

Università degli Studi di Milano  
Dipartimento di Scienze Giuridiche “Cesare Beccaria”  
Sezione di Filosofia e Sociologia del Diritto  
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LAW AND THE ECONOMY IN NEOLIBERALISM:  
THE POLITICS OF COMPETITION REGULATION IN BRAZIL

Iagê Zendron Miola

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the Politics of Competition Regulation in Brazil

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Iagê Zendron Miola

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Supervisor:  
Professor Sol Picciotto

Co-supervisor:  
Professor Luigi Cominelli

## Abstract

How do regulatory reforms happen, and what are their roles in the economy and society? What are the connections between institutional reforms of economic governance and neoliberalism? The purpose of this research is to answer these questions through a case study of the politics of competition regulation reform in Brazil, as crystallized in the reform of the Brazilian competition authority – CADE, the Administrative Council for Economic Defence – in 1994, and the regulatory practice inaugurated since then. Antitrust laws were imported in several countries of the global South as an integral part of the neoliberal agenda of state transformation and economic liberalization of the 1990s. In the narratives of legal doctrine, economics and even in the social sciences, competition policy reform is often depicted as an evolutionary development and a successful technological solution propelled by experts and adopted by governments to avoid the undesirable consequences of a new economic model in construction and to protect consumers. Competition regulation is frequently presented as counter-evidence to the very existence of neoliberalism as a political and economic phenomenon, and to its utility as an analytical concept. In this dissertation, through conceptual tools derived from the sociology of law, economic sociology and a critical political economy, I argue that this regulatory model is both rooted in and functional for the neoliberal project of transforming economies and societies.

Based on a trajectory study of and interviews with lawyers and economists involved in the reform and production of competition regulation, on documentary analysis, and on a quantitative and qualitative inquiry of decisions enacted by CADE between 1994 and 2010, I argue that the linkage between competition regulation and neoliberalism in Brazil can be visualized from three perspectives. First, from that of the roles of the concrete agents who performed reform and monopolized the practice of competition regulation: mostly corporate lawyers and neo-institutional economists whose educational backgrounds, professional trajectories, and political views are consistent with neoliberal theoretical and political tenets, and who shaped reform and instituted a mode of production of competition regulation accordingly. Second, from that of the profiles of economic concentrations and corporate conduct regulated through CADE's decisions, and of how they are regulated, as well as in the disputes to determine competition policy's jurisdiction over financial capital. In this sense, I describe how competition regulation has historically facilitated and legitimized several of the defining phenomena of a neoliberal economy: the concentration and expansion of foreign capital into a recently liberalized economy, the hegemony and concentration of financial capital, and a disciplinary attitude toward local and regional market agents, as opposed to global ones. Third, from the angle of how competition policy contributes to neoliberalism as a project that advocates for the destruction of social collectives – as exemplified in the protection of workers and employment – and for the parallel constitution of a regime of consumer citizenship. In this dimension, I assess how competition policy has defined consumers as the main and only subjects protected by regulation, while simultaneously and selectively excluding labor concerns and workers from its normative domain, even though they are directly affected by economic concentrations regulated by antitrust policy.

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## List of Abbreviations

AGU	Attorney-General of the Union <i>Advocacia-Geral da União</i>
ANATEL	National Agency of Telecommunications <i>Agência Nacional de Telecomunicações</i>
ANC	National Constituent Assembly <i>Assembleia Nacional Constituinte</i>
ANEEL	National Agency of Electric Energy <i>Agência Nacional de Energia Elétrica</i>
ANP	National Agency of Oil, Natural Gas, and Biofuels <i>Agência Nacional do Petróleo, Gás Natural e Biocombustíveis</i>
ANVISA	National Sanitation Agency <i>Agência Nacional de Vigilância Sanitária</i>
AP	Administrative Procedure
APRO	Agreement to Preserve Reversibility of Transaction <i>Acordo de Preservação da Reversibilidade da Operação</i>
ARENA	National Renovation Alliance <i>Aliança Renovadora Nacional</i>
BACEN	Brazilian Central Bank <i>Banco Central do Brasil</i>
BNDES	Brazilian National Bank of Development <i>Banco Nacional do Desenvolvimento</i>
C4	Concentration Ratio
CADE	Administrative Council for Economic Defence <i>Conselho Administrativo de Defesa Econômica</i>
CEBRAP	Brazilian Center for Analysis and Planning Centro Brasileiro de Análise e Planejamento
CEPED	Center for Study and Research in Legal Education <i>Centro de Estudos e Pesquisas no Ensino do Direito</i>
CEUB	Unified Educational Center of Brasília <i>Centro de Ensino Unificado de Brasília</i>
CIESP	Center of the Industries of the State of São Paulo <i>Centro das Indústrias do Estado de São Paulo</i>
CIP	Interministerial Council of Prices <i>Conselho Interministerial de Preços</i>
CLACSO	Latin American Council on Social Sciences <i>Conselho Latino-Americano de Ciências Sociais</i>
CNI	National Confederation of Industries <i>Confederação Nacional da Indústria</i>
CNPq	National Council for Scientific and Technological Development <i>Conselho Nacional de Desenvolvimento Científico e Tecnológico</i>
CONEP	National Commission for Price Stabilization <i>Comissão Nacional para Estabilização de Preços</i>
CPI	Congressional Investigation Committee <i>Comissão Parlamentar de Inquérito</i>
CVM	Brazilian Securities and Exchange Commission <i>Comissão de Valores Mobiliários</i>
CVRD	Companhia Vale do Rio Doce
DG-IV	European Commission Directorate General for Competition
DOJ	United States Department of Justice
DOU	Union's Official Gazette <i>Diário Oficial da União</i>

ECLAC	Economic Commission for Latin America and the Caribbean
EU	European Union
FBI	Federal Bureau of Investigation
FGV-Rio	Getúlio Vargas Foundation – Rio de Janeiro <i>Fundação Getúlio Vargas – Rio de Janeiro</i>
FGV-SP	Getúlio Vargas Foundation – São Paulo <i>Fundação Getúlio Vargas – São Paulo</i>
FHC	Fernando Henrique Cardoso
FIESP	Industrial Federation of the State of São Paulo <i>Federação das Indústrias do Estado de São Paulo</i>
FTAA	Free Trade Area of the Americas
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
HHI	Herfindahl-Hirschmann Index
IBA	International Bar Association
IBGE	Brazilian Institute for Geography and Statistics <i>Instituto Brasileiro de Geografia e Estatística</i>
IBRAC	Brazilian Institute of Studies in Competition, Consumption, and International Trade <i>Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional</i>
ICN	International Competition Network
IMF	International Monetary Fund
IPEA	Institute for Applied Economic Research <i>Instituto de Pesquisa Econômica Aplicada</i>
L&D	Law and Development
Mercosur	Southern Common Market
MIT	Massachusetts Institute of Technology
MR	Merger Review
MSF	Message to the Federal Senate <i>Mensagem ao Senado Federal</i>
NGO	Non-Governmental Organization
NIE	New Institutional Economics
NYU	New York University
OAB	Brazilian Bar Association <i>Ordem dos Advogados do Brasil</i>
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
PCdoB	Communist Party of Brazil <i>Partido Comunista do Brasil</i>
PDC	Christian Democratic Party <i>Partido Democrata Cristão</i>
PDS	Democratic Social Party <i>Partido Democrático Social</i>
PDT	Democratic Labor Party <i>Partido Democrático Trabalhista</i>
PET-CAPES	Tutorial Education Program of the Coordination for Higher Education Staff Development <i>Programa de Educação Tutorial da Coordenadoria de Aperfeiçoamento de Pessoal de Nível Superior</i>
PFL	Liberal Front Party <i>Partido da Frente Liberal</i>
PGFN	National Treasury's Attorney's Office <i>Procuradoria-Geral da Fazenda Nacional</i>

PinCADE	Internship Programme of CADE <i>Programa de Intercâmbio do CADE</i>
PL	Liberal Party <i>Partido Liberal</i>
PMDB	Brazilian Democratic Movement Party <i>Partido do Movimento Democrático Brasileiro</i>
PROCON	Foundation of Protection and Consumer's Protection <i>Fundação de Proteção e Defesa do Consumidor</i>
PSB	Brazilian Socialist Party <i>Partido Socialista Brasileiro</i>
PSDB	Brazilian Social-Democratic Party <i>Partido da Social Democracia Brasileira</i>
PSTU	Unified Workers' Socialist Party <i>Partido Socialista dos Trabalhadores Unificado</i>
PT	Workers' Party <i>Partido dos Trabalhadores</i>
PTB	Brazilian Labor Party <i>Partido Trabalhista Brasileiro</i>
PUC-Rio	Catholic University of Rio de Janeiro <i>Pontifícia Universidade Católica do Rio de Janeiro</i>
PUC-RS	Catholic University of Rio Grande do Sul <i>Pontifícia Universidade Católica do Rio Grande do Sul</i>
PUC-SP	Catholic University of São Paulo <i>Pontifícia Universidade Católica de São Paulo</i>
SBDC	Brazilian System of Competition Defense <i>Sistema Brasileiro de Defesa da Concorrência</i>
SDE	Secretariat of Economic Law <i>Secretaria de Direito Econômico</i>
SEAE	Secretariat for Economic Monitoring <i>Secretaria de Acompanhamento Econômico</i>
SNDE	Secretariat of Economic Law <i>Secretaria Nacional de Direito Econômico</i>
SPE	Secretariat of Economic Policy <i>Secretaria de Política Econômica</i>
STF	Supreme Federal Court <i>Supremo Tribunal Federal</i>
STJ	Superior Court of Justice <i>Superior Tribunal de Justiça</i>
SUNAB	National Superintendence of Provision <i>Superintendência Nacional de Abastecimento</i>
TCD	Term of Commitment to Performance <i>Termo de Compromisso de Desempenho</i>
TRF	Federal Regional Court <i>Tribunal Regional Federal</i>
UCB	University of California, at Berkeley
UERJ	State University of Rio de Janeiro <i>Universidade Estadual do Rio de Janeiro</i>
UFF	Fluminense Federal University <i>Universidade Federal Fluminense</i>
UFMG	Federal University of Minas Gerais <i>Universidade Federal de Minas Gerais</i>
UFMT	Federal University of Mato Grosso <i>Universidade Federal de Mato Grosso</i>
UFPE	Federal University of Pernambuco <i>Universidade Federal de Pernambuco</i>

UFRGS	Federal University of Rio Grande do Sul <i>Universidade Federal do Rio Grande do Sul</i>
UFRJ	Federal University of Rio de Janeiro <i>Universidade Federal do Rio de Janeiro</i>
UK	United Kingdom
UnB	University of Brasília <i>Universidade de Brasília</i>
UNCTAD	United Nations Conference on Trade and Development
UNE	National Students Union <i>União Nacional dos Estudantes</i>
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICAMP	University of Campinas <i>Universidade Estadual de Campinas</i>
UNICTRAL	United Nations Commission on International Trade Law
US	United States of America
USAID	United States Agency for International Development
USP	University of São Paulo <i>Universidade de São Paulo</i>
WTO	World Trade Organization

*Para  
'El Gordo' David,  
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*Ya se sabe: por una línea razonable o una recta noticia hay leguas  
de insensatas cacofonías, de fárragos verbales y de incoherencias.*

Jorge Luis Borges

## INTRODUCTION

*This much is known: For every rational line or forthright statement there are leagues of senseless cacophony, verbal nonsense, and incoherency.* Besides being part of the well-known piece “*Ficciones*” – one of those books to which one comes back several times in life –, this quote from Jorge Luis Borges provides an epigraph for this work that can serve as an elegant metaphor to introduce the object and purposes of the research presented here. Borges’ words, although belonging to the literary (and certainly much more interesting) universe, are helpful keys to open the doors of this text through the explanation of how this research project came about, and what it is about.

This is because the present dissertation stems from an intellectual concern motivated by what I perceive as “cacophonies” that emerge from the knowledge currently available to understand the transformations of law and the economy in the wake of globalization. These “incoherencies” arise when what can be roughly seen as two bodies of literature are put together: studies of the relationship between economic globalization and regulatory reform, and research that approaches globalization as being predominantly oriented by neoliberalism.

### *Economic globalization and regulatory reform*

One of the sources of the mentioned cacophonies are the narratives that emanate from legal and economic scholarship, as well as from studies in the social sciences interested in explaining and evaluating the creation of institutional and legal arrangements of economic governance in the 1980s and 1990s. These are studies about the processes and products of “regulatory reform”, which highlight the modernizing and evolutionary trends implied by the inauguration and reform of regulatory agencies, such as competition authorities, to govern the economy.

In the dominant “lines” and “statements” present in this scholarship, during this period, collapsing welfare states were transformed in the global North, and in the global South developmental and interventionist institutions in place throughout most of the twentieth century were dismantled. Privatization and deregulation were promoted in many countries as solutions for the fiscal and inflation crises and for stagnation, with the objective of inducing economic development. Accompanying these measures were innovative institutional and legal forms of economic governance, of which competition or antitrust policy, as well as other types of regulatory agency, are emblematic examples. In many countries of the South,

regulatory agencies, including competition authorities, were created for the first time as part of the liberalizing impulses, or existing laws were reformed.

The worldwide spread of regulatory agencies and antitrust authorities, which intensified in the 1990s, is often explained as the adoption, by governments, of modern technologies to avoid the potential undesirable outcomes of a “free market” opened through liberalizing measures. The process of reform is described in evolutionary and functionalist terms, as a necessary technical move toward “better” legal and institutional models, a modernization to fill a gap, and to solve the problems of other forms of economic governance, and hence to adapt to a new economic reality. The construction of these new forms of economic regulation is portrayed as largely consensual, and as part of a global phenomenon of institutional convergence. Governments, international organizations and technical experts are said to be the major proponents and implementers of reform.

The diffusion of such institutional and legal mechanisms is said to have consolidated a new paradigm of economic regulation, which has been frequently called the “regulatory state”, or even more broadly, “regulatory capitalism”. This would be a model of economic governance that is essentially technical, autonomous from politics, and which produces the moderation and socialization of the capitalist economy. In regulating the economy and promoting competition, regulatory agencies and antitrust authorities would exercise roles in the economy and society, by promoting competition and protecting consumers, respectively. In doing so, benefits of universal interest would be generated: for market agents, the state, and society as a whole.

Embedded in these narratives are assumptions about how the process of reform occurs, and what are its roles for both the economy and society. Local conditions, concrete agents and political struggles are obfuscated by the idea that reforms entail a technological advancement. The process of reform is thus depoliticized. The roles of regulatory institutions and competition authorities are equally removed from political conflicts, as they are assessed through an often impressionistic empirical basis, and a formal view of the law that takes for granted the objectives it states as sufficient evidence of its practice.

#### *What about neoliberalism?*

These “forthright statements” about regulatory reform have either simply ignored, or more directly contested what a body of literature has affirmed to be a central phenomenon underlying economic globalization: neoliberalism. In approaches that study the political and

economic meanings of neoliberalism, the emphasis is directed to the political aspects and hence the power relations that underlie the transformations of the capitalist economy in the last quarter of the 20<sup>th</sup> century.

In these views, economic globalization is propelled by a political project to solve a crisis of capitalist accumulation, and the institutional and legal reforms that operationalize it are part of a set of measures directed to lift the blockages to the concentration and expansion of capital, especially the free circulation of financial capital. In simplistic terms, neoliberal globalization is said to have implied the subjection of the state to market forces, and for this purpose reversing prior forms of political and social organization in which the state was more interventionist in the economy – be it the welfare state in the global North, or the developmentalist one of the global South.

In this context, the destruction of political, legal and social institutions that could hamper such impulses, and their substitution by other institutional forms, such as technocratic instruments of economic governance, deregulation, and privatization, are a reflection of the neoliberal project to assure the prevalence of the market over the state. As a political agenda, neoliberalism is also hardly seen as a modernizing, evolutionary, or consensual phenomenon, but rather as actively constructed and disputed. The identification of the “problems” to be solved and the “gaps” to be filled in the context of economic globalization are part of these disputes, and so are the institutional and regulatory “solutions” articulated.

When not entirely ignored by studies on regulatory reform, the critical accounts about economic globalization as predominantly neoliberal often lead to a tension with the diagnoses proposed by that literature. This is because the very existence of regulation, or its “improvement” through reform, are pointed to as counter-evidence of neoliberalism as a social phenomenon, and thus of its utility as an analytical concept. The presence of mechanisms to regulate the economy, and the occurrence of regulatory reforms would refute the veracity of the elements that are said to be the defining traces of neoliberalism. Regulatory reforms would neglect the idea that market regulation is absent, or that there is a hegemony of market forces over the state, and hence the interpretation that neoliberalism constitutes a defining trace of economic globalization. That the liberalization of the economy through privatization and deregulatory measures has been accompanied by the consolidation of regulatory agencies and competition authorities becomes naturalized in studies about economic globalization and regulatory reforms.

