this point one should notice the image of White's mirror becomes more complex with the acknowledgement of an (intermediated) third. One is still prevented from looking "through" the mirror: anonymous and numerous consumers are not observable. The attempt to do so – which is a corollary of the idea of indirect competition – reveals that the mirror's surface is more malleable than one could initially think. Competitors refer to intermediates that filter information provided both by consumers and by producers themselves. One makes competitive decisions based on market analysis, on investor positions or, more recently, on consumers' opinions organized in specialized websites. Intermediates become a substitute for the idea of assuming risk. Nevertheless, the communication with those is no less characterized by double contingency and it gives no more guarantee as to what will happen in the future.

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member banks of the MasterCard and Visa U.S.A. card networks may function either as 'issuers' or 'acquirers' or both. A member bank serving as an 'issuer' issues cards to cardholders; it serves as the liaison between the network and the individual cardholder. A member bank serving as an 'acquirer' acquires the card-paid transactions of a merchant; a particular acquiring bank acts as liaison between the network and those merchants accepting the network's payment cards with whom it has contracted). Also *United States v. American Express Co.* (2016) United States Court of Appeals, Second Circuit. 838 F.3d 179. ("On one side of the platform, the issuer acts as an intermediary between the network and the cardholder. On the other side of the platform, the acquirer typically acts as an intermediary between the network and the merchant. The issuer and acquirer are typically banks.")

[577] See footnote 345.

An intermediate of great importance to the present work is the antitrust agency. Antitrust agencies produce a discourse regarding competitors and about consumer preferences based on the agencies' own frameworks[578]. A relevant characteristic of such discourse is that, except for confidential information eventually provided by firms, it is a public one. It is public and it is written, which also means justified[579]. Such publicly reasoned discourse enables one to transform, for example, an obscure cartel in a transparent merger, even though they might be considered by an external observer as functional equivalents[580]. Having the form of a public and written discourse entails consequences which transcend the discipline: antitrust works as an arena for legitimation of capitalism[581] and for educative lessons about competition[582]. When an agency decides a case considering only a limited set of functions and ignoring dysfunctions of competition (or the other way around), such decision can be potentially read and might potentially influence policy-makers who design policies for enhancing competition, for example, within universities or between political parties.

Such a complex mirror in the economic system can be now illustrated as following[583]:

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[578] For an ethnographic study on how such discourse is formed in Brazil, see Gustavo Onto, *Ficções Econômicas e Realidades Jurídicas: uma Etnografia da Política de Defesa da Concorrência no Brasil* (2016), PhD dissertation presented to the Museu Nacional, Universidade Federal do Rio de Janeiro.

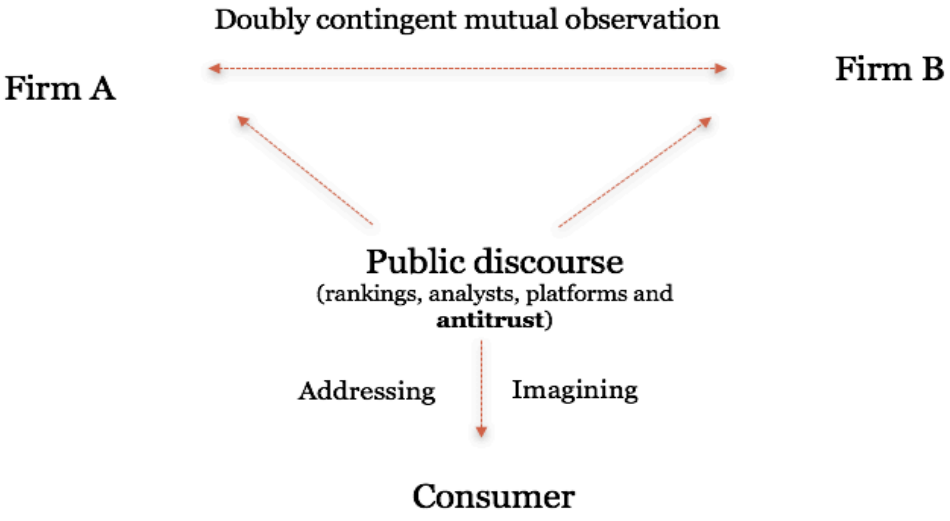
[579] On this, Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 408 (Antitrust law, however, is a particularly *instructive microcosm* because its issues are framed with clarity by price theory and because the law is so largely judge-made, which means that every decision *requires a written explanation*").

[580] See on such consequence of the Sherman Act, footnote 375.

[581] Also Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 422 ("That, I think, is increasingly the lesson taught by antitrust as a whole. The public does not understand the merits of the various cases. In a busy world it has neither the time nor the inclination to do so. The public observes, however, that the government and the federal courts find that business is continually behaving in ways contrary to the public interest. That lesson, endlessly repeated, even though it is quite erroneous, steadily erodes the intellectual and moral legitimacy of capitalism"). This raises the cost illustrated by one of the epigraphs of this work: missing the opportunity to confer "sociological legitimacy" on the market system. Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?* In *Journal of Economic Literature* (December 1982), Vol XX, 1473.

[582] Again Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 421 ("Since, out of all proportion to its direct economic importance, antitrust is a potent educative force, the worrisome question is the lesson it imparts.")

[583] Based on Tobias Werron, *Wettbewerb als historischer Begriff in* Ralph Jessen*, Konkurrenz in der Geschichte* (2014), Frankfurt am Main, Campus Verlag.



The metaphor of the mirror indicates that the reproducibility of markets depends structurally both on the difference among competitors and on their capacity of mutual observations. They need to be able to observe each other as a means of transforming the uncertainty (of an unforeseeable economic future) into risk (of reacting to a contingent strategy adopted by the competitor). But such observation cannot degenerate into transparency: if competitors actually *know* each other's strategy, the triadic structure is in danger. Homogenization and concentration are phenomena that on a certain level harm the very possibility of markets to appear and reproduce. This is not only a problem of reducing choice for the consumer; homogenized markets also diminish the ability for one to learn with the success and failure of competitors.

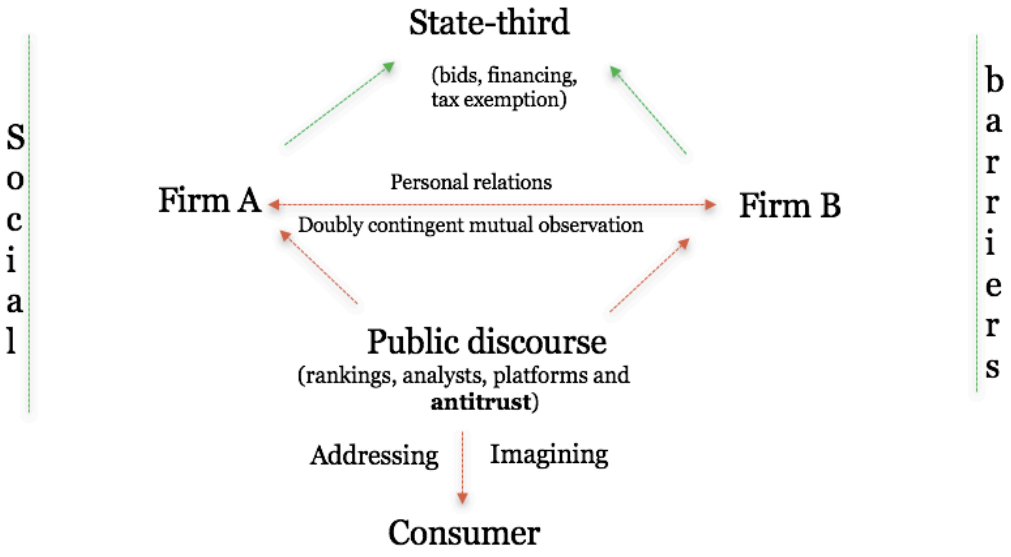
Intermediates like rating agencies and market analysts try to sell their services. If not as infallible guides for decisions, they work at least as accredited means for guaranteeing decision-makers from an unavoidable risk. Ultimately, intuition grounded on long experience keeps playing a more or less subtle (depending on how the entrepreneurs wish to present themselves) but relevant role[584], as well as do personal and organizational (once again more or less explicit) connections. The capacity of dominant and well-connected firms to interpret the mirror is not the same as of less informed and less influential companies. The

[584] On the intuition of businessmen, Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 393 ("The good businessman differs from the mere bookkeeper in the extra qualities he brings to decisions – judgment and intuition based on knowledge of the processes involved [judgments and intuitions whose degree of accuracy will be tested by the forces of the market] – and these are precisely the qualities that the Robinson-Patman Act says he must put aside when making pricing decisions")

number of opportunities of a firm to connect to others and obtain valuable information is a factor which pressures the "pure" or "indirect" form of competition, a factor that is not always captured by instruments like "market share".

All of those challenges seem to become clearer in the tropical version of the mirror[585]. Here, non-economic barriers are markedly added to the economic ones (treated by antitrust as "barriers to entry"): race, gender and origin tend to limit who is able to compete with whom in a society with patriarchal and slavery roots. Also, the overarching personalism in which Brazilian economy is embedded delimitates the opportunities of obtaining useful information and diminishes the relevance of indirect efforts to produce objective values. Finally, the doubly indirect form of competition is challenged by the presence of the state – not as an intermediate, through antitrust agencies, but as a third party. In this context, firms devote energy to compete for scarce resources owned by the state (credit, financing, public bids, tax exemptions, etc.) and dedicate less efforts to attract an anonymous and universal consumer.

After such remarks, the social form of competition in Brazil can be grasped by the following illustration:



[585] Although we have no reasons to believe that any country hosts an always empirically-pure competition. This leads us to the classic debate on the "ideas out of place". *Cf.* Roberto Schwarz, *Nacional por subtração*, in *Que horas são?* (1987), São Paulo, Companhia das Letras, 29-48; and by the same author, *As idéias fora do lugar*, in *Ao Vencedor as batatas* (1992), São Paulo, Duas Cidades, 13-28. See also Jessé Souza, *Uma interpretação alternativa do dilema brasileiro*, in *A modernização seletiva* (2000), Brasília, UnB.

This is the social form of competition whose emergence can be explained with the multivalued functional approach. As our story on the "concurrent discourse" about competition has shown, this "competition for the favor of an audience/public" (here qualified by a few stressing factors) has been reflected in the social sciences now for about 150 years. Roughly at the same period, antitrust statutes started to be created – the first federal law enacted in Canada in 1889 – and expanded to the whole world[586]. Such chronology suggests the expansion of antitrust might be part of an expansion of competition forms, a much older process than the one brought about by the usual suspect: neoliberalism. Our next task is to observe a couple of antitrust decisions through the lens of such multivalued social form – a step that is not always glimpsed by an antitrust doctrine concerned with economic effects.

[586] Showing that the countries with an antitrust law are more than one hundred and now account for more than 85% of the world's population, Keith N. Hylton and Fei Deng, *Antitrust around the World: an Empirical Analysis of the Scope of Competition Laws and their Effects* (2007), Antitrust Law Journal, Vol. 74, n. 2, 271-341; David S. Evans, *Trustbusting Goes Global* (2009), available at SSRN: https://ssrn.com/abstract=1430659.

III - BRINGING COMPETITION TO ANTITRUST

III.I. THREE CASES: BREAD, HOSPITAL AND TAXES

III.I.I. COLLUSION AND TRIADIC COMPETITION

Eighteen bakeries' representatives attending a meeting convened by the regional union of bakeries. The location is a restaurant in a small town at the center of Brazil. The name of the place is "Armação", which in Portuguese means "framework", but can also have the connotation of a "trap". The President of the union has the word:

- "*With a little bit of work, a bit of dedication from all of us, we're going to have a lot more together, right? And we're going to have a lot more unity and we're going to start, or at least earn again, at least ... as we had before. (...) (We are going to) work (that) too. This bread (...) (if) we all (sell) this bread at twenty cents you can be sure of the following: (will) supermarket (...)? Will not. (...) because no one is going to buy bread the other day. (...) (We) Try to talk to the baker, right? He was a companion of yours ... he said: 'Look, my friend, you know one thing: I sell for the price I want! You do not have this (business with me)'.*"

A lady accompanying one of the bakery owners goes to the restroom. In a few minutes, she returns and speaks to the union president:

- *You are arrested!*

The man can only stammer "*crime against the popular economy*", curiously using the term of the old Brazilian laws on competition, before he is detained by the policewoman. In the following day, an indignant consumer would be interviewed by the local newspaper: "*they protect themselves by making agreements and only harm the population. We need the bread and we don't have the right to choose the price"*. Little by little, the others at the "Trap" – many of whom also arrested the same day – begin to realize the facts that led to this unexpected outcome[587].

Weeks before, Jack (fictitious name) was about to open his first business: a bakery in the town of Sobradinho. One of his future competitors had found out about his plans and

[587] The story is based on an interpretation, among other possible views, of the documents from CADE's Administrative Proceeding n. 08012.004039/2001-68. We do not intend to provide a full overview of all the relevant facts of the case.

had inquired how much he would charge for a bread roll. After the opening, other bakery owners approached to ask: "Why don't you charge the same as others do? Everyone is charging the same price". Jack threatened to go to the police if the pressure did not stop.

And so did Jack one week later. Based on the information provided by him, the police officers visited a couple of bakeries and discovered that they all had a poster informing a price increase by R$0,20 per bread roll. The notices – with an identical grammatical mistake – had been allegedly received along with an invitation from the union to come to a meeting at the Armação. The police then prepared the ambush for an eventual arrest in flagrante delicto. One of the police officers was to accompany Jack's son at the meeting, and the others would wait nearby in case she reported a crime.

After the arrests, a report was sent to CADE, which initiated an antitrust investigation in parallel to the criminal one. The report included testimonies from the bakery owners, who informed how they calculated the price of the bread roll. Only one of them used a cost sheet (provided by the union). All the others calculated the prices based on competitors or on the sum of estimated costs[588].

The economic department (DPDE), later followed by the Secretariat of Economic Law (SDE), defined the affected market as "selling 50-grams roll in the city of Sobradinho"[589]. The defendants argued that they do not have market power capable of altering the price of the relevant product, since the bread roll is sold in many places besides the involved bakeries. Also, there would be no barriers to entry for new companies to enter the market[590]. The argumentation was supported by the hearings of the union's president and of its administrative assistant, both arguing that markets and supermarkets also provided bread rolls to the customers of Sobradinho[591]. The assistant informed that only ten bakeries out of more than one hundred bread roll suppliers in the city were affiliated to the union.

Despite the argumentation of the defendants, the SDE understood that the price-fixing "hinders or eliminates price competition among the bakeries in the city of Sobradinho". The Secretariat stated that supermarkets were not effective competitors, since they existed in small numbers and consumers would only buy rolls in those places as an

[588] Administrative proceeding n. 08012.004039/2001-68, 94-96.

[589] Administrative proceeding n. 08012.004039/2001-68, 42 and 835.

[590] Administrative proceeding n. 08012.004039/2001-68, 194 and 241.

[591] Administrative proceeding n. 08012.004039/2001-68, 809 and 815.

impulse purchase (when they need to go to the supermarket for other reasons and take the opportunity to buy bread). Moreover, the presence of non-affiliated bakeries in the meeting at the "Armação" would demonstrate that the anticompetitive ideas had been "spread". Defendants would therefore have market power capable of altering the price of the bread roll[592]. Evidentiary phase was closed in March 2009.

In June, the bakeries presented their closing arguments. Once again, they argued that they do not hold market power, adding that not only supermarkets, but also small stores, vendors in bicycles and residential places sell bread rolls in Sobradinho[593]. SDE issued a new Technical Note stating, first, that the central point of a cartel is not the existence of market power, but the agreement among competitors. Plus, the bakeries considered together would have market power[594]. One of the defendants soon disagreed, arguing that it is necessary to demonstrate the harm caused by the alleged cartel or at least the potential of such harm[595].

About two years later, the Attorney Office at CADE ("ProCADE") issued its opinion[596]. It considered that the effectivity of competition from supermarkets would depend on their ability to react to a small but significant and non-transitory increase in price ("SNIP") by the cartel, and since such verification had not been made by SDE, it would be doubtful whether competition between supermarkets and bakeries was effective or not. Defining market power as "raising prices, reducing output, diminishing quality or variety of products and services or the rhythm of innovation", compared to an "unrestricted competition regime" (what we have been calling the "but for" world), ProCADE concluded that the evidence was not enough to estimate the market power of the bakeries. As this was not a "hardcore cartel"[597], the lack of demonstration regarding the competition from supermarkets and regarding the market power of the bakeries would be enough to dismiss the case with regards to those parties (the union should still be convicted for its conduct of organizing the cartel).

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[592] Administrative proceeding n. 08012.004039/2001-68, 840.

[593] Administrative proceeding n. 08012.004039/2001-68, 847-849.

[594] Administrative proceeding n. 08012.004039/2001-68, 860-865.

[595] Administrative proceeding n. 08012.004039/2001-68, 874-875.

[596] Administrative proceeding n. 08012.004039/2001-68, 890-905.

[597] More on the distinction hardcore/diffuse cartel a few pages ahead.

The Federal Prosecutor at CADE ("MPF") disagreed. According to MPF, the existence of market power is not necessary to the verification of the antitrust violation investigated in the case. The mere proof of acting towards the price manipulation of a product, regardless of market power, characterizes the illicit. However, the presence in the union meeting at the Armação would not suffice as a proof of joining the cartel[598], since some of the bakeries might not follow the prices determined by the union. Only part of the defendants should be convicted[599].

In 2013, CADE finally ruled the case. The Reporting Commissioner considered the intention of raising income through the "union" of efforts was clear from the speeches recorded at the meeting. Plus, defining the relevant market and calculating market shares would be only "analytical tools" which are not necessary in investigations of collusions aimed at pure price increase. This would be so because (i) such conduct does not generate any social benefits, being unnecessary a deeper evaluation of its effects on the economy, and (ii) it can only be implemented by firms capable of influencing the functioning of the market.

Since Brazilian Antitrust Law deems potential harm to be enough to characterize an antitrust violation, it would not be necessary to prove anticompetitive effects were actually reached. Not having to prove effects would be helpful for an antitrust analysis of price cartels, as over-charging is usually not recorded in commercial invoices or in accounting statements. According to the Commissioner, thinking otherwise would require an economist or other specialist to estimate over-pricing in a market with competitors, variable costs, imperfect information and consumers whose incomes, preferences and price reactions may have changed during the period in which pricing took place. Therefore, the proof that the competitors joined a meeting in which a price increase was discussed, and that such meeting was related to other acts aimed at an artificial price increase, would be enough to the conviction of all the participants of the meeting.

In the Commissioner's words:

> "*One of the primary goals of the competition law is to ensure that companies develop their business strategies independently, and the communication among competitors on prices, output or other*

[598] This is compatible with the idea that a differentiated social system enables that a context in which one competes does not exclude interactions in other respects. See footnote 561.

[599] Administrative proceeding nº 08012.004039/2001-68, 932-939.

sensitive competitive information is sufficient to threaten the achievement of this goal"

There is more than one way to interpret the vote unanimously followed by CADE's tribunal. The most common would resort to a legal assumption based on an economic idea. The economic idea is that the agreement between competitors on prices leads unequivocally to a loss in consumer welfare, with no arguably benefit for consumer[600]. In addition to the creation of deadweight loss (sales that are lost due to the higher price charged, even though a consumer values the good more than the cost of creating the next unit of it), the surplus that would be enjoyed by consumers in the absence of collusion is transferred to producers. Being most decisively against consumers, cartels do not warrant the time and expense required for particularized inquiry into their effects. Therefore, such behavior is legally assumed to deserve a "per se" analysis, instead of passing through the complex tests of a "rule of reason".

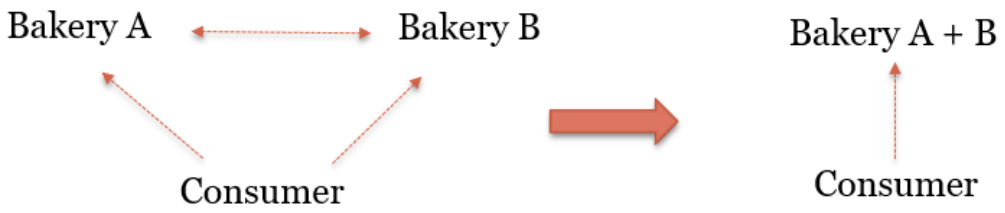
Notwithstanding this usual assumption, the case under comment brought a quantity of evidence that seems to at least cast doubts on the ability of the cartel to produce all such expected effects in the market. There were only ten bakeries affiliated to the union, and only eighteen businesses were present in the meeting, out of more than one hundred providers of bread roll in the city. There was no proof of institutionalized coordination mechanisms of the cartel, such as periodic meetings, operating manuals and principles of behavior. At least one of the bakeries was categorical not to follow the union's recommendation of increasing prices. As the ProCADE observed, both the competition from supermarkets and the market power of bakeries were not obvious from the discovered facts.

The reason why CADE's Commissioners could be so confident in (unanimously) deciding for the conviction of the bakeries is that the concerns with "allocative efficiency" or "consumer surplus" are not the only goals pursued by an antitrust agency. The indirect triadic form of competition is protected under the labels of "free competition" (art. 170, IV, of Constitution and art. 1st of Law 12,529/11), of avoiding the abuse that results in "elimination of competition" (art. 173, §4º of Constitution) and of the prohibition of acts whose object or potential effects are "to limit, to distort or in any way to prejudice free competition" (art. 36, I, of Law 12,529/11). As the Reporting Commissioner's vote puts it,

[600] Arguing that the "per se" analysis is one of the features of antitrust law that supports consumer welfare as an overriding concern, Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 66.

one of the goals of antitrust is to ensure that firms develop their business independently, that is, in a triadic indirect form.

The agreement among bakeries on price risks to transform the most basic feature of competition's social form – its triadic structure[601] – into a dyadic one:



As we have noticed in the previous chapter, there is a multivalued function attached to the triadic form of competition. It means that competition's capacity of addressing a number of social problems – which are not only of an economic nature – helps to explain its pervasive emergence in modern society. It can also aid to explain the protection of competition as an autonomous goal of antitrust, regardless of its ascribed economic effects. Avoiding the triadic form of competition means to preclude its capacity of performing a multivalued function[602], which might help to justify why antitrust agencies are willing to condemn cartels even when their effects in the market are doubtful.

At such point, two important mistakes should be avoided. In the first place, saying that protecting the indirect triadic form is an autonomous goal of antitrust does not equal to stating that competition is the *only* goal of antitrust. Competitors can collaborate to create or produce new products, expand to foreign markets, reduce transaction costs or informational asymmetries. Such collaboration threatens the indirectness of competition and nevertheless can be considered lawful[603]. Firms competing horizontally in the same market can merge and, if they do not meet the turnover thresholds, not even be subject to CADE's scrutiny (or,

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[601] To be sure, some excerpts of the meeting at "Armação" indicate also a parallel dynamic of obtaining favors from the state. However, they do not seem to qualify as a "stressing factor" of the triadic form, as the favor obtained – permission to open on Sundays – is generalized to all bakeries. This is an example of avoiding, through the state, a limit *within* competition, to use Geiger's words.

[602] A triadic form can also be drawn considering two buyers disputing the same "scarce" seller. Accordingly, antitrust punishes buyer cartels as they avoid such triadic form, even though they might result in lower prices for consumers.

[603] See, for example, Federal Trade Commission and Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000), available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

if they do, be approved after the analysis of the antitrust agency)[604]. A horizontal merger does not only threaten the indirectness of competition between the merging parties, but its very triadic form, and can nevertheless be considered lawful. Such treatment is compatible with the perception that competition can create as many social problems as it addresses, and therefore its multivalued function includes dysfunctions.

The second mistake would be to understand the acknowledgment of competition as an autonomous *goal* suffices to provide decisional *criteria* to all cases involving the protection of competition. Here as in other areas, criteria are distinctions produced and consolidated by decision-makers and by legal doctrine. For example, hardcore cartel/diffuse cartel, exchange of sensitive information/agreement on competitive issues, or parallel behavior/collusive behavior are all distinctions which hold important legal consequences. It is significant to notice that they are not inspired by a single economic goal, and that the triadic indirect form of competition stands as an inspiration to all of them.

Take the distinction hardcore cartel/diffuse cartel. CADE has defined[605] "classic" cartels as secret agreements between competitors, involving some form of institutionality, with the objective of fixing prices and conditions of sale, dividing consumers, setting production level or preventing new companies from entering the market. In contrast, "diffuse" cartels would be those acts of coordination between companies of an eventual and non-institutionalized character, as when a group of companies decides to meet to coordinate a price increase due to an external event that affected them simultaneously. While both violates the goal of competition, it should be clear that periodic meetings, operating manuals or principles of behavior, common in hard core cartels, tend to stabilize a dyadic structure between consumers and competitors. With the advance of technology, such institutionalization can involve not only interaction, but also softwares that help monitoring the collusion[606]. Diffuse cartels, in turn, only circumstantially challenge the triadic form.

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[604] See CADE, *Guia de Análise de Atos de Concentração Horizontal* (2016), available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf. Even mergers that do not meet the thresholds might be examined by CADE if the agency requests the submission within one year from the date of consummation.

[605] See Luiz Carlos Delorme Prado in Administrative Proceeding n. 08012.002127/2002-14, 13473-13474.

[606] See Luiz Carlos Delorme Prado in Administrative Proceeding n. 08012.002127/2002-14, 13486.

Accordingly, CADE has been considering 15% of turnover in the field of the business activity as a reference of fine for hardcore cartels, and 5% to 12% for diffuse cartels[607].

A nuanced approach has also been adopted in cases in which there is some exchange of sensitive information, but not an effective agreement between competitors on competitive issues. Like the Reporting Commissioner stated in the bakery case, "*the communication among competitors on prices, output or other sensitive competitive information is sufficient to threaten"* the goal of competition. A present issue on this matter is the elevated transparency in markets stemming from the use of technology[608], which can lead to homogenization and isomorphism as dysfunctions of competition, and not necessarily as a result of an agreement. As we have seen in the last chapter, competition is a social form that creates unity around scarcity without communication between competitors – and such unity is based on a doubly contingent mutual observation. When competitors communicate about sensitive information[609], the contingency tends to diminish and the indirectness ("pureness") of this social relation is blurred, although the triadic form of two independent strategies disputing the same consumer is maintained. Accordingly, CADE has estimated a fine from 2% to 5% of turnover in the field of the business activity for those cases[610].

Finally, there is the distinction parallel behavior/collusive behavior. Firms in an oligopolistic market can observe each other and adjust their conducts. The effects in terms of higher prices or output restriction can be similar to those stemming from a monopoly or a cartel. Nevertheless, the practice is not illegal unless an agreement or a "plus factor"

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[607] See CADE, *Guidelines for Cease and Desist Agreement for cartel cases* ("TCC") (2016), 29-30, available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf.

[608] In proceeding 08012.011791/2010-56, a technology company allegedly provided a software that was used by the competing driving schools, tending to standardize the commercial practices of its users. See Márcio de Oliveira Junior, proceeding 08012.011791/2010-56, page 18. In that specific case, the software was supposedly used also to monitor a cartel (see page 40).

[609] In CADE's view, competitively-sensitive information is, in general, specific (e.g. non-aggregated), recent, and directly related to the performance of the economic agents' core business information. Such information may contain specific data about costs; capacity level and plans for expansion; marketing strategies; product pricing (prices and deductions); main customers and deductions ensured; employees' wages; main suppliers and the terms of the contracts signed with them; non-public information on marks and patents and Research and Development (R&D); plans for future acquisitions; competition strategies, etc. See CADE, *Guidelines for the Analysis of Previous Consummation of Merger Transactions* (2016), 7, available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf.

[610] See Consent Decrees ("TCCs") n. 08700.006694/2016-89, 08700.006721/2016-13, 08700.006875/2016-13, 08700.006955/2016-61 e 08700.007988/2016-28, related to Administrative Proceeding n. 08012.006386/2016-53, approved on October 31, 2017.

(additional evidence that permits an inference of agreement) is proved[611]. While in the bakery case the non-verifiable economic effects were deemed to be less important than the threat to competition, here the preservation of the triadic form prevails over observable harmful effects. When firms autonomously dispute the consumer, even though interdependently (observing each other's public behavior), no illegality is found. The situation is harder when an online system enables almost simultaneous observation of competitors' strategies, like in the airline technology of ATPCO[612]. Such a system can facilitate either veiled agreements, through codes and identification mechanisms, or lawful phenomenon like price leadership[613]. In any case, the inspiring goal for antitrust decisions using the distinction parallel behavior/collusive behavior seems to remain the preservation of a triadic form between competitors and consumers[614].

One can not dismiss technological evolution might lead to a situation in which the double contingency of mutual observation between competitors is almost an illusion. For example, a powerful computer or algorithm that identifies and anticipates the mechanism of price formation by a competitor[615]. In that case, the triadic form risks becoming an artificiality, and antitrust law could start considering such technology as a threat to the goal of competition.

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[611] See Donald F. Turner, *The Definition of Agreement under the Sherman Act* (1962), 75 Harvard Law Review. 655. This position was contested by Richard Posner, according to whom certain price behaviors allowed an inference of punishable tacit conspiracy. See Richard Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach* (1969), 21 Stanford Law Review. CADE has accepted the "plus factor" doctrine in many cases, such as Roberto Pfeiffer, *Administrative Proceeding* n. 08012.006539/1997-97 ("the characterization of a cartel is not merely due to the parallelism of prices between market competitors. The cartel practice goes beyond this spectrum; one must prove any type of combination between companies that is restricting free competition. It is the so-called doctrine of plus parallelism […]")

[612] The ATPCO (*Airline Tariff Publishing Company*) is a firm located in Washington/US that collected information regarding lines, fees, classes and available seats of around 700 airline companies in an online network. In the US, a civil action against ATPCO and eight airline companies resulted in a consent decree. The same result was obtained by CADE in Administrative Proceeding n. 08012.002028/2002-24.

[613] The latter was used as a defense argument by the airline companies in Proceeding n. 08012.000677/99-70.

[614] Another source of concern with the triadic form of competition is the common ownership or investment on supposedly competing firms. See José Azar, Martin Schmalz, Isabel Tecu, *Anti-Competitive Effects of Common Ownership* (2018), The Journal of the American Finance Association vol. 73, issue 4.

[615] See the Summary of an OECD's roundtable on "Algorithms and Collusion" at https://one.oecd.org/document/DAF/COMP/M(2017)1/ANN2/FINAL/en/pdf.

A hospital network and a conglomerate of ambulatory/outpatient treatment filed a merger to the Brazilian antitrust agency and required expedite analysis. The case was presented as a very simple one[616]. According to the agreement, the hospital network ("Rede D'Or") and the selling shareholders would own 50% each regarding the stocks of the outpatient conglomerate ("Acreditar"). As a result of the network's investment, Acreditar would improve its activities, while Rede D'Or would expand to oncologic services. There would allegedly be no horizontal overlap and just a minor vertical integration (measured in market share terms), since Rede D'Or also runs businesses in the health plan segment.

The investigatory department at CADE ("SG") agreed with the simplicity of the analysis[617]. Based on precedents of the antitrust agency, SG distinguished general hospitals like the ones owned by Rede D'Or from the specialized hospital/clinics of Acreditar. The geographic market of the former would be a radius of 10km (or 20min by car), while the latter could reach longer distances (20-30 km or the area of municipality), as consumers are assumed to be willing to go further for specialized treatment. No horizontal overlap was identified: Rede D'Or's hospitals are of a general kind or located in different areas than Acreditar's specialized clinics. As to the vertical integration between health plans and specialized hospitals/clinics, the market share was considered to be low enough to prevent any foreclosure, since competing hospitals and clinics would still have access to most of the plans in the area and competing plans would also have access to other specialized clinics. In the end, SG recommends approval of the merger without remedies.

The process seemed to be coming to an easy solution when CADE started receiving disquieting information. In response to a Reporting Commissioner's request for information, the regional council of doctors (CRM-DF)[618] argued that, alongside with other recent acquisitions by Rede D'Or, the merger could make it more difficult for other clinics' patients to access the hospitals of the network, since the latter would tend to favor their own patients. Moreover, doctors from competing clinics would also have trouble accessing the hospital beds from Rede D'Or, which would now concentrate most of the beds in the region. The

[616] This story is based on the merger examined by CADE under n. 08700.0044151/2012-01. It does not consider all the relevant facts of the case nor does it preclude other possible interpretations of the considered facts.

[617] Merger 08700.0044151/2012-01, 151 and ff.

[618] Merger 08700.0044151/2012-01, 189 and ff.

union of doctors (SINDMEDICO)[619] compared oncology outpatient/ambulatory treatment to oncology hospital treatment, noticing the latter is appropriate to more severe forms of cancer and allows hospitalization or complex exams like hemodynamics and biopsy. Would the merger be approved by CADE, oncologists feared losing a great deal of their patients to the hospital treatment provided by Rede D'Or.

Based on such material, the Reporting Commissioner decided to delay the ruling of the case[620], taking time for receiving more data. It was a window of opportunity for SINDMEDICO to file a new petition[621] with information that changed the course of the analysis. According to the union, unlike other areas of medicine, patients with cancer are always referred to the oncologist by a doctor of another specialty. Diagnosis is made by a doctor of another specialty and, once the disease is confirmed, the patient is referred to an oncologist. This fact would lead to a tendency of the surgeon who operated on the patient to indicate the oncology center of the hospital where he performs his surgeries. In addition to the accreditation with health plans, the indication from doctors of other specialties would be an important tool to capture clients. Therefore, an important concern stemming from the merger was the access to private hospitals by doctors who own their own clinics or are part of the team of other outpatient/ambulatory services.

The Rede D'Or[622] insisted, on the other hand, that the market share resulting from the merger both in the health plan market and in the hospital market were negligible. Other health plans and hospitals would be available for competitors upstream and downstream. With regards to the referral of patients, one should take into account that the professional who indicates the establishment for treatment is one of the patient's trust. Additionally, the Code of Medical Ethics assures medical autonomy in referring the patient to the professional or establishment believed to be the most appropriate. Finally, the doctors are not tied to those hospitals (called "open clinic hospitals") so they would have no interest in directing patients to a particular establishment.

CADE's decision came out shortly after. The Reporting Commissioner begins his vote observing there are two, instead of only one, vertical relations within the merger. The

[619] Merger 08700.0044151/2012-01, 192 and ff.

[620] Merger 08700.0044151/2012-01, 250.

[621] Merger 08700.0044151/2012-01, 329 and ff.

[622] Merger 08700.0044151/2012-01, 1105 and ff.

first, noticed since the notification by the merging parties, is the one between health plans and oncology services: while clinics are paid by health insurance plans, users are treated at clinics. But there is also a "weaker" vertical relation between hospital oncological services and outpatient/ambulatory oncological services: doctors from ambulatory services use the hospital for diagnosis and some treatments as an essential input of their activities. There are several contractual instruments aiming to provide more certainty to the relation between clinical doctors and hospitals, but the merger adds a corporate relationship to the scenario.

According to the Commissioner, the clinic which explores the hospital oncology sector can use this relationship between doctors as an additional means for the generation of clientele. The approximation between surgeons working in the hospital and physicians associated with the clinic that operates the oncology sector from the same hospital creates opportunities of strengthening professional bonds. In other words, proximity increases the exposure to the reputation of physicians linked to oncology clinics among their non-oncologist colleagues. Coexistence in the same health center during working hours leads to a closer relationship between physicians inside the hospital, often sharing the same medical record system.

This state of affairs is reinforced by the fact that, in general, the patient does not choose the oncology department where he will be treated. Instead, he obeys a network of surgeons who perform the biopsies and direct him to a partner service. Asymmetric information collaborates to such result, as consumers in health market are more influenced by the opinions of specialists than in other markets. Therefore, the Commissioner concludes, exploring the oncology sector in a hospital allows privileged formation of reputation among peers, conferring advantages to the capture of clientele.

To be sure, the Commissioner acknowledges that a first approach regarding the case would indicate that the merger does not have potential anticompetitive effects. Measured in number of possible beds for oncology assistance, the merged hospital would have only ten percent of the universe of options in the region. The number would increase only a little if the criterion for calculating the market share was turnover or number of CID-C hospitalizations. But the indirect link between the hospital service and the ambulatory service – intermediated by the surgeon – encourages hospitals to create procedures that induce surgeons to refer patients to the associated clinics. Such incentive is stronger in the

case of a corporate bond between a hospital group and a clinical oncology group, as in the case under analysis.

Thus, the merger was unanimously approved only at the condition that the merging parties agreed with remedies. Such remedies tried to guarantee that the hospital under the domain of Rede D'Or would provide isonomic access of non-integrated agents and avoid discrimination of doctors and surgeons. Isonomic access ought to be broad enough to encompass provision of services, implementation of procedures and follow-up of patients. Prohibition of discrimination should include both positive (gratuities, travel expenses, premiums, etc.) and negative (retaliation, unjustifiable cancellation of surgery, supply of inferior equipment, etc.) measures, in order to ensure medical autonomy in referral of patients to non-integrated clinic colleagues.

Like in the bakeries cartel, the consideration regarding the social form of competition provides a compelling interpretation of CADE's reasoning in this case. CADE could have restricted its analysis, like SG seems to have done, to defining the affected relevant markets and finding low market shares[623]. Such finding would probably recommend approving the merger without remedies. However, the antitrust agency chose to observe the nature of the relations in the market and found a "weaker" vertical relation between hospital oncological services and outpatient/ambulatory oncological service. Moreover, it discovered an *intermediated* relation amongst patients, oncology hospitals/clinics and non-oncologist doctors[624]:

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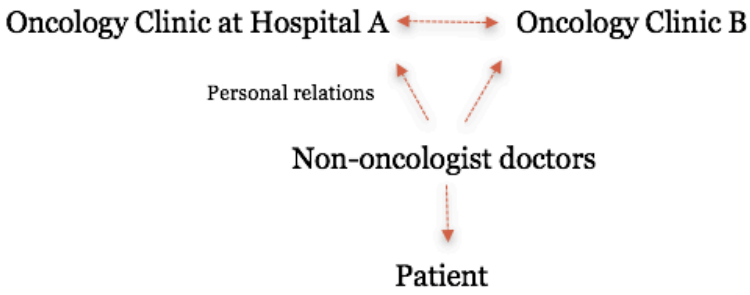
[623] Arguing that market definition serves essentially to examine market shares, which are poor measures of market power, and that determining the best market definition is impossible without first formulating a best estimate of market power, Louis Kaplow, *Why (Ever) Define Markets?* (2010) 124 Harvard Law Review 437 ("why ever define markets when the only sensible way to do so presumes an answer to the very question that the method is designed to address?", 440). But see Gregory Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow* (2013), Antitrust Law Journal vol. 78, n. 3, 729-746 (contending that market delineation serves important analytic purposes other than inferring market power from market share, and that market definition adds clarity and power to the "narrative" of an antitrust case). See recently David Glasner, Sean Sullivan, *The Logic of Market Definition* (2018), University of Iowa, Legal Studies Research Paper (arguing that market definition cannot be entirely replaced by things like economic estimates of residual demand curves, that binding precedent continues to invoke relevant markets, and that market definition serves broad purposes other than to permit calculation of market shares. But the authors concede that the logic of market definition should consider that market is an analytical concept which is not independent of a theory of harm).

[624] On the effects of medical referrals to competition, see Anna Wilde, Melanie Evans, *The Hidden System That Explains How Your Doctor Makes Referrals* (2018), The Wall Street Journal, available at https://www.wsj.com/articles/the-hidden-system-that-explains-how-your-doctor-makes-referrals-11545926166?mod=hp_lista_pos1.



Such figure approximates the dynamics of competition observed in the merger to the form assumed by competition in modernity: a doubly indirect social form. It is indirect because oncology clinics at hospitals and non-integrated clinics dispute the scarce patient without starting a conflict, a mutual destruction or devoting energy to each other. They consider competitors' strategies through a doubly contingent observation, but do not directly communicate while competing. And it is *doubly* indirect because, given the information asymmetry and the fact diagnosis is made by a doctor from another specialty, oncology services are prevented from directly accessing the patient. Non-oncologist doctors function as "market analysts", intermediate figures who observe, compare and evaluate the offerings of the oncology services and articulate expectations of patients.

Such doubly indirect triadic constellation was challenged in this case by a "stressing factor": the close relationship between non-oncologists working in the hospital and physicians associated with the clinic that operates the oncology sector of this same hospital. The remedies imposed by CADE tried to restore the objective intermediate role of non-oncologist doctors by determining isonomic access of non-integrated agents. A behavioral remedy[625] was imposed to avoid dysfunctions such as the exclusion of other doctors and incentives for competitors to produce value to the intermediate (e.g. travel expenses to non-oncologist doctors), instead of creating objective value to an anonymous consumer (e.g. better treatment for patients).

But the kind of intermediate that has been receiving growing attention by competition researchers is not the one that stablishes personal relations with competitors, like doctors sharing the same working facility. They are *public communication processes* which allow

[625] The stressing factor represented by personal relations with intermediates might not be always connected to a corporate integration. Sharing the same building or other types of affinities can be enough for developing distorting incentives in benefit of some competitors. In those cases, the usual preference for structural remedies does not seem to apply. On such preference, see CADE, *Guia Remédios Antitruste* (2018), 15.

an observation accessible to both competitors and their audience. Rankings[626], for example, may impact merger analysis by pointing out to which are the closest competitors in the market. Specially in markets with high information asymmetry, popular rankings[627] might be decisive in shaping consumer's preferences. A merger occurring between Hospital A ranked as first in the specialized rankings and Hospital B ranked as second should deserve careful attention even though their market shares are not quite expressive. This is not only because Hospital B would capture part of the demand of A in case of price increase, but also because the multivalued triadic form of competition is probably best seized in the relation between A and B than between one of them and a hospital ranked lower in the ranking.

With advancements in technology and interconnectivity, a public communication process can also be stablished by a platform that connects patients and physicians. Two-sided platforms are those which (i) bring two or more different types of economic agents together and facilitate communication between them and (ii) in most cases, have greater involvement by agents of at least one type as increasing the value of the platform to agents of other types ("indirect network effects")[628]. The more a platform like "Dr. Consulta"[629] is able to attract patients, the more it will be appealing for doctors as well (and vice-versa). Merger analysis (and antitrust analysis in general) is increasingly aware of those network effects as they tend to lead to winner-takes-all markets, meaning that small initial differences in the number of doctors or patients connected to a platform allows it to capture a disproportionately large share of the rewards.

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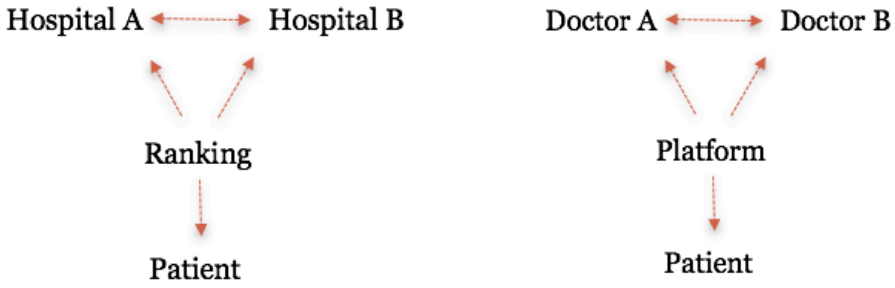
[626] On the way rankings produce or intensify competition, see Jelena Brankovic, Leopold Ringel, Tobias Werron, *How rankings produce competition. The case of global university rankings* (2018), *Zeitschrift für Soziologie* 47(4): 270-288.

[627] See, for example, the rankings of best hospitals in São Paulo in https://groupsaude.com.br/os-10-melhores-hospitais-de-sao-paulo/; https://www.bidu.com.br/blog/melhores-hospitais-em-sao-paulo/; https://www1.folha.uol.com.br/saopaulo/2018/09/1981726-sao-paulo-se-consolida-como-capital-da-saude-e-atrai-pacientes-latinos-e-africanos.shtml.

[628] See David Evans, Richard Schmalensee, *The Antitrust Analysis of Multi-sided Platform Businesses* (2012), Coase-Sandor Institute for Law & Economics Working Paper n. 623.

[629] See https://www.drconsulta.com/ (which is not a pure platform but relies on technology to offer smartphone appointment scheduling, management software for medical care and online storage of patient data).



Intermediaries such as rankings and platforms can perform for competition what antitrust sometimes only struggles to achieve. Such public communication processes articulate expectations from the audience, imagined as individuals able to make their own decisions. By doing so, they tend to diminish the relevance of personal ties among the parties of a competitive structure, a "stressing factor" deemed as mostly significant in the Brazilian case of society. In turn, low costs associated to internet-based entry[630] are hoped to offset renewed obstacles such as strong network effects, winner-takes-all dynamics and cross-subsidies between different sides of platforms.

The fictitious quality of the public, imagined as an unknown audience whose preferences cannot be but roughly estimated, implies the possibility of a universal audience ("struggle for all", to use Simmel's words). Such feature points to a potential of this modern type of competition to develop into global competition. Rankings could compare medical treatments offered in different countries. Setting regulatory barriers aside, a doctor could provide care to a patient located anywhere in the world[631]. In other markets, globalization via platforms is a reality – and such is increasingly true not only for the obvious U.S. examples, but also for platforms coming from other countries, like China[632].

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[630] Arguing that specific legal regulation is necessary to prevent practices of app blocking and discrimination, as well as to avoid exclusionary and exploitative behaviors that could subvert the dynamics of innovation in the internet landscape, Ademir Antonio Pereira Junior, *Infraestrutura, regulação e Internet: a disciplina jurídica da neutralidade das redes* (2018), PhD thesis presented at University of Sao Paulo (defending that antitrust is a "limited instrument" to deal with the issue of net neutrality).

[631] In Brazil, it is required that online platforms (for example, "telemedicine" services) connect two doctors, thus preventing a doctor from connecting to the patient directly. See Resolution n. 1643/2002 of Federal Council of Medicine (CFM). On the possible role of antitrust with regards to telemedicine, Theodosia Stavroulaki, *Mind the Gap: Antitrust, Health Disparities and Telemedicine* (2018 forthcoming), American Journal of Law and Medicine available at https://ssrn.com/abstract=3257606.

[632] See Kai Jia, Martin Kenney, John Zysman, *Global Competitors? Mapping the Internationalization Strategies of Chinese Digital Platforms* (2018), available at http://dx.doi.org/10.2139/ssrn.3220936.

On the other hand, the growing availability of consumer's data[633] can make firms much abler to achieve what "only love manages to conquer" (Simmel): discovering consumer's deepest desires even before he becomes aware of them. As a platform gains more users and collects more user data, it can also have more insights about consumers' needs. For example, a platform that collects eating and sports habits of a user might be able to provide health solutions before the patient even thinks of their need. In this high-technological scenario, intermediates become a substitute for the idea of assuming risk. While in a previous era the unknown desires of an anonymous consumer were addressed by the risk-taking behavior of a good businessman (complemented by observation of competitors); now observation, judgment and intuition can give way to powerful algorithms fed by big data.

What would be the consequences for antitrust? The literature on platforms often emphasize prominent examples such as Facebook and Google Search. Those are media platform which connect consumers and advertisers. The platform provides some valuable content to consumers, like photography functions on Snapchat, and is remunerated by the advertisements that it runs. But the platforms which trigger most of the concerns related to the (doubly indirect) triadic form of competition are "transaction platforms"[634]. Transaction platforms merely facilitate transactions between two sides, buyers and sellers, which could execute such transactions without an intermediary. Examples of transaction platforms are payment cards, Uber, Airbnb, app stores and operating systems. A platform which connects doctors to patients does not provide either side with anything of intrinsic value, even though it would be harder to find doctors without the platform.

Since a relevant strand of competition occurs among the sellers along one side of a transaction platform, an antitrust concern is the facilitation of a collusive arrangement between seller-side competitors[635]. For example, doctors engaging in price-fixing through the platform and, in exchange, agreeing to pay larger platform-usage fees, or to transact exclusively over the platform[636]. As observed in the last section, cartels typically undermine

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[633] For an overview of this topic, see Daniel Sokol, Roisin Comerford, *Antitrust and Regulating Big Data* (2016), 23 Geo. Mason Law Review, 1130-1133.

[634] See Erik Hovenkamp, *Platform Antitrust* (2019 forthcoming), Journal of Corporation Law, 18-26.

[635] See Julian Nowag, *When Sharing Platforms Fix Sellers' Prices* (2018 forthcoming) Journal of Antitrust Enforcement (OUP).

[636] This is often called a "hub and spoke" conspiracy, like in *United States v. Apple, Inc* (2015) United States Court of Appeal, Second Circuit, 791 F.3d 290. For a compilation of hub-and-spoke cases, see Joseph

the triadic indirect form of competition. But the transaction platform can also unilaterally decide to weaken such social form. For instance, the platform might set the prices of each medical appointment and steer the standardization of treatment, like Uber with drivers. Doctors would no longer be able to dispute the anonymous patient by creating objective values (reducing costs and prices, offering better treatment) while mutually observing competitors' strategies in a doubly contingent process.

Of course, such could be mitigated by competition *between* valuation devices or, in this specific case, competition between platforms. They would no longer be seen only as intermediate figures in the triadic form, but as competitors in an expanded triadic structure, struggling themselves to win the scarce resource of the third consumer. Doctors joining different platforms could be influenced to charge dissimilar prices and offer better service as an input for a differentiated platform market. But competition in this case presents special features and challenges as compared to non-platform competition, among which the indirect network effects, the two-sided pricing and the enhanced ability to use data to personalize the desires of consumers. Horizontal mergers involving platforms should consider the remaining capability of competition between intermediates to perform a multivalued function.

Another antitrust concern is raised by the vertical integration of the platform into the seller side of the market, when the platform operates also as a seller. If a group of doctors owns the platform, they may use it to exclude other doctors. Instead of being only an objective intermediate within the triadic form, the platform becomes an instrument of a competitor to prevent the engagement of other competitors in the dispute. The platform owners can also avoid the emergence of competing platforms by exclusively dealing with some doctors. Feedback effects would magnify the exclusionary practice, as more patients would be willing to join the platform where those doctors are. Therefore, mergers that involve sellers and platform owners might be carefully examined due to the magnified possibility of hindering the doubly indirect structure of competition.

National antitrust agencies will hardly be able to block the global market changes stemming from advances in technology[637]. As Luhmann wrote in another context, in the long

Harrington Jr., *How Do Hub-and-Spoke Cartels Operate? Lessons from Nine Case Studies* (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3238244.

[637] According to a study led by CADE's economics department, of 42 merger cases involving the "digital economy", 38 were cleared without conditions, and the other 4 had approvals conditioned on remedies [information provided by CADE's economist Patricia Sakowski at the 24th International Seminar on Competition Policy, Campos do Jordão, October 25, 2018]. See, for instance, merger 08012.005394/2012 -15

run there is little hope to prevent Prometheus from finding the fire[638]. With a view to competition's social form and its multivalued function, however, agencies can still try to preserve the reasons in modern imaginary for supporting competition. We value competition not only because it is allegedly able to discipline prices, otherwise the free or cheap products and services provided through platforms would be enough to avoid any concern. Among other reasons, we care about competition because it enables strangers to reproduce a social dispute for scarce resources, without destroying or starting a conflict with each other. We care about it because it brings complexity to a dyadic dispute through the introduction of a third party in the mirror of the market, whose opacity stimulates risky and diverse competitive strategies. And we care about it because the winner of a competitive dispute is deemed to have created an objective value that could have been created by his competitor, which makes him deserve the victory.

Platforms may emulate such conditions, for example, by stimulating an indirect dispute between sellers. It can also use big data to foster diverse competitive strategies instead of steering homogenization. Those strategies can be tested in the market by an autonomous consumer choosing among his preferences and letting himself be surprised. Transparency might be provided to ranked attributes, so that both sellers and buyers are able to influence the way preferences are formed and perform the market. In a nutshell, antitrust could care that platforms, sophisticated as they can be, not only compete among themselves but also behave as objective and pro-competitive *intermediates* in the market.

In merger control involving platforms, behavioral remedies could be used to avoid homogenization within the seller-side. An acquisition of a competing platform would be allowed only provided that the competitive strategies of each seller-side are independently defined. Structural remedies should also be useful to avoid competitive issues stemming from the vertical integration of the platform into the seller side of the market, like exclusive dealing and other exclusionary conducts. Moreover, antitrust should be wary on evaluation of mergers involving platforms which are not direct competitors, but whose data are complementary to assess consumers' desires and necessities. In all such hypothesis, the relevance of market share shrinks in face of the ability of intermediates to alter the dynamics

(*Ongoing/IG/Telemar*) approved with remedies, and merger 08012.010585/2010-29 (*Telefonica/Form*), cleared without conditions, both dealing with publicity on internet.

[638] Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (1992), Frankfurt am Main, Suhrkamp Verlag, 594.

of competition. Like in the case of non-oncologist doctors, the goal of competition requires platforms to be prevented from stressing the indirect triadic form.

III.I.III. EXCLUSIONARY CONDUCT AND THE STATE-THIRD

Our third story is based on a Query submitted to CADE by the National Thought of Business Bases (PNBE)[639]. The non-profit association of firms, whose objective is the "improvement of democracy through the political awareness of entrepreneurs", inquired the antitrust agency to take a position on the phenomenon known in Brazil as "tax war"[640]. In other words, PNBE asked CADE to examine the granting of tax and financial incentives by States and municipalities and to establish neutral criteria for such incentives.

PNBE explained that the tax war is fundamentally based on two types of benefits: (i) the reduction or exemption of tax collection on the movement of goods and services (tax incentives) and (ii) the granting of financing through state banks that operate with resources from state investment funds or development programs (financial incentives). In addition to tax and financial incentives, other benefits are eventually offered, like the simplification of companies' registration, training and qualification programs, technical assistance in the preparation of projects and the simplification of bidding processes.

According to PNBE, the granting of incentives should be uniform and neutral, so as to avoid any misaligned competition among economic agents. In practice, however, such incentives result in great competitive advantages obtained in an artificial way. Firms that receive government incentives can offer much lower prices than those of other companies. They are able to dominate the market, while such domination is not a result of a "natural process" based on efficiency. PNBE concludes the State should be held responsible for the damages to competition and thus defends the applicability of competition law to state actions[641].

The Attorney Office at CADE ("ProCADE") understood PNBE reported ongoing conducts practiced by agents who were not the authors of the Query[642]. Therefore, for

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[639] Query n. 0038/99. This story does not consider all the relevant facts of the case nor does it preclude other possible interpretations of the considered facts.

[640] Query n. 0038/99, 03-70.

[641] Art. 15 of Law 8,884/94 (corresponding to art. 31 of Law 12,529/11).

[642] Query n. 0038/99, 239-246.

procedural motives[643], the process should be sent to the Secretariat of Economic Law ("SDE") for investigation. ProCADE saw "strong indications" that the entities of the federation had violated the economic order with harmful effects to competition. Still, those were the likely results of state acts in the constitutional exercise of regulatory power, and for that reason CADE should ultimately only issue recommendations or request measures to comply with the law.

The Reporting Commissioner disagreed with ProCADE[644]. CADE has a duty of instructing the public about the forms of violations to the economic order. The Query does not seek manifestation over any specific concrete case, much less does it seek any kind of condemnation. Thus, CADE should just proceed with the analysis and answer whether those practices known as "tax war" do or do not "limit, distort, or in any way prejudice free competition and the free enterprise"[645]. Proceeding with the analysis, CADE received several contributions. For example, the summary of a speech given by a Federal Deputy whose conclusion was that "tax war directly affects the prices of goods and services through discretionary and unforeseeable decisions" of the federative entities. Such practice was regarded as a "source of unfair competition".

CADE also received, from the National Council of Finance Policy (CONFAZ), the Report of a Parliamentary Commission of Inquiry that investigated the consequences of tax incentives. In such report, the Coordinator of Tax Administration of the State of São Paulo's Treasury Department informed that incentives distort the basic concept of the decision regarding industrial location. With incentives, the decision is no longer based on economic factors like proximity to the consumer market, proximity to raw materials sources, labor costs, labor quality, basic transport infrastructure, etc. Moreover, incentives create conditions for a "more perverse" effect: the "predatory" competition of the subsidized firm with other firms that pay full taxes.

In another contribution, the Tax Consultancy of the State of São Paulo's Treasury Department stated that firms of the same branch located in other regions are compelled to compete "unfairly" with firms that are not subject to the same tax conditions. The National Confederation of Commerce, in turn, understood that the incentives are valid provided that

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[643] Based on resolution 18/98 which was then in force.

[644] Query n. 0038/99, 248.

[645] Art. 20, I, of Law 8,884/94.

the opportunity for private use would not be enjoyed absent the incentive, and that residents are the main beneficiaries of the tax exemption. The National Confederation of Industry concluded that tax incentives generally create advantages for some companies to the detriment of others, which creates pressure for extending benefits to all established firms.

Based on the information accompanying the Query and on further documents received by CADE, the Reporting Commissioner was ready to issue his vote[646]. He started by reinforcing CADE's jurisdiction to analyze the matter. The granting of tax incentives is deemed to influence the formation of prices in the market, a matter which is linked to the defense of competition. CADE's jurisdiction was affirmed in terms of the concern with efficient allocation of resources in the economy. More specifically, it is up to the antitrust agency to analyze whether the tax war can affect the promotion of a competitive economy or limit competition.