Here is precisely where the cacophonies lay. That the move towards more open economies was paralleled by legal reforms that at first sight constrict the free market seems

puzzling, not at all a natural or obvious process in a context of economic globalization. It looks odd, and even quite paradoxical that a mechanism for regulating the market was part of the same agenda that sought to liberate it by reducing the presence of the state in the economy. Moreover, the rebuttal of the existence of neoliberalism as a political and economic phenomenon based solely on the presence of these regulatory novelties is hardly convincing from a sociological view point. How could the formal enactment of laws and the reform of institutions to govern the economy be taken as assurances of the inexistence of certain political and economic practices that are said to be characteristic of neoliberalism?

Making sense of the coincidence between neoliberal economic globalization and the creation of new regulatory institutions is thus the central objective of this dissertation. This endeavor is herein translated as an attempt to grasp why and how such legal reforms happen, and what are their roles in the announced task of reforming states and economies. Since the exclusion of neoliberalism from the “rational lines” of studies on regulatory reform sounds as a cacophony, my purpose in this work is to assess if and how the transformations in the forms of interaction between the state and the economy, as articulated through law and policy, fit into the broader phenomenon of neoliberal globalization. If a profanation of Borges’ piece is here authorized, this is a work that intends to grasp the possible “incoherencies” within the “forthright statements” about regulatory reforms and its linkages to neoliberalism. Contrary to Borges, however, and be it because this connection, with a few exceptions, has not been explored, or due to its explicit contestation in certain narratives, I believe that within the arid terrain of academic research those cacophonies are still not “much known”.

### *The research problematique*

To explore the cacophonies observed in the linkages – or better said, in the absence of linkages – between regulatory reform and neoliberalism, this dissertation focuses on the construction and practice of a particular regulatory arena that was part of the agenda of reforming states and economies within economic globalization in a concrete setting: competition policy in Brazil. I deploy conceptual and methodological instruments of the sociology of law, economic sociology and of a critical political economy to develop a sociologically informed analysis of regulatory reform and regulatory practice. In departing from these references, the study of the possible connections between reform and neoliberalism is translated into the analysis of both the process of construction of this arena of economic regulation, and the roles it exercises in the economy and society. It is precisely in

the production of functionalist or formalist “rational lines” about both of these dimensions – the *construction* and the *roles* of regulatory reform – that those linkages are ignored, or explicitly neglected by the dominant narratives on regulatory reform. The research question that guided this inquiry was thus the following: *how was competition regulation constructed in Brazil, and what are its roles in the economy and society?*

The research *problematique* herein addressed was in turn translated into a more specific and operational set of questions to explore each of the two dimensions approached by the dominant “rational lines” about regulatory reforms. On the side of the *process* of reform or construction of this regulatory arena, the dissertation sought to identify “*Who are the agents that construct competition regulation in Brazil, and how did they shape the reform and practice of this regulatory arena?*”. Through a question that calls for the analysis of concrete agents that structure this regulatory arena, I seek to re-politicize regulatory reform, and thus circumvent the often agentless, functionalist and evolutionary perspectives that enable erasing its potential links to neoliberalism.

On the side of the *roles* or *outcomes* produced by competition policy in the country, two specific questions were formulated. With respect to the roles of competition policy in the economy, I ask “*What economy competition policy facilitates and for whom, and how economic interests both affect regulation and are impacted by it?*” In this sense, instead of accepting the “forthright statements”, as Borges would say, about the universally beneficial roles of competition regulation to the economy, I seek to scrutinize how regulation actually impacts the economy, and if and how it differs with respect to distinct economic agents and interests.

Finally, with respect to its roles in society, I enquire: “*What society is constituted through competition policy? What social groups are protected and affected by regulatory practice?*” Similarly to that concerning the outcomes of competition regulation for the economy, this question aims to problematize the discourses of the roles of regulatory reform in protecting society. By inquiring about which are the actual social groups involved in regulation, and how are they affected by it, I construct an empirically-based narrative about the society that regulatory reform helps to constitute. In both cases, differently from what can often be found in the “rational lines” about regulatory reform, these are questions to be answered empirically, beyond the crude text of the laws that institutionalize competition policy.

The circumscription of the object in such terms is motivated by two distinct but interconnected reasons. First, the focus on competition policy constitutes an entry point to

discuss the relationship between neoliberalism and regulatory reform. Besides being an arena of economic regulation at the core of the intersection between the state and the economy, as the worldwide spread of competition or antitrust laws in the 1990s evidence, it emerged in parallel to and as part of the agenda to reform states and economies under the auspices of neoliberalism. In Brazil, the landmark of this process was the enactment of law number 8.884 of 1994, which reformed the Brazilian antitrust authority – the Administrative Council for Economic Defence (CADE) – accordingly to international standards. Since then, together with the regulation of corporate conduct, Brazilian competition policy also started to supervise economic concentrations in the form, for instance, of mergers and acquisitions, becoming a “modern” regulatory arena.

Through this case study, although I don’t expect to generate results of universal validity either about competition policy reform, or regulatory reforms in general, I believe it is possible to identify and discuss indicators of the connection of regulatory reform with neoliberalism. The circumscription of the research to the particular domain of the construction of competition policy as exemplary of regulatory reform is thus oriented to enable an in-depth study about the topic, from which conclusions can be extracted to engage with the specialized literature and to propose what I see as a different view about reform and its connections with neoliberalism. Additionally, the approach to neoliberalism as an object of study through regulatory reform, and more specifically through competition policy reform, is far from well explored, and thus constitutes an attractive research field, with potential contributions for those interested in understanding this political and economic phenomenon.

The focus on the Brazilian experience responds to yet another reason for the delimitation of the object, in turn connected to my personal trajectory. Although the dissertation aims to contribute to the academic debate about regulatory reform, the actual attraction of this object of study comes from beyond this particular domain. It is rather inseparable from the political and social surroundings in which I have been historically inserted, and hence from my formation as an academic and political subject. Since the beginning of my graduate studies, my research interests have orbited the relationship between law and the economy in globalization. Such interests are unavoidably rooted in the context in which I have been formed as an academic: growing up in a semi-peripheral country such as Brazil in the 1990s, and particularly in the city that hosted several meetings of what is reputed as an emblematic initiative of criticism and resistance to neoliberal globalization – the World Social Forum –, attending law school, and then “converting” to the sociology of law in the first decade of the 21<sup>st</sup> century. During this period, I have been socially, politically and



academically exposed to the deep transformations motivated by economic globalization that occurred in the world, substantively affecting the legal, political and economic domains of Latin American countries such as Brazil, and that had already started to be scrutinized by academics.

As a student of the law and society tradition, this context induced a curiosity about the role played by law in neoliberal globalization, i.e. to understand how neoliberalism has both affected and been affected by the law, especially in countries of the so-called global South, and notably in Brazil. The study of the connections between competition policy reform and neoliberalism in Brazil is thus also an attempt to contribute to the understanding of the broader transformations that occurred in this country, and hence to respond to a sort of subjective calling to the task. Although according to the canons of scientific inquiry the distinction between research and politics is not only recommended but established as a condition, I don't see these realms as entirely separable. However, as I tried to accomplish in my writing through a constant methodological awareness, I understand that such distinction can and must be practised. In any case, and although the very presentation of the purposes underlying this dissertation demands such disclaimer, only by the end of the reading of the pages that follow will be possible to judge if this distinction has been successfully respected or not.

### *The argument in a nutshell*

Based on the answers empirically delineated for each of the questions elaborated to guide the research, the central claim of this dissertation is that the construction of competition regulation in Brazil, the economy it facilitates, and the society it helps to constitute through its practice have contributed to the structuring and legitimization of the economic and political tenets of neoliberalism in Brazil. In this work I thus propose an alternative narrative to understand the connections between regulatory reform and neoliberalism, sustaining that the regulatory model of competition policy, as institutionalized and practiced in Brazil, is both rooted in and functional for the neoliberal project of transforming economies and societies.

I explore these connections through two complementary strategies. On one side, a trajectory study of the agents who were the architects of reform and who were recruited to produce competition regulation in the state apparatuses between 1994 and 2012, their capitals, positions and political stances toward the state and the market. On this dimension of the *construction* of competition regulation, I argue that the linkage between reform and

neoliberalism can be visualized in the role of concrete agents who actively shaped the reform and practice of competition regulation: mostly corporate lawyers and neo-institutional economists whose educational backgrounds, professional trajectories, and political views are consistent with neoliberal theoretical and political tenets, and who shaped reform and regulatory production accordingly. Instead of an agentless process of institutional modernization, competition policy reform was disputed to be made compatible with the parallel trends of economic liberalization through privatization and deregulation, and to the expansion and concentration of capital. Such trends were strongly institutionalized in competition policy, managing to last for years after the first initiatives of reform, and even despite broader political changes in the country.

The second research strategy departs from the approach of a critical political economy of neoliberalism and applies a study of the “law in action” produced by these agents. On this dimension of the *outcomes* of competition regulation in Brazil, I base the dissertation’s overall claim about the connection between this reformed regulatory arena and neoliberalism upon two main indicators. On the one hand, through a study of the profiles of economic concentrations and corporate conduct regulated through CADE’s decisions, and of how they are regulated, as well as of disputes to determine competition policy’s jurisdiction over financial capital, I argue that competition regulation has historically facilitated and legitimized several of the defining phenomena of a neoliberal economy: the concentration and expansion of foreign capital into a recently liberalized economy, especially through privatizations, the hegemony and concentration of financial capital, and a disciplinary attitude toward local and regional market agents, as opposed to global ones. Instead of interpreting the roles exercised by competition regulation as what the competition act states – to “promote competition” –, I base this analysis on an empirical and systematic study of decisions.

The argument about competition regulation’s roles is complemented by its outcomes on a societal dimension. In this sense, I argue that competition policy contributes to neoliberalism as a project that advocates the destruction of social collectives – best exemplified in labor protection – and for the parallel constitution of a regime of consumer citizenship. This hypothesis is based on empirical findings showing that the delimitation of consumers as the main and only subjects protected by competition policy has simultaneously and selectively excluded labor concerns and workers from its normative domain, even though they are directly affected by economic concentrations regulated by antitrust policy.

## *Structure of the thesis*

The argument is developed in two steps. Part I of this dissertation is dedicated to describe in detail the construction of the *problematique* herein addressed, the theoretical debate in which it is inserted, and the conceptual and methodological contours of the alternative approach to regulatory reform that I propose. In Chapter 1, I review the dominant “rational lines” available to understand how does regulatory reforms occur, with the focus directed to the reform of competition regulation in Brazil, and what are its roles in the economy and society, and point to what I see as shortcomings underlying these approaches. In Chapter 2, I present the conceptual and theoretical foundations from which I departed to construct an alternative narrative about regulatory reforms and its linkages to neoliberalism. These are, the actor-centered approach as well as the theories about the roles of lawyers and economists in neoliberalism applied in the study of the construction of competition regulation in Brazil, combined with the “law in action” perspective and the critical political economy of neoliberalism deployed for the study of the outcomes of competition regulation in the economy and society. In Chapter 3, I describe the methodological strategies derived from this conceptual framework, and explain how the research questions elaborated to guide the inquiry were translated into an empirical study.

Part II comprises the presentation and discussion of the results of the empirical material gathered through the conceptual and methodological instruments sketched in the previous chapters. In Chapter 4, I present the reconstruction of the historical process of construction of competition policy as a “modern” regulatory arena in Brazil focused on the agents directly involved in reform. Chapter 5 also entails the actor-centered approach to competition regulation, but focuses on assessing the mode of production of competition regulation since its inauguration in the early 1990s as a modern regulatory arena until 2012. Together, these chapters portray the political clashes that underlie competition regulation, and enable visualizing the roots of this regulatory arena in neoliberalism. In Chapter 6, I describe the regulatory outcomes produced by competition policy in the economy and society through both quantitative and qualitative data about CADE’s decision-making. At the end of each of these three chapters, I contrast the empirical findings with the dominant narratives about regulatory reform mapped in Chapter 1, and connect them to the theoretical background of this dissertation, as described in Chapter 2.

In the Conclusions of the dissertation, I discuss the broader implications of the findings of the empirical study about the politics of competition regulation in Brazil for the

body of literature with which I engaged in Part I. I also present an appraisal of the narrative that I herein offer about regulatory reform and neoliberalism, pointing to what I see as new “cacophonies” generated by this “rational line”, and suggesting ways in which they can be turned into new research endeavors.

## **CHAPTER 1**

### **Dominant narratives about competition policy reform**

As described in the introduction, making sense of the coincidence between the construction of a legal and institutional regime to regulate competition and the occurrence of neoliberal reforms, understanding the relation between regulatory reforms and the attempts at transforming economies and states is the central objective of this dissertation. I want to understand why and how such legal reforms happened, and what are their roles in the announced task of reforming states and economies, that is: what is the role of competition policy in neoliberalism. With these objectives in mind, I looked for explanations to understand why and how an institutional framework to govern competition was developed within the agenda of state reform and economic liberalization, and what roles it performs.

I identified three main sources of knowledge available to tackle these questions. The first and most obvious place to look for answers is in the very institutions that were created or reformed. My initial attempt was thus to see how the Brazilian competition authority – the Administrative Council for Economic Defense (CADE) – describes its functions and its history. A second candidate as a source of knowledge to understand reforms are two fields that are directly imbricated in the production of the content of these reforms and in its practice – law and economics. Lawyers and economists are not only professionals who work as regulators and practitioners in these new regulatory environments. Through specialized legal doctrine and economic studies, they also offer explanations and justifications for the creation of these institutions and legal reforms and accounts about their roles. Finally, explanations that are “external” to this policy domain can also be found in a growing literature in the social sciences. These are attempts in sociology and political science to understand the creation of regulatory models such as competition law.

In this chapter, I therefore present the narratives currently available to explain the process of reform of competition law in Brazil and its roles in transforming the state and the economy. I believe it is not arbitrary to point to these streams of narratives as exemplary of the existing explanations for the questions raised by this research. To my knowledge, they constitute the available discourses about regulatory reform of competition policy, and thus

provide a fairly comprehensive view of what can be considered the dominant model for describing competition law reform and its implications<sup>1</sup>.

In many cases, the literature found in each of these streams is not explicitly or entirely interested in responding to the questions of how reform occurred and what impacts have been produced by this institutional framework. Nevertheless, a tacit narrative about these issues is often present, underlying institutional definitions, studies which are policy-oriented or even those with analytical intentions. These are the narratives available to understand the causes, meanings and consequences of the establishment of an institutional framework for producing competition law in Brazil.

The use of the term *narrative* here is deliberate, and it is chosen as an alternative to the notion of *theory*. Treating the different accounts about how reform happens and what are the goals of competition policy as narratives enables me to simultaneously assess descriptions and explanations of different types and analytical levels. In a hardcore positivistic definition, theory would be a system of universal laws (or hypotheses), a model of explanation of “how [certain] conditions cause an outcome” (Mjøset 2001). In this sense, there are theories about how legal reform happens and about the roles of competition policy that are applied to the Brazilian case, explanations that put forward a systematic set of assertions of causal relations to describe and explain certain empirical phenomena.

Nevertheless, other types of assertions are equally influential as forms of knowledge to explain the phenomena in question, but which could be hardly called scientific theories. These are descriptive and even normative propositions that entail an explication of how certain phenomena happened and what are their impacts, even if tacitly or in an unsystematic and unempirical way – that is, even if not departing from or suggesting an explicit system of hypotheses. Exemplary of this strand are the official histories constructed by the very institutions that are reformed, and accounts in legal doctrine, which often does not have the explication of reform and its outcomes as its central concern. Although not properly scientific according to certain criteria, these assertions have intentions that are – to some degree –

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<sup>1</sup> Türem’s (2010) study about the reform of competition policy in Turkey – which in many senses served as reference and inspiration to my research – also identifies these narratives as the available sources of knowledge about competition law reform. As he puts it, “[k]nowledge production about regulatory agencies point to a rather regular pattern: what we know about these agencies and their creation, our way of thinking about them are shaped most heavily by the disciplines of law, economics, business, or public administration, disciplines which are mostly prescriptive and normative, rather than critical and questioning” (Türem 2010, p. 17). Together with these academic disciplines, the narratives of institutions which act as “reformers”, such as the OECD and UNCTAD, and “social scientific works”, most notably in political science, are also approached by Türem as part of the existent descriptions about the reform of competition policy.

similar to a theory's purpose: "to catch what we call 'the world': to rationalize, to explain, and to master it" (Popper 2005).

By grouping these different types of assertions under the name of narratives I do not intend to dissolve the notion of theory into the former, equalizing it with other forms of propositions<sup>2</sup>. Rather, by calling them narratives, I aim to avoid the confusion of calling all types of propositions theory, and to simultaneously address different types of explanations that despite their distinct analytical structures and explanatory intentions are potential sources of knowledge about the object of investigation. The concept of narrative thus enables the grouping of different types of assertions about the reform of competition policy: official discourses, legal doctrine, economic studies and properly scientific theories. What these different types have in common is that they are forms of knowledge available to address the questions initially formulated, i.e. to understand why and how reform of competition law occurred, and what are its roles and outcomes. The extent to which the different narratives identified are valid, useful or limited cannot be determined beforehand by their type. Assessing these questions is precisely what I will tackle in this chapter.

In reviewing each of these streams, I also don't aim at providing an exhaustive survey of the descriptions of competition law in Brazil, or regulatory reform in general. Rather, my objective is to illustrate what I consider to be a tendency found in each set of narratives when it comes to explaining how reform occurred and what are the roles and outcomes of this institutional arrangement devised to transform the state and the economy. The chapter is structured around the narratives constructed by these different sources in two dimensions: why and how reform occurs, and what are the roles and outcomes performed by the reformed institutions. Section 1.1 reviews the narratives found in official institutional descriptions, focusing on the stories told by CADE, the very institution that was object of the process of reform in Brazil. In section 1.2, I describe how scholars in the fields of law and economics explain the emergence and roles of these regulatory mechanisms. In section 1.3, I present a review of approaches developed in the social sciences to study regulatory reform, and competition policy reform in particular – what can be called "diffusion studies". In section 1.4, I close the chapter by drawing out the similarities that can be identified among these narratives, and discussing what I believe to be shortcomings in their approaches.

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<sup>2</sup> While the differentiation between scientific theory and other forms of knowledge intends to avoid a post-modern conception of theory, it does not necessarily imply an "epistemological hierarchy" between them. In affirming this distinction, I only aim to make explicit the awareness of the different analytical character of the types of propositions about competition policy reform. What I will argue is that despite these differences, these narratives share many important assumptions and conclusions in explaining legal reform and its roles.

## 1.1 Institutional stories

The first set of narratives from where the “cacophonies” that motivate this research emerge can be found in official institutional descriptions – the stories told by the very institution that was the object of the process of reform. In March 2012, the Brazilian Competition Authority launched a commemorative celebration of the 50<sup>th</sup> anniversary of competition policy in Brazil. As part of the campaign, several conferences involving lawyers, economists, policy-makers, and academics were organized, a new institutional logo was issued, and a “hotsite” of the project entitled “CADE 50 years” was released.<sup>3</sup> The objectives of these celebrations were to diffuse information about CADE’s main attributions and to “promote competition defense and preserve institutional memory” of a governmental institution created in 1962.

In such cabalistic moments of celebration, discourses and evaluations about the history, objectives and roles of an institution proliferate. The preservation of “institutional memory” demands the production of a narrative about this institution, the choice of a form and content to consolidate this memory as history. CADE’s 50<sup>th</sup> anniversary campaign was no different. The initiatives promoted in this celebration entailed the production of several narratives about the historical evolution of competition law in Brazil. These narratives also define the role of competition policy, how it has developed in Brazil, and how it is practiced. They appear, therefore, as a potential source of knowledge for understanding this arena of economic governance, its transformations and implications. It also helps to introduce the object of study and specific elements about the institutional and legal structures of competition policy in Brazil.

To depict the institutional narratives about competition law in Brazil, I analyze how the institution responsible for producing competition policy which was reformed in the 1990s describes its transformation and roles. I rely on institutional materials and official documents produced at different moments of time, such as the 50<sup>th</sup> anniversary commemorative campaign launched in 2012, which includes the “hotsite” and a book published in 2013, as well as the “Practical Guide” published by CADE in 2007, and CADE’s permanent website.<sup>4</sup> My objective in surveying these sources is to portray the themes of the institutional narratives about the nature of competition law, and its account of the historical developments in Brazil, the goals it pursues and roles it performs.

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<sup>3</sup> Available at: <http://www.cade.gov.br/50Anos/>. Last access on April 28<sup>th</sup> 2013.

<sup>4</sup> Available at: [www.cade.gov.br](http://www.cade.gov.br)



### 1.1.1 Once “small” but now “super”

The commemorative website organized by CADE is a fruitful entry point to observe how an institution of economic governance describes its history and defines its roles, since it offers a schematic and historical overview of competition law in Brazil.

**Figure 1.** “CADE 50 years” hotspot printscreen



Source: <http://www.cade.gov.br/50Anos/>. Last access on April 28<sup>th</sup>, 2013.

At the top of the page, there are four links to information about “*What is CADE*” (“*O que é*”), “*What does it do*” (“*O que faz*”), its 50 years’ history, and a recent process of “*Restructuring*” (“*Reestruturação*”). At the bottom of the page, a timeline of competition policy’s history in Brazil is depicted as a racing track for a stylized athlete, beginning in 1945 and finishing in 2011. At the lower right side, the logos of the Brazilian Ministry of Justice and of the Brazilian national government complete the page’s composition. As the campaign targeted a wide public through insertions in websites, magazines and national newspapers, its concern was to be didactic, to communicate the content in a succinct, jargon-free form.

In telling the history of its 50 years, CADE’s commemorative website points to five landmarks. In 1945, the promulgation of the first legal mechanism of competition regulation in Brazil: a decree enacted by president Getúlio Vargas<sup>5</sup> that penalized “acts against the moral and economic order” and created “CADE’s first version”, with a slightly different name: the

<sup>5</sup> In Annex I, I list the presidents mentioned in this dissertation in chronological order.

Administrative *Commission* for Economic Defense, instead of what would become a *Council*. In CADE's most recent institutional publication (CADE 2013), a book based on several testimonies of former officials of the Council, the first landmark of antitrust policy in Brazil is identified even before the 1945 decree. The book mentions a provision of the 1937 Constitution, which established in article 141 the protection of the "popular economy" as a principle. One year later, decree 869 of 1938 concretized this principle by establishing provisions to combat crimes against the popular economy (CADE 2013, p. 36).

The 1945 act was different from the 1938 provisions, as it had an administrative character, rather than a criminal one. The establishment of the 1945 schema is depicted as a conflictual episode. The provisions instituted by Vargas were accused of being "interventionist", and of "making the development of the country difficult" (CADE 2013, p. 37 Ch 1), especially in the view of foreign corporations. This institutional arrangement lasted for only five months, as in 1946 a new government revoked the decree that instituted competition regulation. The polemics around the 1945 law would have nevertheless opened room for "upgrading a previous antitrust legislation in Brazil and contributed directly to including the fight against the abuses of economic power in a Constitution for the first time" (CADE 2013, p. 14).

A second landmark in CADE's official history of competition law is the year of 1962, the initial point for its 50<sup>th</sup> anniversary celebration. Presented in Congress in 1948 through the law project number 122/1948, the creation of CADE was approved only after 14 years, through the enactment of law number 4.137/1962, inspired by the Sherman Act of 1890 (CADE 2013, p. 40). According to the website's presentation, the statute that created CADE aimed to operationalize a provision of the 1946 Constitution. CADE, then a *Council*, would have the role of enforcing this norm. Again, the most recent institutional publication provides a more contextualized view of this period. According to this book (CADE 2013), the project of what would eventually become the law of 1962 was blocked at least twice in Congress. It was only in 1961, in reaction to another project presented in Congress by president Jânio Quadros, that the antitrust act proposed in 1948 moved forward. The project presented by Quadros in 1961 also aimed to regulate the provision of the 1946 Constitution, but was considered "much worse" than the 1945 provisions (CADE 2013, p. 42). In face of the presidential proposal, political leaders that until then opposed the 1948 project ended up approving it as Law number 4.137 of 1962.

The 1962 Competition Law did not have much "expressive" effect, according to the institutional narratives, due to two factors: the "rigid control of economic activity by the

government”, and the frequent overruling of its decision by the Judiciary (CADE 2013, p. 48). Economic policy adopted by the military governments initiated in 1964 was “incompatible with the spirit of the antitrust law”, as it promoted price control<sup>6</sup> and stimulated the formation of big economic groups, which “sometimes were born out of mergers and acquisitions” (CADE 2013, p. 44).

The third moment mentioned in this institutional official history dates in the 1990s, and is contextualized within the legal framework inaugurated by the Constitution of 1988. The Constitution established “free competition” and “consumer protection” as two pillars of the Brazilian economic order<sup>7</sup>. As repeated in CADE’s “Practical Guide” (CADE 2007a), “free trade is considered one of the basic foundations for the repression of any economic abuse that may intend to eliminate competition, dominate markets or arbitrarily increase profit”. Competition law thus appears in CADE’s official narrative as the translation of these principles into concrete institutions and enforcement mechanisms.

The first initiatives that stemmed from this legal framework date from the beginning of the 1990s, when the government of Fernando Collor de Mello promoted the “first modifications in the competition law” since 1962, through two laws enacted in 1990 and 1991. The law number 8.137 of 1990 “defined crimes against the fiscal and economic orders and against consumer relations” (CADE 2013, p. 51). Through the law 8.158 of 1991, the government created the National Secretariat of Economic Law (SNDE), an agency of the Ministry of Justice responsible to enforce competition policy in cooperation with CADE. According to CADE’s latest publication, the law of 1991 also gave CADE the “responsibility of analyzing merger reviews”, which differed from the sole focus on competitive conducts of the 1962 law (CADE 2013, p. 51). Although CADE was “practically abandoned between 1989 and 1991”, as no commissioners were appointed, and despite the lack of resources, infrastructure and staff in the initial years of the 1990s, the Council “managed to keep its jurisdictional activity and decided important cases when it resumed its activities, in 1993” (CADE 2013, p. 53).

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<sup>6</sup> Two examples of price control mechanisms are mentioned in CADE’s latest publication: the National Superintendence of Provision – SUNAB (*Superintendência Nacional de Abastecimento*), created in 1962, which had the role of “promoting a national policy of supplying essential products” and could “fix quotas of production, imports and exports”, and the National Commission for Price Stabilization – CONEP (*Comissão Nacional para Estabilização de Preços*), created in 1967, which controlled the prices of the manufacturing industry (CADE 2013, p. 46).

<sup>7</sup> The Federal Constitution of 1988 has a chapter dedicated to the *General Principles of Economic Activity* (articles 170 through 181). In article 170, the Constitution describes, among others, “free competition” and “consumer protection” as “principles” to be protected by the economic order.

In 1994, during the government of Itamar Franco, another and more decisive landmark: law number 8.884 was sanctioned, replacing the law of 1991 and instituting the control of mergers and acquisitions and the repression of anticompetitive behavior. The project of the 1994 law was “elaborated by a commission of jurists and economists” (CADE 2013, p. 55), and faced pressures from different sides. On the one hand, at first it was opposed by “some entrepreneurs that feared the return of price and production control” (CADE 2013, p. 56). On the other hand, the institutional history also points to attempts at including mechanisms of price control in the new antitrust law (CADE 2013, p. 56). Presented in Congress in 1993 and approved in 1994, the law would have nevertheless constructed a “modern institutional framework responsible for dealing with competition defense” (CADE 2007).

The 1994 law inaugurated the Brazilian System of Competition Defense – SBDC (*Sistema Brasileiro de Defesa da Concorrência*), integrated by CADE, now entitled to give the “final word in decisions on merger reviews and anticompetitive conduct”, and two governmental secretariats. These were the Secretariat for Economic Law of the Ministry of Justice – SDE (*Secretaria de Direito Econômico*), which replaced the SNDE with the roles of investigating conduct and presenting reports on cases decided by CADE; and the Ministry of Finance’s Secretariat for Economic Monitoring – SEAE (*Secretaria de Acompanhamento Econômico*), created in 1995 with the role of “providing assistance and opinions in cases judged by CADE” (CADE 2013, p. 60). Through the law of 1994, “an objective filter” for merger reviews was established, and notification to CADE became mandatory in cases involving corporations with annual revenues equal or superior to 400 million Reais or implying market concentration of at least 20% (CADE 2013, p. 71).

In this narrative, the creation of the SBDC is connected to the economic transformations that occurred in the period, notably privatizations and deregulation:

[t]he stability of the currency as well as privatization and deregulation of trade that started in the 1990’s made it vital to develop competition defense policy capable of responding to the market’s new reality, considering the fact that enterprises need clear and stable rules to follow in a competitive market (CADE 2007).

The reform of competition policy in 1994 is seen as fulfilling the needs of a recently liberalized market and the struggle against inflation. The context of the legislation enacted in the 1990s was one “marked by economic crises and by the exacerbation of the defense of

economic liberalization and of the opening of the market as instruments to tackle the inflationary process” (CADE 2013, p. 51).

With the reform, CADE, which had so far “exercised only a marginal role in the country’s economic life”, was granted more powers and autonomy from the national government, becoming “the main institutional guardian of free competition” (CADE 2007a). Through the law of 1994, it was transformed into an “independent”, “adjudicative agency”, as mandates were conferred on its commissioners. In these official narratives, CADE is described as part of a set of institutions with a similar “duty”: “to ensure that enterprises with market dominance do not abuse such power in order to harm free competition” (CADE 2007a). These institutions are the regulatory agencies created throughout the 1990s in a variety of privatized sectors.

A more recent landmark of competition policy’s official history dates from 2011. In this year, during Dilma Rousseff’s government, law number 12.529 was enacted, and came into force in May 2012. The new law restructured the SBDC, extinguishing the SDE and merging its functions into CADE, and giving the SEAE the role of “diffusing the knowledge about the benefits of competition to society, businessmen, legislators and regulators” (CADE 2013, p. 140). The role of economic analysis until then performed by SEAE was given to a Department of Economic Studies created within CADE’s organizational structure.

Some of the “most radical changes” brought by the 2011 law concern the merger control regime (CADE 2013, p. 140). The law instituted a pre-merger control system, by which proposed mergers and acquisitions must be authorized by CADE before they are concretized. As is portrayed on the topic on “*Restructuring*” of CADE’s commemorative website, until 2011 Brazil was one of the only countries in the world in which corporations submitted a merger operation after concretizing it, which would be a “inefficient from the economic point of view, and ineffective in protecting the public interest”. Since this recent reform, antitrust legislation thus became a “modern and adequate law” to the “increasingly open and dynamic” Brazilian economy, giving birth to a “new CADE”. The foreword of CADE’s most recent book, signed by a journalist who has covered the Brazilian competition authority for many years, states that due to these changes CADE ceased to be a “small” organ and became a “super” institution (Basile 2013).

That reforms and the roles of these institutions are part of a “a historical evolution of more than 50 years in economic law”, as CADE’s current president claims in the presentation of the commemorative book launched in 2013 (Carvalho 2013, p. 14), is an explicit element that permeates institutional narratives. The opening paragraph of this book’s first chapter –

entitled “*A retrospective look*” – informs how the reader should interpret the history that is about to be told:

[...] the various legislations that marked the interest in competition issues in Brazil shall not be seen as ruptures with the past, but as new steps in the path of consolidation of the Brazilian institutions entitled of imposing healthy limits to economic relations. Each of the succeeding laws added up to the legacy left by the preceding ones (CADE 2013, p. 35)

In this history, CADE presented “methodological, managerial and, above all, institutional advances” that result from the “initiatives adopted in those year of inexpressive activity of the Brazilian antitrust authority, before the 1990s” (CADE 2013, p. 181). “Structural changes” such as the opening of the domestic market, economic globalization and financial stability, were the “engines that gave impulse to the development of [competition policy] in the country” (CADE 2013, p 181-182).

#### 1.1.2 *Who wins: “You, corporations, and Brazil”*

The same sources that provide a history of competition policy in Brazil and its reforms also describe the roles performed by this model of economic governance since the 1990s. If someone wants to know “*What is CADE*”, the commemorative website offers a concise definition: “The Administrative Council for Economic Defense – CADE is an independent entity of the Ministry of Justice that promotes competition defense in Brazil”. When it comes to describing “*What does it do*”, the official website explains that CADE is “responsible for analyzing acts of economic concentration, such as mergers and acquisitions of corporations, and for investigating and judging anticompetitive conduct in the market”.