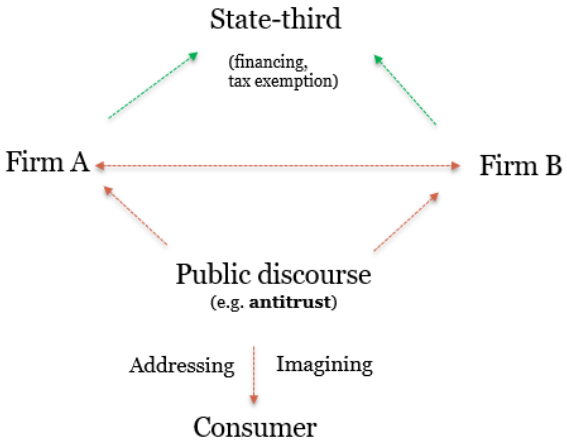
The Commissioner then examined the data brought to the process. A study presented by federal deputy Antonio Kandir concluded, based on the country's tax burden, that any fiscal or financial incentive could bring great advantages to firms which were politically chosen. A work from the National Confederation of Industry (CNI) and the Economic Commission for Latin America and the Caribbean (CEPAL) found that tax incentives are among the predominant reason for the installation of productive plants in other units of the Federation. The data in the process confirmed that the tax war has a huge effect on the profitability of the benefited firms, giving them advantageous conditions in relation to other firms competing in the same market. Such advantages were deemed to interfere with the "dynamics of relevant markets", leading to "distortions" from the point of view of competition.

According to the Commissioner, the issue analyzed in the Query touches the basic goals of a market system based on free competition. Constitutional goals such as "guaranteeing everyone a dignified existence" (article 170, caput) or "guaranteeing national development" and "promoting the good of all" (article 3, II and IV) are directly related to increasing the welfare of society. And competition is one of the central elements in this process, forcing companies to make better use of their resources and inputs, and to transfer those gains to society for the benefit of the consumer.

[646] Query n. 0038/99, 484-523.

In view of the historical debate on the objectives of competition policy, the vote observes efficiency and consumer welfare rank high among antitrust goals, both nationally and internationally. Competition policy must then be concerned with the economic conditions and incentives that maximize consumer welfare. In an analogy with a soccer game: each team must win by its own merits in a "level playing field". According to the vote, it is the task of an antitrust agency to ensure that socially desirable effects are not blocked by practices like a fault or the opponent's co-optation. But the same risk to society arises if the field itself is skewed or sloped in favor of one or more players. As it stems from the data on firms' profitability in the tax war context, the slope obtained with tax incentives can be brutal, putting some competitors in a highly superior situation.

In other words, the Commissioner was saying that not only the internal preservation of the indirect triadic form (from "faults" and "cooptation") is important, but also its protection from external stressing factors ("level playing field") might be subject to an antitrust agency's consideration. One of such stressing situations is exactly the alteration of competitive dynamics, moving from a dispute for the resources of a consumer-third to a struggle for the favors of a state-third. Typically, such favors take the form of tax and financial benefits:



The losses identified by CADE's Commissioner in such altered configuration are many. First, the stressing factor reduces the efficiency of economy as a whole, even though consumers might be better-off with eventual lower prices adopted by the benefited firm. The costs regarding moving to a place that is distant from supplying or consumer markets and lacking in infrastructure or high-skill labor tend to be superior. Furthermore, an equivalence that is present at least since Adam Smith – the one between the consumer and the collectivity

(or the public) – is deemed to be challenged by this stressed social form. Consumers benefit from low prices, but collectivity loses with inefficient allocation of resources.

Second, both the benefited firm and its competitors are affected. The incentivized firm tends to stagnate as a result of the "protective mattress" against competitors. It does not even need to raise its price later to recover from a "predatory" practice, since it would not be losing money. Competitors, in turn, are in a brutal disadvantaged situation, one that could hardly be compensated by efforts in cost reduction or technological improvement. Moreover, investments and new entries are discouraged because at any time the benefited firm can lower its prices to a point that cannot be followed.

The argumentation makes it clear that the social form of competition is not only about the third party (the consumer), but about all three parties involved in the triadic structure. An apparent benefit for the consumer coming from a stressing factor that challenges the triadic form is at odds with harmful effects to the competing parties. And society can be worse-off in several ways. Even though CADE emphasized economic efficiency in this case, we have seen that competition actually addresses multiple social problems, and such multivalued function can be hampered by the weakening of the triadic form.

But what can antitrust do about it? As we know, antitrust is a strong component of the public discourse on competition in modern society. It can alert the public about the consequences to competition stemming from state decisions – in this case, the granting of tax and financial incentives to firms. Competition will not always prevail over other important goals (e.g. reducing inequality among regions of a country), but in most cases the attention to its triadic form and multivalued function will smooth public policies whose objectives might not have recommended going so far against competition in the first place.

As a result of Query n. 0038/99, CADE recommended the application of the existing Law (24/75) on agreements among States as a condition for incentives. Tax incentives and equivalent benefits should be allowed provided that (i) they are granted by the Union or (ii) by States in accordance with rules agreed upon by all members[647]. While this addresses the issue of the dispute between States (the "war" implied in the "tax war" expression), it does

[647] In a comparison with the WTO rules that allow the imposition of countervailing duties to correct distortions caused by State subsidies, the vote observed that a similar logic exists in the case of interstate transactions within Brazil. The Brazilian legislation (Law n. 24/75, article 60, II) provides for the possibility of a refusal, by the State of destination, of crediting a tax not collected in the State of origin as a result of an incentive not approved under such legislation.

not face the equally raised problem of distorted competition among firms. In such cases, CADE could use its experience to recommend criteria that emulate the multivalued function of competition and discourage its dysfunctions: for example, suggesting the granting of incentives also to competing firms, the conditioning of benefits to the realization of investments, the periodical monitoring of impacts of incentives to the dynamics of competition, etc.

Recently, a tax law scholar has published a short article providing up-to-date examples of tax or economic benefits which generate competitive disturbances in Brazil[648]. The author defends that under the current Antitrust Law (Law 12,529/11) there are possible measures against "distortions to competition" deriving from tax and financial incentives. The General Superintendence (SG) should monitor practices occurring in the relation between taxpayers and the State that potentially lead to deviations in the horizontal relations among competitors. Such practices could eventually entail violations to the economic order, which should be verified in a case-by-case analysis by CADE until the legislation provided for in the Constitution has been edited: "*Supplementary law may establish special taxation criteria, with the aim of preventing imbalances of competition, without prejudice to the authority of the Union, by law, to establish norms of equal objective*"[649].

The examples of stressing factors imposed by the State-third to the social form of competition abound in the Brazilian context. However, they are often also the result of the regulatory and legislative power of the state, which is entitled to pursue other relevant public goals[650]. Queries proposed by the authors of conducts, or complaints filed by harmed competitors, tend to impose complex cases to CADE. An obvious way to address them is the competition advocacy of the Secretariat for Productivity Promotion and Competition

[648] Fernando Facury Scaff, *Tributação, concorrência, sonegação e renúncias fiscais* (2018) Conjur, October, available at https://www.conjur.com.br/2018-out-29/tributacao-concorrencia-sonegacao-renuncias-fiscais (for example, the differentiated tax regimes such as MEI, Simples and presumed profit with high margins; the ICMS tax incentives granted to specific firms, rather than to a sector; the flexibilization of the national content requirement for the oil industry).

[649] Brazilian Constitution, article 146-A (our translation).

[650] On the possibility of a state's regulatory scheme to be considered a violation of antitrust law, see *TFWS, Inc. v. Schaefer* (2001), F.3d 198 4th Circuit and the discussion on the "state-action doctrine". For the application of the "state action" doctrine in Brazil, see administrative proceeding 08012.006504/2005-29. Its application in Brazil was questioned by part of the Commissioners judging administrative proceeding 08012.001518/2006-37.

Advocacy (SEPRAC)[651]. Another is SG's authority to "guide the public administrative entities and bodies about adoption of the necessary measures to fulfill the Law"[652].

But a possibility which should not be disregarded is the issuing of recommendations in concrete cases as an exercise of both SG's and CADE's Tribunal's duty to "instruct the public about the various forms of violations to the economic order"[653]. CADE would exceptionally be granted a "*quasi-non liquet*" declaration[654] in cases discussing legislative or regulatory acts, provided that it offers suggestions that public administrative entities can use to adapt their acts to the social form of competition[655]. Such solution would help to enhance the competitive suitability of public policies, without the need to compromise to a declaration of their illegality.

The state authorship of the practice is not the only complex issue deriving from conducts that are similar to the tax war. Another complicated point concerns, as we have seen, their effects, which are apparently beneficial to the consumer. The most challenging type of exclusionary conduct is the one that both excludes or harms rivals and increases output. Antitrust has been struggling to find a consistent way to determine when such practices should be regarded as anticompetitive. Yet, those are exactly the kind of conduct that can be better grasped by the indirect triadic form of competition.

Exclusionary conduct can be unilateral, when it is practiced by a single firm, or result from an agreement, for example, a (vertical) agreement of exclusive dealing between firms that do not compete with one another. Some exclusionary conducts, known as "naked

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[651] Decree 9,266/2018.

[652] Law 12,529/11, article 13, XIII.

[653] Law 12,529/11, article 9, XIV and article 13, XV.

[654] Such option was the object of a debate in the international law (whose exceptionality among the legal fields is comparable to the one of the situation now discussed). Hersch Lauterpacht defended the possibility of courts, in addition to deciding complex disputes based on international law, also playing a role of suggesting changes. Julius Stone offers a reviewed version of the suggestion: the indication of desirable lines for the future development of law would be appropriate, not by virtue of the *non liquet* prohibition, but precisely in cases where the courts would be free to declare it. See Hersch Lauterpacht, *Some observations on the prohibition of* 'Non Liquet' *and the completeness of the law* (1958) in *International Law: Collected Papers* (1975), vol. 2, part 1, Cambridge, University Press, 226-232 and Julius Stone, *Non Liquet and the function of law in the International Community* (1960), in *The British Year Book of International Law 1959* (1960), Oxford, University Press, 148-153.

[655] The offering of suggestions would comply with the duty of Law 9,784/99 (article 48): "The Administration has the duty to explicitly issue a decision in administrative proceedings and on requests or complaints, within its competence." (our translation)

exclusion"[656], have no efficiency properties and serve only to harm rivals. For example, the destruction of Firm B's factory by Firm A, or the payment to suppliers of inputs that are needed by Firm B but not used by Firm A not to do business with the rival. Such conducts are closer to a dyadic conflict between firms than to a triadic structure that includes consumer. Therefore, like cartels, they can be considered anticompetitive to the extent that they avoid what the modern imaginary conceives as the very form of competition[657].

But many antitrust cases involve both output increase[658] and exclusionary costs. They benefit third parties (consumers) *and* harm competitors. This would make them eligible to a rule of reason, like the one used to assess collusive conduct which is not unlawful per se. However, an open-ended rule of reason that "balances" long-run welfare costs and benefits can be hard to apply and give poor guidance to businesses. It attempts to mirror economic theory by condemning welfare-reducing conduct, but has problems of practicability and consistency[659]. Thus, antitrust doctrine has been trying to develop more specific tests that take account of applicable legal process considerations[660].

The "static balancing" test[661] proposes to weight the welfare benefits to the defendant against the static welfare costs caused by the harmful impact of the conduct on rivals. The test has been criticized for its uncertainty, for not taking account of the dynamic costs of antitrust intervention and for providing no basis for condemning conduct (like predatory

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[656] Douglas Melamed, *Exclusive Dealing Arrangements and Other Exclusionary Conduct – Are There Unifying Principles?* (2006) 73 Antitrust Law Journal 375, 377.

[657] There is discussion in the United States on whether the so-called "tortious conduct" can violate the antitrust laws or should be addressed by state tort and unfair competition law. In Brazil, unfair competition is subject to a different statute (Law 9,279/1996, article 195) and deemed to concern damages to competitors, not competition. Discussing such antitrust slogan, see footnote 70.

[658] Often called "competition on the merits", although the expression lacks precise definition. Output might be increased by reducing costs or (quality adjusted) prices or by increasing product quality or diversity and thereby shifting the demand curve to the right. See Douglas Melamed, *Antitrust is not that complicated* responding to Louis Kaplow, *On the Relevance of Market Power* (2017), 130 Harvard Law Review 1303, 166.

[659] See Douglas Melamed, *Exclusive Dealing Arrangements and Other Exclusionary Conduct – Are There Unifying Principles?* (2006) 73 Antitrust Law Journal 375, 386 (presenting Hovenkamp's "market-wide balancing" as consistent with the rule of reason). In this view, exclusionary conducts are such that "(1) are reasonably capable of creating, enlarging, or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits that the acts produce, or (2c) produce harms disproportionate to the resulting benefits". Part (2c) is called the "disproportionality test". Phillip Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer, 72.

[660] See Douglas Melamed, *Exclusive Dealing Arrangements and Other Exclusionary Conduct – Are There Unifying Principles?* (2006) 73 Antitrust Law Journal 375, 388 and ff.

[661] See Steven Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard* (2006) 73 Antitrust Law Journal, 311-374 (calling the test the "consumer welfare effect standard").

pricing) that does not raise rivals' costs. The "excluding equally efficient rivals" test[662] recommends antitrust law to condemn only conduct that would exclude an equally efficient rival. Criticism has been in the sense it does not make clear what it means to exclude a less efficient rival (especially when firms and products are heterogeneous) and that it would be hard for firms to apply the test when attempting to conform their conduct, as they would need to know a great deal about their rivals.

Indeed, such tests assume, both ex ante (e.g. by the defendant) and ex post (e.g. by the antitrust agency), an almost omniscient position regarding the impacts of the conduct to the parties involved in competition. Firms and agencies would need to assess costs and benefits to competing parties. In real life, with limited resources and information, this is hard to achieve. Moreover, such tests often require comparing incommensurable values (unless artificially reduced to pure monetary terms) like defendant's welfare and rivals' costs, or the "efficiency" of heterogeneous firms.

Considering the social form of competition, the "sacrifice test" [663] seems to put us onto a better track. Under this test, the decision-maker first asks whether the conduct is profitable to the defendant in light of its incremental costs and incremental benefits. This is helpful to assure the firm is operating within an indirect relation, since under the test such incremental benefits should not include the result of the exclusion of rivals. The second step of the test, however, asks whether the conduct enabled the defendant to gain additional market power or a dangerous probability thereof. Such second step is both unnecessary and insufficient: unnecessary because, if the conduct is unprofitable, the absence of an indirect strive can be presumed; insufficient because the gain of market power is not the only harm accompanying the hindering of a multivalued competition.

The goal of competition seems to fit better to an adjusted "sacrifice test", which could be called a "competition test". Under this test, the firm or antitrust agency would also ask first whether the conduct is itself profitable, disregarding the exclusion of rivals. If defendant

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[662] Richard Posner, *Antitrust Law* (1978, 2nd 2001) Chicago, The University of Chicago Press, 194-195 ("I propose the following standard for judging practices claimed to be exclusionary: in every case in which such a practice is alleged, the plaintiff must prove first that the defendant has monopoly power and second that the challenged practice is likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor").

[663] See Douglas Melamed, *Exclusionary Conduct under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal* (2005), Berkeley Technology Law Journal, vol. 20, issue 2, 1247. See also Gregory Werden, *Identifying Exclusionary Conduct Under Section 2: The 'No Economic Sense' Test* (2006) Antitrust Law Journal 413 (clarifying that it does not mean "short-term" profit sacrifice).

fails to pass such test, there is no indirect competition and the goal has been violated. If it passes, the defendant would need to face the evidence that the social form of competition was weakened: either because a competitor was excluded, because its costs were raised in such a way it cannot compete as effectively as before, or because the rhythm of objective values produced to the consumer (in terms of price, quality or innovation) is not the same. If so, defendant would be required to demonstrate, with actual data about the competitive relations existing in the market, that each hindered social form has been substituted by an equivalent one stablished with a new entrant, or in a broader geographic area or product scope.

A tax incentive can be profitable to the benefited firm even if it did not impose harms to its rivals. Hence, it passes the first step and defendants (e.g. the involved state and firm) are exempt from paying a monetary fine to the antitrust agency. However, the conduct might still hinder social forms which are not substituted by equivalent competitive relations, either because new entries are deterred or because there is no upper-level competition to which the benefited firm is submitted. In such case, the antitrust agency would not impose a fine, but would issue a recommendation to alter the conduct[664]. If defendant is a public authority acting under the scope of its regulatory power, like in the tax war cases, recommendation would be non-mandatory. But if defendant is a firm exercising its free initiative[665], the recommendation will be a compulsory affirmative covenant.

To recapitulate all the steps of antitrust analysis regarding an exclusionary conduct with use of the "competition test": (1) First, plaintiff must prove a *prima facie* harm caused by defendant; (2) Defendant will try to demonstrate that (2a) the potential harm results from an indirect dispute for the resource of consumer, not from a direct hit with no increase in output or creation of objective value ("naked exclusion"); (2b) the conduct is profitable regardless of the harm caused to rivals and (2c) the weakening of social forms of competition

[664] One could inquiry whether this confronts the view of antitrust as "passive in nature". See footnote 50.

[665] In the Administrative Proceeding n. 08012.006439/2009-65, for example (see more in section III.II.II.), the antitrust agency could have solved the competitive issue of beer distribution by stablishing a duty to share, even if it found no reason to fine the defendant. Find our disclaimer in footnote 768. Predatory pricing cases are another fruitful source for the "competition test". A price set above average total cost should be enough for passing the test step of indirectness. However, if the social form of competition is weakened in a non-replaceable way, CADE could be able to impose the progressive sharing of the causes of reduced costs. See Philipp Areeda, Donald Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act* (1975), Harvard Law Review vol. 88, n. 4, 697-733 and Paul Joskow, Alvin Klevorick, *A Framework for Analyzing Predatory Pricing Policy* (1979), Yale Law Journal 213. After all, market society is not raw tribalism in which all is forgiven to someone perceived as a champion of my community.

– due to a stressing factor, an increase in rival's costs, a diminished creation of objective values or economic and social barriers – was compensated by other triadic relations with entrants or in a broader geographical or product context. If defendant fails in (2a) or (2b), it will be compelled to pay a fine and eventual reparation. If defendant fails only in (2c), it will be subject to an affirmative covenant, which might be mandatory (if defendant is a firm exercising free initiative) or non-mandatory (if defendant exercises regulatory power).

III.II. THEORETICAL IMPLICATIONS

III.II.I. FOR ANTITRUST: PROTECTING COMPETITIVE BEHAVIOR BEYOND PSYCHOLOGY

"Bringing competition to antitrust" could mean more than offering a renewed description of some antitrust cases from the perspective of a social form with a multivalued function. In a different level of generalization, it could also suggest enhancing competition within the marketplace of ideas regarding antitrust goals. Three dimensions of such attitude will be considered in this section. First, we will assess to what extent the "protection of competition" challenges the goal which has prevailed among scholars in the last decades: "consumer welfare". Then, it is important to know what it means to "protect competition" via antitrust and to compare the recent proposals of antitrust scholarship with our perspective. Finally, we shall examine the antitrust paradoxes that arise from the attitude defended in this thesis.

The consumer welfare principle has recently been challenged by two opposite claims[666]. Both of them allegedly stand against a principle which encourages markets to produce output as high and prices as low as possible. The first challenge comes from a general welfare approach that regards efficiency as a sufficient antitrust defense even when specific efficiencies cannot be proven, and the challenged practice leads to higher prices. This avenue is inspired by Kaldor-Hicks efficiency[667], the Williamson model and Bork's antitrust paradox[668]. The second is a "neo-Brandeisian" approach that defends broader normative objectives like the preservation of small firms and dispersion of economic power,

[666] See Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* (2018) Faculty Scholarship at Penn Law 1985.

[667] See footnote 268.

[668] See section I.I.II.

tending to redistribute wealth from larger to smaller firms. This path is connected to a Brandeisian "curse of bigness"[669], several recent scholarly works[670] and Lina Khan's antitrust paradox[671].

This work is interested in a specific formulation that is probably closer to the "neo-Brandeisian" approach. As to the general program of such approach, we are prone to agree that cartels of smaller firms can wield as much political power as large firms do, that one cannot confuse with predatory pricing the losses required by development of a new product, and that firms become large not only because of politics but also due to technology and innovations in distributions (coupled with a certain amount of anticompetitive practice)[672]. We also tend to agree that "antitrust is not good at balancing", that a metric is necessary for the operationalization of an alternative goal, and that transparency is a central issue in the debate on antitrust goals[673]. But none of those censures is enough to discard a particular neo-Brandeisian goal: "protecting competition"[674].

Such goal was explicitly defended by Tim Wu in a short piece[675]. The author argues that the promised scientific certainty regarding the Chicago method has not materialized, "for economics does not yield answers, but arguments". The "protection of competition" would arguably be more determinate than the consumer welfare test. It requires antitrust to protect a process (e.g. competition), instead of maximizing some value (e.g. consumer welfare). Accordingly, the focus of antitrust law should be on one question: "*is the*

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[669] See section I.III.III.

[670] From authors like Adam Candeub, Sally Hubbard, Barry Lynn, Nathan S. Newman, John M. Newman, Matthew Stoller, Zephyr Teachout, Sandeep Vaheesan and Ramsi Woodcock. Find the list in Douglas Melamed, Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets* (2018), available at https://ssrn.com/abstract=3248140, 6.

[671] Lina Khan, *Amazon's Antitrust Paradox* (2017), 126 Yale Law Journal 710.

[672] Those are the criticisms presented by Hovenkamp against the "Neo-Brandeisian" approach. See Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* (2018) Faculty Scholarship at Penn Law. 1985, 26-34.

[673] See Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* (2018) Faculty Scholarship at Penn Law. 1985, 35-37.

[674] Also agreeing with the New Brandeis School that antitrust case adjudication should focus on the competitive process, Gregory Werden, *Back to School: What the Chicago School and New Brandeis School Get Right* (2018), available at https://ssrn.com/abstract=3247116, 7.

[675] Tim Wu, *After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice* (2018), CPI Antitrust Chronicle. Inserting his view on antitrust goals within a broader "Neo-Brandeisian Agenda", Tim Wu, *The Curse of Bigness: Antitrust in the New Guilded Age* (2018), New York, Columbia Global Reports, 127-145.

complained-of conduct (or merger) merely part of the competitive process, or is it meant to 'suppress or even destroy competition?"[676].

In this line of reasoning, antitrust should separate "fair" and "foul". "Fair" is a competitive process, including both competition on quality and price, that can be disrupted by the development of new technologies and by market entry. "Foul" means collusion, barriers to competition or entry and raising of rivals' costs. Thus, after querying "who is the complainant" (is it a maverick?) and "who is the alleged lawbreaker" (is it one that holds market power?) antitrust enforcers, according to Wu, should be ready to ask: Is the complained-of conduct competition on the merits? Or is it distortion or suppression of the competitive process?[677]. After asking those two nuclear questions, enforcers should also inquire: "does the complained-of conduct or merger tend to implicate important non-economic values, particularly political values"?

The first four questions proposed by Tim Wu have been criticized for being too obvious ("the bread and butter of everyday antitrust law"), and the last for being too indeterminate[678]. Melamed and Petit frame antitrust law under the consumer welfare paradigm as prohibiting "the creation or increase of market power by conduct that is not competition on the merits". They seem to agree with Wu in one of the elements of an antitrust violation, which is protecting competition on the merits[679]. They also accept price is not the only concern in this regard, even though the focus on price might be explained due to greater availability of data for decision-makers. However, there seems to be disagreement around a second element: while Wu adds non-economic objectives ("particularly political values") to antitrust enforcement, Melamed and Petit stick to the requirement the conduct increases the defendant's market power[680].

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[676] The wording is quite similar to Brandeis' formulation of the rule of reason: see footnote 154.

[677] Tim Wu, *After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice* (2018), CPI Antitrust Chronicle, 9.

[678] See Douglas Melamed, Nicolas Petit, *Before 'After Consumer Welfare' – A Response to Professor Wu* (2018), CPI's North America Column.

[679] Part of the so-called New Brandeis School seems to defend the opposite: to keep the concern with market power and to give less weight to the requisite of violating competition on the merits. Such an approach would probably not be careful enough with the multivalued social form of competition.

[680] Based on the arguments that market power reduces antitrust compliance costs (firms can act without consulting antitrust lawyers if not implicating increased market power), reduces the likelihood of false positives and ensures that antitrust law is not looked to as a remedy for all sorts of undesirable commercial conduct, Douglas Melamed, Nicolas Petit, *Before 'After Consumer Welfare' – A Response to Professor Wu* (2018), CPI's North America Column, 8-9 (but conceding that "maybe an optimal antitrust regime would have

According to Melamed and Petit, ignoring the requirement of prospective market power would be particularly problematic in the context of the information economy. As platforms operate as intermediaries between numerous groups of users active on multiple sides, it is important to have a "screening function" that reduces the incentives of third parties to turn every marketplace dispute into an antitrust case. Moreover, because platform industries have been characterized by short innovation cycles and disruptive innovation, antitrust enforcement should be sensible to new forms of conduct or business organization. The market power requirement would work here to reduce the likelihood of false positives[681].

It looks like much of the debate between Wu and Melamed/Petit is grounded on a lacking definition for "competition". On the one hand, Wu circumvents the task of conceptualizing competition by referring to a "process" that involves quality, price and new technologies. We also know that it is impaired by collusion and barriers to entry. But there is no concentrated effort to define what competition actually means. On the other hand, Melamed and Petit feel comfortable to affirm that both competition on the merits and concerns with increase in market power are "ultimately about protecting the competitive process"[682]. This is intriguing, since the authors criticize Wu for eliminating from the "process" of competition the requirement that the conduct is shown to increase or be likely to increase the defendant's market power. The poles of the debate probably mean different things by "competitive process", and the reader is left without knowing the exact divergence. We simply know that a prospective consideration on market power is an essential element for only one side of the discussion.

As we have observed before[683], the difficulty to provide a positive and specific definition of competition is a long-standing trait of antitrust scholarship. In the earlier years

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more *per se* or quick look rules that do not require proof of market power"). Clarifying a third element of the consumer welfare paradigm, Douglas Melamed, Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets* (2018), available at https://ssrn.com/abstract=3248140, 8 (besides "conduct that is not efficiency-based competition on the merits" and "an increase or likely increase in market power", one needs "a causal connection between the two")

[681] See Douglas Melamed, Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets* (2018), available at https://ssrn.com/abstract=3248140, 38-41 (but supporting a "recalibration" towards more per se or quick look rules, increased recourse to presumption or incipiency tests, new thresholds for specific restraints, relaxed evidentiary requirements and changed conduct requirements).

[682] Douglas Melamed, Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets* (2018), available at https://ssrn.com/abstract=3248140, 8.

[683] See section I.I.III.

of antitrust, competition was negatively defined[684] as an *absence*: the neoclassical absence of "market coercion". In the highest years of Chicago School, competition became a *derivation* of another goal*:* competition as a "shorthand phrase" for consumer welfare. Finally, in the recent debate, despite important advances, competition still carries a considerable degree of *indetermination*: conceived as a nostalgic "lost goal", as an open "complex system", as the "contrary of monopoly" or – now we can add – as an unspecified "process".

An attempt to bring concreteness to the dynamics of competition was made by so-called "behavioral antitrust". Such movement relies on the departures from rational choice models provided by developments of economic theory in the last decades[685]. People's different tastes and concerns about fairness were deemed to alter predictions based on self-interest[686]. They started to be considered satisficers, not maximizers[687]. We are now assumed to give more weight to losses than to gains in our decisions[688], as well as not to ignore sunk costs[689]. Choice is actually not independent from irrelevant alternatives[690]. The list of

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[684] Regarding the negative and the positive approach to competition in German context, Eugen Buss, *Der Wettbewerb: eine rechtssoziologische Untersuchung* (1973), Tübingen, J.C.B. Mohr, 26-27.

[685] For a didactic overview, see Robert H. Frank, *Microeconomics and Behavior* (2006, 9th ed. 2015), New York, McGraw-Hill Education.

[686] See, for example, Rajna Gibson, Carmen Calmonte, Alexander Wagner, *Preferences for truthfulness: Heterogeneity among and within individuals* (2013) American Economic Review, 103 (1), 532-548 (contrasting "economic individuals" and "ethical individuals" in a decision-theoretic laboratory experiment about telling the truth, with results that are compatible with heterogeneous preferences for truthfulness).

[687] Arguing that the replacement of the goal of maximizing with the goal of satisficing is an essential step in the application of bounded rationality, Herbert Simon, *A Behavioral Model of Rational Choice* (1955), The Quarterly Journal of Economics, Vol. 69, No. 1, 99-118 and Herbert Simon, *Rational choice and the structure of the environment* (1956), Psychological Review, 63 (2), 129-138 (the latter introducing the term "satisficing": "Since the organism, like those of the real world, has neither the senses nor the wits to discover an 'optimal' path (…) we are concerned only with finding a choice mechanism that will lead it to pursue a 'satisficing' path, a path that will permit satisfaction at some specified level of all its needs")

[688] Amos Tversky, Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, *Science* (1981) 211, 453–458 (showing that changes of perspective reverse the relative desirability of options: "the displeasure associated with losing a sum of money is generally greater than the pleasure associated with winning the same amount, as is reflected in people's reluctance to accept fair bets on a toss of a coin", 454).

[689] Richard Thaler, *Toward a Positive Theory of Consumer Choice* (1980), Journal of Economic Behavior and Organization 1, 47-50 ("I suggest the alternative hypothesis that paying for the right to use a good or service will increase the rate at which the good will be utilized, *ceteris paribus.* This hypothesis will be referred to as the *sunk cost effect,* 37 [...] I agree with Friedman and Savage that positive theories should be evaluated on the basis of their ability to predict behavior. In my judgment, for the classes of problems discussed in this paper, economic theory fails this test", 57-58).