These are what CADE defines as its “preventive” and “repressive” roles, respectively: it prevents mergers and acquisitions that may “jeopardize” the market, and represses conducts that may “harm free competition”<sup>8</sup>, such as the formation of cartels and predatory pricing practices. In the first case, CADE evaluates if “an operation may involve an abuse of economic power by one corporation or group”. If so, the merger or acquisition may be rejected in totality or partially. These roles are justified by what is reported to be “the pattern of natural behavior in a great part of entrepreneurial strategies”: seeking concentration

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<sup>8</sup> Definitions available at CADE’s permanent institutional website. Last accessed on April 28<sup>th</sup> 2013.

(Carvalho 2013, p. 14). Given this pattern, the “mission” of CADE would be to “avoid these forms of abuse” (CADE 2013, p. 14).

In institutional narratives, the practice of CADE’s preventive and repressive roles is depicted according to two historical moments since 1994, in which the Council would have had different emphases. Initially, the emphasis was on “economic efficiency” and the analysis of mergers (CADE 2013). The latest institutional publication mentions six emblematic merger reviews that would illustrate an active role of CADE in this area, and calls to attention that since the 1994 law the Council has “continued its analysis, even imposing total vetoes on some operations” (CADE 2013, p. 71-85). As a result of the “improvement of competition policy in Brazil over the years”, since 2003 CADE would have focused on repressing cartels and other anticompetitive behaviors (CADE 2013, p. 89). Again, CADE’s latest book mentions 8 cases that would be exemplary of such repressive activity. In face of this practice and due to the 1994 reform, “Brazilian society in general started to acknowledge the importance of these organs, and particularly corporations began to accept the reality of a legal obligation to submit mergers to the Council” (CADE 2013, p 75).

Beside the preventive and repressive functions, there is also an “educational” role often mentioned in institutional narratives. Such pedagogical activity comprises CADE’s tasks to “instruct the general public” about conduct that may compromise competition, and to “stimulate studies and academic research on the topic”. In doing so, CADE performs its role to “foment” and “disseminate” a “competition culture”. Another example of such promotion of a “competition culture” is given in CADE’s recent book: an internship program instituted in 1999 through which undergraduate and graduate students spend a period of time in CADE, participating in the daily work of the institution, and engaging in classes and debates about competition policy<sup>9</sup>.

CADE is a council in charge of decision-making, and is comprised by six commissioners and one president, all appointed by the President of the Republic. These commissioners, chosen from citizens over 30 years old and with “notable legal and economic knowledge”, once approved by the Federal Senate, enjoy a two-year term, and may be re-appointed for another one. Mandates assure that commissioners “can be removed only under very special circumstances”, which would in turn confer “autonomy of CADE’s Board members, which is essential for guaranteeing the technical and impartial tutelage of the diffusion of competition rights” (CADE 2007a, p. 130). Since its enactment until 2012, the

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<sup>9</sup> This is PinCADE, CADE’s Internship Program (*Programa de Intercâmbio do CADE*).

1994 Law for the Defense of Competition was the framework that defined “the way to implement competition policy in the country, establishing the jurisdiction and powers of the authorities in charge of its defense, with the goal of repressing the abuse of economic power” (CADE 2007a, p. 125).

In describing what it does, CADE also narrates the goals of competition policy, the roles it performs for the economy and society. The website that celebrates 50 years of competition law in Brazil is illustrative of the institutional narratives about the outcomes of this model of economic governance. The website portrays the starting line of an athletic contest between five runners. Highlighted on the lower left side, the campaign’s slogan presents a question in reference to the photograph – “*Do you know who wins in a competition like this in the market?*” – to which it provides an immediate answer: “*You, corporations, and Brazil*”. Competition law is thus depicted as a mean to provide gains for a broad spectrum of subjects: individuals, corporations and the country as a whole.

Competition appears in the institutional narratives of the website as a way “to avoid increasing prices and the loss of quality of products and services”. Anti-competitive conduct attacked by CADE would “jeopardize economic development, harm small corporations and consumers”. In protecting competition, CADE therefore works for the “economic welfare of society”. This would be so because “when there is competition, corporations struggle to offer higher products and services with lower prices”. In doing so, “the citizen pays less and has access to a wider variety of products and services”. Competition law is seen not only as producing welfare for consumers, but also as generating “opportunity for corporations to enter a market and develop its businesses”, as it would “stimulate innovation, increase efficiency and productivity”. Together, these elements would “help to create a healthy economic environment, generating growth for the country”.

CADE’s performance in producing competition policy since the latest reforms is praised in institutional narratives. In the introduction to the book published by the Council in 2013, CADE’s president calls attention for the international recognition achieved by the institution, as it received – for the first time in its history – “four out of five possible stars” in the annual ranking of the specialized British journal *Global Competition Review* (Carvalho 2013, p. 15). A similar idea about CADE’s roles is put forward by the journalist who signs the foreword full of metaphors in the same book. In this text, the role of CADE in regulating the market is portrayed as the struggle between David and Goliath, where the first has “always managed to surprise the second, imposing setbacks or ‘remedies’” (Basile 2013, p. 21). Because of “strong vetoes and remedies” imposed on corporations, he continues, the organ



“gained muscle” since the 1994 reform, and is now a “lion with permanent teeth” (Basile 2013, p. 30).

## 1.2 Legal and economic scholarships

The second set of narratives about the reform of competition policy and its outcomes comes from the knowledge produced by two fields that are directly connected to policy-making in the area of competition regulation: law and economics. Lawyers and economists practice competition law and perform roles in the institutions responsible for competition policy, both defending the interests of corporations before CADE and as regulators. They also produce knowledge about how competition policy is or should be practiced. Very often, the same individuals develop these two tasks – professional practice and knowledge production.<sup>10</sup> Legal and economic scholarships thus constitute potential sources of knowledge to understand the reform of competition policy.

The narratives that are here taken as exemplary of the knowledge produced by lawyers<sup>11</sup> about competition policy reform are present in the particular model of scholarship traditionally developed in the legal field.<sup>12</sup> At the core of this scholarship are attempts to identify, define, organize and criticize the rules that legal institutions apply or which regulate their behaviors (Abel 1973). These are studies that aim to “rationalize” legal rules and institutions, be it through parameters that are “internal to the legal system”, or by connecting “the rule with some social goal” (Abel 1973, p. 175). This form of knowledge is what constitutes “law books” (Abel 1973), or “legal scholarship” (Rubin 2001).<sup>13</sup>

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<sup>10</sup> The coincidence of the roles of practitioner and scholar can be seen as a defining characteristic of the Brazilian legal field. While in European countries and to some extent in the US there would be a more clear-cut separation between the role of knowledge production and practical activity, law schools in Brazil have not become professionally autonomous from the “world of practitioners” (Engelmann 2008, p. 71). This phenomenon is to a great extent confirmed in the area of competition law, as I will illustrate in chapters 4 and 5. Although economics is often reputed to be a more well-established academic field, economists who are specialists in antitrust frequently have some kind of professional involvement in this area.

<sup>11</sup> I am here referring to lawyers in a broad sense, not to a specific legal profession.

<sup>12</sup> Determining what is the most appropriate form of conceptualizing the knowledge produced by lawyers, defining whether it has a scientific status or not, and what goals it should pursue are questions that mobilize an intense debate among legal philosophers (e.g. Ferraz Jr. 2006; Nobre 2003; Rodriguez 2012) and outside the legal field (e.g. Cotterrell 1998, 2006; Nelken 1993). I will address some of these issues in this chapter’s final section, when discussing the nature and limits of legal ideas in explaining competition policy reform and its outcomes.

<sup>13</sup> Abel’s notion of “law books” is presented in contrast to what he calls “books about law”, among which would be placed sociological studies about law. Rubin (2001) suggests a similar parallel: “legal scholarship” versus “scholarship about law”. In Chapter 2, I come back to these distinctions, as the framework I will propose for this dissertation stands precisely on the side of the contrasting ideas of “books about law” or “scholarship about law”.

It is possible to distinguish between two types of “law books” that are especially relevant for the study of competition law reform and its roles. On the one hand, there are studies commonly referred to as legal doctrine or legal dogmatics.<sup>14</sup> These are efforts to rationalize a set of legal rules based on the internal logic of the legal system. Exemplary of this type of legal scholarship are textbooks and doctrinal works on competition policy, which constitute the specialized branch of competition law. Legal doctrine on competition law is not homogeneous, as there are important divergences about how *should* law be interpreted, about how to define the key concepts of competition policy, the roles and goals it should pursue, what constitutes a *correct* decision etc.<sup>15</sup> There are, however, relevant similarities among these narratives. These convergences are reflected in the theoretical and methodological assumptions that permeate the narratives about competition law reform, its roles and outcomes.

On the other hand, there are efforts to discuss legal arrangements through a mode of analysis that is external to legal rules. This is the case of what some scholars define as “an academic discipline to study the relationship between law and development and governments” (Trubek 2011, p.1): Law & Development scholarship (L&D). Whether L&D can be considered a distinguishable academic discipline or a “field of study” is far from being settled in the literature.<sup>16</sup> In this chapter, however, I take L&D as a distinctive strand of scholarship vis-à-vis legal dogmatics, to the extent that these are studies that claim to explore the roles of law “as an instrument of promoting development” and/or as “an end in itself and one of the goals that should be pursued by development reforms” (Prado 2010, p. 19). L&D literature focuses on “the causal relationship between law and the promotion of development”, and its

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<sup>14</sup> Although some legal theorists and philosophers do distinguish the concepts of legal doctrine and legal dogmatics (e.g. Ferraz Jr. 2006; Nobre 2003), and despite the fact that these concepts may gain different meanings in common and civil law traditions, I am here using them interchangeably. What is important to stress at this point is that in countries of the “Latin legal tradition” such as Brazil, legal dogmatics can be seen as the “dominant paradigm of production of scientific knowledge about the law” (Konzen 2013, p. 39; Zuleta Puceiro 1981).

<sup>15</sup> Exemplary of such divergences is the discussion about the goals of competition law. For instance, while some authors subsume competition policy to “constitutional objectives” and advocate a role for it in promoting public policies (Forgioni 2005, Grau and Forcioni 1998), other legal scholars explicitly mobilize legal theories to break a link with the constitution and principles other than the promotion of economic efficiency (Schuartz 2009, Nusdeo 2002).

<sup>16</sup> Prado (2010), for instance, finds it difficult to visualize a “field of study” in L&D as there are many differences among scholars in respect to how they relate law and development, how they conceptualize development, and the theories and methodologies they adopt to investigate this relation. Tamanaha (2011, p. 220) provides an even more radical view, arguing that L&D is better not seen as a field, as there is no “uniquely unifying basis upon which to construct” it and “no way to draw conceptual boundaries”. Even in the work of Trubek (2010, 2011) – a key-promoter of the idea of Law & Development – there is no consistency in the definition of L&D. In a single text, it is presented as an “academic discipline”, but it is also said that “the hoped-for academic field of law and development never materialized” (Trubek 2011, p. 2).

“main focus is on identifying what kind of ‘good law’ leads to development” (Halliday and Osinsky 2006, p. 457). It differs, therefore, from traditional legal doctrine since at its core rests an attempt to assess the correlation between the economic and political contexts and legal arrangements, something peripheral in legal dogmatics.

Despite this difference, L&D retains similarities with the hybrid roles of legal dogmatics as both a descriptive discourse and a foundation for policy-making. This is because L&D scholarship has been a combination of academic and policy-oriented movements characterized by the promotion of law and legal institutions, notably those of Western legal systems – and specifically those of the United States – as a tool for “modernizing” underdeveloped countries (Tamanaha 2011). L&D may thus refer to both “a wide range of public and private programs by American lawyers throughout the world that attempt to impact legal development with regional and national foci” and to “theorists who both evaluate such work and propose broad frameworks for thinking about how to impact foreign legal development” (Kroncke 2012, p. 483).<sup>17</sup> Not infrequently, theorists and policy-makers are the same, just as the dogmatic legal scholar and the practicing lawyer are often the same person.

In this chapter, I focus on the knowledge produced by L&D scholars in respect to the legal reforms of the 1990s and its later developments. The selection of works taken to be representative of the L&D narratives was based on the “self-declaration” of some scholars as belonging to such a “field”.<sup>18</sup> They are part of a recent literature that mobilizes the notion of L&D to assess the legal and institutional reforms that took place in the 1990s in Brazil and elsewhere, and its later transformations with the emergence of a new political and economic context. As Trubek et al (2013, p. 306) define it, L&D research focuses on identifying and explaining the changing models of state and the economy by studying the “corresponding changes in law”.

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<sup>17</sup> The L&D movement has its origins in the 1960s, and was later evaluated as a failure in its policy dimension (Trubek and Galanter 1974). However, the agenda of connecting law and development was eventually resumed in the 1990s and 2000s through a series of measures of “technical assistance” promoted by scholars and policy-makers, such as transforming legal education in countries of the South, diffusing the “rule of law”, transplanting legal institutions and inducing reforms in various areas, among them competition law (Kroncke 2012, p. 537).

<sup>18</sup> It is interesting to note, however, that many scholars that claim the label of L&D to their work can also be placed as representative authors of studies that “rationalize” legal rules and institutions through parameters that are “internal to the legal system”, as Abel (1973) puts it, or as historical references of “books about law”, such as socio-legal studies. An example of the former is Diogo Coutinho, co-author of an article that is analyzed in this section (Aguillar and Coutinho 2012) that is to a great extent similar in style to legal dogmatics, and who is one of the proponents of the L&D agenda in Brazil. Illustrative of the latter, in turn, is David Trubek, a scholar whose work has been influential in the Law & Society tradition, and who is also reputed as one of the fathers of the Law & Development movement since the 1960s. The disciplinary boundaries, therefore, are not static or well defined.

Several L&D studies have deployed a similar theoretical and methodological framework in this endeavor: the comparative analysis of legal and institutional arrangements across countries in historical terms. Through the “reverse engineering” of policies and programs that are said to be characteristic of a model of state, L&D “describ[es] the functions associated with them, and see[s] if law has contributed, or could contribute, to those functions” (Trubek et al 2013, p. 307). This framework has been applied in the study of various areas and institutions in emerging economies such as Brazil, China, India and Russia: among others, social policy (Coutinho 2012; Joshi 2012), intellectual property (Ghosh 2012), banking (Schapiro 2012), and competition law (Carvalho and Castro 2012; Wang 2012; Mattos 2007, 2009). In the study of the Brazilian case, L&D scholars have analyzed the changing role of law in economic development in two periods: during neoliberalism – from the 1990s until around 2002 – and under a so called “new developmental state”, which would have started to emerge with the shift of government in 2003 (Trubek 2008, Schapiro and Trubek 2012).

In general, the central objectives of legal scholarship are determining how the law *should* be interpreted and practiced, how *must* an institution behave, or discussing if a set of rules is compatible with certain goals. An explanatory perspective that would conform to the standards of the social sciences is thus rarely the main concern of studies developed by lawyers. However, although mostly normatively oriented, “law books” often endorse propositions with descriptive intentions, even if tacitly. In other words, even if explaining legal reform and assessing its roles and outcomes are not among the central objectives, these questions are frequently embedded in the narratives produced by lawyers. The “legal ideas” found in these two strands of scholarship are therefore here taken as “a form of social knowledge in themselves”, as “means of structuring the social world” (Cotterrell 1998, p. 172) – more specifically, the world of regulatory reform.

Beside “law books”, economic scholarship constitutes another stream of narratives that emanate from agents directly involved in the practice of competition policy. The knowledge produced by economists is full of descriptions about how the reform of competition policy occurred and what are its roles and outcomes.<sup>19</sup> What is frequently distinctive of economic scholarship with respect to the knowledge produced by lawyers is its empirical character, notably the systematic use of quantitative methods for the study of competition policy. Nevertheless, similarities between the studies developed by economics

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<sup>19</sup> Similarly to the criterion adopted to review the work of lawyers, by economic scholarship I mean studies authored by economists.

and legal dogmatics can be observed in several respects. Just as a “sub-area” of legal practice and doctrine can be identified (competition law), a branch of economics specializing in competition policy has also developed, under the name of “antitrust economics”, or related to “industrial organization” studies.

Although economic science allegedly has a better-established scientific status in comparison to legal doctrine and even to other “social sciences”, not infrequently scholarship constructed by economists also aims to evaluate the outcomes of competition policy in terms of its correctness, i.e. to produce normative statements about how should decisions be taken. Like legal dogmatics, this form of knowledge is far from homogeneous. There are important divisions among economists when it comes to defining how competition policy should be practiced or what constitutes a correct decision.<sup>20</sup> However, more importantly for the purposes of this review and as in legal dogmatics, economic scholarship provides explanations about the reasons for competition law reform, and assesses its roles and outcomes in transforming the Brazilian state, economy and society.

In the next two subsections, I will identify what are the underlying narratives about competition policy reform in Brazil that can be found in legal and economic scholarships. The sources I will resort to in order to depict these narratives are legal treatises, economics textbooks, and articles published by lawyers and economists in specialized journals and books.

### 1.2.1 *Necessity, evolution and modernization*

A first trend that can be identified in the narratives of legal and economic scholarship concerns the descriptions of how and why the 1990s reform of competition policy occurred. Almost every legal textbook, as well as many doctrinal articles specialized in competition law and economics start with a historical reconstruction of antitrust policy in Brazil. As in institutional narratives, most authors locate the origins of Brazilian competition policy in the

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<sup>20</sup> Exemplary of the divergences within economics with respect to competition policy is the historical divide between the Harvard and the Chicago schools. Originating in the 1950s, the so-called Harvard, or structural school proposed the Structure-Conduct-Performance framework for analyzing the effects of concentrations. In this view, concentrated economic structures are “the principal determinant of anticompetitive behavior and poor economic performance” (Hovenkamp 2010, p. 2). Antitrust policies derived from this framework are “mostly concerned with the increase of concentration and with the presence of barriers to entry” (Gama and Ruiz 2007, p. 235). Chicagoan antitrust economics brought economic efficiency to the forefront of competition policy, and developed “a more general argument that vertical ownership and contract integration should be lawful per se, with perhaps an exception for practices shown to facilitate horizontal collusion” (Hovenkamp 2010, p. 3). The Chicago school thus breaks with the structuralist paradigm, sustaining that concentration “is not bad per se, as long as it is seen in terms of economic efficiency” (Gama and Ruiz 2007, p. 235).

late 1930s, and identify several historical points of inflection that depict reform as a process of “evolution”.<sup>21</sup> In comparison to the institutional official history, what is different in the narratives of lawyers and economists is that the antecedents for the 1990s reform, its motivations and later development receive a more sophisticated and contextualized treatment.

In narrating the history of competition policy prior to the 1990s reforms, legal scholars and economists view this arena of regulation as a tool of interventionism, especially from 1938 until 1962, or as being jeopardized by it, notably after the military coup of 1964. Before the 1990s reforms, antitrust policy is depicted as an instrument of political clashes between domestic aspirations and foreign corporations (Forgioni 2005), a more “ideological than descriptive” form of regulation (Nusdeo 2002, p. 218).<sup>22</sup> Even with the establishment of a “fully functioning competition authority” by the 1962 law (Todorov and Torres Filho 2012, p. 217), competition policy is said to have served the purposes of governmental economic policy of the military regime, strongly based on intervention and facilitating the concentration of national capital. The economists Considera and Correa (2002) identify an “ideological climate” historically incompatible with the development of competition policy prior to the 1990s, as it favored negotiation among firms, state interventionism and import substitution. Through price control mechanisms, the government is said to have stimulated economic concentration and agreements among competitors, rendering unfeasible the “logics of competition” (Salgado 2004, p. 362).

Similarly to institutional descriptions, legal and economic scholarship approach the 1990s reforms as a step in a historical evolution of antitrust policy motivated by a “need” for the state to adjust to a new economic context. Moreover, it is depicted as an expression of institutional modernization, of evolutionary rupture with the preceding years of

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<sup>21</sup> Nusdeo, for instance, tells the story of the “evolution of antitrust legislation” in Brazil as a struggle for the “protection of the popular economy” in which the initial landmark of this history would be in 1938, when Decree 869 was enacted (Nusdeo 2002, p. 218). Todorov and Torres Filho (2012) point to a “first phase” of competition policy in the period between the 1930s and 1962, followed by other four stages. In telling the history of competition policy in Latin American countries, Peña (2006) divides it into three periods, the first being between the 1920s and the 1980s. Nascimento (2012) narrates competition policy in Brazil as a development in four moments: from the 1930s to the 1960s, from the 1960s to the 1990s, from the 1990s to the first decade of the years 2000, and since 2011, when the new antitrust law was enacted. Similar periodizations can be found in Forgioni (2005), Considera (2005), Considera and Correa (2002), Aguillar and Coutinho (2012), and Oliveira and Konichi (2006).

<sup>22</sup> Forgioni mentions the existence of strong reactions to antitrust policy during that time: the US government would have opposed the adoption of competition policy in Brazil, classifying the 1945 act as “an act of economic nationalism that discouraged the arrival of foreign capital to Brazil”, and some local oppositionists classified it as a “Nazi-fascist” legislation that threatened the economy (2005, p. 120-122). In the same line, Todorov and Torres Filho say that the 1945 law was surrounded by the political opposition to Vargas’ nationalistic project, and motivated fears “of the possibility that the new law could be used as an instrument against opposing political groups” (2012, p. 215).

interventionism. Several illustrations of these narratives can be identified in legal dogmatics, L&D literature and economic scholarship. In the book edited by Naím and Tulchin (1999), for instance, several articles discuss the competition policy reform as a component of the “modernization” of Latin American countries in the 1990s. Similarly, Gerber (2010, Ch. 7, Sec. D, Topic 3) claims that with the shift of economic policy induced by liberalization and privatizations, competition “replaced governmental control as the basis of economic policy, [and therefore] law to protect competition would appear to be an obvious focus of government efforts to move in the new direction”. In a similar line, Forgioni (2005, p. 141-142) explains the initiatives of reform in the 1990s as “necessary [tools] to avoid the dysfunctions and crises that could be caused by the behavior of free economic agents in the market”. For Nusdeo (2002, p. 156), globalization implied the “need” for both corporations and national legislation to “adapt” to “new patterns”.

In analyzing competition law reform in Latin America, Peña stresses that liberalization policies and structural adjustments did not prove to be “sufficient to achieve the desired development”, so competition policy became a necessary instrument (2006, p. 737). Brazil is given as an example of a country that “modernized” its existing legislation due to a “need to counter-attack the effects of privatizing monopolies” (Peña 2006, p. 737). Reforms would reflect a “consensus” among Latin American governments that competition policy was needed as a “safeguard of the gains brought by economic liberalization” (Peña 2006, p. 738).

Although legal dogmatics stresses political opposition to antitrust policy as a constant from the 1930s until the 1960s, conflicts surrounding the 1990s reforms are exceptional in its narratives. Nascimento (2012), for instance, indicates the existence of some turmoil in Congress and with market agents when the 1994 legislation was being discussed. Martinez (2011) also reports that the law was intensively debated in Congress. While it enjoyed great support from the Executive, it was received in a “dubious form by businessmen”, even being accused of “installing economic terror” by some market agents (Martinez 2011, p. 41).

L&D scholars offer an even more contextualized view, as they point to the creation of a competition authority and regulatory agencies as illustrations of a new legal and institutional framework that emerged with neoliberalism<sup>23</sup>. The neoliberal period is said to be characterized by the “universalization of a set of institutions”, a convergence around market-centered institutional arrangements founded on the pillars of privatization and regulatory

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<sup>23</sup> Between 1994 and 2001, several regulatory agencies were created in Brazil, in the sectors of electric power (ANEEL), oil & gas (ANP), telecommunication (ANATEL), health surveillance (ANVISA), health insurance (ANS), water (ANA), water transport (ANTAQ), and land transport (ANTT). In 2005, an agency to regulate the aviation sector was also created (ANAC).

institutions (Schapiro and Trubek 2012, Trubek 2006, Trubek forthcoming).<sup>24</sup> Although neoliberal transformations were mostly articulated through the establishment of strong private law regimes to support transactions, instead of a large amount of public law, “some public regulation was necessary to support the market” (Kennedy 2006, p. 132), of which antitrust law is depicted as exemplary. Through reforms, Brazil is said to have adopted “the US model of regulatory agencies to supervise and enforce post-privatization rules and to introduce competition in natural monopolies” (Trubek et al 2013, p. 286). As a “stage of the wider process through which the roles of the state were reduced”, the “adoption of antitrust in Brazil” implied a shift from a key-mechanism of economic coordination of the developmentalist state: the instruments of price control (Aguillar and Coutinho 2013, p. 143).

Narratives of reform as part of an evolutionary and modernizing process can also be found in economic scholarship<sup>25</sup>. In Salgado’s view (1997, p. 160; 1993), “the redefinition of an antitrust policy is simultaneously a process of modernization of the state and modernization of the economy”. The enactment of the 1994 law would have put Brazil in a condition similar to that of more developed countries (Gama 2005, p. 16; Considera 2005, p. 21). The modernization of antitrust legislation was a landmark in “the microeconomic level of state intervention”, and would have “anticipated the process of state reform” undertaken by the Cardoso administration (Salgado 2004, p. 365).

Another indicator of such an evolutionary perspective to explain legal reform is how it narrates the changes brought by the 2011 law. This latest reform would have *enhanced* the system and corrected some problems of the regulatory model inaugurated in 1994. Martinez, for instance, maintains that despite the “notorious advances” in competition policy since the 1990s, experience evidenced the need for “legislative enhancements” (2011, p. 56). The reform that ended with the law of 2011 would have been result of this need. In legal dogmatics it is often mentioned that one of the most important novelties brought by the recent law was the institution of a prior notification process by which mergers can only be closed after CADE’s approval. Until then, Martinez stresses that Brazilian competition policy had a

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<sup>24</sup> In this view, from the 1930s until the mid-1980s, the preceding years of neoliberalism, Brazil was under a “classic developmentalist phase”, in which the state was actively present in the economy “through state-owned enterprise, in industrial policy, economic planning, price control, regulatory and administrative authorities in key sectors, and use of tax and financial incentives” (Trubek et al 2013, p. 282).

<sup>25</sup> In this respect, Prado (2012, 2013) provides a dissonant account about reform in comparison to most of economic scholarship. In this author’s view, the reform of the 1990s was as part of a development agenda of neoliberal inspirations (Prado 2013, p. 6) that created a “public system that would be functional to a new market friendly economic order” (Prado 2012, p. 98). In the forthcoming chapters, I will sustain a similar hypothesis, exploring in detail some of the data Prado offers as evidence of the connection between the reform of competition policy and neoliberalism in Brazil.



particular post-closing notification system that placed the country with only Egypt and Pakistan among the more than 90 countries with merger control regimes (Martinez 2011). The change is often described in legal doctrine as the solution of a problem of the 1994 law.<sup>26</sup> Martinez (2011, p. 67), for instance, commemorates the fact that the “time for instituting a system of previous control of mergers has finally arrived in Brazil”, and Todorov and Torres Filho describe it as “Brazil join[ing] more traditional jurisdictions” (2012, p. 244).

Also, if the narratives of lawyers and economists relate the inefficacy of competition policy of interventionism and authoritarianism, reform is linked to democratization. Martinez (2011, p. 35) explains the 1990s reforms within the spectrum of the 1988 constitution, which is said to have inaugurated a new context in which “free competition” became one of its core principles. Gerber proposes an even stronger link, explaining that democratization *enabled* the creation of competition law because it “provided a vehicle for consumer interests to play a greater role in the formation of economic policy” (Gerber 2010, Ch. 7, Sec. D, Topic 3).

### 1.2.2 *Success and effectiveness*

A second trend that can be observed in the knowledge produced by lawyers and economists concerns how it assesses the roles and outcomes of competition policy since the 1994 reform, i.e. how it narrates what are the functions of this regulatory system in transforming the state, the economy and society. There is recurrent evaluation of the roles performed by Brazilian competition policy in terms of its success and effectiveness. In legal scholarship, competition policy is mostly assessed as a successful enterprise, despite some episodic “mistakes”. For Martinez (2011), for instance, the 1994 reform meant the shift from a system based on the protection of the popular economy “disguised under the name of ‘competition’ in the period 1962-1988” into a “true promotion of competition” (2011, p. 42). Peña states that the reformed regulatory regime brought “economic efficiency and consumer protection as their main goals” (2006, p. 738). In doing so, the Brazilian system of competition defence was “created de facto”, “finally organized and consolidated” (Peña 2006, p. 740). Together with a “propitious environment”, the application of new concepts brought by the 1994 law, such as that of economic efficiency, meant a true “revolution of antitrust in Brazil” (Martinez 2011, p. 42). Schuartz (2009, p. 8) puts forward a similar understanding,

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<sup>26</sup> For most authors of legal dogmatics, an a posteriori system of notification such as that instituted by the 1994 law presents many problems: parties have low incentives to provide information to the antitrust authority, and the longer it takes to analyze, the harder it is to implement structural solutions (Martinez 2011, p. 56).

stating that the 1994 law initiated an “evolutionary process” with “reasonably satisfactory” results in comparison with the international experience and the performance of other regulatory agencies and the Judiciary.

Legal scholarship often maintains that competition policy has been successful in Brazil, contributing to the constitution of a competitive economy and to the protection of consumers. There are multiple examples of such narratives. Martinez emphasizes that although competition law is not necessarily central in promoting a competitive economy, it has played an accessory role in constituting the “the current level of competition in the Brazilian market” (2011, p. 24). Del Chiaro and Pereira Jr., for instance, maintain that since 1994 competition policy has achieved its objectives, as “competition policy demonstrated that it can minimize losses for consumers and, at the same time, be compatible with the reality of a developing country, in which state action to induce certain markets is essential” (2012, p. 67). The linkage between competition policy and consumers is a recurrent theme in legal dogmatics. The protection of consumers is seen “an important parameter in modern antitrust legislation” (Nusdeo 2002, p. 246). Although legal scholarship recognizes that there are different views on the relation between consumer protection and antitrust, the Brazilian model is seen to have privileged a view in which consumers’ interests are harmonized with the increase of productivity and innovation, and with an efficient allocation of resources (Nusdeo 2002, p. 249). In this reform model of regulation, consumers are the “immediate stakeholders of competition rules”, and together with competitors they are the subjects protected by the “competition system” (Salomão Filho 2007, p. 82-87).

L&D scholarship also identifies the law of 1994 as a landmark, as it would be an innovative antitrust legislation that for the first time in the country’s economic and legal history was actually “in effect and truly enforced” (Aguillar and Coutinho 2013, p. 143). Similarly to institutional and legal-dogmatic narratives, L&D states that although the Brazilian antitrust authority existed since 1962 and could regulate anti-competitive conduct, it was only in 1994 that CADE was granted the jurisdiction to control mergers and acquisitions<sup>27</sup>. It was thus from this moment on that a modern framework of “competition was fostered and enforced” (Trubek et al 2013, p. 283). To L&D authors, this move illustrates a shift in the role of law and the state: from “molding and boosting” an import-substitution economy and directly coordinating economic actors, to “strengthening competitive markets”

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<sup>27</sup> A distinct view within legal scholarship is presented by Shieber (1966, p. 165), who analyzed the 1962 competition act and already identified in it a provision to regulate concentrations, although according to him it was never implemented, once the law did not impose the mandatory submission of mergers and acquisitions to CADE’s rule.

and “stimulating private investments” through fiscal equilibrium, calculability and economic efficiency (Aguillar and Coutinho 2013, p. 140-142).

Although often more empirical than lawyer’s accounts of the roles and outcomes of competition policy, narratives of success and efficacy also permeate economic scholarship. Brazilian competition policy is often seen as autonomous from political influence and as producing results according to international standards. Salgado, for instance, sees competition policy inaugurated by reform as producing “good results” (2004, p. 376). In analyzing decisions of merger reviews between 1994 and 2002, this author notes that 5% of operations suffered some kind of restriction by the Brazilian competition authority, “an intervention pattern that can be observed in countries with antitrust experience” such as OECD members (Salgado 2004, p. 367). In a study of CADE’s decisions on Administrative Proceedings between 1991 and 1993, i.e. under the laws enacted in 1991 (the first initiatives of reform), Salgado (1997, p. 151) maintains that the results of the reformed competition policy indicate “notable political autonomy”. Similarly, Prado asserts that once the law of 1994 was the “most complete, encompassing and efficient legislation of Brazilian competition defence”, “reforms created the legal bases for and effective action of the State in imposing limits to economic power” (2012 p. 112-116).