[690] Itamar Simonson, Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion* (1992) Journal of Marketing Research vol. XXIX, 281-95 ("Both tradeoff contrast and extremeness aversion entail assessments that seem more complicated than those implied by value maximization. More generally,

departures is extensive and includes many other interesting insights from psychology research. Yet, they appear to focus on demand side as a group of individuals, while antitrust policy has also to consider the "behavior" of supplying firms. Those are usually assumed to aim to maximize economic profit[691], although such view has received numerous challenges within economics[692].

"Behavioral antitrust" aimed to modify such state of affairs[693]. Firms were showed to enter markets when irrational to do so under neoclassical economic theory, and not to enter markets when, in theory, entry is the profit-maximizing response. Behavioral factors, such as managers' social preferences for trust and cooperation, help competing firms both establish and maintain collusive agreements where rationality-based models that ignore such factors expect them to fail. Instead of maximizing profits, firms sometimes charge prices they deem "fair" and avoid fully exploiting their market power. Unlike it is commonly assumed by antitrust agencies, many mergers prove inefficient rather than profit maximizing.

Despite offering those kind of findings, the empirical evidence of departure from rational choice models has not been successful in posing an antitrust-relevant theory of competition [694]. Behavioral economics empirically tests the normative assumptions underlying prevalent economic theories, but behavioral antitrust struggles to use the anomalies to create new theories with policy implications. In part, this frustrating result is due to conflicting data, such as the fact that behavioral biases are equally distributed to both incumbents and potential entrants, or that psychological traits can either facilitate cartels (e.g. satisficing aspirations) or destabilize collusion (e.g. considering competitor's output). But the underlying reason for the failure reaches probably deeper: the overall potential of

context effects imply that people take into account comparative characteristics of alternatives that tend to complicate the choice task. This process, we believe, is driven primarily by an attempt to achieve better resolution and identify the best choice, not merely by the tendency to simplify the task", 293).

[691] While accounting profit means total revenue less explicit costs, the calculus of economic profit includes implicit costs – for example, opportunity cost of capital – associated with resources used by the firm.

[692] Among which the idea that the firm's goal is to maximize its chances of survival, or the notion that they actually maximize total sales/total revenues. Robert H. Frank, *Microeconomics and Behavior* (2006, 9th ed. 2015), New York, McGraw-Hill Education, 320.

[693] See Maurice Stucke, *New Antitrust Realism* (2009), Global Competition Policy Magazine, 7 and Avishalom Tor, *Understanding Behavioral Antitrust* (2013), 92 Texas Law Review 573, 595-602.

[694] See Joshua Wright, Judd Stone, *Misbehavioral Economics: the Case Against Behavioral Antitrust* (2012), Cardozo Law Review, vol. 33, n. 4, 1545-1548.

behavioral antitrust seems to be less of providing broad hypothetical propositions than offering empirical sensibility for assessment of concrete cases[695].

The theoretical deficit of behavioral antitrust is related to the very nature of its prevailing methodology. Taking into account the sum of each individual's reasoning and its variable constraints in a firm context would add unbearable complexity for a theoretical construction, let alone one with policy implications. This thesis holds diversely that competition is an aspect of social forms rather than a matter of independent cognitions. Competitors observe each other in doubly contingent relations and identify their "niches". Such relations are structured as a twofold social phenomenon: (i) a form that pervades the whole society and is (ii) conformed by specific systemic rationalities. Regarding the antitrust context, competition is notably a doubly indirect form that holds a multivalued function while confined by economic rationality. "Bounded rationality" in this case is less a deviation from rational choice theories than a logic unavoidably constrained by a system.

The goal of "protecting competition" means to protect a triadic structure that, in the economic context, is formed by at least two firms producing objective values to dispute the scarce resource of a consumer (less often, it is a dispute between buyers for the scarce resource of a seller). It also means to protect the indirectness of such form, which in the economic context involves mutual observation without communication among firms and can be measured by conduct that is profitable regardless of harms caused to a rival[696]. Furthermore, protection of competition implies that intermediates do not prevent an indirect dispute for a third party, which in modern economy requires platforms, for example, to refrain from substituting sellers (regulating competition between them) or consumers (using big data to preclude choice). Finally, an antitrust that protects competition must fight stressing factors of an unlevelled playing field, such as a state-third which favors one firm or social barriers[697] that tend to exclude competitors.

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[695] See Avishalom Tor, *Understanding Behavioral Antitrust* (2013), 92 Texas Law Review 573. In Brazil, behavioral considerations about the departure from the rationality model were used to defend that consumers might not take into account the price of spare parts when buying a new vehicle. See Commissioner Carlos Ragazzo's vote in Administrative Proceeding 08012.002673/2007-5. Find our disclaimer in footnote 768.

[696] As we have seen with Bourdieu, the economic field distinguishes itself from other fields because conducts can present themselves publicly as having the aim of individual material profit. See footnote 403. Nevertheless, they might prefer to adopt the "adaptive technique" mentioned in footnote 65.

[697] See, for instance, Muriel Niederle, *Gender* in *Handbook of Experimental Economics* (2015) (finding "large gender differences in reaction towards competition").

An antitrust that protects competition does not do so because it assumes competition maximizes an economic goal. Competition is legally valued on its own terms and holds a multivalued function which goes beyond likely economic effects. The reticence to proclaim the independent value of competition has been leading supporters of this goal to have problems with the determinacy and the transparency of their proposals. One should not be afraid to state that competition is an autonomous goal of antitrust. But in order to do so, one has also to lose the fear of paradoxes[698].

Part of the Brazilian antitrust doctrine is headed in this direction[699]. Ferreira de Souza supports competition – a "limited" competition – as an antitrust goal. Isabel Vaz defends that the preservation of free competition is more important than repression of abuses of economic power. Salomão Filho sees the effective possibility of choice (or "competition") as the central organizing element of the market, and the interests of competitors and consumers as "reciprocally instrumental". Significant passages from other authors could also be quoted.

If one takes competition seriously as an antitrust goal, she will hardly escape from facing paradoxes. Paradoxes are constitutive of the legal system and it is naïve to expect them to vanish from antitrust. The first paradox will be the one between "competition" and "efficiency"[700]. Brazilian antitrust statute stablishes that "*achieving dominance in a market by natural process and by being the most efficient economic agent in relation to competitors does not characterize the tort set forth in item II*", which is the item of article 36 that prohibits "*to control the relevant market of goods of services*". Nothing is said with regards to item I, which forbids "to limit, restrain or in any way injure free competition". Also, a merger that encourages efficiency may be permitted even if it involves elimination of competition in a substantial portion of the relevant market, as long as a relevant part of the resulting benefits is transferred to consumers (article 88, § 6).

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[698] Arguing that "replacing the well-established consumer welfare standard would necessarily require courts to trade-off some amount of consumer welfare for some other set of values, thereby throwing open the door to uncertainty and to exploitative behavior", Joshua Wright, Elyse Dorsey, Jonathan Klick, Jan Rybnicek, *Requiem for a Paradox: the Dubious Rise and Inevitable Fall of Hipster Antitrust* (forthcoming 2019), Arizona State Law Journal, 67 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524&download=yes.

[699] See section I.II.III.

[700] Framing the terms in a way that the paradox disappears: Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, 49 ("Competition is inherently a process in which rivals seek to exclude one another. Efficiency tends to exclude firms that are less efficient").

But an antitrust that protects competition might want to avoid situations in which one firm ("the gainer") gains enough to compensate all losers, while destroying the possibility of emergence of triadic forms. Protecting competition would in this case conflict with Kaldor-Hicks efficiency. Efficiency can also contradict competition when the efficient producer, able to coordinate the means of production so as to obtain the greatest results, impairs any possibility of stablishing an effective competitive relation with other firms. Productive efficiency would be at odds with competition. Finally, the protection of competitive relations in some markets might recommend an allocation of resources which is not the one that would maximize the equation between social costs and social desires among the various lines of industries. The relation between competition and allocative efficiency can also be paradoxical.

An unconditioned support of consumer welfare might also stablish paradoxes with protection of competition. Law 12,529/11 is grounded both in "free competition" and in the "defense of consumers" (article 1). However, increased output and low prices might stem from strategies or economic structures that are not compatible with sustainable competition. One could be reminded that the environment leading to the promulgation of the Sherman Act in the 1880s was one of steeply declining prices. Nowadays, access to essential facilities, control of technologies and network effects can still generate low-priced or even nominally-free products. The costs for society are often paid in terms of an arduous emergence of social forms with multivalued function.

The view according to which interests of competitors and consumers are "reciprocally instrumental", as defended by Salomão Filho, critically depends on the delineation of the concepts. In fact, in order to assess the extension of potential paradoxes, one would need not only to define competition but also to discern who is the consumer implied in the "consumer welfare"[701]. Smith equated the consumer to the public. Lande thought of consumer as the consumer in the relevant market. Bork included the producer (the "other group of consumer") in the relevant market[702]. Hovenkamp understands the word "consumer" as a term of art that includes concern with injuries to suppliers. Meese tends to

[701] See section I.I.III. Another line of required distinctions is, of course, what is implied by "welfare" (discussed in section I.III.I.).

[702] Much has been written about the use of "consumer welfare" by Bork as a prestidigitation, but it could also be a coherent choice with his belief that more efficient methods of doing business are as valuable to the public as they are to businessmen. One could always argue that cost savings that result in producer surplus free resources that can be used to produce goods and services that consumers want at lower prices.

consider producers and consumers in every market. Ultimately, the dimension of the paradoxes would change if consumer welfare was framed as the creation of objective values for a third party in a triadic social form.

Finally, bringing competition to antitrust could enlighten paradoxes within the different notions of competition that inspire antitrust policy. On the one hand, "perfect competition" promises to allow one to judge the efficiency of policies[703] and suggests the use of equilibrium output as "the best measure of competition"[704]. On the other hand, the idea of a competitive "process" is originated precisely in the criticism of the theory of perfect competition[705]. As Geiger and others have noticed, the mechanism of price equilibrium presumes social atomization and does not explain reproductive competition as a social relation. And Hayek famously stated that policy should be guided by the comparison with a situation "as it would exist" if competition were prevented from discovering facts that would remain unknown or not used.

The fundamental ambivalence here is between an ideal state that should be maximized (e.g. Bork's constantly moving "equilibrium point") and a but-for competitive world that offers greater opportunities than the deprivation of competition (e.g. the absence of "market coercion"). Such ambivalence reappears in the debate between Wu and Melamed/Petit: while the former criticizes the "consumer welfare" goal because it requires law to maximize a value, the latters argue the rhetoric of maximization should not be taken for a practice that actually prohibits "bad conduct" which enhances market power. The triadic form of competition described in this thesis is in tension both with an atomized ideal of perfect competition (as we defend that competition constitutes a social relation) and with an open-ended "discovery process" (since we frame competition as a particular multivalued form that emerges in modern society).

In any case, the protection of competition as an autonomous goal and the observation regarding the paradoxes that result from such attitude enhances transparency in antitrust policy. One is prevented from solving complex dilemmas by merely resorting to a "value" –

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[703] See footnote 289.

[704] Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer, 3. Noticing that the modern theory of "perfect competition", attended by technical notation and the mathematics of marginalism, made economics and law begin speaking "in completely different languages" about competition, Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition* (1989), 74 Iowa Law Review, 1023.

[705] See section II.I.II.

which, by definition, evades criticism – supposed to inspire every antitrust decision. But we are also cautioned against optimistically supporting an indefinite "process". At the end of the day, distinctions need to be created and consolidated in order to enable and control decision-making. And those are tasks of which legal doctrine should be apt to take part.

III.II.II. FOR LEGAL DOCTRINE: PRODUCING SOCIALLY ADEQUATE DIFFERENCES

Some readers may see in the observation of paradoxes a call for methods of "balancing". Efficiency, consumer welfare and competition – with all the puzzles that may arise from their simultaneity – would need to be "balanced" in order to produce decisions. The difficulties of such enterprise should be clear in the exploration of the antitrust domain in which "balancing" has appeared as a promising candidate: the "rule of reason".

A branch of law that intends to be closer to market relations than to abstract legal forms, antitrust has eagerly welcomed the possibility of balancing contradictory effects ("positive" and "negative") of economic activity[706]. The remote origins[707] of the rule of reason can be found in the *Dyer's Case* and later in *Mitchel vs. Reynads* (1711), in which Lord Macclesfield introduces a "reasonableness" rule in the case law on restrictions on trade. However, its modern formulation is founded in *Standard Oil*[708] and *American Tobacco*[709], with the notion that social and economic justifications not related to competition would not be accepted in the application of the rule. Such modern understanding was consolidated in Brandeis' famous words:

> *"the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition"*[710]

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[706] See René Joliet, *The rule of reason in antitrust law: American, German and Common Market laws in comparative perspective* (1967), Liège, Faculté de Droit, 189-190.

[707] American Bar Association, *The rule of reason* (1999), Section of Antitrust Law, Monograph 23, 23.

[708] *Standard Oil Co. of New Jersey v. United States* (1911) Supreme Court of the United States, 221 U.S. 1.

[709] *United States v. American Tobacco Company* (1911), Supreme Court of the United States, 221 U.S. 106.

[710] *Board of Trade of City of Chicago v. United States* (1918) 246 U.S. 231.

In an interpretation of the *Chicago Board of Trade* precedent, the American Supreme Court decided in 1977 that the rule of reason required one to "*weigh [...] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition*" [711]. Such formulation seems to excessively enlarge the boundaries of the rule of reason ("all of the circumstances of a case"). Nonetheless, a decision issued in the following year[712] made it clear that limitations to competition should not be justified "*by asserting a broad range of socially beneficial justifications if they did not impact competitive conditions*"[713].

As in other topics of antitrust, the difficulty lies in defining what it means to "promote competition", to "suppress or even destroy competition" or to "impact competitive conditions". Specially in exclusionary cases, antitrust has been trying to translate such broad expressions into a specific test. The rule of reason would require, thus, that plaintiffs (i) demonstrate defendant's market power and effects such as increases in price, decreases in output or quality; (ii) once that initial burden is met, the burden of production shifts to the defendants, who must provide a procompetitive justification for the challenged restraint; (iii) if they do so, then plaintiff must prove either that the challenged restraint is not reasonably necessary to achieve the defendants' procompetitive justifications, or that those objectives may be achieved in a manner less restrictive of "free competition"[714].

Framed this way, the rule of reason does not properly reach the stage of "balancing" benefits and harms in terms of deciding which one outweighs the other. When a "per se" rule

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[711] *Continental T.V., Inc. v. GTE Sylvania Inc.* (1977) Supreme Court of the United States, 433 U.S. 36. Reproaching the expansive interpretation of Chicago Board of Trade, René Joliet, *The rule of reason in antitrust law: American, German and Common Market laws in comparative perspective* (1967), Liège, Faculté de Droit, 39.

[712] *National Society of Professional Engineers v. United States* (1978) Supreme Court of United States. 435 U.S. 679.

[713] See American Bar Association, *The rule of reason* (1999), Section of Antitrust Law, Monograph 23, 67.

[714] See *United States v. Visa U.S.A., Inc., et al* (2003), United States Court of Appeals, Second Circuit, 344 F. 3d 229. See also *United States v. Brown University* (1993), United States Court of Appeals, Third Circuit, 5 F. 3d 658 ("Even if an anticompetitive restraint is intended to achieve a legitimate objective, the restraint only survives a rule of reason analysis if it is reasonably necessary to achieve the legitimate objectives proffered by the defendant […] To determine if a restraint is reasonably necessary, courts must examine first whether the restraint furthers the legitimate objectives, and then whether comparable benefits could be achieved through a substantially less restrictive alternative. […] Once a defendant demonstrates that its conduct promotes a legitimate goal, the plaintiff, in order to prevail, bears the burden of proving that there exists a viable less restrictive alternative.")

or "quick look"[715] approach is not at hand, courts might decide based on plaintiff's failure of proving anticompetitive harm or defendant's failure to present procompetitive justification. If both succeed, the case could still be decided on grounds of showing that restraint was not necessary or that there was a less-restrictive alternative. Another way to escape balancing is to resort to a regulatory or legislative provision (which assumes that legislative has done the balancing) and to understand that the benefits of the conduct are somehow deemed in the harm to competition[716]. Given all those alternatives, it is not a surprising conclusion that "as decades of antitrust litigation has shown, antitrust is not good at balancing"[717].

To use the consecrated terms in constitutional law, the practice of the rule of reason reveals it might reach the stages of suitability (*Geeignetheit*) and necessity (*Erforderlichkeit*)[718], but not the one of proportionality in the strict sense. Only the latter would correspond to the actual process of balancing. Like in the constitutional principle of proportionality[719], its formal structure plays an essential role in the claims of rationality of the rule of reason. The rule would be rational because it follows pre-defined and controllable stages[720]. Nevertheless, such formal argument might not suffice if one considers that the last stage of actual balancing is never reached, and that such structure does not provide criteria

[715] See *United States v. Brown University* (1993), United States Court of Appeals, Third Circuit, 5 F. 3d 658 ("In addition to the traditional rule of reason and the per se rule, courts sometimes apply what amounts to an abbreviated or 'quick look' rule of reason analysis. The abbreviated rule of reason is an intermediate standard. It applies in cases where per se condemnation is inappropriate, but where 'no elaborate industry analysis is required to demonstrate the anticompetitive character' of an inherently suspect restraint. […] Because competitive harm is presumed, the defendant must promulgate 'some competitive justification' for the restraint, 'even in the absence of detailed market analysis' indicating actual profit maximization or increased costs to the consumer resulting from the restraint")

[716] See, in Brazil, CADE's decision in Administrative Proceeding 08012.002673/2007-5. Find our disclaimer in footnote 768.

[717] Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* (2018) Faculty Scholarship at Penn Law. 1985, 35.

[718] This is not totally surprising, since both stages are connected to the factual conditions of balancing, while the rule of reason has precisely the function of embracing the factual complexity of antitrust cases.

[719] See Guilherme Augusto Azevedo Palu, *Grundrechte, Spielräume und Kompetenzen: Eine Untersuchung formeller Prinzipien vor dem Hintergrund der Prinzipientheorie* (2017), PhD thesis at Heidelberg University, 120 and ff (presenting the criticism on the theory of principles, including of its irrationality, as well as possible responses).

[720] The shifts in the burden of proof are not as clear in Brazilian administrative processes, which are more flexible than American judicial cases that produced most part of the doctrine on the rule of reason.

for decision-making[721]: What counts as a "procompetitive justification"? What is a "reasonably necessary" restraint?

The material references expected to fulfill the promises of rationality of the rule of reason are two. First, its exclusive orientation on a variation of economic theory. "*Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason*."[722] Rationality here means only systemic rationality, that is, a rationality of the economic system. The second element of rationality of the rule of reason is its reference to the competitive process. "*In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable*"[723]. Competition is assumed to be reasonable and a source of rationality to antitrust decision-making.

However, we have seen that economically inspired goals such as efficiency and consumer welfare often clash with each other or with the protection of competition. Moreover, different understandings of competition itself (e.g. "perfect competition" and "but-for competition") can lead to paradoxical situations. Even with its limitation to economics and to competition, the rule of reason does not provide *a priori* responses for circumstances in which competitive arrangements are less efficient than non-competitive ones or in which increase of output requires less competition. Its avoidance of the balancing stage makes it also incapable of providing *a posteriori* reproducible answers to such puzzles.

Like principles in constitutional law[724], goals such as "efficiency" and "consumer welfare" only delay the decision until conflicting cases arise in which one hopes to have more information. Alike argumentative *practice* in the theory of argumentation, competition undifferentiated *process* could only be the foundation of antitrust if, instead of attributing

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[721] Arguing that the rule of reason deals with "conflicting purposes" but does not determine the content of the criteria according to which competing standards are to be weighed against each other, Ernst-Joachim Mestmäcker, *Das Prinzip der Rule of Reason und ähnliche Ausnahmemechanismen im Recht der Wettbewerbsbeschränkungen* in Erich Hoppmann, Ernst-Joachim Mestmäcker, *Normenzwecke und Systemfunktionen im Recht der Wettbewerbsbeschränkungen* (1974), Tübingen, J.C.B. Mohr, 23.

[722] *National Society of Professional Engineers v. United States* (1978) Supreme Court of United States. 435 U.S. 679.

[723] *National Society of Professional Engineers v. United States* (1978) Supreme Court of United States. 435 U.S. 679.

[724] See Niklas Luhmann, *Kontingenz und Recht* (1971; 2013), Frankfurt, Suhrkamp, 271.

lawfulness or illegality to conducts and mergers, it aimed to spell "the fire of truth"[725]. The rule of reason cannot provide a reason for the validity of antitrust decisions in case of conflicting goals because the "reason" is the reason for itself and cannot be "balanced". In its paradoxical formulation, the reason *is* and *should be,* presenting itself as both the result and foundation of a rational procedure[726].

In order to accomplish its task of deciding mergers and conducts, antitrust does not require one to rationalize decisions basing them on an indistinguishable process, to justify goals, or to stablish the supremacy of only one goal. It needs only to find distinctions that exclude, discriminate and thus allow decision-making. Such differences can be consolidated in concepts, which are useful as repositories that can be stored and mobilized in other decisions[727]. To use Jhering's old words, conceptualization enables one to "break down" rules into simple definitions and to reconstitute them in a "legal alphabet"[728]. Even if contemporary law does not hold illusions of transforming such alphabet into a flawless system, concepts are still useful to control the recurrent use of distinctions. In Civil Law contexts, the type of legal discourse that has commonly dealt with concepts and controlled its application throughout decisions is legal dogmatics[729].

More than an alphabet, concepts stablish a "language" which allows one to identify semantic deviations. One can refine concepts, unfold them into new distinctions, but cannot rebel against them without paying the price of speaking another language. Concepts also facilitate legal dogmatics operations of comparison among decisions. They guide legal argumentation by limiting it to what can be considered similar (analogous) or not: equal cases are decided equally and unequal circumstances are treated unequally. Therefore, it is

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[725] To borrow the expression from Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970* (1983), 26 Journal of Law & Economics.

[726] See Raffaele de Giorgi, *Argomentazione giuridica a partire dalla Costituzione* in Temi di filosofia del diritto vol. 2 (2015), Lecce, Pensa MultiMedia Editore.

[727] See Niklas Luhmann, *Das Recht der Gesellschaft* (1993) Frankfurt am Main, Suhrkamp Verlag, 385.

[728] Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (1883) translated by José Ignacio Coelho Mendes Neto, *A dogmática jurídica* (2013) São Paulo, Ícone, 30. Even in his mature criticism to systemic thinking, Jhering does not criticize the role of concepts as working instruments. See Niklas Luhmann. *Das Recht der Gesellschaft* (1993). Frankfurt am Maim, Suhrkamp Verlag. See also Robert Alexy, *Theorie der Juristischen Argumentation* (1983; 1991), Frankfurt am Main, Suhrkamp Verlag, 311 (describing the three tasks of legal dogmatics - logical analysis of legal concepts, synthesis of this analysis in a system and the use of its results to justify legal decisions - as well as criticism of such description "since Jhering")

[729] See section I.II.I.

important that conceptual constructions are compatible with contingent and arbitrarily-initiated processes[730]. They should be compatible with the validity of a law that is modifiable under conditions that can be determined. Modern legal system is changeable *and* valid. But how can one conceptually control the reactions of other social systems to changeable legal constructions?

The question leads us to the search for "socially adequate" legal concepts, a longstanding endeavor that would be particularly appreciated in antitrust. Antitrust requires distinctions in situations in which the legal system is not the only one asking for decisions: decisions are constantly demanded by evolving economic pressures and dynamic competitive relations. In such contexts, concepts should deal with the consistency of legal categories and concomitantly be more permeable to the rationality of other systems[731]. The ability of economists and other social scientists to help building useful and socially adequate concepts depends on their capacity of maintaining contact with concrete theories of legal dogmatics[732].

A successful forerunner in the project of designing a socially adequate dogmatics – or "doctrine"[733] – was the Brazilian jurist Orlando Gomes. Gomes has been praised for being ahead of the curve[734] and a developer of a "new legal dogmatics"[735]. Since early in his career, he defended that the jurist should have "sensitivity" to understand "the facts of real life in its creative force and in its palpitating actuality". Equipped with such understanding, "the technician gives way to the sociologist", since "all social phenomena must be considered

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[730] Niklas Luhmann, *Rechtssystem und Rechtsdogmatik* (1974) Stuttgart, Kohlhammer Urban-Taschenbücher, 24.

[731] This is the task for a "peripherical dogmatics" as we delineated in Luiz Felipe Ramos, *Por trás dos casos difíceis* (2017), Curitiba, Juruá (using Luhmann's distinction center/periphery to illustrate the need to make consistency and complexity compatible not only within tribunals pressed by the "non liquet" prohibition [center], but also for agents that respond to non-filtered political and economic demands [periphery])

[732] See Niklas Luhmann, *Die Rückgabe des zwölften Kamels* (1985; publicado em 2000) translated by Dalmir Lopes Jr. *A restituição do décimo segundo camelo: do sentido de uma análise sociológica do direito in Niklas Luhmann: Do sistema social à sociología jurídica* (2004), Rio de Janeiro, Editora Lumen Juris, 87.

[733] We prefer the term doctrine to stablish the difference with the *Rechtswissenschaft* of legal dogmatics. See item I.II.I.

[734] See José Eduardo Faria, *Juristas fora da curva: três perfis* (2016), Revista Direito GV vol 12, n. 2, 272-310.

[735] José Carlos Moreira Alves, *Orlando Gomes e sua obra* (2009), in Revista Brasileira de Direito Comparado, número especial: o centenário do nascimento de Orlando Gomes, 19.

sub specie juris"[736]. In addition to the emergence and evolution of norms, legal knowledge would have to include the analysis of "social effectiveness"[737].

What distinguished Gomes from other socio-legal crusaders was that he never abandoned an extreme care with legal concepts. Concepts were recognized as the "working instrument" of the jurist, an instrument that enables them to legally consider and understand both the social reality and the legal phenomenology[738]. Once the jurist accepts the categories of law, contract, obligation, he has to conform his thought to those categories, as formal notions cannot vary according to the particularism of new realities. Social reality does not bend to concepts, nor is it confined to schemes. But if new facts ostensibly rebel against juridical constructions the role of the jurist is not to subvert such constructions due to technical difficulties[739].

According to Orlando Gomes, concepts cannot be separated from the social transcendence of legal norms. The jurist must have his "feet on the ground" and his "eyes on the variants" of the historical context[740]. The "ground" means not only positive law, but the "real base" of the legal system, which includes observations of economic relations. Such base is subject to selections and interpreted according to a scale of values that "exudes" from the "ideological content" of positive law. In this context, concepts like good faith, abuse of right and abuse of economic power are progressively seen as "exhaust valves" in a "necessary tension" between individualism and social justice[741].

Legal doctrine within antitrust could benefit from a similar project. Primarily, it can go beyond the declaration of goals and the presentation of a rule of reason. In order to work

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[736] Orlando Gomes, *As classes sociais na formação do direito*, in *A crise do direito* (1945), Salvador, Vera-Cruz, 7.

[737] Orlando Gomes, *Relações entre o direito e a economia*, in *Direito econômico e outros ensaios* [1975], Salvador, Distribuidora de Livros Salvador, 11.

[738] See Orlando Gomes, *Novas Considerações sôbre alguns conceitos jurídicos*, in Direito privado (novos aspectos) (1961), Rio de Janeiro, Freitas Bastas, 342.

[739] Cf. Orlando Gomes, *O problema da natureza jurídica da convenção coletiva de trabalho*, in *Transformações gerais do direito das obrigações* (1967), São Paulo, Revista dos Tribunais, 191.

[740] Orlando Gomes, *A casta dos juristas* in *Escritos menores* (1981), São Paulo, Saraiva, 23.

[741] See our Luiz Felipe Ramos, Osny da Silva Filho, *Orlando Gomes* (2015), Rio de Janeiro, Elsevier (emphasizing different "dampening concepts" in different phases of Orlando Gomes' thinking). Arguing that legal dogmatics must "broaden its horizons" and become a "center of convergence" of a multidisciplinary scientific task, Luis Alberto Warat, *La linguística jurídica, la problemática definitoria y el condicionamiento ideológico del accionar humano,* in Luis Alberto Warat, Antonio Anselmo Martino, *Lenguaje y definicion juridica* (1973), Buenos Aires, Cooperadora de Derecho y Ciencias Sociales, 56.

on criteria that inform decisions, antitrust doctrine should identify the differences that make a difference in an antitrust case, that is, the distinctions that discriminate, exclude and make it possible to decide. Moreover, antitrust jurists could develop concepts based on the recurrence of such differences across several cases and the need for consistency. Finally – and here this thesis offers the observation of multivalued triadic forms – such concepts need to be socially adequate, so they can accommodate the "necessary tensions" between economic goals and competitive relations.

Within such a project, there are more means to solve contradictions between efficiency and competition than simply relying on a definition that equates the goals in an abstract level. One can observe, for example, the differences that make a difference in decisions about collaboration among competitors[742]. When competitors collaborate, they usually combine complementary assets in a way that is not deemed in the social form of competition. However, such combination can also enable an efficiency-enhancing integration that participants could not achieve separately. Such efficiency-enhancing characteristic leads antitrust agencies to decide the case under the rule of reason, that is, to avoid considering the collaboration as one that suppresses or even destroys competition upfront.

Two start-up companies formed by computer specialists might decide to form a partnership joint venture whose function is to market and distribute the network software of each company. If the documents setting up the JV specify that the firms will agree on prices at which the individually-produced software is sold, the agreement tends to be challenged as per se illegal, even though it would distribute the software at lower costs. The same result can be achieved if the collaboration between the companies implies using only half of their aggregate pre-collaboration sales forces, by taking advantage of economies of scale and refraining from time-consuming demonstrations. Although the savings attributable to economies of scale would be cognizable efficiencies, eliminating demonstrations that highlight the differences between the products impairs the constitution of a triadic form, as third parties (consumers) are not able to tell the relative advantages of each manufacturer.

[742] See Federal Trade Commission and Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000), available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

The analysis could be different if two producers of a variety of computer software determine that in light of their complementary areas of design expertise they could develop a better program together than either can produce on its own. The joint venture formed by such producers could jointly develop and market a new program with expenses and profits to be split equally, and thus be considered an efficiency-enhancing integration of economic activity that promotes procompetitive benefits. Although the triadic form is harmed by their collaboration, such harm results in a cognizable efficiency that takes the form of a new product. Such new product can enable the joint venture to stablish triadic relations with other competitors or incentivize entrants to compete on the new-stablished terms.

In such cases[743], broad goals such as efficiency and competition are specified in differences such as (i) combination on prices / collaboration to create a new product or (ii) combination that produces economies of scale / collaboration that reduces consumer's ability to choose. Such distinctions can appear throughout several antitrust cases and give rise to concepts like "naked restraint" and "ancillary restraint". Finally, such concepts can be socially adapted to the perception that harms to the triadic form of competition impair a form of socialization that holds a multivalued function, and so the preservation of competition might be a concern even in situations in which a cognizable efficiency is proven. This could give rise to a concept like "competition-preserving ancillary restraint".

Also the paradoxes between consumer welfare and competition can be addressed by an antitrust doctrine that absorbs the progression: goals – differences – concepts – socially adequate concepts. Such progression can be inferred, for instance, from a case that discussed the introduction of one-liter bottles in the Brazilian beer market[744]. A major brewery was accused of having introduced and stimulated the use of a type of bottle that could not be part of the empties sharing system that traditionally distributed beer in the country. Such a strategy would arguably harm the ability of other breweries to distribute their products and compete. On the other hand, consumers benefited from increase in output, as they obtained more beer at proportionally lower prices, and from greater variety of products in the market, with the introduction of the new bottle size.

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[743] See the last pages of See Federal Trade Commission and Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000), available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[744] *Abrabe/Kaiser vs. Ambev*, 08012.006439/2009-65. Find our disclaimer in footnote 768.

The clash between competition and consumer welfare was expressed in distinctions that could be applied throughout other antitrust cases. The decision-maker differentiated between a conduct that is justified as a rational business strategy and one that only aims to harm or exclude rivals. It also differentiated between gaining market share from selling better products and coordinating to subtract products or selling tactics from competitors. Finally, it distinguished between a situation in which rivals are able to compete in the market and another situation in which they are unreasonably incapable of competing, only the latter justifying an "artificial" duty to cooperate imposed by an antitrust agency.

Such differences could be consolidated in a concept like "competition on the merits", which would refer to rational business strategies that aim to sell more product by increasing output to consumers. Still, such concept could be socially adapted to the perception that in some circumstances one of competition dysfunctions (disrupting cooperation) may undermine the very possibility of new triadic constellations to emerge. If smaller breweries are unable to distribute their products merely because the one-liter bottles have the logo of the major brewery, there could be an antitrust solution that harmonizes the pro-consumer innovation (with the introduction of the new product) with the preservation of the triadic form (by preventing the incumbent from inscribing its high relief logo in the bottles).

Finally, differences and socially adequate concepts can also be extracted from the paradoxes between diverse understandings of competition. In a rumorous and contemporary case, the FTC observed that "*challenging Google's product design decision in this case would require the Commission – or a court – to second-guess a firm's product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence*"[745]. On the other hand, others in different jurisdictions have understood that "*Google's strategy for its comparison shopping service wasn't just about attracting customers by making its product better than those of its rivals. Instead, Google abused its market dominance as a search engine by promoting its own comparison shopping service in its search results, and demoting those of competitors*"[746].

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[745] *In the Matter of Google Inc*. Statement of the Federal Trade Commission Regarding Google's Search Practices, January 3, 2013. FTC File Number 111-0163.

[746] See Commissioner Margrethe Vestager, *Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (2017) European Commission, Press release, Brussels.

Among the several other aspects involved in the Google's case, we would wish to highlight the different nuances in the understandings of competition. Part of the interpreters understand that the "but for" world, that is, the state of affairs that would exist without Google's practices, is one with less innovation and inferior products. Other exegetists seem to understand that Google's products could be "even better" had they not made it more difficult for rivals to show their products. The General Superintendence of CADE touches that second understanding when it observes that "*Google Search could maintain its quality in the search for products at a lower level, but in such a way that the user would not yet search for the second option; and this level of quality would be as lower as more difficult to find a second option.*"[747]

Once more, this plurality of view seems to be an expression of antitrust old dichotomy between competition as a "but for" concept and competition as a maximization value occasionally inspired by ideal characteristics of "perfect competition". Such dichotomy can be transformed in distinctions like product design decisions with plausible justifications / design decisions without justification or attracting costumers by making better products / failing to design an "even better" product. Such distinctions can evolve to a concept like "transparent competition", meaning that firms would clearly present the reasons why they believe that their rival-harming products better attend consumers and would subject such reasons to public scrutiny.

Such a concept can also become more socially adequate by taking the multivalued triadic form of competition into account. Antitrust is an important intermediate in competition social form, but ultimate choices between different products are expected to be made by informed third parties, that is, by consumers themselves. On the one hand, for such choices to be possible, triadic structures must be preserved so that competing parties with different strategies are able to dispute consumer favors. On the other hand, the multivalued function of competition assumes that consumers are individuals capable of making decisions in the market and should not be substituted by the preferences of antitrust agencies, let alone by the State-third.

[747] General Superintendence, Administrative Proceeding 08012.010483/2011-94. Find our disclaimer in footnote 768.

III.II.III. FOR LEGAL SOCIOLOGY: THE LAUGHING THIRD IN NOBODY'S LAND

The project with regards to bringing a multivalued social form to antitrust has not only theoretical implications for antitrust (as a strategy for protecting competition beyond psychological theories) or for legal doctrine (as a call for developing socially adequate concepts). Such project can also impact an approach particularly suitable to bring law closer to the "social facts". This is the approach of "legal sociology", whose story in Brazil started early in the twentieth century.

In 1922, the jurist Pontes de Miranda published *O Sistema de Ciência Positiva do Direito* (The System of Positive Science of Law). Defending an intermediate position between Weber and Ehrlich[748], Miranda argued that law could be scientifically rationalized, but also unconsciously elaborated. In the decades of 1930 and 1940, legal scholars from the state of Bahia progressively substituted references to Durkheim or Marx for the older unanimous references to Spencer and Haeckel[749].

With the name of "legal sociology", this field of studies starts to gain prominence in the country with the publication of the Brazilian edition of Gurvitch's classic book[750]. After such publication, several works including "Legal Sociology" in the title would be published in the decades of 1950 and 1960[751]. Those are the works from Evaristo Moraes Filho (1950), Euzébio de Queiroz Lima (1958), Vamireh Chacon de Albuquerque Nascimento (1959), Carlos Campos (1961) and A. L. Machado Neto (1963). A hallmark from the period was the

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[748] See Claudio Souto, Solange Souto, *Sociologia do Direito* (1981) São Paulo, EDUSP, 54.

[749] An "intermediate" period in Bahia's contribution to philosophy and sociology of law, Antônio Luís Machado Neto, *Contribuição baiana à filosofia jurídica e à sociologia do direito* (1966), in Revista da Faculdade de Direito da Universidade de São Paulo 61, 132. Cf. Dinorah Castro e Francisco Pinheiro Jr.*, Idéias filosóficas na Faculdade de Direito da Bahia* (1997), Salvador, Ufba, 54-55 (with caveats to Neto's periodization). An example of this period is the first edition of Orlando Gomes, *A crise do direito* (1945), Salvador, Vera-Cruz (partially inspired by Marx's ideas). Before, Nestor Duarte had suggested sociology of law as the most suitable propaedeutic to understand law as a social fact in Nestor Duarte, *Direito, noção e norma* (1933), Salvador, Oficina dos Dois Mundos.

[750] George Gurvitch, *Sociology of Law* (1942)*,* translated by Djacir Menezes, *Sociologia jurídica* (1946), Rio de Janeiro, Kosmos. Cf. Felippe Augusto de Miranda Rosa, *Sociologia do Direito: O Fenômeno Jurídico como Fato Social* (1970, 5th ed. 1977), Rio de Janeiro, Zahar Editores, 43-44.

[751] Before, one can find a work published in Rio de Janeiro by Adolpho Pinto, *Ensaios de Sociologia do Direito* (1925), Rio de Janeiro, Livraria Francisco Alves (defending that "all the sociological elements influence law, but specially the economic factor, which provides most part of its content", 100). In the field of criminology, one can also quote the earlier works from Paulo Egídio (1900), Luciano Pereira da Silva (1906) and Sebastião Fernandes (1922), as well as the criminal anthropology of Nina Rodrigues in the same period. See Nelson Nogueira Saldanha, *Sociologia do Direito* (1970), São Paulo, Editora RT, 28.

empirical work conducted by Claudio Souto in 1965 (*Sentimento e Ideia de Justiça*), a first step in the author's project of formulating a legal theory with an empirical object[752].

In the description of a forerunner in the Brazilian context, legal sociology was then an authentic "nobody's land", an inhabited territory between the "scientific imperialisms" of law and sociology:

> *"The truth is, as Raymond Aron reminds us, that jurists and sociologists live in polemics, with mutual misunderstandings, each wanting to attribute everything to his science, and diminishing the other's own field. They are two scientific imperialisms that devour one another, when there would be room for a conciliatory middle ground. And this middle ground, nobody's land, is precisely the legal sociology, much more sociology, no doubt, than law; for it is a special sociology, which seeks to surprise and understand what is relational, social, basic inter-human in the legal phenomenon that occurs in societies"*[753].

Since 1963, legal sociology starts to be provided in Brazil as a course at a graduate law school, which happened first in Recife, Pernambuco, at the Catholic University. In 1964, the discipline is also offered at the undergraduate level of the law school[754]. In the 1970s, the tension projected by Evaristo Filho between the "imperialists" sociologists and jurists can already be observed. A work from Miranda Rosa notices that sociologists had curiously demonstrated cold reaction to the development of the discipline of legal sociology in Brazil, an echo of "resentments and intellectual restrictions" from those scholars, according to the

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[752] See Luciana Silva Reis, *A modernização crítica do pensamento jurídico brasileiro no século XX: ciência do direito, ensino e pesquisa* (2018), São Paulo, PhD thesis presented at the University of Sao Paulo, 110-128. Calling this a "heroic" period of Brazilian sociology of law, José Eduardo Faria, Celso Fernandes Campilongo, *A Sociologia Jurídica no Brasil* (1991) Porto Alegre, Sergio Antonio Fabris. Even earlier, Claudio Souto had supervised a research named *Receptividade Social a Lei Agrária* (1962). Such empirical efforts would influence many other works in the following years, such as Claudio Souto, Solange Souto, *Mudança Social e Direito* (1970), Joaquim Falcão, Maria Teresa Miralles, *Reforma do Ensino Jurídico* (1976), João Baptista Herkenhoff, *A Função Judiciária no Interior* (1977), Joaquim Falcão, *Conflito de Direito de Propriedade* (1984). See Agerson Tabosa Pinto, *Sociologia Geral e Jurídica* (2005), Fortaleza, Qualygraf Editora e Gráfica.

[753] Evaristo de Moraes Filho, *O Problema de uma Sociologia do Direito* (1950), São Paulo, Livraria Freitas Bastos S.A., IX (our translation).

[754] Cf. Claudio Souto, Solange Souto, *Sociologia do Direito* (1981) São Paulo, EDUSP, 57. See also Agerson Tabosa Pinto, *Sociologia Geral e Jurídica* (2005), Fortaleza, Qualygraf Editora e Gráfica, 571.

author[755]. In the same year, Saldanha refers to Auguste Comte as an author who believed that law is a "systematic of egoisms" and a "hollow fruit of metaphysics and scholastics", and to the Austrian legal scholar Eugen Ehrlich as the paradigm of a sociologist of legal life beyond "sociological reveries" from jurists[756].

Such passages capture one of the sides of the disputes faced by legal sociology: the quarrels with sociologists. The other side of the dispute is with established legal scholars. Two legal sociologists who developed their works in the following decades in Brazil would precisely clash with the ambitions of conventional legal theory[757]. While the dialectic humanism of Lyra Filho favors surpassing legal dogmatics with a "legal science" in which law is equated to the *historical process*, the non-dogmatic comprehensive inquiry of José Eduardo Faria sees the object of "legal science" as being the *social facts* of which legal rules are considered to be mere valuations.

Both authors find in legal dogmatics their immediate adversary, but their projects seem to target a greater level of abstraction. Lyra Filho and Faria produce legal theory[758]. They operate at the level of discussing the basis of legal knowledge and the grounds for the alleged unity of the legal system. Of course, they do so with a view of developing theoretical observations distinctive from the ones that offered ballast for the legal dogmatics criticized by them. But they hardly attempt to dispute with dogmatics at its own level, that is, to

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[755] Felippe Augusto de Miranda Rosa, *Sociologia do Direito: O Fenômeno Jurídico como Fato Social* (1970, 5th ed. 1977), Rio de Janeiro, Zahar Editores, 42. The reasons for the tension are longstanding. With the older development of their field, many lawyers have been important figures in the development of sociology. Additionally, social sciences in Brazil were historically constituted as an attempt to oppose an explanatory model to the rhetorical model of legal discourse in which many social scientists of the 1930s were formed. See Eliane Botelho Junqueira, *A Sociologia do Direito no Brasil: introdução ao debate atual* (1993), Rio de Janeiro, Lumen Juris, 11.

[756] Nelson Nogueira Saldanha, *Sociologia do Direito* (1970), São Paulo, Editora RT (also considering Comte as the founder of a sociology believed to surpass legal knowledge, and Ehrlich's *Grundlegung der Soziologie des Rechts* [1913] as a work that goes beyond a "mere look" from a sociologist over aspects of the law).

[757] See Luciana Silva Reis, *A modernização crítica do pensamento jurídico brasileiro no século XX: ciência do direito, ensino e pesquisa* (2018), São Paulo, PhD thesis presented at the University of Sao Paulo, 130-188.

[758] Observing the opposition "legal theory vs. sociology of law", Celso Campilongo, *O direito na sociedade complexa* (2000, 2nd 2011), São Paulo, Saraiva, 139. See Luciana Silva Reis, *A modernização crítica do pensamento jurídico brasileiro no século XX: ciência do direito, ensino e pesquisa* (2018), São Paulo, PhD thesis presented at the University of Sao Paulo, 133, 181 (about Lyra Filho and Faria, using the term "legal science") and 128 (defending that Claudio Souto, beyond his empirical efforts, also tried to develop legal theory). Curiously, Souto was supervised in his PhD in social sciences in Bielefeld, Germany, by Niklas Luhmann, an author claimed to have been responsible for the resurgence of interest in theoretical elaborations in sociology of law after the empirical turn in American academia. See Eliane Botelho Junqueira, *A Sociologia do Direito no Brasil: introdução ao debate atual* (1993), Rio de Janeiro, Lumen Juris, 69.

consolidate concepts applied throughout decisions as a means to control what is legally possible.

This seems to be a common trait in Brazilian production on legal sociology: both empirical and theoretical works produced by legal sociologists challenge conventional legal knowledge without formulating an alternative to dogmatics. The results of such state of affairs appear in the diagnosis produced in the 1990s about sociology of law in Brazil. One is provided by Faria and Campilongo:

> *"Empirical research – and even theoretical production – are virtually nonexistent in the law schools. (...) Brazilian legal sociology, especially in recent years, has not developed a significant number of empirical studies – also because, not institutionalized as a compulsory course of the undergraduate curriculum, there are no enough researchers and theoreticians today with solid knowledge in terms of methodology. However, even acting in contexts that are averse to its methods, objects and problems, it contributes greatly to the introduction of a critical and reflexive wedge in Brazilian legal thinking."*[759]

Eliane Junqueira, who differentiates the "legal sociology" produced by jurists from the "sociology of law" as a specialization of social sciences, also provided an influential diagnosis of the field's *status quo* in the end of 20th century. Sociologists were presented as heirs of a rationalist tradition which works with empirical evidences, whereas jurists articulate *topoi.* While the institutionalization of sociology of law depended of the establishment of rigid boundaries moving it away from legal sociology, the product of the latter is seen as the emergence of a "free rider" discourse. After being doubly rejected, the "free-rider" goes to his "nobody's land" and finds a "frontier zone":

> *"In this confrontation between two intellectual fields with distinct traditions, the Brazilian sociology of law, as a discipline situated in*

[759] José Eduardo Faria, Celso Fernandes Campilongo, *A Sociologia Jurídica no Brasil* (1991) Porto Alegre, Sergio Antonio Fabris, 44-45 (our translation).

a frontier zone, that is, as a free-rider discourse, has been rejected by both sociology and law."[760]

The Ordinance 1886, published in 1994, made both sociology and legal sociology mandatory disciplines for legal students in Brazil. The proliferation of courses over the country in the next decades drastically raised the number of workers in the field. Unlike the working group Law and Society of ANPOCS in the early 1990s[761], initiatives like the empirical research network REED and the sociology of law association ABRASD are now enduring examples of the impacts of the criticism on traditional legal thinking. The epistemological openness resulting from such criticism is now observed in several works published by legal scholars, either as a result from empirical researches or as a consequence of the interest on sociological theories[762].

Nevertheless, the legal sociology in Brazil has not been successful in providing an alternative to legal dogmatics. It is hard to find sociological knowledge embedding the concepts that are meant to control variation and stabilization in different legal fields like tax law, civil law or criminal law. Two hypothesis, which might not be disconnected, could be raised to explain this failure: (i) first, the legal dogmatics itself in Brazil could have been frail in controlling the realm of the legally possible, a dysfunction that makes it harder to develop functional equivalents; (ii) second, the strategies adopted by legal sociology in terms of questioning traditional legal thinking at a low level (empirical works) or at a high level (legal theories) of abstraction would make it incapable of influencing law in the middle ground supposedly occupied by legal dogmatics.

Regardless of the accuracy of such hypothesis, which is out of our current scope to explore, the present thesis refrained from doubling the bet in one of the strategies already tried to overcome the failure. Instead, it has reviewed antitrust doctrine in order to find its organizing concepts (or its self-established "goals") and found that the frequently assured but rarely accomplished promise to promote competition has been based on a scarce definition of the concept. In a field essentially influenced by economics, we looked at the

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[760] Eliane Botelho Junqueira, *A Sociologia do Direito no Brasil: introdução ao debate atual* (1993), Rio de Janeiro, Lumen Juris, 15 (our translation).

[761] See José Reinaldo de Lima Lopes, Roberto Freitas Filho, *Law and Society in Brazil at the Crossroads: A Review* (2014), The Annual Review of Law and Social Science, 10, 94.

[762] See José Reinaldo de Lima Lopes, Roberto Freitas Filho, *Law and Society in Brazil at the Crossroads: A Review* (2014), The Annual Review of Law and Social Science, 10, 100.

tradition of sociology of competition to find an alternative. And we ended up with a multivalued doubly indirect social form which seems to be suitable both to the legal distinctions produced in antitrust cases (i.e. internally consistent) and with the modern imaginary regarding competitive relations (i.e. socially adequate).

Embedded in a functionalist legal tradition that can be traced back to Jhering and includes the realism movement in the United States, the multivalued functional approach offers a heuristic tool to compare social problems possibly addressed by regulated social forms. By doing so, it provides an explanation for the emergence of such social constellations, which should be considered by jurists concerned with social adequation of regulation. A form like competition could be explained not only in terms of economic theory, but also according to the social functions (and dysfunctions) it is able to perform.

In addition of requiring further development within antitrust, such an endeavor could probably be worked out in other legal fields as well. The task for a legal sociologist would be to identify crucial concepts produced by legal doctrine and to make them socially adequate with use of sociological empirics and theory[763]. As any other legal concept, socially adequate legal concepts should perform the function of helping lawyers to use distinctions in a way that is both useful to decide a particular case and coherent with other decisions. At this stage, we believe it is not necessary to provide a perfectly finished legal theory to substitute the current understandings on what valid law is. We trust that such theories, if needed, might appear in the process of changing legal dogmatics.

As we tried to demonstrate in the present work, the legal sociologist could be a *tertius gaudens* that benefits from the dispute between law and sociology without necessarily provoking a conflict – or without expecting a great theory to finally settle the battle before one starts to act. It is sufficient for legal sociology that the two parties have a certain difference, foreignness and qualitative dualism (even though hostility can also be a common case among lawyers and sociologists). We only have to observe wisely who we want the other two parties to be: in our view, on the one hand, sociological knowledge (both

[763] Noteworthy, in his criticisms of the law taught at his time, Ehrlich identified the "trusts" and the "cartels" as two of the most significant and neglected legal issues, as they occurred "in the legal life" but not in the "judiciary". See Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (1913), translated by René Ernani Gertz and revised by Vamireh Chacon, *Fundamentos da Sociologia do Direito* (1986), Brasília, Editora da UNB, 13.

theoretical and empirical[764]); and on the other hand, the specific level of legal dogmatics. Moreover, we should be conscious of the price we are willing to pay for doing "peripheral doctrine": dealing with different systemic rationalities; struggling to harmonize high social complexity with the need for legal consistency; finally, being even less directly concerned than traditional legal dogmatics with the legal duty to decide – and probably much more often misunderstood by decision-makers.

We could now remember (with Simmel) there are two ways of being "impartial": to be indifferent to the parties and to assume both sides. Legal sociology can be *both* law and sociology. While being so, it can also become none of them. If we follow such path, instead of "free riders", legal sociologists might one day be seen as "laughing thirds". A laughing third that, after visiting legal dogmatics and sociology, returns to his homeland, legal sociology, which is no land and no home at all:

> *"Between this nothingness and the social order which is brought into being and which presents itself as unthinkable, lies the homeland of the third, which is neither a land nor a home. As far as his two distinct discursive positions are concerned, one can imagine him as a journeyman of the trickster Eshu-Elegba, who walks along the border between the fields with a double-colored hat. As a troublemaker in the fortification wall erected, since the dawn of modern times, between the 'hardness of things' and the 'floating of poetry', between the 'real' and the 'imaginary'."*[765]

[764] Besides the empirical observations on competition that ground the sociological works quoted throughout this thesis, preliminary empirical research has been conducted at the Nucleus of Studies on Competition and Society, NECSO-USP. Some ongoing research can also be found at the Sub-theme of the Colloquium of the European Group for Organizational Studies, "The Organizational Origins and Consequences of Competition".

[765] Albrecht Koschorke, *Ein neues Paradigma der Kulturwissenschaften* in V.V.a.a, *Die Figur des Dritten: Ein kulturwissenschafliches Paradigma* (2010), Berlin, Suhrkamp Verlag, 30-31 (our translation).

FINAL REMARKS

"It is not far-fetched to view antitrust as a microcosm in which larger movements of our society are reflected and perhaps, in some small but significant way, reinforced or generated". [766] The phrase from Bork's classic book could have worked well as an introduction to a research agenda, but it seems to have remained an insight that has not been fully developed. Neither Bork himself nor many antitrust authors were curious enough to approach competition as a social phenomenon, besides describing it as an economically inspired legal construct. Facing antitrust from a legal-sociological perspective, this thesis is among the outsiders in such landscape.

It began by observing that the Sherman Act (1890) in the United States brought innovations that went beyond the common law. Such freshness gave its framers an occasion to formulate the goals of antitrust policy, but the formulators seem to have believed the goals of opportunity, efficiency, competition, fair distribution and political freedom were consistent. The existing notion of competition implicitly reflected an emergent neoclassicism: voluntary price-fixing agreement was anti-competitive not because anyone's freedom to act was restrained, but because market opportunities were lost. Taft's *Addyston Pipe* opinion fused the neoclassical economics with the classical doctrine, creating the illusion common law had always been concerned with competition neoclassically defined.

In 1978, Bork's Antitrust Paradox stated that the goal of antitrust was to improve allocative efficiency without impairing productive efficiency in such a way that no gain or a net loss was produced in consumer welfare. Correspondingly, competition was understood as a term of art designating any state of affairs in which consumer welfare cannot be increased by judicial decree. Maximization of consumer welfare, in this reasoning, was conceived as the best practicable approximation to a constantly moving economic "equilibrium point". Such statements make clear, as Posner puts it, that the effort of Chicago School was to replace forays into sociology and psychology by the "rational" definitions and "logical" structure of economic theory.

The current international debate on antitrust goals includes dispute on the concept of consumer welfare, attempts to develop the goal of consumer welfare at its margins and suggestions of alternative goals. At the end of the day, the debate consolidates no

[766] Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978; 1993), New York, The Free Press, 10.

comprehensive meaning of competition. In the earlier years of antitrust, competition had been negatively defined as an *absence* (the neoclassical absence of market coercion). Chicago School made it a *derivation* of another goal (a shorthand phrase for consumer welfare maximization). In its turn, the recent debate carries a high degree of *indetermination*: competition appears as a "lost goal", a "complex system" or the "contrary of monopoly".

In Brazil, the scholars who addressed the issue of antitrust goals had to face three challenges posed by antitrust. First, the antitrust legal duty to observe potential effects seems to require some intimacy with a (conceptually uncertain) future – whereas legal dogmatics usually deals only with conditional programs. Second, the dialogue with economics brings models that were not produced by a legally controlled decision and were meant to present only probably correct answers for most of the cases – while legal dogmatics traditionally works between positive law and the prohibition of denial of justice. Finally, many of antitrust criteria were created by judges in a Common Law environment inspired by a "rule of reason" – whereas legal dogmatics is expected to consolidate concepts applied across decisions. Brazilian scholars are aware of the challenges. In view of both its potentialities and difficulties, this thesis referred to Brazilian antitrust "dogmatics" as a legal *doctrine*.

Since the early years of such doctrine – aided by a statute that, differently from the original Sherman Act, expressly mentioned the word – there were attempts to define competition as a goal. In the origins of antitrust in Brazil, competition was conceptualized as "limited" competition, as an "absence" (of monopolies harmful to popular economy) or as "free" competition (necessary to industrial development). During the so-called conversion of Brazilian antitrust in "modern antitrust", at least one author tried to overcome the pathological angle, which faces competition only as an economic illicit. Finally, the current debate depicts competition as an "instrument", a "protection" of the market dispute or as effective "possibility of choice". All things considered, there is a Brazilian lineage explicitly approaching competition as a nuanced concept, which in different contexts included authors such as Ferreira de Souza, Isabel Vaz and Salomão Filho.

Brazilian antitrust doctrine is only moderately reflected at CADE's practice. In our empirical assessment of the materials produced by the antitrust agency, competition appears as the most frequently pursued goal. Yet, the lack of support on a semantically consolidated concept results in a case law that is plentiful on references to "competition", and at the same time silent or obscure as to its conceptual delineation. In at least one case, an economic

approach rivaled with a legal-dogmatic view, while a sociological input was briefly suggested. The door was open to a multiplicity of sources, but the passage between the (legal) "interior" and the (economic, sociological, etc.) "exterior" was only timidly traversed.

Exploring the "external" sources of antitrust was the next step of our work. We initially observed a debate on Chicago School's claim that *wealth maximization* provides a basis for a normative theory of law in general. The proposal of reducing political philosophy to economics had to present itself in philosophical terms, and the School's expansion to new legal fields raised complexities that remained latent in the taken-for-granted world of antitrust. The boundaries of the wealth maximization morality, for example, became explicit, as well as its incapacity in playing a "foundational" role. Once justifications based on efficiency lose attractiveness in public discourse, one must contemplate other reasons for the persistence of economically inspired legal approaches.

We found such reason in the idea of *scarcity*. Basic microeconomics holds that under conditions of scarcity one should perform an action if and only if its benefits exceed its costs. On the one hand, neoclassical economics derives its views on competitive and monopolized markets from such assumption of rationality. On the other hand, legal procedures distribute scarcity by deciding who is entitled to disputed resources. In an "Economic Analysis of Law" approach, one could use economic models to criticize contemporary decisions as "irrational". But one can also observe that access – the other side of scarcity – is influenced by concrete relations that can be *regulated* (besides modelled with game theory). The bilateral interchange between law *and* economics in the treatment of scarcity makes Calabresi suggest an approach which can result in changes in economic theory rather than in the way legal reality is described.