Some criticisms of how CADE actually regulates the economy can nevertheless also be found in legal and economic scholarship, often in the form of what constitutes a “correct” or “incorrect” decision. Todorov and Torres Filho argue that although since reform CADE has adopted rigorous criteria in the requirements for notifying mergers, it has applied “none in the material review of cases”. Forgioni, for instance, sees that some decisions by the end of the 1990s authorized a high level of concentration in certain markets, consolidating the image of CADE as a “political tribunal” with low credibility (2005, p. 144). Despite this behavior, she also detects a “contiguous line of activity” in CADE’s decision-making, in which the work of the organs that compose the SBDC has “contributed to increase the diffusion of a competition culture in the country” (Forgioni 2005, p. 144). Similarly, Nusdeo states that CADE’s decisions “have not always been characterized to be correct” (2002, p. 270), and especially during the first 5 years under the law of 1994 it demonstrated an “effort to discharge itself from the attributions related to the prevention of excessive concentration of the market without, however, impeding the exercise of free initiative by economic agents directed to obtaining efficient operations” (2002 p. 258).

Whether they are critical or apologetic of the outcomes produced by CADE, lawyers’ narratives about the outcomes of competition policy rarely have systematic empirical

foundations, and are at best anchored on what they claim to be emblematic cases. Nusdeo, for instance, maintains that CADE privileges the “protection of competition and consumers” (2002, p. 273) based on seven “important cases”, as well as on quotes from policymakers that are taken to be “illustrative” of how competition law is practiced. Todorov and Torres Filho point to CADE’s lack of rigor in a certain period by mentioning two examples of cases that “although leading to a significant market concentration, were approved by the authorities with minor restrictions” (Todorov and Torres Filho 2012, p. 236).<sup>28</sup>

Another relatively well settled consensus in the narratives of lawyers and economists is that due to reform, decisions have become very technical, insulated from political influence (Del Chiaro 2012, p. 68; Campilongo 2012, p. 34; Martinez 2011, p. 45). Several reasons can be found in legal dogmatics to explain what is seen as a “successful” form of decision-making and its “satisfactory quality of enforcement” (Schuartz 2009, p. 9): the institutional design of the 1994 law, which is seen to have promoted the depoliticization of antitrust policy, and the “good will” of those responsible for appointing the members of the SBDC (Schuartz 2009, p. 8), as well as the extensive use of economic science in decision-making (Nusdeo 2002, p. 258)<sup>29</sup>. The influence of economics and economists is considered to have implied a true “revolution” in competition policy-making (Mattos 2003, 2008)<sup>30</sup>.

Such a generally positive evaluation of the performance of competition policy in Brazil since the 1990s is stable over time, even though the political and economic context

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<sup>28</sup> A possible exception to this pattern of unsystematic empirical claims based on selected cases that can be found in legal dogmatics is Martinez’s (2011) analysis of historical data about CADE’s decisions on merger reviews. Based on a time series of the types of decisions from 1994 to 2010, she identifies “significant advances since 1994” in competition policy, stating that in the initial years after reform CADE would have focused on regulating “big concentrations” with the objective of diffusing merger control. However, her work does not provide much detailed information about the substantive outcomes of CADE’s decisions on the economy – a topic that will be central to understanding the role of competition policy reform and practice in Brazil.

<sup>29</sup> Schuartz (2009) provides a set of hypotheses to explain such “successful” forms of scientific rather than political decision-making: first, lack of political interest in competition policy, its organizational isolation and the lack of effectiveness in the previous period protecting the construction of this arena of public policy from an “intrusive and structuring control of the Judiciary”; second, since there were no “decisionary patterns rooted” in Brazil due to the absence of an effective competition policy prior to the 1990s, “vanguard foreign authors” (especially of economic science) were “transplanted” into the Brazilian competition regulation without much resistance; third, the presence of economists (in the role of authorities or as private consultants) facilitated the importation of “scientific theories” of decision-making.

<sup>30</sup> The idea that the extensive use of economic science in antitrust policy implied a “revolutionary” transformation is inspired by the work of two American economists, Kwoka and White (2008). In 1989, these authors published a book entitled “*The antitrust revolution: the role of economics*”, now in its fifth edition, in which they assess the growing incorporation of economic concepts and methods in competition policy in the US. The evaluation is mostly positive. Mattos (2003, 2008) has developed the same effort in two collections entitled “*The antitrust revolution in Brazil*”. Similarly, the “revolution” is seen as an enhancement of competition policy. A less optimistic vision about the use of economics in CADE’s decisions is an empirical study conducted by economists Gama and Ruiz (2007). Based on a sample of decisions made between 1994 and 2004, the authors identify a fragile, “heterogeneous and not so rigorous application of antitrust theory in decision-making” (Gama and Ruiz 2007, p. 256).

might have changed, as some scholars recognize. Peña, for instance, compares two periods of the history of competition policy in Latin America: the 1990s reform is seen as part of a period defined by the liberalizing measures of the Washington consensus, and since the 2000s a “post-Washington consensus” stage would have begun. In this later period, motivated by the “population’s great disappointment with the region’s development and wealth distribution”, new governments were elected, and competition policy changed in most parts of the region (Peña 2006, p. 732). Compared to the 1990s, it would have become “more flexible and politically driven” due to the “introduction of non-traditional concepts, [and the] weakening of the institutional framework” (Peña 2006, p. 745).<sup>31</sup> Motivated by the “greater government presence in the market”, it would have provoked a “setback of competition policy in the region” (Peña 2006). Brazil, however, is an exception to this politicization<sup>32</sup>. To Peña, “competition policy was reinforced after the 2003 change of government”. In Todorov and Torres Filho’s view, since Lula’s election in 2003, despite the government’s inclinations to industrial policy and a more interventionist profile of economic policy, antitrust was not undermined, but was actually “strengthened” (2012, p. 228). Exemplary of this reinforcement is the shift of focus toward cartels, the adoption of concepts imported from the US and a closer interaction with that country (Peña 2006, p. 746).

The emphasis on cartels (rather than on mergers and acquisitions) is a recurrent element pointed by lawyers and economists as evidence of the consolidation of Brazilian competition policy in time. For economist Salgado, emphasizing the attack on cartels at the beginning of the 2000s is a sign of considerable “advances in the construction of a competition culture”, following a “world trend”, especially of OECD countries (2004, p. 373). Instead of undermining competition policy, the change of “enforcement priorities” in this period would have thus “rais[ed] the profile of the antitrust law in the eyes of the business

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<sup>31</sup> Examples of what Peña calls “non-traditional concepts” that would have been infused in competition policy since the 2000s are “social and labor considerations” such as unemployment, “national interest”, and “strategic interest” (2006, p. 753). The “institutional weakening” would in turn encompass “budget reduction, institutional reforms and politically driven appointments, forsaking the technical expertise acquired in the past decade” (Peña 2006, p. 748)

<sup>32</sup> In Peña’s view (2006), together with Brazil, Chile would also represent an exception of this trend of politicization in the “post-Washington consensus” period. Argentina, Mexico, Peru and Venezuela would in turn present some elements of politicization or institutional weakening identified by the author. Gerber (2010, Ch. 7, Sec. D, Topic 3, a) provides a slightly different view of the so called “post-Washington consensus” period, maintaining that the effort to develop “a market economy that is embedded in Brazilian society”, initiated with Lula’s election in 2003, would have “positioned competition law politically”. In his narrative, however, although competition policy is “serving the interests of the entire society, and controlling mergers and preventing competitive abuses by dominant firms, especially those from outside Brazil” (Ch. 7, Sec. D, Topic 3, a), no dramatic shifts can be identified. Rather, it appears as another stage in its historical development.

community, the general public, and other government agencies” (Todorov and Torres Filho 2012, p. 209).

In the narratives of law and economics, competition policy inaugurated by the 1990s reform has thus been a successful and effective enterprise in promoting competition, consolidating throughout time with no major setbacks. Similar narratives can be found in how international organizations evaluate the Brazilian experience, such as the “peer reviews” produced by OECD and the Inter-American Development Bank (OECD 2005, 2010), and in how lawyers and economists describe the construction, diffusion and roles of competition policy in different countries (e.g. Fox 2001, Kovacic 2001, Naím and Tulchin 1999).

### **1.3 Diffusion perspectives**

The third source of narratives about the reform of competition law entails studies that can be seen as “external” to this policy domain, as they do not emanate from the institutions responsible for its production and reform, or from the fields directly involved in the professional practice of competition policy. These are what Türem (2010, p. 20) defines as “‘social scientific’ works on independent regulatory agencies and regulation”, “beyond the ‘technical’ world of law and economics”. They are part of what can be seen as a body of research of “diffusion perspectives” on regulatory reforms.<sup>33</sup>

Dobbin et al (2007) offer a useful summary of the defining characteristics of this literature, as well as of the major theories often mobilized by it. Diffusion perspectives seek to explain how and why a variety of “policy innovations” – “from the protection of women’s rights to tariff reductions to privatization” – have “spread around the globe in the last half century” (Dobbin et al 2007, p. 450). Institutional and legal reforms are approached within a framework that places it as part of a “wave of [global] diffusion” (Dobbin et al 2007, p. 50).

Four major theories are often mobilized to explain the diffusion of institutions and public policies worldwide. They construct explanatory models of reform that emphasize different “mechanisms” of diffusion. Constructivist perspectives focus, for instance, on the changes in ideas as an explanation of diffusion (Dobbin et al 2007, p. 454). In this view, the role of expert groups in formulating and spreading policy regimes is a key element. Illustrative of such works are the notion of “epistemic communities” in, for example, Haas

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<sup>33</sup> As referred to in footnote 1, my review of the streams of narratives available to understand competition policy reform builds on Türem’s (2010, p. 21), including what he identifies as a “diffusion approach”: “the intellectual home of the many works that aim to understand the spread of regulation and regulatory agencies, including competition laws and agencies”. This is a “new orthodoxy” that has “not only become an academic literature”, but also “constitute[s] a sub discipline” with its own specialized journals (Türem 2010, p. 99).

(1992) and Sikkink (1993), and DiMaggio and Powell's (1987) idea of "normative isomorphism" – the role of experts in advocating policy norms leading to convergence around certain institutions and practices. The focus tends to be on how "global groups of experts" and networks engage in deliberating "what kinds of states should adopt what kinds of policies" (Dobbin et al 2007, p. 453).

Another mechanism often present in diffusion perspectives is coercion, or "coercive isomorphism" (DiMaggio and Powell 1983). It explains diffusion as a result of coercion from powerful countries, organizations (such as the World Bank, the International Monetary Fund, and the European Union) and ideas. Diffusion occurs because of "the influence of an external source of pressure or ideas" (Dobbin et al 2007, p. 457). Powerful actors give incentives to less powerful ones to adopt certain policies. Incentives may come in the form of conditionalities, policy leadership, and "hegemonic ideas" (Dobbin et al 2007, p. 455-456).

Economic competition entails another explanation for the diffusion of public policies. In this view, diffusion occurs because countries compete in the world economy. The main idea is that governments adopt certain policies to become more attractive for investment and more competitive in the global economy (Dobbin et al 2007, p. 457). The agents of diffusion are "well-informed governments vying for a fixed quantity of trade or investment" (Dobbin et al 2007, p. 458). A fourth recurrent emphasis of diffusion perspectives is learning, i.e. when policy adoption is not a mere imitation, but occurs due to actors' "beliefs about cause and effect change" (Dobbin et al 2007, p. 460). Governments learn from each other, and in doing so, they identify policies to be adopted. The assumption is similar to the economic competition framework: there is a rational government evaluating possible policies, a "cost-benefit" analysis (Dobbin et al 2007, p. 463).

Several studies have applied such a diffusion perspective, emphasizing different theories or mechanisms, to explain institutional reforms in economic regulation dating from the 1990s. These are works mostly conducted by political scientists (Jordana and Levi-Faur 2004a, 2004b, 2005, Jordana et al 2011, Levi-Faur 2005) and sociologists (Braithwaite 2005, 2008), which approach legal and institutional reforms of economic regulation as phenomena of policy diffusion. They provide explanations about why and how occurs what they identify as a convergence of several countries around certain institutional and legal arrangements. The creation and reform of institutions for economic regulation such as competition agencies constitute one of the main empirical focuses of these investigations.

Although the emphasis of this body of research is on explaining how reforms occur, they also end up describing its roles, even if tacitly. In this section, I review the narratives of

diffusion perspectives about competition policy in the two dimensions explored in the previous streams: how reform occurs, and what are its outcomes.

### 1.3.1 *Reform as diffusion*

Diffusion perspectives interested in the study of economic regulation seek to explain the institutional reforms of the state in the 1980s and 1990s, taken as the “changing relations between the economy, society and politics in late-modern societies” (Levi-Faur 2005, p. 20). Compared to institutional narratives and legal and economic scholarship, they can be called properly theoretical as regards how reform is approached, since they deploy a schematic, hypothesis-based research design. The “dependent variable” is the emergence (or reform) of regulatory agencies and competition authorities. Diffusion scholars attempt to assess the role of several factors that propel the proliferation of regulatory reforms (Jordana et al 2011). In doing so, they construct causal models, often through quantitative methodologies (Dobbin et al 2007, p. 450), to assess correlations between the occurrences of reforms and factors that might explain it.

Competition policy reform appears in these narratives as part of a phenomenon of a “global regulatory explosion”, or a “regulatory revolution” intensified since the 1980s (Levi-Faur 2005, p. 24-28). Together with regulatory agencies, competition law would have spread globally, exported from “Occidental state structures to the rest of the world” (Jordana and Levi-Faur 2005, p. 119). Evidence of such diffusion is identified in the enactment of laws creating or reforming regulatory agencies and competition authorities in the period. Jordana and Levi-Faur (2005), for instance, identify the growth of new regulatory authorities by analyzing the creation of these institutions across nineteen Latin American countries and twelve sectors of regulation, among them competition policy. While before 1979 there were only 43 regulatory authorities in the region, the number grew to 138 by 2002 (Jordana and Levi-Faur 2005, p. 103). Such spread is also detected in respect of competition law taken separately. Aydin (2010) and Braithwaite (2008) note that while in the 1980s not much more than 20 countries had enacted competition laws in the world, in 2009 there were 107. The growth is specially relevant until the year 2000, when the number of countries with competition laws rose to 80 (Aydin 2010, p. 55; Braithwaite 2008, p. 20). In regional terms, the growth was more intense in Europe, Asia and in the Americas. In this last region, while in 1980 around 20% of the countries (including the US and Canada) had competition authorities



in place, in the 1990s the proportion more than doubled, reaching 50% of countries in the year 2000 (Aydin 2010, p. 56).<sup>34</sup>

Going beyond the detection of a global spread of regulatory and competition agencies, diffusion perspectives seek to explain it, i.e. to identify the “logic of diffusion” behind reforms (Jordana and Levi-Faur 2005, p. 108), with a particular interest in Latin America. Diffusion perspectives relate the spread of regulatory mechanisms in the region to several reasons. In consonance with the evolutionary narratives of the previous streams, the “consolidation of a new convention” would have motivated diffusion: there is seen to be a global consensus that this model was a more “appropriate” form of economic governance (Jordana and Levi-Faur 2005, p. 103), an alternative to bureaucratic forms of government (Jordana et al 2011, p. 1344), such as those of the developmental state. In this sense, the establishment of regulatory and competition agencies would constitute another stage of the capitalist development, in replacement of the “police economy” of the 18<sup>th</sup> century, the 19<sup>th</sup> century laissez-faire or liberal economy, and the 20<sup>th</sup> century provider state (Braithwaite 2008). State crisis in the 1970s, induced by high debt and hyperinflation, is said to have given the impulse for Latin American governments to promote a shift toward a different type of state relation to the economy (Jordana and Levi-Faur 2005, p. 106). Also, similarly to legal and economic scholarship, democratization and measures of economic liberalization (such as privatization) that arose in the 1980s are seen to have paved the way for the establishment of new institutions of economic governance (Jordana and Levi-Faur 2005, p. 106). Moreover – and again similarly to legal and economic scholarship – privatization is said to create the “need” for regulation (Braithwaite 2005, p. 9), since “efficient markets may require not only strong regulatory frameworks but also efficient ones” (Levi-Faur 2005, p. 14).