An example of a relation that influences access is precisely *competition*, which both produces and results from scarcity. But in addition to being legally regulated and economically modelled, competition emerges as a social phenomenon. Such feature recommends a combination of various disciplines, including economics, to grasp the emerging phenomenon: a "Law and Society" approach. In the history of antitrust, such comprehensive insights were attempted by authors like Louis Brandeis and Thurman Arnold. The former's "passion for facts" isolated market coercion from effect upon prices. The latter's realist background favored to treat, in antitrust policies, organizations as individuals (the "folklore"). Nonetheless, a specific sociological approach on competition would only

be tried by Stern's forgotten article in 1971. In Brazil, the frequency of legal sociologists working with antitrust suggests a more welcoming environment for alternative views.

We started to build our alternative view based on the pioneers of sociology of competition. After the second half of the 19th century, a concurrent discourse on competition was favored by the recognition of competition's ambivalent effects and of its emergence in areas that are not strictly economic. Authors like Cooley and Simmel published works that were not primarily dedicated to draw links between competition and economic effects. Cooley viewed competition as a selective process capable of defining the position of an individual in society – a process that allows one to see in the opponent "a man like himself" and his own life "from a new point of view". Simmel characterized "pure competition" as an indirect contest in which participants seek favors, attention or material sources from a third party. In such contest, competitors produce objective values and are inspired to discover the deepest desires of the third "even before he becomes aware of them".

In the 1940s, sociology of competition met two influential authors and a missing link. Polanyi avoided the strict separation between themes of economic and of sociological research. In his description of the "great transformation" after which social relations would end up embedded in the economic system, antitrust legislation opposed the needs of a self-regulating market to the demands of laissez-faire. Hayek' criticism of the theory of perfect competition comprised the remark that the theory had excluded "all personal relationships existing between the parties". In its place, the author suggests a competitive *process* whose achievements should be judged in comparison to the situation as it would exist if competition were prevented from operating. Finally, the overlooked work from Geiger is dedicated to the nuances of competition as a social relation instead of normatively supporting it as a principle.

The sociological approaches produced after the 1970s connected to the 1940s as conceptual developments of Polanyi's insights, as latent links to Geiger's nuanced view or as reactions to the policies alleged inspired by the practical utility of Hayek's ideas. Among the "founding fathers" of the New Economic Sociology, White perceives the role of competition in the reproducibility of markets. Producers observe each other, not consumers, in the mirror. Thus, they are able to reproduce existing structures without the information required for maximizing of efficient behavior. An attempt to provide a more general approach – one that combines the sociology of competition with a theory of modern society – is offered by Bourdieu. Present in different fields, in economy competition involves

conducts that can present themselves *publicly* as having the aim of maximizing individual profit. Such pervasive feature of competition in modern society led authors to refine the diagnostic of an "economization" of society through the use of sociology of competition.

But how far would competition have spread in the economic context itself? And what would be the lessons to be learned therefrom? An influential interpretation of Brazilian economic history holds that the country's economy and society were organized with an external objective: the interests of European commerce. A development of such view observes that, beyond external dependence, the status of colony created internal power structures: monopolies with "triple draining" effects. Reading such diagnosis through the lens of methodological caveats from economic historiography, we suggested to look at the "other side" of monopolies. Competition in Brazil could have evolved within a social project of archaism, one that aimed at reproducing a highly differentiated hierarchy through relations of power based on slavery.

Although free competition, among other principles of liberalism, reverberated into Brazilian political commitments since the 1830s, it was only partially reflected in social relations. The defense of "free-exchange" came along usurpation of public lands by well-connected individuals; "individualism" was defended by farmers who organized measures to avoid competition in the railway sector; "liberalism" was advocated while a few banks dominated a financial sector with formal and informal links to the government. At a time when liberal ideas were being challenged in many ways, Ferreira de Souza published a book in 1939 sustaining that free competition is only one of competition's modalities or historical forms. Whereas free competition is regarded as a "myth" in the tropics, "limited" competition can be controlled by law for the sake of public interest.

Moving away from a normative support of competition as a principle, Brazilian social thought captured interesting traits of the competitive social phenomenon in the country. With Freyre, we noticed that competition in Brazil emerged as a low-energized struggle within boundaries that excluded the former inhabitants of *senzalas*. With Buarque de Holanda, we observed that competitive indirect dispute was tensioned in the country by person-to-person relations and by an emotive background. Faoro enabled us to see Brazilian competition as an aristocratic and state-determined social phenomenon. Lazzarini provides a contemporary diagnosis based on empirical data where competition appears constrained by relationship networks ("ties") and by strategies on political contacts.

Both the recapitulation of sociology of competition and the observation of its Brazilian delineation brought sufficient material to work on a concept of competition. But we still needed to specify the perspective through which we would do so. Despite its controversial character in the realm of both natural and social sciences, we decided to rely on a functional approach that has solid backgrounds and optimistic contemporary endeavors in legal functionalism. Embedded in such functionalist tradition, our approach could not be subsumed to any of its manifestations: away from causality, from indistinct teleology and from theoretical monolithism, we accepted Luhmann's early critiques of previous sociological methods and did not fully adhere to his preferred attitude.

In Luhmann's systemic construction, the phenomenon of competition was observed mainly with reference to the economic system. Competition was presented as a structure of economic environment which structures risk by enabling competitors to observe each other's strategies through a doubly contingent relation. The embraced method referred to a specific problem (uncertainty in market orientation) and compared different performances (competition, interactional conflicts, cooperation/exchange). We found that the particularities of competitive phenomenon – its social pervasiveness and its inability to form systems – justified a reversal: instead of analyzing *equivalent performances* based on a referential problem, one could heuristically compare *the multiple problems* addressed by competition. Not only does such multivalued function (and dysfunctions) help to explain the pervasive emergence of competition in modern society, but it also helps to justify the protection of competition as an autonomous goal of antitrust.

Indeed, competition has such a strong presence in education, sports or science not only because of its alleged economic effects, but due to the social problems it addresses. Competition enables sociability in scarcity; complexity, moralization and avoidance of conflicts; reproducibility and objective values within uncertainty, etc. While doing so, it also creates problems: it disrupts cooperation; produces isomorphism and heteronomy; naturalizes exclusion, etc. Such multivalued competition is not an idealized principle, nor a "but-for" (negative) concept: it is a specific and historically-situated social form. Based on Werron's insights and on Brazilian social thought, we described it as a doubly indirect triadic dispute for the favors of consumers – a form that can be stressed by personal relations, by the incentives of a State-third and by social barriers that reproduce hierarchies.

In the last chapter, the thesis inquired about the convergences and divergences of such form with the distinctions produced in Brazilian antitrust cases. While the second-order observations made in the preceding chapters stand on their own, the third chapter expands their scope and asks whether they could impact an exercise traditionally done by legal doctrine. We noticed that an agreement on prices among competing bakeries risks to transform the most basic feature of competition's social form – its triadic structure – into a dyadic one, even if its economic effects are most likely neutral. Other antitrust distinctions are also inspired by the protection of the indirect triadic form: hardcore cartel/diffuse cartel, exchange of sensitive information/agreement on competitive issues, parallel behavior/collusive behavior. Although the complexity of the analysis tends to raise with technology (e.g. with the use of softwares and algorithms to collude), the preservation of triadic social forms remains a compelling explanation for several criteria in cartel cases.

Something similar could be said about merger control. Using the doubly indirect social form of contemporary competition, we noticed that the discovery of an intermediated relation between patients, oncology hospital/clinics and non-oncologist doctors changed the result of a merger analysis. As non-oncologist doctors observe, compare and evaluate the offerings of oncology services and articulate expectations of patients, CADE decided for remedies that potentially restored the objectivity of doctors' intermediate role, even though market shares indicated no antitrust concern. With advancements in technology and interconnectivity, the kind of intermediate that has been receiving growing attention by competition researchers and antitrust community are the public communication processes that allow observation accessible to both competitors and their audience. We briefly explored the impacts to antitrust analysis stemming from the acknowledgment of such intermediated social forms in cases involving rankings, platforms, market analysts and big data.

Antitrust analysis of exclusionary conduct also reflect concern with the social form of competition, specially bearing in mind the stressing factors that often accompany such form. In a Query made to CADE about the so-called "tax war" between Brazilian states, the agency observed competitive dynamics moved from a dispute for the resources of a consumer-third to a struggle for the favors of a state-third. Since antitrust is a strong component of the public discourse on competition in modern society, it could adopt measures to protect the social form of competition even if there is technically no exclusionary conduct. If an antitrust decision-maker does so, the weakening of social forms of competition might be sufficient to recommend an affirmative covenant as a case solution.

Protection of competition, thus, can be an autonomous goal of antitrust, which fits to the idea that multivalued competition addresses social problems regardless of economic effects. The theoretical implication for antitrust deriving from such attitude is twofold: (i) first, one needs a definition for competition, (ii) second, one needs to lose the fear of paradoxes, since competition will eventually clash with other antitrust goals. As to the former, we detected how the recent rise of an explicit defense of competition goal still struggles to overcome antitrust traditional notions of competition. The empirical approach of behavioral antitrust, in its turn, is theoretically deficient in its consideration of competition as a matter of independent cognitions. With regards to the emergence of paradoxes, distinctions need to be consolidated in order to enable and control decision-making.

And this is classically a task for legal doctrine, the second impacted area according to the last sections of this thesis. In order to accomplish its duty of deciding mergers and conducts, antitrust does not require one to rationalize decisions basing them on an indistinguishable process, to justify goals, or to stablish the supremacy of only one goal. It needs only to find distinctions that exclude, discriminate and thus allow decision-making even though the rule of reason is not good at balancing. Based on the legacy of Orlando Gomes, we suggested that antitrust could benefit from a legal doctrine that is both careful with legal distinctions and attentive to the need of social adequacy. Such doctrine would identify the differences that make a difference in a case, develop concepts based on the recurrence of such differences across several cases and accommodate tensions between economic goals and competitive relations in view of multivalued triadic forms.

Finally, the approach developed in this thesis presented a potential impact for legal sociology. The legal sociologist could become a *tertius gaudens* that benefits from the dispute between law and sociology (a dispute particularly noticeable in Brazilian historical context) without necessarily provoking a conflict. It suffices to discern the qualitative dualism between legal dogmatics and sociological knowledge in order to deal with different systemic rationalities and harmonize high social complexity with the need for legal consistency. To some extent, such legal sociology (also a kind of peripheral doctrine) is *both* law and sociology, since it requires serious immersion in each of the fields before offering its third-like perspective. But it is also *none* of them, as it never loses the double-colored hat with which it walks along the border between the fields.

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In a nutshell, the descriptive part of this thesis found that negative notions (absence of market coercion, but-for world), ideal principles (free competition, equilibrium point) and indeterminate processes – all strategies attempted by antitrust doctrine to grasp competition – did not produce a recursive use of such concept in antitrust practice. We confirmed and specified the hypothesis that antitrust doctrine has not consolidated a concept of competition that is both legally coherent and socially adequate. Instead, based on sociological works, competition could alternatively be viewed as a multivalued doubly indirect social form that emerges and pervades modern society.

If antitrust agencies and statutes are certain that protecting competition is a goal of competition policy, the doctrinal part of our work offers a possible route. It suggests that a socially adequate concept of competition could help identifying the protected competitive phenomenon and avoiding social problems resulting from its unthought-of promotion. Notwithstanding convergences and divergences, part of Brazilian antitrust doctrine and cases are headed in such direction: competition policies can be designed to help protecting competition. Such conclusion might sound too simple or too obvious, but this is not necessarily a bad thing according to John McNaughton[767]: "*An outside idea has a chance to influence government policy only if it has two characteristics. First, it can be stated in a simple declarative sentence. Second, once stated it is obviously true*".

[767] A former assistant secretary of defense of the United States, quoted by Emily Parker, *To Be Read by All Parties* (2012) The New York Times Book Review, 27 [February 19], available at https://www.nytimes.com/2012/02/19/books/review/the-impact-of-books-on-washington-policy.html?pagewanted=1&_r=1. Also quoted by Robert Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2403.

REFERENCES

ANTITRUST CASES[768]

Abrabe and Cervejaria Kaiser v. Ambev (2012), CADE, 08012.006439/2009-65;

ABRIVE v. Several Insurance Companies (2013), CADE, 08012.008224/1998-38;

ABTA v. ECAD and others (2013), CADE, 08012.003745/2010-83;

American Needle, Inc. v. National Football League (2010) Supreme Court of the United States, 560 U.S. 183;

ANFAPE v. Volkswagen, Fiat and Ford (2018), CADE, 08012.002673/2007-5;

ANP and MPF/SP v. Several gas stations (2013), CADE, 08012.004472/2000-12;

ANS v. HC Lagos Hospital das Clínicas (2012), CADE, 08012.005969/2009-96;

ANS v. Unimed Araruama (2013), CADE, 08012.011935/2008-50;

ANS v. Unimed de Ibitinga (2013), CADE, 08012.009534/2006-78;

ANS v. Unimed Maceió (2013), CADE, 08012.008143/2008-06;

ANS v. Unimed Nordeste RS (2013), CADE, 08012.009866/2008-14;

ANS v. Unimed Pato de Minas (2013), CADE, 08700.003447/2008-11;

APEC v. Unimed Presidente Prudente (2013), CADE, 08012.006253/2005-82;

Aspen Skiing Co. v. Aspen Highlands Skiing Corp. (1985) Supreme Court of the United States. 472 U.S. 585.

Associação Hospital de Caridade Ijuí v. Unimed Ijuí (2013), CADE, 08012.002440/2005-97;

Associated Press v. United States (1945) Supreme Court of the United States, 326 U.S.1;

Atl. Richfield Co. v. USA Petroleum Co. (1990), 495 U.S. 328;

Board of Trade of City of Chicago v. United States (1918) 246 U.S. 231;

Broadcom Corp. v. Qualcomm, Inc. (2007) United States Court of Appeals, Third Circuit. 501 F.3d 297;

Brooke Group v. Brown & Williamson Tobacco (1993) Supreme Court of the United States;

Brown Shoe Co. v. United States (1962) 370 U.S. 294;

CAA/DF v. Livraria do Advogado and others (2013), CADE, 08012.012420/1999-61;

CADE v. Arcal Consultoria and SIPROCFC/MG (2013), CADE, 08012.003874/2009-38;

[768] The law firm where I worked during part of the PhD (AJDC) represented clients in some of the following cases. Opinions and views expressed in this thesis are the author's own and do not represent any client's position.

CADE v. Independent Aftermarket (several firms) (2016), CADE, 08012.006386/2016-53;

CADE v. Unimed do Brasil (2013), CADE, 08012.001305/2003-62;

CDC v. Devanlay Ventures Comércio, Importados, Exportação e Participações Ltda. (2011), CADE, 08012.002764/2009-59;

CIEFAS v. SOBED-CE and Sociedade Cearense de Radiologia (2011), CADE, 08000.011516/1994-72;

Continental T.V., Inc. v. GTE Sylvania Inc. (1977) Supreme Court of the United States, 433 U.S;

Copperweld Corp. v. Independence Tube Corp. (1984) Supreme Court of the United States, 467 U.S. 752;

DECOM-PI and MP/PI v. SINDIPETRO/PI and José Duarte Saraiva (2013), CADE, 08700.000547/2008-95;

DPC/PR v. several gas stations (2013), CADE, 08012.011668/2007-30;

*Eastman Kodak Co. v. Image Technical Services, Inc***.** (1992) Supreme Court of the United States, 504 U.S. 451;

E-Commerce v. Google (ongoing), CADE, 20108012.010483/2011-94;

Fashion Originators' Guild of America v. Federal Trade Commission (1941) Supreme Court of the United States. 312 U.S. 457;

Federal Trade Commission v. Procter & Gamble Co. (1967), 386 U.S. 568;

Fernando A. Dulce, Conegundes P. Moreira and others v. Unimed de Barbacena, Bebedouro e Santos Dumont/MG (2013), CADE, 08012.001046/2003-70;

Grupo Executivo para Modernização dos Portos do Ministério da Marinha v. SINDAMAR and others (2013), CADE, 08000.009391/1997-17;

GVT and others v. Americel and others (2013), CADE, 08012.008501/2007-91;

Hosp. e Maternidade Jardim América Ltda. v. Unimed Goiânia (2013), CADE, 08012.003368/2004-34;

Hospital de Caridade Dr. Astrogildo de Azevedo v. Unimed Santa Maria (2013), CADE, 08012.003035/2008-39;

IG, Telemar, Ongoing (2012), CADE [merger], 08012.005394/2012 -15;

Image Technical Services, Inc. v. Eastman Kodak Co. (1997) United States Court of Appeals, Ninth Circuit. 125 F.3d 1195;

In re Text Messaging Antitrust Litigation (2015) United States Court of Appeals, Seventh Circuit. 782 F.3d 867;

International Distribution Centers v. Walsh Trucing Co. (1987), 812 F.2d 786 2d Circuit;

Jefferson Parish Hospital District No. 2 v. Hyde (1984) Supreme Court of the United States, 466 U.S. 2;

Juizo de Direito da 3ª VC – RS v. Several gas stations in Caxias do Sul (2013), CADE, 08012.010215/2007-96;

Leegin Creative Leather Products, Inc. v. PSKS, Inc. (2007) Supreme Court of the United States, 551 U.S. 877;

Leistung Comércio e Serviços Ltda. v. Siemens Engenharia e Service Ltda (2011), CADE, 08012.000478/1998-62;

Marimex Despachos Transportes e Serviços Ltda. v. Rodrimar S/A Transportes, Equipamentos Industriais e Armazéns Gerais (2016), CADE, 08012.001518/2006-37;

Med Life Saúde v. Unimed de Araraquara e Região (2013), CADE, 08012.001792/2007-97;

Monsanto Co. v. Spray–Rite Service Corp (1984) Supreme Court of the United States. 465 U.S;

MP Pará v. Unimed Sul do Pará (2013), CADE, 08012.008031/2008-47;

MP RS v. Gas Stations (2013), CADE, 08012.007149/2009-39;

MP/CE and DECOM v. Sindipostos and others (2012), CADE, 08012.000998/1999-83;

MP/GO v. Sindiposto/GO and others (2012), CADE, 08012.000444/2002-98;

MP/PI v. SINDIPETRO/PI (2013), CADE, 08012.007301/2000-38;

MP/Pilar do Sul v. Bakeries (2004), CADE, 08012.006539/1997-97;

MP/RS v. Auto Abastecedora Visentin and others (2011), CADE, 08012.005495/2002-14;

MP/RS v. Gas stations (2013), CADE, 08012.004573/2004-17;

MP/SP v. Associação dos despachantes de Santa Bárbara D'Oeste (2016), CADE, 08012.011791/2010-56;

MP/SP v. Hidrópolis Engenharia Ltda. and others (2011), CADE, 08012.0006768/2000-78;

MP/SP v. SINCOPETRO and others (2011), CADE, 08012.000921/2000-53;

MPF Amazonas v. AMAZONPETRO and others (2013), CADE, 08012.002959/1998-11;

National Society of Professional Engineers v. United States (1978) Supreme Court of United States. 435 U.S. 679;

Northern Securities Co v. United States (1904), 193 U.S. 197;

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co. (1985**)** Supreme Court of the United States, 472 U.S. 284;

Pepsico v. Recofarma and Spal (2013), CADE, 08012.006450/2000-97;

PNBE (1999), CADE [query] n. 0038/99;

Polícia Civil do DF v Several bakeries (2013), CADE, 08012.004039/2001-68;

Polygram Holding, Inc. v. Federal Trade Commission (2005) United States Court of Appeals, District of Columbia Circuit. 416 F.3d 29;

Pró Genéricos v. Janssen Cilag Farmacêutica Ltda. (2013), CADE, 08012.000841/2011-51;

Procon-SP v. *SKF do Brasil Ltda.* (2011), CADE, 08012.001271/2001-44;

Rambus Inc. v. FTC (2008) United States Court of Appeals, District of Columbia Circuit. 522 F.3d;

Rede D'Or, Acreditas Oncologia (2013) CADE [merger], 08700.0044151/2012-01;

Reiter v. Sonotone Corp. (1979) Supreme Court of the United States 442 U.S. 330;

SDE and SEAE v. TAM, Varig, Vasp, Transbrasil (1999), CADE, 08012.000677/99-70;

SDE v. ABAV RJ (2013), CADE, 08012.006923/2002-18;

SDE v. Associação Paranaense dos Produtores de Cal (2013), CADE, 08012.009834/2006-57;

SDE v. ATPC (2014), CADE, 08012.002028/2002-24;

SDE v. Fecombustíveis; Luiz Gil Siuffo Pereira (2011), CADE, 08012.006431/1997-31;

SDE v. KLM and others (2013), CADE, 08012.011027/2006-02;

SDE v. Peróxidos do Brasil and others (2012), CADE, 08012.004702/2004-77;

SDE v. Santher and others (2011), CADE, 08012.006059/2001-73;

SDE v. Sindipedras and others (2002), CADE, 08012.002127/2002-14;

SDE v. Unimed Angra dos Reis (2013), CADE, 08012.006748/2009-35;

SDE v. Unimed Caçador (2013), CADE, 08012.006762/2009-39;

SDE v. Unimed Campina Grande (2013), CADE, 08012.008736/2007-83;

SDE v. Unimed de Bauru (2013), CADE, 08012.008733/2007-40;

SDE v. Unimed de Ilhéus (2013), CADE, 08012.008740/2007-41;

SDE v. Unimed de Londrina (2013), CADE, 08012.008737/2007-28;

SDE v. Unimed Divinópolis (2013), CADE, 08012.003884/2010-15;

SDE v. Unimed Frutal (2013), CADE, 08012.006755/2009-37;

SDE v. Unimed Itajubá (2013), CADE, 08012.003779/2010-78;

SDE v. Unimed Itatiba (2013), CADE, 08012.007204/2009-91;

SDE v. Unimed Nordeste Goiano (2013), CADE, 08012.007205/2009-35;

SDE v. Unimed Norte do Mato Grosso (2013), CADE, 08012.007203/2009-46;

SDE v. Unimed Poços de Caldas (2013), CADE, 08012.008741/2007-96;

SDE v. Unimed Porto Alegre (2013), CADE, 08012.008735/2007-39;

SDE v. Unimed Regional de Maringá (2013), CADE, 08012.008738/2007-72;

SDE v. Unimed São Carlos (2013), CADE, 08012.004596/2004-21;

SDE v. Unimed Vale do Caí (2013), CADE, 08012.011124/2008-59;

SDE v. Unimed Vales do Taquari (2013), CADE, 08012.010576/2009-02;

SDE v. Unimed Vitória (2013), CADE, 08012.004993/2009-16;

SDE, Lucia Curti Guedes v. Petrocoque Indústria e Comércio S.A (2011), CADE, 08012.004520/1999-50;

SINAMGE v. Unimed da Caçapava – Cooperativa de Trabalho Médico (2013), CADE, 08012.006271/2009-98;

Sindeprestem v. Tática, Sellan and others (2011), CADE, 08012.000792/1999-16;

Sindicato dos Empregados em Estabelecimentos Bancários de Araxá/MG v. Unimed Araxá (2013), CADE, 08012.002112/200-88;

Sindicato dos Estivadores nos Portos do Estado de Pernambuco and others vs. Tecon Suape S.a and Suape (2015), CADE, 08012.006504/2005-29;

Sindicato Nacional das Empresas de Medicina de Grupo v. Unimed de Taubaté (2013), CADE, 08012.007885/2008-14;

Sindicato Rural de Presidente Prudente and others v. SUDAN and others (2011), CADE, 08001.000852/99-21;

SINOG v. Uniodonto de Lençóis Paulista (2013), CADE, 08012.001503/2006-79;

SITEL v. Telma (2013), CADE, 08700.000783/2001-35;

Smart Rio v. SINDACAD/RJ and Ricardo Marques de Abreu (2013), CADE, 08012.005524/2010-40;

Spectrum Sports, Inc. v. McQuillan (1993) Supreme Court of the United States, 506 U.S. 447.

Standard Fashion Co. v. Magrane-Houston Co. (1922) United States Supreme Court. 258 U.S.

Standard Oil Co. of New Jersey v. United States (1911) Supreme Court of the United States, 221 U.S. 1.

Standard Oil Co. of New Jersey v. United States (1911) Supreme Court of the United States, 221 U.S. 1.

Steel Placas Indústria e Comércio Ltda. v. Comepla Indústria e Comércio Ltda and others (2012), CADE, 08012.001099/1999-71;

Swift & Co. v. United States (1905) 196 U.S. 375;

Tampa Electric Co. v. Nashville Coal Co. (1961), Supreme Court of the United States. 365 U.S.

Telefonica, Phorm (2011), CADE [merger], 08012.010585/2010-29;

TFWS, Inc. v. Schaefer (2001), F.3d 198 4th Circuit;

T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit (2009), European Court Reports;

Union Carbide v. Alipio Gusmão and others (2011), CADE, 08012.007412/1999-93;

United States v. Addyston Pipe & Steel Co. (1898) Circuit Court of Appeals of the United States, Sixth Circuit, 85 F. 271, affirmed, 175 U.S. 211

United States v. Aluminum Co. of America (1945) United States Court of Appeals for the Second Circuit, 148 f.2d 416.

United States v. American Express Co. (2016) United States Court of Appeals, Second Circuit. 838 F.3d

United States v. American Tobacco Company (1911), Supreme Court of the United States, 221 U.S. 106.

United States v. AMR Corp., American Airlines Inc. (2003) United States Court of Appeals, Tenth Circuit. 335 F.3d 1109

United States v. Andreas (2000) United States Court of Appeals, Seventh Circuit, 216 F.3d 645

United States v. Apple, Inc (2015) United States Court of Appeal, Second Circuit, 791 F.3d 290.

United States v. *Arnold, Schwinn & Co*. (1967) 388 U.S. 365.

United States v. Brown University (1993) United States Court of Appeals, Third Circuit. 5 F.3d

United States v. E.I. du Pont de Nemours & Co. (1956) Supreme Court of the United States, 351 U.S. 377

United States v. Microsoft Corp. (2001) United States Court of Appeals, District of Columbia Circuit. 253 F.3d 34.

United States v. Socony-Vacuum Oil Co. (1940) Supreme Court of the United States, 310 U.S. 150

United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).

United States v. Trans–Missouri Freight Association (1897) Supreme Court of the United States, 166 U.S. 290

United States v. Trenton Potteries Co. (1927) Supreme Court of the United States, 273 U.S. 392.

United States v. Visa U.S.A., Inc., et al. (2003) United States Court of Appeals, Second Circuit. 344 F.3d 229.

Verizon Communications v. Law Offices of Curtis V. Trinko (2004) Supreme Court of the United States. 540 U.S. 398

Viação Oliveira Torres v. Empresa Valadares de Transporte Coletiva Ltda. and others (2011), CADE, 08012.005610/2000-81;

INSTITUTIONAL MATERIAL

CADE, *Guia de Análise de Atos de Concentração Horizontal* (2016), available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf;

CADE, Guia Remédios Antitruste (2018) available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/copy_of_GuiaRemdios.pdf;

CADE, *Guidelines for Cease and Desist Agreement for cartel cases* ("TCC") (2016), 29-30, available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf;

CADE, *Guidelines for the Analysis of Previous Consummation of Merger Transactions* (2016), 7, available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf;

Commissioner Margrethe Vestager, *Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (2017) European Commission, Press release, Brussels;

Democrats, *A Better Deal: Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power* (2017), available at https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf;

Federal Trade Commission and Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000), available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf;

Federal Trade Commission *In the Matter of Google Inc* (2013) Statement regarding Google's Search Practices, January 3. FTC File Number 111-0163;

https://necsousp.com/;

International Competition Network, *Competition Enforcement and Consumer Welfare — setting the agenda 14* (2011), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf;

International Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 9 (2007), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf;

OECD, *Summary of Discussion of the Roundtable on Algorithms and Collusion,* available at https://one.oecd.org/document/DAF/COMP/M(2017)1/ANN2/FINAL/en/pdf;

U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (2010);

DICTIONARIES

AULETE, Caldas. *Dicionário Contemporâneo da Língua Portuguesa* (1958), Rio de Janeiro, Delta;

AULETE, Caldas. *Dicionário Contemporâneo da Língua Portuguesa* (1964), Rio de Janeiro, Delta;

AULETE, Caldas. *Dicionário Contemporâneo da Língua Portuguesa* (1970), Rio de Janeiro, Delta;

DA CUNHA, Antônio Geraldo. *Vocabulário histórico-cronológico do Português Medieval* (1984), Fundação Casa de Rui Barbosa;

DE FIGUEIREDO, Cândido. *Dicionário da Língua Portuguesa* (1949) Livraria Bertrand;

DE HOLANDA FERREIRA, Aurelio Buarque. *Dicionário da Língua Portuguesa* (1980), Editora Nova Fronteira;

DE HOLANDA FERREIRA, Aurelio Buarque. *Novo Dicionário da Língua Portuguesa* (2nd ed. 1986), J.E.M.M. Editores Ltda;

DE MORAIS, Orlando Mendes. *Dicionário de Sinônimos* (1944) Rio de Janeiro, Editora Getulio Costa;

NASCENTES, Antenor. *Dicionario Ilustrado da Língua Portuguesa* (1972), Academia Brasileira de Letras, Rio de Janeiro, Bloch Editores;

Novo Dicionario da Lingua Portuguesa (5ª ed. 1939), W. M. Jackson, Rio de Janeiro;

SILVEIRA BUENO, Francisco da. *Dicionário Escolar da Língua Portuguesa* (1965), Saraiva;

TORRINHA, Francisco. *Novo Dicionário da Língua Portuguesa* (1946), Porto, Rua de Oliveira Monteiro.

REPORTS

MOURA, Eduardo. *Crise das redes Saraiva e Cultura expõe problemas de gestão no setor livreiro* (2018), Folha de São Paulo [November 2], available at https://www1.folha.uol.com.br/ilustrada/2018/11/crise-das-redes-saraiva-e-cultura-expoe-problemas-de-gestao-no-setor-livreiro.shtml

PARKER, Emily. *To Be Read by All Parties* (2012) The New York Times Book Review [February 19], available at https://www.nytimes.com/2012/02/19/books/review/the-impact-of-books-on-washington-policy.html?pagewanted=1&_r=1.

The Sugar Trust Illegal (1890), New York Times, available at http://query.nytimes.com/mem/archive-free/pdf?res=990DEFD6123BE533A25756C2A9609C94619ED7CF.

"The Economist", The University of Chicago worries about a lack of competition (Apr 12, 2017).

"The Economist", *Too much of a good thing* (Mar 26, 2016).

ARTICLES AND BOOKS

ACKERMAN, Bruce. *Law, Economics, and the Problem of Legal Culture* (1986) in Duke Law Journal, vol. 1986, n. 6;

ACKERMAN, Bruce. *Reconstructing American Law* (1984), Cambridge, Harvard University Press;

ALCHOURRÓN, Carlos E.; BULYGIN, Eugenio. *Introducción a la metodologia de las ciências jurídicas y sociales* (1975, 3rd reprint 1998), Buenos Aires, Astrea;

ALENCASTRO, Luis Felipe de. *O trato dos viventes. Formação do Brasil no Atlântico Sul* (2000), São Paulo, Companhia das Letras;

ALEXY, Robert. *Theorie der Juristischen Argumentation* (1983; 1991), Frankfurt am Main, Suhrkamp Verlag;

AREEDA, Philipp; TURNER, Donald. *Predatory Pricing and Related Practices under Section 2 of the Sherman Act* (1975), Harvard Law Review vol. 88, n. 4;

AREEDA, Phillip; HOVENKAMP, Herbert. *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer;

ARNOLD, Thurman. *The Bottlenecks of Business* (1940), New York, Reynal & Hitchcock;

ARNOLD, Thurman. *The Folklore of Capitalism* (1937), Washington, Yale University Press;

ARRUDA DE ANDRADE, José Maria. *Economicização do Direito Concorrencial* (2014), São Paulo, Quartier Latin;

ARRUDA DE ANDRADE, José Maria. *Reflexões sobre o* more economic approach *no direito concorrencial europeu* in Celso Campilongo, Roberto Pfeiffer, *A evolução do antitruste no Brasil* (2018), São Paulo, Singular;

ASSOCIATION, American Bar. *The rule of reason* (1999), Section of Antitrust Law, Monograph 23;

AZAR, José; SCHMALZ, Martin; TECU, Isabel. *Anti-Competitive Effects of Common Ownership* (2018), The Journal of the American Finance Association vol. 73, issue 4;

AZEVEDO PALU, Guilherme Augusto. *Grundrechte, Spielräume und Kompetenzen: Eine Untersuchung formeller Prinzipien vor dem Hintergrund der Prinzipientheorie* (2017), PhD Dissertation at Heidelberg University;

BACHUR, João Paulo. *Inclusão e exclusão na teoria dos sistemas sociais: um balanço crítico* (2014), Revista Brasileira de Informação Bibliográfica em Ciências Sociais – BIB, São Paulo, n. 73;

BAKER, Jonathan B. *Economics and Politics: Perspectives on the Goals and Future of Antitrust in The Goals of Antitrust* (2013) 81 Fordham Law Review;

BASTIAT, Fréderic. *Harmonies économiques* (1850) translated by W. Hayden Boyers, *Economic Harmonies* (1996), New York, Foundation for Economic Education;

BEARD, Charles. Introduction in Alfred Lief (org.) *The Social and Economic Views of Mr. Justice Brandeis* (1996), Florida, Gaunt.

BECKERT, Jens. *The Great Transformation of Embeddedness. Karl Polanyi and the New Economic Sociology* (2007), MPIfG Discussion Paper 07/1, Cologne, Max Planck Institute for the Study of Societies Cologne;

BELLO, Carlos Alberto. *Autonomia frustrada: o Cade e o poder econômico* (2005), São Paulo, Boitempo Editorial;

BLACK, Oliver. *Conceptual foundations of antitrust* (2005), Cambridge, University Press.

BLAIR, Roger; SOKOL, Daniel. *Welfare Standards in U.S. and E.U. Antitrust Enforcement in The Goals of Antitrust* (2013) 81 Fordham Law Review;

BOBBIO, Norberto. *Dalla struttura alla funzione. Nuovi studi di teoria del diritto* (1977), Milano, Edizioni di Comunità. Bork seems to ascribe here a repressive role for antitrust;

BORK, Robert H. *Legislative Intent and the Policy of the Sherman Act* (1966), The Journal of Law & Economics, vol. 9;

BORK, Robert H. *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press;

BOURDIEU, Pierre. *Actes de la Recherche en Sciences Sociales* (1997), translated by Suzana Cardoso and Cécile Raud-Mattedi, *Política & Sociedade* (2005), v. 4, n. 6.

BOURDIEU, Pierre. *Le champ économique* in *Actes de la Recherche en Sciences Sociales* (1997), translated by Suzana Cardoso and Cécile Raud-Mattedi, *Política & Sociedade* (2005), v. 4, n. 6.

BOURDIEU, Pierre. *Le marché des biens symboliques* (1971) translated by Sergio Miceli, *A economia das trocas simbólicas* (1987), Rio de Janeiro, Ed. Perspectiva;

BRANDEIS, Louis. *An Interview* in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press;

BRANDEIS, Louis. *Competition,* in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press;

BRANDEIS, Louis. *Dissenting Opinion* (Liggett Company vs. Lee - 1933) in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press;

BRANDEIS, Louis. *Dissenting Opinion* (New State Ice Company vs. Liebmann) in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press;

BRANDEIS, Louis. *Manufacturers in Cooperation in Alfred Lief (org.) The Social and Economic Views of Mr. Justice Brandeis* (1996), Florida, Gaunt;

BRANDEIS, Louis. *Shall we Abandon the Policy of Competition? In Osmond Fraenkel, Clarence Lewis, The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press;

BRANDEIS, Louis. *The Democracy of Business* in Osmond Fraenkel, Clarence Lewis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press;

BRANDEIS, Louis. *The Living Law* (1916), Illinois Law Review, February;

BRANDEIS, Louis. *The Solution of the Trust Problem in Osmond Fraenkel, Clarence Lewis, The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (1935), New York, The Viking Press;

BRANKOVIC, Jelena; RINGEL, Leopold; WERRON, Tobias. *How rankings produce competition. The case of global university rankings* (2018), Zeitschrift für Soziologie 47(4): 270-288;

BUARQUE DE HOLANDA, Sergio. *Raízes do Brasil* (1936, 2016), São Paulo, Companhia das Letras;

BURT, Ronald S. *Structural Holes: The Social Structure of Competition* (1992), Cambridge, Harvard University Press;

BUSS, Eugen. *Der Wettbewerb: eine rechtssoziologische Untersuchung* (1973), Tübingen, J.C.B. Mohr.

CABRAL, Mario André Machado. *Estado, Concorrência e Economia: Convergência entre Antitruste e Pensamento Econômico no Brasil* (2016), PhD Dissertation, University of São Paulo;

CALABRESI, Guido. *The Future of Law and Economics: Essays in Reform and Recollection* (2016), Yale University Press, New Haven;

CALLON, Michel. *Introduction: the embeddedness of economic markets in economics* (1998) in The Sociological Review (Special Issue: Sociological Review Monograph Series: The Laws of the Markets), Ed. vol. 46: S1;

CAMPILONGO, Celso Fernandes. *O direito na sociedade complexa* (2000, 2nd 2011), São Paulo, Saraiva;

CAMPILONGO, Celso Fernandes. *Ruptura com mitos e superação de obstáculos: direito, economia e mercado (Prefácio)* in Fernando Herren Aguillar, *Direito Econômico: do direito nacional ao direito supranacional* (3rd. 2012), São Paulo, Editora Atlas;

CAMPILONGO, Celso Fernandes. *Prefácio* in Antônio Maristrello Porto, Patrícia Sampaio, *Direito e economia em dois mundos: doutrina jurídica e pesquisa empírica* (2014), Rio de Janeiro, Editora GV

CAPELATO, Maria Helena. *Os Arautos do Liberalismo: Imprensa Paulista* 1920-1945 (1989) Editora Brasiliense;

CARR, Edward. *What is history?* (1961) translated by Lúcia Maurício de Alverga, *Que é historia?* (3. ed 1982) São Paulo, Paz e Terra;

CARVALHO FILHO, Irineu; COLISTETE, Renato. *Education performance: was it all determined 100 years ago? Evidence from São Paulo, Brazil* (2010), MPRA Papers;

CASTILHO MISSALI, Guilherme Teno; VIEIRA, Yan Villela. *Why (not) talk about the sociology of competition?* (2017) available at https://www.competitionpolicyinternational.com/wp-content/uploads/2017/08/Why-we-should-not-talk-about-sociology-of-competition.pdf;

CASTRO Dinorah; PINHEIRO JR, Francisco. *Idéias filosóficas na Faculdade de Direito da Bahia* (1997), Salvador, Ufba;

COASE, Ronald. *The Nature of the Firm* (1937), Economica, New Series, Vol. 4, N. 16;

COASE, Ronald. *The Problem of Social Cost* (1960), Journal of Law and Economics, vol.3;

COHEN, Felix. *The Problems of a Functional Jurisprudence* (1937) Modern Law Review 1.1;

COLEMAN, Jules L. *Efficiency, Utility, and Wealth Maximization* (1980), Hofstra Law Review vol. 8;

COMPARATO, Fábio Konder. *Função social da propriedade dos bens de produção* in Revista de Direito Mercantil, Industrial, Econômico e Financeiro (1986) 63;

COMPARATO, Fábio Konder. *Funções e disfunções do resgate acionário in Direito Empresarial: Estudos e Pareceres* (1995), São Paulo, Saraiva;

Congressional Record Senate (1890), available at https://www.govinfo.gov/.

COOLEY, Charles. *Personal Competition: Its Place in the Social Order and Effect Upon Individuals; With Some Considerations on Success in Sociological Theory and Social Research: Being Selected Papers of Charles Horton Cooley* (1894), Economic Studies 4, No. 2;

COOLEY, Charles. *Social Process* (1918), New York, Charles Schriber's Sons;

COSER, Lewis. *The Functions of Social Conflict* (1964), New York, The Free Press;

DE CARVALHO, Vinicius Marques. *Defesa da concorrência: estudos e votos* (2015), São Paulo, Singular;

DE CASTRO, Viveiros. *Prefácio* in Beatriz Azevedo, *Antropofagia: Palimpsesto selvagem* (2018), São Paulo, Sesi SP;

DE GIORGI, Raffaele. *Argomentazione giuridica a partire dalla Costituzione* in Temi di filosofia del diritto vol. 2 (2015), Lecce, Pensa MultiMedia Editore;

DE GIORGI, Raffaele. *Scienza del diritto e legitimazione* (1979; 1998), Bari, Pena Multimedia;

DENNIS, Kenneth. '*Competition' in the History of Economic Thought* (1975), Oxford, Faculty of Social Studies, 1-53;

DEVLIN, Alan; JACOBS, Michael. *Antitrust Error* (2010) 52 William & Mary Law Review 75;

DI LORENZO, Thomas J. *The Origins of Antitrust: An Interest-Group Perspective* (1985) 5 International Review. Law & Economics 73;

DIEKMANN, Andreas, VOSS, Thomas. *Die Theorie rationale Handelns. Stand und Perspectiven in Rational-Choice-Theorie in den Sozialwissenschaften. Anwendungen und Probleme* (2004), Munich, Oldenbourg;

DUARTE, José. *A Constituição brasileira de 1946* vol. 3 (1947) Rio de Janeiro;

DUARTE, Nestor. *Direito, noção e norma* (1933), Salvador, Oficina dos Dois Mundos;

DUGUIT, Léon. *Les transformations générales du droit privé depuis le code Napoléon* (1912), Paris, Félix Alcan;

DURET, Pascal. *Sociologie de la compétition* (2009), Armand Colin;

DWORKIN, Ronald. *Is Wealth a Value?* In Symposium, 9 J. Leg. Stud. 191-253 (1980): essays by Dworkin and Kronman, response by Posner;

DWORKIN, Ronald. *Taking Rights Seriously* (1977, 1978) Massachusetts, Harvard University Press;

EDGEWORTH, Francis Y. *Competition and Regulation* in Robert Palgrave, *Dictionary of Political Economy* (1910), London, 378-380;

EHRLICH, Eugen. *Grundlegung der Soziologie des Rechts* (1913), translated by René Ernani Gertz and revised by Vamireh Chacon, *Fundamentos da Sociologia do Direito* (1986), Brasília, Editora da UNB;

ENGERMAN, Stanley L.; SOKOLOFF, Kenneth L. *Factor Endowments, Inequality, and Paths of Development among New World Economies* (2002), Cambridge, New World Economies;

EVANS, David S. *Trustbusting Goes Global* (2009), available at SSRN: https://ssrn.com/abstract=1430659;

EVANS, David; SCHMALENSEE, Richard. *The Antitrust Analysis of Multi-sided Platform Businesses* (2012), Coase-Sandor Institute for Law & Economics Working Paper n. 623;

EZRACHI, Ariel. *Eu Competition Law Goals and The Digital Economy* (2018), Oxford Legal Studies Research Paper No. 17/2018, available at https://ssrn.com/abstract=3191766.

FAORO, Raymundo. *Os donos do poder: formação do patronato político brasileiro* (1958, 5a ed. 2012), São Paulo, Globo;

FARIA, José Eduardo; CAMPILONGO, Celso Fernandes. *A Sociologia Jurídica no Brasil* (1991) Porto Alegre, Sergio Antonio Fabris;

FARIA, José Eduardo. *Juristas fora da curva: três perfis* (2016), Revista Direito GV vol 12, n. 2;

FERNANDES, Florestan. *A integração do negro na sociedade de classes: vol.1 o legado da "raça branca"* (1964, 5th ed. 2008), São Paulo, Globo;

FERRAZ JR., Tercio Sampaio. *Direito da concorrência: sua função social nos países desenvolvidos e em desenvolvimento in João Grandino Rodas, Direito econômico e social: atualidades e reflexões sobre direito concorrencial, do consumidor, do trabalho e tributário* (2012), São Paulo, Revista dos Tribunais;

FERRAZ JR., Tercio Sampaio. *Função social da dogmática jurídica* (1980), São Paulo, Revista dos Tribunais;

FERREIRA DE SOUZA, Jose. *Uniões de Emprezas Concorrentes* (1939), Rio de Janeiro;

FIRST, Harry; WALLER, Spencer Weber. *Antitrust's Democracy Deficit* in *The Goals of Antitrust* (2013) 81 Fordham Law Review;

FISCHER, Joachim. Der lachende Dritte in V.V.a.a, Die Figur des Dritten: Ein kulturwissenschafliches Paradigma (2010), Berlin, Suhrkamp Verlag;

FISHLOW, Albert. *Origens e consequências da substituição de importações no Brasil* (1972), Estudos Econômicos v. 2 n. 6;

FOGEL, Robert William. *The Specification Problem in Economic History* (1967), Volume XXVII, number 3;

FORGIONI, Paula. *Os Fundamentos do Antitruste* (1998; 9ª ed. 2016), São Paulo, Editora Revista dos Tribunais;

FOUCAULT, Michel. *Naissance de la biopolitique* (1979), translated by Eduardo Brandão, Nascimento da biopolítica (2008), São Paulo, Martins Fontes;

FOX, Eleanor M. *Against Goals* in *The Goals of Antitrust* (2013) 81 Fordham Law Review, 2158;

FOX, Eleanor M. *The Battle for the Soul of Antitrust* (1987) 75 California Law Review 917;

FRAGOSO, João; FLORENTINO, Manolo. *O arcaísmo como projeto. Mercado Atlântico, sociedade agrária e elite mercantil no Rio de Janeiro, c. 1790-1840* (1993), Rio de Janeiro, Diadorim;

FRANCESCHINI, José Inácio Gonzaga. *Introdução ao Direito da Concorrência* (1996) São Paulo, Malheiros Editores;

FRANK, Robert H. *Microeconomics and Behavior* (2006, 9th ed. 2015), New York, McGraw-Hill Education;

FRAZÃO, Ana. Direito da Concorrência: Pressupostos e perspectivas (2017), São Paulo, Saraiva;

FREYRE, Gilberto. *Casa-Grande & Senzala* (1933, 51st ed. 2006), Global, São Paulo;

FRIEDMAN, Milton. *The Methodology of Positive Economics* (1953), in Essays in Positive Economics (1966), Chicago, University of Chicago Press;

FUDENBERG, Drew; TIROLE, Jean. *Non-Cooperative Game Theory for Industrial Organization: An Introduction and Overview* (1989) in Richard Schmalensee, Robert Willig, 1 Handbook of Industrial Organization 259;

FURTADO, Celso. *Formação Econômica do Brasil* (32a ed. 2005), São Paulo, Companhia Editora Nacional;

GEIGER, Theodor. *Konkurrence: en sociologisk analyse* (1940), translated by Gert J. Fode, *Konkurrenz. Eine soziologische Analyse* (2012), Frankfurt am Main, Peter Lang;

GIBSON, Rajna; CALMONTE, Carmen; WAGNER, Alexander. *Preferences for truthfulness: Heterogeneity among and within individuals* (2013) American Economic Review, 103 (1);

GILISSEN, John. *Le problème des lacunes du droit dans l'évolution du droit médiéval et moderne* (1967), in Chaim Perelman, *Le problem des lacunes en droit* (1968), Bruxelles, Établissements Émile Bruylant;

GLASNER, David; SULLIVAN, Sean. *The Logic of Market Definition* (2018), University of Iowa, Legal Studies Research Paper;

GOMES, Orlando. *A casta dos juristas* in *Escritos menores* (1981), São Paulo, Saraiva;

GOMES, Orlando. *A crise do direito* (1945), Salvador, Vera-Cruz;

GOMES, Orlando. *A função social da propriedade* (1984) in Boletim da Faculdade de Direito de Coimbra: estudos em homenagem a A. Ferrer-Correia 2 (1989);

GOMES, Orlando. *As classes sociais na formação do direito*, in *A crise do direito* (1945), Salvador, Vera-Cruz;

GOMES, Orlando. *Novas Considerações sôbre alguns conceitos jurídicos*, in Direito privado (novos aspectos) (1961), Rio de Janeiro, Freitas Bastas;

GOMES, Orlando. *O problema da natureza jurídica da convenção coletiva de trabalho, in Transformações gerais do direito das obrigações* (1967), São Paulo, Revista dos Tribunais;

GOMES, Orlando. *Relações entre o direito e a economia*, in *Direito econômico e outros ensaios* [1975], Salvador, Distribuidora de Livros Salvador;

GRANDY, Christopher. *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis* (1993), The Journal of Economic History vol. 53, n. 2;

GRANOVETTER, Mark. *Economic Action and Social Structure: The Problem of Embeddedness* (1985) in Mark Granovetter, Richard Swedberg, *The Sociology of Economic Life* (2011), Westview Press.

GREEN, Edward; PORTER, Robert. *Non-cooperative Collusion under Imperfect Price Information* (1984), Econometrica, Vol. 52, n. 1;

GUIMARÃES, Nadya Araujo, VERETA-NAHOUM, André. *Apresentação: Explorando os sentidos sociais da economia* (2017) Tempo Social v. 29, Universidade de São Paulo;

GURVITCH, George. *Sociology of Law* (1942), translated by Djacir Menezes, *Sociologia jurídica* (1946), Rio de Janeiro, Kosmos;

HARRINGTON JR., Joseph. *How Do Hub-and-Spoke Cartels Operate? Lessons from Nine Case Studies* (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3238244;

HART, Herbert. *Concept of Law* (1961), translated by Antônio de Oliveira Sette-Câmara, *O Conceito de Direito* (2009), São Paulo, Martins Fontes;

HAYEK, Friedrich von. *The Use of Knowledge in Society* (1945), The American Economic Review Vol. XXXV, n. 4;

HAYEK, Friedrich von. *Individualism and Economic Order* (1948), Chicago, University of Chicago Press;

HAYEK, Friedrich von. *Wettbewerb als Entdeckungsverfahren* (1968), Kiel, Institut für Weltwirtschaft;

HECK, Philipp. *Begriffsbildung und Interessenjurisprudenz* (1932), Tübingen, Mohr;

HIRSCHMAN, Albert O. *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?* In Journal of Economic Literature (December 1982), Vol. XX.;

HOLZHAUSER, Nicole. *Konkurrenz als Erklärungsansatz im Werk Theodor Geigers: Untersucht am Beispiel der sozialen und wirtschaftlichen Konkurrenz als*

Triebfeder des Strukturwandels der Öffentlichkeit (2015), available at https://www.researchgate.net/publication/270584779;

HOVENKAMP, Erik. *Platform Antitrust* (2019 forthcoming), Journal of Corporation Law;

HOVENKAMP, Herbert. *Implementing Antitrust's Welfare Goals in The Goals of Antitrust* (2013) 81 Fordham Law Review;

HOVENKAMP, Herbert. *Is Antitrust's Consumer Welfare Principle Imperiled?* (2018) Faculty Scholarship at Penn Law. 1985;

HOVENKAMP, Herbert. *The Antitrust Enterprise: Principle and Execution* (2005), Cambridge, Harvard University Press;

HOVENKAMP, Herbert. *The Sherman Act and the Classical Theory of Competition* (1989), 74 Iowa Law Review;

HUBERLANT, Charles. *Les Mecanismes intitués pour combler les lacunes de la loi* (1964) in Chaim Perelman, *Le problem des lacunes en droit* (1968), Bruxelles, Établissements Émile Bruylant, 54-55;

HYLTON, Keith; DENG, Fei. *Antitrust around the World: an Empirical Analysis of the Scope of Competition Laws and their Effects* (2007), Antitrust Law Journal, Vol. 74, n. 2,

HYMAN, David A; KOVACIC, *William E. Institutional Design, Agency Life Cycle, and the Goals of Competition Law in The Goals of Antitrust* (2013) 81 Fordham Law Review;

JHERING, Rudolf von. *Der Zweck im Recht* (1877, 3. 1904), Leipzig, Breittopf und Gärtel;

JHERING, Rudolf von. *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (1883) translated by José Ignacio Coelho Mendes Neto, *A dogmática jurídica* (2013), São Paulo, Ícon;

JIA, Kai; KENNEY, Martin; ZYSMAN, John. *Global Competitors? Mapping the Internationalization Strategies of Chinese Digital Platforms* (2018), available at http://dx.doi.org/10.2139/ssrn.3220936;

JOHNSON, Harold. *The Portuguese Settlement of Brazil, 1500-1580* in Leslie Bethell, *The Cambridge History of Latin America* vol. 1 (1984) Cambridge, Cambridge University Press;

JOLIET, René. *The rule of reason in antitrust law: American, German and Common Market laws in comparative perspective* (1967), Liège, Faculté de Droit;

JOSKOW, Paul; KLEVORICK, Alvin. *A Framework for Analyzing Predatory Pricing Policy* (1979), Yale Law Journal 213;

JUNQUEIRA, Eliane Botelho. *A Sociologia do Direito no Brasil: introdução ao debate atual* (1993), Rio de Janeiro, Lumen Juris;

KALMAN, Laura. *Legal Realism at Yale 1927-1960* (2001), New Jersey, The Lawbook Exchange Ltda;

KAPLOW, Louis. *On the Choice of Welfare Standards in Competition Law in Daniel Zimmer, The Goals of Competition Law* (2012), Edward Elgar, Cheltenham;

KAPLOW, Louis. *Why (Ever) Define Markets?* (2010) 124 Harvard Law Review 437;

KELSEN, Hans. *Reine Rechtslehre* (1934, 2nd ed. 1960) translated by João Baptista Machado, *Teoria Pura do Direito* (1985; 7a ed. 2006), São Paulo, Martins Fontes;

KHAN, Lina. *Amazon's Antitrust Paradox* (2017), 126 Yale Law Journal 710;

KINCAID, Harold. *Assessing Functional Explanations in the Social Sciences* (1990), in Contributed Papers to proceedings of the Biennial Meeting of the Philosophy of Science Association, The University of Chicago Press;

KIRKWOOD, John B. *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct in The Goals of Antitrust* (2013) 81 Fordham Law Review;

KIRKWOOD, John B.; LANDE, Robert H. *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency* (2008) 84 Notre Dame Law Review 191.

KITCH, Edmund W. *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970* (1983), 26 Journal of Law & Economics;

KOSCHORKE, Albrecht. *Ein neues Paradigma der Kulturwissenschaften in V.V.a.a, Die Figur des Dritten: Ein kulturwissenschafliches Paradigma* (2010), Berlin, Suhrkamp Verlag;

KOVACIC, William. *Module 1: Origins and Aims of Competition Policy* (2011), International Competition Network, available at http://www.icnblog.org/ftc/ftc-1-module-4-28-11/player.html;

KRAAKMAN ET. AL, Reinier. *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2nd ed. 2009), New York, Oxford University Press;

KRONMAN, Anthony. *Wealth Maximization as a Normative Principle* in Symposium, 9 J. Leg. Stud. 191-253 (1980): essays by Dworkin and Kronman, response by Posner;

LANDE, Robert H; AVERITT, Neil W. *Using the 'Consumer Choice' Approach to Antitrust Law* (2007), Antitrust Law Journal, vol. 74;

LANDE, Robert H. *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice* in *The Goals of Antitrust* (2013) 81 Fordham Law Review;

LANDE, Robert H. *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged* (1982) 34 Hastings Law Journal 65.

LARENZ, Karl. *Methodenlehre der Rechtwissenschaft* (1965, 3. 1995), Berlin, Springer Verlag;

LAUTERPACHT, Hersch. *Some observations on the prohibition of* 'Non Liquet' *and the completeness of the law* (1958) in *International Law: Collected Papers* (1975), vol. 2, part 1, Cambridge, University Press;

LAZZARINI, Sérgio. *Capitalismo de Laços: os Donos do Brasil e suas Conexões* (2011, 2nd ed. 2018), São Paulo, Bei Comunicação;

LEFF, Nathaniel. *Economic Retardation in Nineteenth-Century Brazil* (Aug., 1972), in The Economic History Review, vol. 25, n. 3;

LEIFER, Eric M, WHITE, Harrison C. *A Structural Approach to Markets* in M. Schwartz, M. Mizruchi (1988), New York, Cambridge University Press;

LEME DE BARROS, Marco Antonio Loschiavo. *Sociedade, Direito e Concorrência: reflexões sociológicas sobre o sistema brasileiro de defesa da concorrência* (2018), Juruá, Curitiba;

LEOPOLDINO DA FONSECA, João Bosco. *Lei de proteção da concorrência* (2001), Rio de Janeiro, Forense;

LETWIN, William. *Law and Economic Policy in America: the Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press;

LIMA, Heitor Ferreira. *História do pensamento econômico no Brasil* (1976), São Paulo, Companhia Editora Nacional;

LIMA LOPES, José Reinaldo; FREITAS FILHO, Roberto. *Law and Society in Brazil at the Crossroads: A Review* (2014), The Annual Review of Law and Social Science 10, 91-103.