Within this context, diffusion scholars present theories to explain how the spread of regulatory institutions occurs. Jordana and Levi-Faur (2005), for instance, deploy a statistical analysis of the factors that account for the creation of regulatory institutions in Latin America, such as the local conditions of countries that undertake it (“economic wealth”, political characteristics, size, among others), and the economic sectors affected. These authors sustain

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<sup>34</sup> The attention to the global spread of competition policy is certainly not exclusive to diffusion perspectives. Sassen (2008, p. 236), for instance, whose sociological work can hardly be placed within this paradigm of research, has emphasized that the spread of competition policy from its original context (the US) has historically accompanied the opening of markets in new regions – since the first half of the 20<sup>th</sup> century, as part of the post-war reforms in Germany and Japan, within the agenda of “reinsertion” of former Soviet countries into the international market, and in the dismantlement of developmentalist states, especially in Latin America in the 1980s and 1990s. Also the economist Palim (1998, p. 109) produced an empirical study based on quantitative analysis to explain the worldwide growth of competition laws, where he notes that “61% [of the laws] date from 1990 or later, and 79% date from 1980 or later”.

that international conditionality is not decisive in diffusing regulatory and competition agencies, and identify that privatization is correlated to its creation, as well as that national and sectorial mechanisms have a role in explaining diffusion (Jordana and Levi-Faur 2005, p. 117-118). Gilardi et al (2006, p. 142) also apply statistical analysis to argue that the competition for capital triggers regulatory reform, as countries want to “improve their credibility in domains where attracting private investment is important, that is, in economic regulation in general”. Dobbin et al (2007, p. 452) place the reform of competition law as an example of how certain countries “mimic” others when they perceive a certain policy as a reason of good performance.

To explain how such consensus around competition policy travelled throughout the world, diffusion literature has also focused on the role of international and transnational actors and networks. The emphasis here is on the mechanisms of normative isomorphism as an explanation for how reform happens, i.e. the role of experts and professionals in promoting competition policy reform and inducing global convergence. International organizations such as the OECD, UNCTAD, the IMF, and the World Bank are said to have crucial roles in diffusing competition law, mainly through technical assistance to developing countries (Braithwaite and Drahos 2000; Braithwaite 2008, p. 19). International law firms would have also been key-actors in spreading competition regulation. According to Morgan (2006), for instance, the fast diffusion of competition law is related to the internationalization of law firms in the 1990s. Transnational networks of experts and competition authorities such as the International Competition Network and the Global Forum on Competition (Aydin 2010; Djelic and Kleiner 2006), as well as “epistemic communities” of trained legal officials (Waarden and Drahos 2011; Jordana and Levi-Faur 2007; Gilardi et al 2006), are also identified as potential forces mobilizing the spread of competition law and promoting convergence.

If compared to legal and economic scholarship, the focus of diffusion perspectives on mechanisms of spread provides a schematic, theoretically driven and empirically grounded view of how reforms happen. The reform of competition policy in a specific context such as Brazil is connected to a broader social phenomenon of global dimensions. Whatever the mechanism emphasized by this body of research, the core statement about the reform of competition policy underlying diffusion perspectives is that the enactment of laws creating regulatory agencies and competition authorities in a variety of countries is part of a process of global diffusion of regulation.

### 1.3.2 *Regulation versus neoliberalism*

In this body of literature, and similarly to the other streams of narratives analyzed, the wave of reforms in the 1990s is part of the diffusion of a model of economic governance that substituted previous state forms, such as the old developmentalist state existent in Latin America (Jordana and Levi-Faur 2005, p. 106). The result of spreads has received different names in diffusion perspectives. Some authors locate the impacts of policy and institutional diffusion on the state sphere, identifying the rise of a “regulatory state” due to the shifts which occurred in the 1980s and 1990s (Majone 1993). Others call attention to the broader spectrum of “regulatory” novelties, and advocate for a wider concept, such as the notion of “regulatory capitalism” (Jordana and Levi-Faur 2005; Braithwaite 2005, 2008).<sup>35</sup>

The nuances among these concepts concern the amplitude of the phenomenon they intend to describe. Although sometimes referring to a narrower concept such as “state”, or to a broader idea of “capitalism”, diffusion perspectives have in common the emphasis on the adjective “regulatory”. This notion contains a narrative about what are the roles performed and outcomes produced by the reforms studied by this body of research as a process of global convergence.<sup>36</sup> What diffusion perspectives identify as a shift promoted by reforms toward a “regulatory” model of governance and how they describe its characteristics are in many ways similar to how institutions, lawyers and economists narrate the roles and outcomes of competition policy institutions inaugurated in the 1990s.

This narrative is embedded in how diffusion perspectives discuss the appropriateness of the adjective “regulatory” to describe the substance of the processes of spread, in contrast to the idea of “neoliberalism”. The diffusion of regulatory institutions is often taken as evidence of the inadequacy of the concept of “neoliberalism” to approach reforms of economic governance. Neoliberalism is defined as a set of institutions to promote privatization, deregulation and a diminished public sphere (Braithwaite 2008, p. 05). The changes implied by the reforms of the 1980s and 1990s are “commonly captured in the

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<sup>35</sup> Coined by Jordana and Levi-Faur and endorsed by Braithwaite (2005, 2008) this concept is presented as encompassing the idea of “regulatory state” (Levi-Faur 2005, p. 13). It is proposed as a “better” term because it entails not only regulation produced by the state, but also non-state regulation, and regulation of the state (Braithwaite 2008, p. 21).

<sup>36</sup> The authors I am here placing as representative of diffusion perspectives maintain that diffusion is “defined by the process of adoption rather than the similarity of outcomes”, and even that “[...] diffusion as a process should be separated from the outcomes that it may or may not produce” (Jordana et al 2011, 1346-1347). However, in this section I argue that despite their claim to solely focus on the *process* of diffusion (or reform), this body of research ends up producing a narrative about the *roles* and *outcomes* of the institutions that are spread.

notions of privatization and deregulation, and understood as the outcome of the rise of neoliberalism and the sweeping forces of economic globalization” (Levi-Faur 2005, p. 12).

However, the spread of regulatory agencies and competition authorities through legal and institutional reforms and the consequent “expansion in the regulatory capacities of the state” are said to be indications of “significant regulatory components that go largely unnoticed and that are incompatible with either neoliberalism or economic globalization” (Levi-Faur 2005, p. 12). The diffusion of regulatory reforms would therefore pose a “paradoxical” situation: that neoliberalism is actually the “era of regulation” (Gilardi et al 2006, p. 127). Rather than the “retreat of the state” or “the consolidation of a neoliberal hegemonic order” (Levi-Faur 2005, p. 27), the worldwide diffusion of regulatory agencies is therefore seen as evidence of the non-neoliberal character of the period (Gilardi et al 2006, p. 127). In this context, the concept of neoliberalism would thus be incapable of capturing the series of institutional changes entailed by the diffusion of regulatory agencies in the 1980s and 1990s (Levi-Faur 2005, p. 13).

In diffusion perspectives, the notion of neoliberalism would not be an “analytically insightful” or “useful way of describing what was happening during a passing moment” (Braithwaite 2008, p. 10), even constituting a “fairytale” that has never become an “institutional reality” (Braithwaite 2005, p. 2). Since neoliberalism promotes deregulation only at an “ideological level”, while at the “practical level” it produces or is accompanied by regulation, “the new global order may well be most aptly characterized as “regulatory capitalism” (Levi-Faur 2005, p. 14).

In narrating the spread of regulatory mechanisms as evidence of the non-neoliberal character of the 1990s reforms, diffusion perspectives therefore affiliate with a “revisionist literature on the impact of neoliberal reforms”, “challenging the notion of neoliberal change and the consolidation of a neoliberal hegemonic order” (Levi-Faur 2005, p. 13-14). The debate around the best concept to characterize the institutional reforms that would have diffused in the 1990s is not, however, restricted to an analytical exercise. Underlying these discussions is also a substantive claim about the roles and outcomes of regulatory capitalism. Similarly to how lawyers and economists describe the role of a reformed competition policy, this body of research produces an apologetic portrait of regulatory devices as institutions that control the market and assure its proper and “efficient” functioning.

Although some social setbacks are recognized as being associated with the institutional reforms of the 1990s,<sup>37</sup> there is an overall optimistic view about these mechanisms. The diffusion of regulatory agencies and competition policy is considered to have promoted a qualitative change in economic governance (Jordana et al 2011, p. 1361). A new “division of labor between state and society” – and “in particular between state and business” (Levi-Faur 2005, p. 15) – would have emerged with regulatory reforms. It is one in which the state and the market have different functions as parts of what seems to be one and the same “boat”: the state has the “role” of “steering”, while business has the role of “rowing” (Levi-Faur 2005, p. 15). The regulatory mode of governance would “reopen the field for a more balanced approach to the distribution of power and resources” (Levi-Faur 2005, p. 28). The result would be the conformation of a “regulatory paradigm” oriented to “balance the effects of neoliberalism” (Braithwaite 2008, p. vii), a “tool that moderates and socializes” capitalism (Levi-Faur 2005, p. 14). Neoliberalism would thus not only be incorrect in grasping reforms, but in direct tension with the phenomena of diffusion, as it is the antithesis of regulation (Braithwaite 2008, p. 08), “contrary” to “regulatory capitalism” (Jordana et al 2011, p. 1344). Especially regarding competition policy, while previous modes of economic governance are said to have “legitimized monopolies”, the new regulatory authorities that were established all over the world are committed to active promotion of competition, using modern regulatory techniques” (Jordana and Levi-Faur p. 1-2).

The “technical” aspect of regulatory capitalist constitutes another substantive claim of diffusion perspectives about the roles of the institutions inaugurated by the wave of reforms. Similarly to the narratives of lawyers and economists, this body of literature describes regulatory mechanisms as an attempt at insulation from politics. Be it the state or capitalism as a whole, an idea that permeates the descriptions offered by diffusion perspectives in defining the characteristics of “regulatory” mechanisms of economic governance is that regulatory and competition agencies represent an autonomous form of governance. Regulatory agencies, including competition authorities, are characterized as being “autonomous” from politicians, as they consolidate a delegation of power to experts (Jordana and Levi-Faur 2005, p. 103). Among several elements that define “regulatory capitalism” is “an increase in delegation (remaking the boundaries between the experts and the politicians)” and “the growth in the influence of experts in general and of international networks of experts in particular” (Levi-Faur 2005, p. 27). Despite variations across countries and sectors,

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<sup>37</sup> In Levi-Faur’s view (2005, p. 28), “the regulatory instruments and institutions that were developed in the past two decades certainly marginalized the domestic and global poor”.

regulatory agencies would constitute an “effort” to “strengthen the autonomy of professionals and experts in the public policy process, to keep the regulators at arm’s length from their political masters, and to separate the responsibility for policy making from the responsibility for regulation” (Jordana et al 2011, p. 1344). A positive evaluation is attached to the technical and non-political character of regulation. Such autonomy of regulatory and competition agencies is perceived as “encouraging to the extent that regulatory institutions have some clear advantages over ministries, and that the mere fact of reform opens new possibilities for effective governance” (Jordana and Levi-Faur 2004, p. 2).

If placed within the narratives of diffusion perspectives, the reform of competition policy in Brazil can be understood as an evolution with respect to previous forms of economic governance. The establishment of regulatory frameworks is seen as an indication of the existence of control of the market by the state, but now in a qualitatively different form: protected from politics. Within these narratives, reform is part of the diffusion of regulatory capitalism, and was motivated by a “need” for efficient markets opened by privatization. Reflecting a new division of labor between the state and the market, regulatory and competition agencies reformed in the 1990s would be therefore evidence of initiatives to counter-act neoliberalism.

#### **1.4 Assumptions and shortcomings**

In the beginning of the chapter, I announced the goal of surveying the dominant narratives available for understanding how and why competition policy reform happened within the neoliberal agenda, and what are its roles and outcomes in transforming the state, the economy and society. In this section, I summarize the similarities that can be found among the three streams identified, discuss the existence of “questionable assumptions” underlying these accounts, and assess the corresponding shortcomings they imply for the study of competition policy reform.

##### *1.4.1 Process and agents of reform*

The smooth history that underlies the narratives put forward by institutions, legal and economic scholarships as well as by diffusion perspectives to explain the reform of competition policy is not the result of a style adopted to present these discourses in the previous sections. Be it in describing the particular history of competition policy in Brazil, or

in putting reform in a broader context of global diffusion, the attempt to narrate reform as an evolutionary and modernizing process constitutes the very structure of these narratives. The reader who accesses these sources is invited to interpret the series of laws targeting competition as several steps toward an immutable objective of achieving development, and transformations of states in adapting to a new context. Often in institutional narratives and in the descriptions of legal and economic scholarships, the 1990s reform in Brazil is part of a periodization that goes back to the 1930s. It constitutes a step of institutional modernization within a “legacy” that until then did not have much concrete effect. In the same sense, for diffusion perspectives the establishment of regulatory and competition agencies appears as evidence of a new model of state that is more “adequate” to the economic context. The historical development after reforms is depicted as the continuation of a process of modernization initiated in the 1990s. Even if the political context is said to have changed in the early 2000s, as is especially acknowledged by L&D literature and some legal scholars, competition policy seems to have kept the pace of evolution, with subsequent legislative adjustments that *corrected* some *mistakes* of the 1990s reform.

Reform is also often narrated as a means to fill gaps and a necessary response to adjust to a liberalizing economy. The establishment of new institutional and legal frameworks of competition policy is said to have both enabled and been needed by economic liberalization. In institutional narratives, the 1990s reform was made “vital” due to the opening of the economy through privatizations and deregulation. Similarly, in the narratives of legal and economic scholarship, reform was a response to a “need” to control the market and safeguard the benefits brought by economic liberalization, to “counter-attack” possible “dysfunctions” of privatized markets, to “adapt” to a “new pattern” opened by globalization. Diffusion perspectives also associate reform with the liberalizing measures of the 1980s and 1990s, stating that privatization created the need for regulation, as functional markets require some sort of control. Reform is thus generally described as a logical and even “obvious” result of the new economic context, and in the case of Brazil specifically, also of the legal framework inaugurated by the Constitution of 1988.

The perception of competition policy as a necessary instrument for functional markets is often portrayed as a widespread consensus. In legal scholarship, it is explicitly mentioned that reform reflected an agreement among Latin American countries about its necessity. In diffusion perspectives, the existence of a global consensus around a “new convention” is one element that would explain the spread of regulatory and competition agencies throughout the world. Contestation of reform is absent or at best peripheral in these narratives. In

institutional descriptions, struggles during the reform process are mentioned, but seem not to have affected the institutional design that resulted from it. Similarly, although legal and economic scholarship emphasize the existence of political opposition to antitrust policy as a constant from the 1930s until the 1960s, conflicts surrounding the 1990s reforms are exceptional in its narratives. Despite such sporadic references to tensions around reform, there is no assessment of if and how they might have impacted the competition act of 1994 and the very practice of competition policy.

In such a story of evolution and necessity described by the three assessed streams, there is also an embedded narrative about the agents that propel reform. Reform is often depicted as an agentless process, or at best as driven by the “state” or groups of technical agents. In institutional narratives, the several “moments” of competition policy history in Brazil are described as a series of laws enacted in different governments. In legal and economic scholarship, competition policy reform reflects the adaptation of states or “governments” to the new forms of economic governance. In the particular case of Brazil or in analyzing reform in regional terms, legal scholarship talks about governments creating laws that establish competition authorities. Diffusion perspectives provide a more nuanced view of the agents of reforms, emphasizing the role of international and transnational agents and networks in spreading institutions such as competition authorities, although not in the particular case of Brazil. However, in many senses it resembles institutional narratives and legal and economic scholarships in taking reform as the enactment of statutes by countries which create regulatory and competition authorities motivated by international competition for capital and by “mimicking” other countries.

#### 1.4.2 *Outcomes of reform*

Underlying the three streams of narratives assessed in the previous sections are also similar descriptions of the outcomes produced by a reformed competition policy. A first element that can be noticed is an account of the relationship between the state and the market installed by the establishment of a competition agency. All three streams generally portray reform as an attempt of the government, the main agent of reform, to control the market and, in doing so, to guarantee its proper functioning. In institutional narratives, reform inaugurated a model of state control of the economy in which CADE has the “duty” to ensure the proper functioning market; it is a “guardian” of a competitive economy against abuses of market agents. Legal and economic scholarship emphasize the role of competition policy reform as a



component of the modernization of the state and describe how it is associated with a new role of the state vis-à-vis the market: instead of directly coordinating the economy, it is an instrument for stimulating a competitive market. For diffusion perspectives, the consolidation of the “regulatory paradigm”, of which competition agencies are emblematic, entailed a new “division of labor” in economic governance: one in which the state controls the movements promoted by market agents. Depicted either as a cooperative relationship, in which the state and the market have different roles in a joint enterprise, or as one with opposing poles of an interaction through which the state tames the market, the boundaries between the two are well defined. The state and the market are separate entities, and competition policy is a tool of the state to control the market.