LUHMANN, Niklas. "*Was ist Kommunikation?"* in *Soziologische Aufklärung 6* (1995), Wiesbaden, VS Verlag für Sozialwissenschaften;

LUHMANN, Niklas. *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie* (1999), Frankfurt am Main, Suhrkamp;

LUHMANN, Niklas. *Das Recht der Gesellschaft* (1993) Frankfurt am Main, Suhrkamp Verlag;

LUHMANN, Niklas. *Die Gesellschaft der Gesellschaft* (1997), Frankfurt a.M, Suhrkamp;

LUHMANN, Niklas. Die Rückgabe des zwölften Kamels (1985; publicado em 2000) translated by Dalmir Lopes Jr. *A restituição do décimo segundo camelo: do sentido de uma análise sociológica do direito in Niklas Luhmann: Do sistema social à sociología jurídica* (2004), Rio de Janeiro, Editora Lumen Juris;

LUHMANN, Niklas. *Die Wirtschaft der Gesellschaft* (1988), Frankfurt am main, Suhrkamp;

LUHMANN, Niklas. *Die Wirtschaft der Gesellschaft als autopoietisches System* (1984), in Zeitschrift für Soziologie (1984), vol. 13. N. 4;

LUHMANN, Niklas. *Die Wissenschaft der Gesellschaft* (1992), Frankfurt am Main, Suhrkamp Verlag;

LUHMANN, Niklas. *Ebenen der Systembildung – Ebenendifferenzierung* (1975, 2014), Unveröffentlichtes Manuskript;

LUHMANN, Niklas. *Einführung in die Systemtheorie* (2004). Heidelberg, Carl-Auer-Systeme Verlag;

LUHMANN, Niklas. *Funktion und Kausalität*, in Soziologische Aufklärung 1. Aufsätze zur Theorie sozialer Systeme (1970), Opladen, Westdeutscher Verlag;

LUHMANN, Niklas. *Ich sehe das, was Du nicht siehst* in *Soziologische Aufklärung 5* (1990), Opladen, Westdeutscher Verlag;

LUHMANN, Niklas. *Interaktion, Organisation, Gesellschaft. Anwendung der Systemtheorie in Soziologische Aufklärung 2. Aufsätze zur Theorie der Gesellschaft* (1975, 6 ed. 2009), VS Verlag;

LUHMANN, Niklas. *Ist Konkurrenz zu empfehlen?* (-) Unveröffentlichtes Manuskript;

LUHMANN, Niklas. *Kontingenz und Recht* (1971; 2013), Frankfurt, Suhrkamp;

LUHMANN, Niklas. *Legitimation durch Verfahren* (1969; 2nd 1975), Hermann Luchterhand Verlag, Darmstadt;

LUHMANN, Niklas. *Ökologische Kommunikation. Kann die moderne Gesellschaft sich auf ökologische Gefährdungen einstellen?* (1985; 5ª ed. 2008), Wiesbaden, VS Verlag;

LUHMANN, Niklas. *Organisation und Gesellschaft in Organisation und Entscheidung* (2000), Opladen, Wiesbaden;

LUHMANN, Niklas. *Probleme mit operativer Schliessung* in *Soziologische Aufklärung 6* (1995), Wiesbaden, VS Verlag für Sozialwissenschaften;

LUHMANN, Niklas. *Rechtssystem und Rechtsdogmatik* (1974) Stuttgart, Kohlhammer Urban-Taschenbücher;

LUHMANN, Niklas. *Soziale Systeme: Grundriß einer allgemeinen Theorie* (1984) Frankfurt am Main, Suhrkamp;

LUHMANN, Niklas. *Soziologie des Risikos* (1991) Berlin-New York, de Gruyter;

LUHMANN, Niklas. *Soziologische Aufklärung 1* (1970; 6 ed. 1991), Opladen, Westdeutscher Verlag GmbH;

LUHMANN, Niklas. *Vorbemerkungen zu einer Theorie sozialer System* in Soziologische Aufklärung 33. Soziales System, Gesellschaft, Organisation (1981), Westdeutscher Verlag;

MACHADO NETO, Antônio Luís. *Contribuição baiana à filosofia jurídica e à sociologia do direito* (1966), in Revista da Faculdade de Direito da Universidade de São Paulo 61;

MACKENZIE, Donald; MILLO, Yuval. *Constructing a Market, Performing Theory: The Historical Sociology of a Financial Derivatives Exchange* (2003), American Journal of Sociology, vol. 109, n. 1;

MANDEVILLE, Bernard. *The fable of the bees or private vices, public benefits* (1732), available at https://ebooks.adelaide.edu.au/m/mandeville/bernard/bees/complete.html;

MANNHEIM, Karl. *Die Bedeutung der Konkurrenz im Gebiet des Geistigen in Verhandlungen des Sechsten Deutschen Soziologentages vom 17. Bis 19. September 1928 in Zürich* (1929), Tübingen, Mohr;

MARTINS, Izabel Andrade. *Monarquia, empreendimentos e revolução: entre o laissez-faire e a proteção à 'indústria nacional' – origens da Revolução Praieira (1842-1848)* in Izabel Andrade Marson, Cecília de S. Oliveira, *Monarquia, Liberalismo e Negócios no Brasil: 1780-1860* (2013), São Paulo, Editora da Universidade de São Paulo;

MATTOON, Robert. Ra*ilroads, coffee, and the growth of big business in São Paulo, Brazil* (1977) Hispanic American Historical Review 7 (2);

MATTOS, Cesar. *A revolução do antitruste no Brasil* (2003), São Paulo, Singular;

MAUSS, Marcel. *Essai sur le don* (1925), translated by Paulo Neves, *Ensaio sobre a dádiva* (2003) Presses Universitaires de France;

MAY, James. *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880 – 1918* (1989), in Ohio State Law Journal vol. 50 n. 2;

MEESE, Alan J. *Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare* in *The Goals of Antitrust* (2013) 81 Fordham Law Review;

MELAMED, Douglas; PETIT, Nicolas. *Before 'After Consumer Welfare' – A Response to Professor Wu* (2018), CPI's North America Column;

MELAMED, Douglas; PETIT, Nicolas. *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets* (2018), available at https://ssrn.com/abstract=3248140;

MELAMED, Douglas. *Antitrust is not that complicated* responding to Louis Kaplow, *On the Relevance of Market Power* (2017), 130 Harvard Law Review 1303;

MELAMED, Douglas. *Exclusionary Conduct under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal* (2005), Berkeley Technology Law Journal, vol. 20, issue 2;

MELAMED, Douglas. *Exclusive Dealing Arrangements and Other Exclusionary Conduct – Are There Unifying Principles?* (2006) 73 Antitrust Law Journal 375;

MERCADANTE, Paulo. *A consciência conservadora no Brasil* (1965) Rio de Janeiro, Editora Saga;

MESTMÄCKER, Ernst-Joachim. *Das Prinzip der Rule of Reason und ähnliche Ausnahmemechanismen im Recht der Wettbewerbsbeschränkungen* in Erich Hoppmann, Ernst-Joachim Mestmäcker, *Normenzwecke und Systemfunktionen im Recht der Wettbewerbsbeschränkungen* (1974), Tübingen, J.C.B. Mohr;

MILL, John Stuart. *Principles of Political Economy with some of their Applications to Social Philosophy* (1848, 7th. 1909), London, Longmans, Green and co;

MILLER, Nathan *Strategic Leniency and Cartel Enforcement* (2009), The American Economic Review vol. 99, n. 3;

MINHOTO, Laurindo Dias; LEITE GONÇALVES, Guilherme. *Nova ideologia alemã? A teoria social envenenada de Niklas Luhmann* (Jul/Dez 2015), São Paulo, Tempo Social, vol. 27, n. 2;

MIOLA, Iagê Zendron. *Law and the Economy in Neoliberalism: the Politics of Competition Regulation in Brazil* (2014), dissertation presented to the "Renato Treves" International PhD Program in Law and Society;

MIRANDA ROSA, Felippe Augusto de. *Sociologia do Direito: O Fenômeno Jurídico como Fato Social* (1970, 5th ed. 1977), Rio de Janeiro, Zahar Editores;

MORAES FILHO, Evaristo de. *O Problema de uma Sociologia do Direito* (1950), São Paulo, Livraria Freitas Bastos S.A;

MOREIRA ALVES, José Carlos. *Orlando Gomes e sua obra* (2009), in Revista Brasileira de Direito Comparado, número especial: o centenário do nascimento de Orlando Gomes;

MOTTA, Massimo. *Competition Policy: Theory and Practice* (2004), Cambridge, UK;

MUSACCHIO, Aldo. *Experiments in financial democracy. Corporate governance and financial development in Brazil, 1882-1950* (2009), Cambridge, Cambridge University Press;

NAVARRETE, Pedro Henrique. *As Origens do Sistema Brasileiro de Defesa da Concorrência: o CADE (1962-1994),* Master Dissertation, Federal University of Rio de Janeiro;

NEUMEYER, Fredrik. *Monopolkontrolle in USA* (1953), Berlin, Duncker & Humblot;

NIEDERLE, Muriel. *Gender* in *Handbook of Experimental Economics* (2015), available at https://web.stanford.edu/~niederle/Gender.Niederle.pdf;

NOWAG, Julian. *When Sharing Platforms Fix Sellers' Prices* (2018 forthcoming) Journal of Antitrust Enforcement (OUP);

OCTAVIANI, Alessandro. *A Bênção de Hamilton na Semiperiferia: Ordem Econômico-Social e os Juros da Dívida Pública Interna, in José Conti; Fernando Scaff, Orçamentos Públicos e Direito Financeiro* (2011), São Paulo, Revista dos Tribunais;

OLIVEIRA MOURÃO, Fernando Emanuel de. *A figura do cidadão no direito da concorrência: uma análise de sociologia jurídica* (2001), Masters Dissertation in Sociology, University of São Paulo;

OLIVEIRA, Gesner; RODAS, João Grandino. *Direito e Economia da Concorrência* (2004), Rio de Janeiro, Renovar;

OLIVER, Alex; SMILEY, Timothy. *Plural Descriptions and Many-valued Functions* (2005) Mind Association, vol. 114;

ONTO, Gustavo. *Ficções Econômicas e Realidades Jurídicas: uma Etnografia da Política de Defesa da Concorrência no Brasil* (2016), PhD dissertation presented to the Museu Nacional, Universidade Federal do Rio de Janeiro;

ORBACH, Barak; REBLING, Grace Campbell. *The Antitrust Curse of Bigness* (2012), Southern California Law Review vol. 85;

ORBACH, Barak. *How Antitrust Lost its Goal* in *The Goals of Antitrust* (2013) 81 Fordham Law Review;

OSTROM, Vincent; OSTROM, Elinor. *Public Goods and Public Choices* (1977) Workshop in Political Theory and Policy Analysis, Indiana University;

PAGE, William. *Ideological Conflict and the Origins of Antitrust Policy* (1991), Tulane Law Review Association vol. 66 n. 1;

PARISI, Francesco. *Positive, Normative and Functional Schools in Law and Economics* (2004), European Journal of Law and Economics, vol. 18, n. 3;

PARRET, Laura. *The multiple personalities of EU competition law: time for a comprehensive debate on its objectives* in Daniel Zimmer, *The Goals of Competition Law* (2012), Edward Elgar, Cheltenham;

PARSONS, Talcott; SMELSER, Neil. *Economy and Society: a Study in the Integration of Economic and Social Theory* (1956) New York, The Free Press;

PELAEZ, Carlos Manuel. *A balança comercial, a grande depressão e a industrialização brasileira* (1968), Revista Brasileira de Economia 2;

PEREIRA JUNIOR, Ademir Antonio. *Infraestrutura, regulação e Internet: a disciplina jurídica da neutralidade das redes* (2018), PhD thesis presented at University of Sao Paulo;

PEREIRA NETO, Caio Mário da Silva; CASAGRANDE, Paulo Leonardo. *Direito Concorrencial: Doutrina, Jurisprudência e Legislação* (2016), São Paulo, Editora Saraiva;

PFEIFFER, Roberto Augusto Castellanos. *Defesa da concorrência e bem-estar do consumidor* (2015), São Paulo, Editora Revista dos Tribunais;

PINTO, Adolpho. *Ensaios de Sociologia do Direito* (1925), Rio de Janeiro, Livraria Francisco Alves;

PITOFSKY, Robert. *The Political Content of Antitrust* (1979) 127 University of Pennsylvania Law Review 1051;

POLANYI, Karl. *The Great Transformation: The Political and Economic Origins of Our Time* (1944), New York, Rinehart & Company;

POSNER, Richard. *Antitrust Law* (1978, 2nd 2001) Chicago, The University of Chicago Press;

POSNER, Richard. *Antitrust Law: An Economic Perspective* (1978) Chicago, The University of Chicago Press;

POSNER, Richard. *Oligopoly and the Antitrust Laws: A Suggested Approach* (1969), 21 Stanford Law Review;

POSNER, Richard. *The Chicago School of Antitrust Analysis* (1979), 127 University of Pennsylvania Law Review 925;

POSNER, Richard. *The Economic Approach to Law* (1975) 53 Texas Law Review;

POSNER, Richard. *The Ethical and Political Basis of the Efficiency Norm* in Common Law Adjudication (1980) 8 Hofstra Law Review 487;

POSNER, Richard. *The Problems of Jurisprudence* (1990), Massachusetts, Harvard University Press;

POSNER, Richard. *The Value of Wealth: a Comment on Dworkin and Kronman* in Symposium, 9 J. Leg. Stud. 191-253 (1980): essays by Dworkin and Kronman, response by Posner;

POSNER, Richard. *Utilitarianism, Economics and Legal Theory* (1979), 8 J. Leg. Stud. 103;

POSSAS, Mario. *Limites normativos da análise econômica antitruste* (2009), Revista do IBRAC, v. 16;

PRADO JR., Caio. *Formação do Brasil contemporâneo: colônia* (1942, 2008), São Paulo, Brasiliense;

PRADO JR., Caio. *História econômica do Brasil*. (1945, 11 ed., 1969) São Paulo, Brasiliense;

PRIEST, George L. *Ronald Coase, Firms and Markets* (2014), Man and the Economy, 1(2), 144;

PRIEST, George L. *The Limits of Antitrust and the Chicago School Tradition* (2009), in Journal of Competition Law & Economics, 00(00);

PROENÇA, José Marcelo Martins. *Concentração empresarial e o direito da concorrência* (2001), São Paulo, Editora Saraiva;

RAMOS, Luiz Felipe; SILVA FILHO, Osny da. *Orlando Gomes* (2015), Rio de Janeiro, Elsevier;

RAMOS, Luiz Felipe; WERRON, Tobias. *Concorrência como um conceito histórico-sociológico: trazendo variação para a "evolução do antitruste"* in Celso Campilongo, Roberto Pfeiffer, *Evolução do antitruste no Brasil* (2018), São Paulo, Singular;

RAMOS, Luiz Felipe. *Por trás dos casos difíceis* (2017), Curitiba, Editora Juruá;

RICARDO, David. *On the Principles of Political Economy and Taxation* (1817/1821, 2001), Ontario, Kitchener;

RIZZO, Mario. *The Mirage of Efficiency* (1980), Hofstra Law Review Vol. 8, Iss. 3;

ROSA, Hartmut. *Wettbewerb als Interaktionsmodus. Kulturelle und sozialstrukturelle Konsequenzen der Konkurrenzgesellschaft*, (2006), Leviathan 34, Nr. 1, S., 91;

ROSS, Edward Alsworth. *The Principles of Sociology* (1920), New York, The Century CO;

SALDANHA, Nelson Nogueira. *Sociologia do Direito* (1970), São Paulo, Editora RT;

SALOMÃO FILHO, Calixto. *A Legal Theory of Economic Power: Implications for Social and Economic Development* (2011), Edward Elgar, Cheltenham;

SALOMÃO FILHO, Calixto. *A paralisia do Antitruste*, in Revista do IBRAC – Direito da Concorrência, Consumo e Comércio Internacional (2009), vol. 16, 305-323;

SALOMÃO FILHO, Calixto. *Direito Concorrencial* (2013), São Paulo, Malheiros;

SALOMÃO FILHO, Calixto. *Monopolies and Underdevelopment: From Colonial Past to Global Reality* (2015), Edward Elgar, Cheltenham;

SALOMÃO FILHO, Calixto. *Teoria crítico-estruturalista do direito comercial* (2015) São Paulo, Marcial Pons;

SALOP, Steven. *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard* (2006) 73 Antitrust Law Journal;

SALOP, Steven. *Strategy, Predation and Antitrust Analysis* (1981) Federal Trade Commission, Bureau of Economics;

SAMUELSON, Paul. *The Pure Theory of Public Expenditure* (1954), The Review of Economics and Statistics, vol. 36, n. 4;

SAVIGNY, Karl von. *System des heutigen römischen Rechts* (1849), translated by Jacinto Mesía and Manuel Poley, *Sistema del derecho romano actual* (1878), Tomo I, Madrid, F. Góngora y Compañia Editores;

SAUDER, Michael. *Third Parties and Status Systems. How the Structures of Status Systems Matter in Theory and Society 35* (2006) 299-32;

SCAFF, Fernando Facury. *Tributação, concorrência, sonegação e renúncias fiscais* (2018) Conjur, October, available at https://www.conjur.com.br/2018-out-29/tributacao-concorrencia-sonegacao-renuncias-fiscais;

SCHELLING, Thomas. *The Strategy of Conflict* (1980), Cambridge, Harvard University;

SCHUARTZ, Luis Fernando. *A desconstitucionalização do Direito de Defesa da Concorrência* in Cláudio Pereira de Souza Neto; Daniel Sarmento; Gustavo Binenbojm (Org.) *Vinte Anos da Constituição Federal de 1988* (2009), Rio de Janeiro, Lumen Juris;

SCHUARTZ, Luis Fernando. *Quando o bom é o melhor amigo do ótimo. A autonomia do direito perante a economia e a política da concorrência* (2007), Revista de direito administrativo, v. 1, 97.

SCHWARTZ, Louis. "*Justice" and Other Non-Economic Goals of Antitrust* (1979), 127 University of Pennsylvania Law Review;

SCHWARTZ, Stuart. *Plantations and peripheries, c. 1580-c.1750"* in Lesle Bethell, *Colonial Brazil* (1987), Cambridge, Cambridge University Press;

SCHWARZ, Roberto. *As idéias fora do lugar*, in *Ao Vencedor as batatas* (1992), São Paulo, Duas Cidades;

SCHWARZ, Roberto. *Nacional por subtração*, in *Que horas são?* (1987), São Paulo, Companhia das Letras;

SELLA, Emanuele. *La Concorrenza I* (1916), Torino, Fratelli Bocca;

SHAPIRO, Carl. *Antitrust in a Time of Populism* (2018), International Journal of Industrial Organization, available at SSRN: https://ssrn.com/abstract=3058345;

SILBER, Simão Davi. *Política econômica; defesa do nível de renda e industrialização no período 1929/1939* (1973), Master dissertation presented at Fundação Getúlio Vargas, Rio de Janeiro;

SILVA REIS, Luciana. *A modernização crítica do pensamento jurídico brasileiro no século XX: ciência do direito, ensino e pesquisa* (2018), São Paulo, PhD thesis presented at the University of Sao Paulo;

SIMMEL, Georg. *Soziologie der Konkurrenz* (1903), Neue Deutsche Rundschau XIV;

SIMMEL, Georg. *Soziologie. Untersuchungen über die Formen der Vergesellschaftung* (1908; 5 ed. 1968), Berlin, Duncker & Humblot;

SIMON, Herbert. *A Behavioral Model of Rational Choice* (1955), The Quarterly Journal of Economics, Vol. 69, No. 1;

SIMON, Herbert. *Rational choice and the structure of the environment* (1956), Psychological Review, 63 (2);

SIMONSON, Itamar; TVERSKY, Amos. *Choice in Context: Tradeoff Contrast and Extremeness Aversion* (1992) Journal of Marketing Research vol. XXIX;

SMITH, Adam. *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776; 1905), London, Cannan ed;

SOKOL, Daniel, COMERFORD, Roisin. *Antitrust and Regulating Big Data* (2016), 23 Geo. Mason Law Review;

SOLOW, Robert M. *Economic History and Economics* (1985), The American Economic Review, vol. 75, n. 2;

SOUTO, Claudio; SOUTO, Solange. *Sociologia do Direito* (1981) São Paulo, EDUSP;

SOUZA, Jesse. *A tolice da inteligência brasileira* (2nd ed. 2018), Rio de Janeiro, Leya;

SOUZA, Jesse. *Uma interpretação alternativa do dilema brasileiro,* in *A modernização seletiva* (2000), Brasília, UnB;

STAVROULAKI, Theodosia. *Mind the Gap: Antitrust, Health Disparities and Telemedicine* (2018 forthcoming), American Journal of Law and Medicine available at https://ssrn.com/abstract=3257606;

STEINER, Philippe. *Altruísmo, dons e trocas simbólicas* (2016), São Paulo, Editora Unesp;

STEINER, Philippe. *Altruísmo, egoísmo e solidariedade na Escola Durkheimiana* in Alexandre Masella et alii, *Durkheim 150 anos* (2009), Argumentum Editora.

STEINER, Philippe. *Comte, altruism and the critique of Political Economy* (2015), Gemass Working Paper;

STERN, Louis. *Antitrust Implications of a Sociological Interpretation of Competition, Conflict, and Cooperation in the Marketplace* (1971) 16 Antitrust Bulletin;

STIGLER, George. *Perfect Competition, Historically Contemplated* (1957) 65 The Journal of Political Economy;

STIGLER, George. *The Origin of the Sherman Act* (1985), in The Journal of Legal Studies, Vol. 14, n. 1, 1-12;

STIGLITZ, Joseph. Foreword in Karl Polany, *The Great Transformation: The Political and Economic Origins of Our Time* (1944, 2nd ed 2001), Boston, Beacon Press;

STONE, Julius. *Non Liquet and the function of law in the International Community* (1960), in *The British Year Book of International Law 1959* (1960), Oxford, University Press;

STUCKE, Maurice. *Does the Rule of Reason Violate the Rule of Law?* (2009) 42 University of California Davis Law Review;

STUCKE, Maurice. *New Antitrust Realism* (2009), Global Competition Policy Magazine, 7 and Avishalom Tor, *Understanding Behavioral Antitrust* (2013), 92 Texas Law Review 573;

STUCKE, Maurice. *Reconsidering Antitrust's Goals* (2012), 53 Boston College Law Review 551;

STUCKE, Maurice. *Should Competition Policy Promote Happiness? in The Goals of Antitrust* (2013) 81 Fordham Law Review;

STUCKE, Maurice. *What is competition?* in Daniel Zimmer, *The Goals of Competition Law* (2012), Edward Elgar, Cheltenham;

SUMMERHILL, William. *Order against progress. Government, foreign investment and railroads in Brazil, 1854-1913* (2003). Stanford, Stanford University Press.

SWEDBERG, Richard. *Markets in Society* in N. Smelser, R. Swedberg, *Handbook of Economic Sociology* (2005), Princeton, Princeton University Press, 250, n. 1;

TABOSA PINTO, Agerson. *Sociologia Geral e Jurídica* (2005), Fortaleza, Qualygraf Editora e Gráfica;

TAUSCHEK, Markus. *Kulturen des Wettbewerbs: Formationen kompetitiver Logiken* (2013), Münster, Waxmann;

TEPPER, Jonathan; HEARN, Denise. *The myth of capitalism: monopolies and the death of competition* (2019), New Jersey, Hoboken;

THALER, Richard. *Toward a Positive Theory of Consumer Choice* (1980), Journal of Economic Behavior and Organization 1;

THORELLI, Hans. *The Federal Antitrust Policy: Origination of an American Tradition* (1954), Stockholm, Norstedt & Söner;

TOR, Avishalom. *Understanding Behavioral Antitrust* (2013), 92 Texas Law Review 573;

TROESKEN, Werner. *The Letters of John Sherman and the Origins of Antitrust* (2002), available at http://www.pitt.edu/~troesken/papers/letters.pdf;

TURNER Donald F.. *The Definition of Agreement under the Sherman Act* (1962), 75 Harvard Law Review. 655;

TVERSKY, Amos; KAHNEMAN, Daniel. *The Framing of Decisions and the Psychology of Choice* in Science (1981) 211.

ULHOA COELHO, Fábio. *Direito antitruste brasileiro* (1995), São Paulo, Saraiva;

VARIAN, Hal. *Intermediate Microeconomics: a modern approach* (1987, 8th ed. 2010), W.W. Norton & Company, New York;

VAZ, Isabel. *Direito econômico da concorrência* (1993), Rio de Janeiro, Forense;

VON WIESE, Leopold. *Die Konkurrenz vorwiegend in soziologisch-systematischer Betrachtung in Deutsche Gesellschaft für Soziologie (DGS), Verhandlungen des 6. Deutschen Soziologentages vom 17. bis 19. September 1928 in Zürich: Vorträge und Diskussionen in der Hauptversammlung und in den Sitzungen der Untergruppen* (1929), Tübingen, Mohr Siebeck;

WAKED, Dina I. *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices* (2015), in Seattle University Law Review, vol. 38;

WALLER, Spencer Weber. *The Antitrust Legacy of Thurman Arnold* (2004), 78 St. John's Law Review;

WALLER, Spencer Weber. *Thurman Arnold: Biography* (2005), New York University Press, New York;

WARAT, Luis Alberto. *La linguística jurídica, la problemática definitoria y el condicionamiento ideológico del accionar humano,* in Luis Alberto Warat, Antonio Anselmo Martino, *Lenguaje y definicion juridica* (1973), Buenos Aires, Cooperadora de Derecho y Ciencias Sociales;

WEBER, Max. *Die protestantische Ethik und der 'Geist' des Kapitalismus* translated by José Marcos Mariani de Macedo, *A ética protestante e o "espírito" do capitalismo* (2004), São Paulo, Companhia das Letras;

WEBER, Max. *Wirtschaft und Gesellschaft* (1922, 2006), Paderborn, Voltmedia GmbH;

WERDEN, Gregory. *Back to School: What the Chicago School and New Brandeis School Get Right* (2018), available at https://ssrn.com/abstract=3247116;

WERDEN, Gregory. *Identifying Exclusionary Conduct Under Section 2: The 'No Economic Sense' Test* (2006) Antitrust Law Journal 413;

WERDEN, Gregory. *Why (Ever) Define Markets? An Answer to Professor Kaplow* (2013), Antitrust Law Journal vol. 78, n. 3;

WERRON, Tobias; RAMOS, Luiz Felipe. *Why do we believe in (sociology of) competition*? (2017) available at https://necsousp.files.wordpress.com/2016/09/why-do-we-believe-in-sociology-of-competition_necso.pdf;

WERRON, Tobias. *Wettbewerb als historischer Begriff* in Ralph Jessen*, Konkurrenz in der Geschichte* (2014), Frankfurt am Main, Campus Verlag;

WERRON, Tobias. *Why do we believe in competition? A historical-sociological view of competition as an institutionalized modern imaginary* In E. Hartmann & P.F. Kjaer Competition, Special Issue of Distinktion (2015) Scandinavian Journal of Social Theory;

WETZEL, Dietmar J. *Soziologie des Wettbewerbs. Eine kultur- und wirtschaftssoziologische Analyse der Marktgesellschaft* (2013), Wiesbaden, Springer VS;

WHITE, Harrison. *Identity and Control: How Social Formations Emerge* (1992; 2nd ed. 2008), Princeton, Princenton University Press;

WHITE, Harrison. *Where do markets come from?* (1981), American Journal of Sociology, Volume 87, Issue 3, November;

WILDE, Anna, EVANS, Melanie. *The Hidden System That Explains How Your Doctor Makes Referrals* (2018), The Wall Street Journal, available at https://www.wsj.com/articles/the-hidden-system-that-explains-how-your-doctor-makes-referrals-11545926166?mod=hp_lista_pos1;

WILLIAMSON, Oliver. *Economies as an Antitrust Defense: The Welfare Tradeoffs* (1968), 58 American Economic Review 18;

WRIGHT, Joshua; DORSEY, Elyse; KLICK, Jonathan; RYBNICEK, Jan. *Requiem for a Paradox: the Dubious Rise and Inevitable Fall of Hipster Antitrust* (forthcoming 2019), Arizona State Law Journal available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524&download=yes;

WRIGHT, Joshua; GINSBURG, Douglas. *The Goals of Antitrust: Welfare Trumps Choice* in *The Goals of Antitrust* (2013) 81 Fordham Law Review;

WRIGHT, Joshua; STONE, Judd. *Misbehavioral Economics: the Case Against Behavioral Antitrust* (2012), Cardozo Law Review, vol. 33, n. 4;

WRIGHT, Larry. *Teleological Explanations: An Etiological Analysis of Goals and Functions* (1976), Berkeley, University of California Press;

WU, Tim. *After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice* (2018), CPI Antitrust Chronicle;

WU, Tim. *The Curse of Bigness: Antitrust in the New Guilded Age* (2018), New York, Columbia Global Reports;

YERGIN, Daniel. *The Prize: The Epic Quest for Oil, Money and Power* (1991), available at https://erenow.com/modern/theepicquestforoilmoneyandpower/3.html;

ZANATTA, Rafael. *Desmistificando a Law & Economics: a receptividade da disciplina Direito e Economia no Brasil* (2012), available at https://www.researchgate.net/publication/266344891_Desmistificando_a_Law_Economics_a_receptividade_da_disciplina_Direito_e_Economia_no_Brasil;

ZIMMER, Daniel. *The basic goal of competition law: to protect the opposite side of the market* in Daniel Zimmer, *The Goals of Competition Law* (2012), Edward Elgar, Cheltenham;

ZUCKERMANN, Ezra. *The Categorial Imperative: Securities Analysts and the Illegitimacy Discount in American Journal of Sociology 104* (1999), 1398-1438;