In the exercise of this alleged new role through competition policy, the state is said to successfully control the market and promote competition. The metaphor of “David versus Goliath” found in institutional narratives is illustrative of a recurrent idea that although the Brazilian competition agency has faced difficulties due to its limited structure, it has imposed several “setbacks” to market agents who would have a “natural behavior” of seeking concentration. In conducting its preventive and repressive activities against the abuses of market agents, CADE is depicted as an effective instrument of the state in creating a “healthy economic environment”. Legal and economic scholarship’s more detailed assessment of decisions made by the Brazilian competition agency reaches similar conclusions. Despite some detected “mistakes”, a reformed competition authority is said to be generally successful and for the first time effective in its task of minimizing the harmful effects of market competition. Moreover, such positive outcomes are said to have survived and even been strengthened by the transformations of the economic and the political context in the early 2000s, which is indicated by the shift of emphasis toward regulating conduct. Lawyers and economists often see Brazilian competition policy as an exception to the politicization of antitrust brought about by interventionist governments elected in the last decade in other countries of Latin America. Social-scientific scholarship converges in such description of the outcomes of competition policy reform. For diffusion perspectives, regulatory and competition agencies balance the effects of market liberalization by effectively promoting competition and dismantling the legitimization of monopolies characteristic of state models prior to reform.

Such successful enterprise is said to produce impacts not only in the economy, but also in society as a whole. Together with the preventive and repressive roles of a reformed competition policy, institutional narratives identify an educational function in promoting a

“competition culture” to the “general public”. Moreover, by targeting anti-competitive conduct, the competition authority has the role of guaranteeing the welfare of consumers. Legal and economic scholarship deepen this understanding, often portraying consumers as the main “stakeholders” of competition policy. Due to reform, competition policy would have contributed to minimizing losses for these subjects. Although they do not refer explicitly to consumers, diffusion perspectives narrate the outcomes of regulatory and competition agencies in a similar way. Reformed institutions would have enabled the moderation and socialization of capitalism and a more equitable distribution of power. The outcomes of a reformed competition policy are thus generally portrayed as bringing universal benefits: as suggested by the institutional slogan, those who “win” with competition policy are corporations, individuals (consumers) and the country as a whole.

Another recurrent claim underlying the three sources of narratives concerns the technical character of policy-making inaugurated by reform vis-à-vis political influence. Institutional narratives stress the independence and autonomy of the reformed Brazilian competition agency. The institutional design introduced by the 1990s reform, attributing to professionals from law and economics the duty of producing competition policy, is said to guarantee technical and impartial decision-making. Legal and economic scholars also sustain that reform would have insulated competition policy from politics. Parallel to reform, a technical “revolution” in Brazilian competition policy would have happened, induced by the extensive use of economic science in decision-making. In the same line, diffusion perspectives describe regulatory mechanisms such as competition agencies as emblematic of an autonomous form of governance. Similarly to the other narratives, the delegation of decision-making power to experts rather than politicians would be the main cause of such non-political form of policy-making.

At a conceptual level, the narratives about the process and outcomes of reform underlying the three assessed streams tacitly or explicitly imply the dissolution of the puzzle that motivates my inquiry, as stated at the beginning of this chapter: how and why a mechanism to regulate the market, such as competition policy, was developed as part of the neoliberal agenda that sought to liberate that market? When institutions, lawyers, economists and social scientists narrate reform and its outcomes, they produce an analytical claim about how to understand the reform of competition policy that ignores neoliberalism, functionalizes reform within it, or opposes it to regulation. In institutional narratives, for instance, the notion of neoliberalism is not mentioned. Reform is depicted as a necessary instrument to control an opened market, and the government is said to successfully achieve its objectives. In the

descriptions of lawyers and economists, a similar account is produced. When an explicit reference is made to neoliberalism, as was the case of L&D literature, competition policy reform is seen as compatible with neoliberal reforms to the extent that it is seen as “needed” for a liberalized market to work properly. In the first two streams discussed, competition policy reform is therefore an unproblematic element of a set of transformations brought about by a context of economic liberalization. In diffusion perspectives, in turn, neoliberalism is directly challenged as an incorrect conceptual tool to understand the set of reforms of which competition policy is part. The creation and reform of competition agencies as was the case of Brazil would indicate that the market is being regulated, and thus evidence that the notion of neoliberalism is inappropriate for understanding how and why this transformation happened and what are the roles it performs in the state, the economy, and society. Such technical instruments mobilized by governments to control market agents, often depicted as successful in their task of assuring competition and the protection of consumers, would thus suggest that neoliberalism also implied forms of controlling itself, or even more radically, that they are anti-neoliberal.

#### 1.4.3 *Reform and outcomes depoliticized*

Having identified the similar descriptions proposed by different sources about competition policy reform and its roles (or alleged conceptual incompatibility) within neoliberalism, two questions arise: are these narratives problematic? If so, on what grounds can they be criticized? My argument is that these accounts are not convincing in offering a complex or critical view of reforms, as well as in suggesting the functionalization of reform as a counter-balance to neoliberalism, or as an evidence of the inadequacy of this notion to understand reform. This is because they share methodological and conceptual assumptions that imply a limited perspective to explain and assess the transformations of economic governance.

I find support for this idea in a literature that criticizes studies on “diffusion of law” (Twining 2005a, 2005b, 2006) and “globalization of law” (Halliday and Osinsky 2006), as well as neo-institutionalist perspectives on law<sup>38</sup> (Suchman and Edelman 1996; Edelman and

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<sup>38</sup> I am here referring specifically to the “theoretical tradition” of sociological new institutionalism (Suchman and Edelman 1996, p. 909). The “resurgence of institutionalism” is not restricted to sociology, but can be also identified in economics (for instance, Ronald Coase’s new economic institutionalism) and in political science (Heimer 2001). Although to some degree similar in several assumptions, the notion of new institutionalism may gain different contours in each field. A major focus of sociological new institutionalism has been to explain

Suchman 1997). The targets of these criticisms are to a great extent similar and at some points coincident with those sources whose narratives were assessed in the previous sections: institutions, legal doctrine and economic scholarship, and diffusion studies. Given these similarities, I understand that such criticisms are valid for the surveyed narratives about the reform of competition policy and its outcomes.

Twining's (2005a, 2005b, 2006) assessment of the mainstream body of research on "diffusion of law" is particularly helpful to identify the embedded theoretical assumptions in these narratives and to organize a criticism of them. Although the notion of "diffusion of law" proposed by Twining does not refer exactly to what I have been calling legal reform, it is possible to identify several overlaps among the narratives I surveyed and the kind of scholarship addressed by this author.<sup>39</sup> In Twining's work (2005a, p. 5-6), studies about "diffusion of law" are those interested in the interaction and influence among legal systems and traditions that have been conceptualized under different "labels": reception, transplants, spread, expansion, transfer, exports and imports, imposition, circulation, transmigration, transposition, etc. It constitutes a body of research conducted within several "research traditions" of legal scholarship (Twining 2006, p. 204), such as legal history, comparative law, law reform, law and development, legal theory, sociology of law, among others.

According to this author (Twining 2005a, p. 8-9), although no "paradigm" has consolidated in the literature of diffusion of law, there are several assumptions shared by these different perspectives. They would conform to an "ideal type" of research, a "standard" – or even more critically – a "naïve model" for studying the diffusion of law (Twining 2005a,

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"how regimes emerge, how coherent normative and cognitive structures develop, and how jurisdictional boundaries solidify" (Suchman and Edelman 1996, p. 927-928). At its core is the interest in "processes of institutionalization", that is: the process by which a practice or structure is diffused, adopted by an increasing proportion of the organizations in a field (Heimer 2001, p. 8534). Explaining phenomena of institutional homogeneity thus became a central agenda of new institutional research. A neo-institutionalist approach is therefore particularly evident in the case of "diffusion perspectives" assessed in section 1.3. However, as I will argue in the following paragraphs, many of its assumptions also underlie the official narratives described in section 1.1, and the descriptions of legal and economic scholarships assessed in section 1.2.

<sup>39</sup> The notion of "diffusion of law" constructed by Twining should not be confused with "diffusion perspectives" discussed in the previous section. In assessing the literature on diffusion of law and identifying a "naïve model", Twining is referring to "legal thought and discourses" (2005a, p. 4), notably comparative law developed in the 20<sup>th</sup> century. In evaluating how could the "problematic assumptions" of this model be overcome, he advocates the need of establishing a dialogue with the social sciences. Although Twining poses this criticism to various forms of legal scholarship, I am here expanding it to the three streams of narratives I surveyed, including social-scientific works of "diffusion perspectives". I will argue that the criticism constructed by Twining may be also applied to these sources of study of diffusion or, as I have been using the term, reform. Although the literature that is being referred by this author has many similarities to the body of research interested in explaining the diffusion of regulatory capitalism, Twining curiously does not explicitly refer to it. In the following paragraphs, I nevertheless sustain that "diffusion perspectives" found in the social sciences in many ways resemble what Twining identifies as a standard model for studying the "diffusion of law"

p. 15-16).<sup>40</sup> Twining (2005a, p. 3) identifies what are “questionable assumptions” underlying these approaches, and discusses what would be several “significant omissions” associated with them. In his critique, these assumptions are reflected in several elements that constitute the scholarship about the diffusion of law: how literature defines the *source and destination* of diffusion, its *pathways*, the *agents* of diffusion, the *timing* of diffusion, the *object* that diffuses, and the *impacts* produced by the diffused law. A “paradigm case” of such model in narrating the diffusion of law would be for example:

[diffusion of law is] a *bipolar* relationship between *two countries* involving a *direct one-way* transfer of *legal rules or institutions* through the agency of *governments* involving *formal enactment or adoption* at a particular moment of time (a *reception date*) *without major change*. [...] it is commonly assumed that the standard case involves *transfer from an advanced (parent) civil or common law system to a less developed one*, in order to bring about *technological change* (‘to modernise’) by *filling in gaps or replacing* prior local law. There is also considerable vagueness about the criteria for ‘success’ of a reception - one common assumption seems to be that if it has survived for a significant period *‘it works’*. (italics of the author)

Similarly to the narratives I assessed in the previous sections, these elements can be seen in how mainstream literature narrates the *process* and *agents* of diffusion (or reform), and its *outcomes*. Putting it in Twining’s terms, in describing the *process* of diffusion, the literature generally assumes that it is a “direct one-way transfer” from one country to another, that diffusion takes place among “*countries*”, that it occurs when there is the “formal enactment or adoption at a particular moment of time” (Twining 2005a, p. 3). As a movement from a developed context to a “*less developed*”, or “*adolescent*” legal system, diffusion occurs due to a “*technical*” process with the objective to “*fill a legal vacuum or [to] replace* prior (typically outdated or traditional) law” (Twining 2005a, p. 3). With respect to the agents of diffusion, the scholarship assessed by Twining is said to assume that there is an exporter and an importer, and that these are often *governments* (Twining 2005a, p. 3). What diffuses (the *object* of diffusion) is approached as a set of “legal rules and concepts” that “*retains its identity without significant change*” (Twining 2005a, p. 3). Finally, in respect to the *outcomes* of diffusion, Twining sees literature endorsing a view that evaluates the impacts of institutions and laws that diffuse in terms of what “*works*” and what “*fails*”.

Twining identifies a series of shortcomings implied by these trends in narrating the process, agents and outcomes of reform – or, in his terms, diffusion – which converge with

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<sup>40</sup> As Twining (2005b, p. 205) recognizes, the assumptions conform to an “ideal type”, which is rarely entirely endorsed in actual researches.

criticisms of neo-institutionalist approaches to law. With respect to the *process* of diffusion, four “questionable assumptions” identified by Twining are especially relevant. The first concerns the object of diffusion. The “standard model” “assumes that what is borrowed, imposed or imported remains the same” (Twining 2005a, p. 24). In doing so, it ignores “how and to what extent any particular ‘import’ retains its identity or is accepted, ignored, used, assimilated, adapted, rooted, resisted, rejected, interpreted, enforced selectively, and so on depends largely on local conditions” (Twining 2005a, p. 24). The diffusion of law is often immersed in “broad political struggles” that are reflected in “resistance to foreign legal ideas, laws, and institutions” (Twining 2005a, p. 25). Assuming that the object of diffusion is the same everywhere, despite a necessary process of translation mediated by political struggles, is thus a shortcoming of these approaches. The second assumption, related to the first, also concerns the relation of the imported law or institutions to pre-existing conditions. The “standard model’s” idea that that diffusion simply “fills a vacuum” ignores local struggles in the importation process. According to Twining (2005a, p. 35), imported law rarely entirely replaces prior local law, but interacts with it.

The third problematic element commonly shared by the studies criticized by Twining regards the timing of diffusion. This scholarship often adopts a synchronic approach to reform, as diffusion is assumed to occur in specific “reception dates”, and moments of formalization and enactment of law. As a law is enacted, reform is said to have occurred. The problem, according to Twining, is that diffusion “often involves a long drawn out process, which, even if there were some critical moments, cannot be understood without reference to events prior and subsequent to such moments” (Twining 2005a, p. 34).

Finally, the fourth element concerning the process of diffusion deals with the motives of reform. Among the several perspectives identified by Twining as forms of explaining reforms, two are especially recurrent in the narratives I identified in the study of competition policy: so called “enthusiastic” and “instrumentalist” views. An enthusiastic perspective is one that talks about the law that diffuses as “technological products” or “innovations” that are “instruments of legal and social modernisation” (Twining 2005a, p. 26). An instrumentalist view, in turn, defines diffusion as a process of “problem solving”, the importation of a solution to a local problem (Twining 2005a, p. 26). Both perspectives converge in treating the law that diffuses as “no more than a series of technical solutions to shared problems [...] or choosing one system over another because of its technical superiority” (Twining 2005a, p. 28). The questionable character of this assumption is that it “obfuscates the underlying purpose [of reform] and pretends that the ends are uncontentious” (Twining 2005a, p. 28).

With respect to the *agents* of reform, the recurrent focus on “governments” as the propelling vectors of change is also said by Twining to be problematic. Governments are often not the only, “and may not be the main, agents of diffusion” (Twining 2005a, p. 34). Halliday and Osinsky (2006, p. 450) identify a similar problem in studies of “globalization of law”, which usually assume “that the agents that create global norms are themselves global or transnational institutions”. The globalization of law (or “diffusion”, and even “reform”) can however be promoted by a plurality of actors, such as governments, professionals, corporations, organizations, local actors, etc (Halliday and Osinsky 2006, p. 451). By erasing specific agents and groups from consideration, such an abstract notion of “government” as an agent of reform may once again obnubilate a proper understanding of the local political struggles involved in the diffusion of law.

When it comes to narrating the *outcomes* of the diffusion of law, Twining identifies another set of shortcomings in mainstream scholarship. To this author, there is a “tendency in the diffusion literature to talk vaguely of receptions ‘working’ or ‘failing’” (Twining 2005a, p. 30). The assessment of the effects of reform would often lack an empirical evaluation and measurement of impact (Twining 2005a, p. 32). When empirically grounded, measurement of outcomes tends to be “technocratic, formalist, and strongly instrumentalist, paying scant regard to culture, context, and tradition” (Twining 2005a, p. 32). These would be studies that endorse an “audit culture” of reform, often conducted by perspectives of economic analysis and new institutionalism (Twining 2005a, p. 32). Not by chance, a similar criticism is implied by Suchman and Edelman’s assessment of neo-institutionalist approaches to the study of law. In these authors’ view, such approaches tend to endorse a formalist view of law, for which “laws mean what they say, and they do what they mean” (Suchman and Edelman 1996, p. 928). An institutional perspective on models of economic governance departs from an assumption that takes law as “explicit, authoritative, and coercive”, obscuring its “fragmented and highly ambiguous” character (Suchman and Edelman 1996, p. 929). As law is taken to be “an objective and monolithic reality”, its outcomes are not seen as problematic, as they would be the translation of straightforward rules, a process of “universal compliance” (Suchman and Edelman 1996, p. 933). Suchman and Edelman specifically direct this criticism to studies about regulatory agencies and “regulatory enforcement”. These authors detect an “imagery of legal formalism” that leads to understanding that these agencies “act only within the scope of their official charter” (Suchman and Edelman 1996, p. 933). Although the spread of certain institutions is taken as evidence of “global convergence in particular domains of law, empirical research demonstrates the rampant contingency of globalization” (Halliday and

Osinsky 2006, p. 466). Assessing the outcomes of these diffused institutions through the sole indicator of their spread may thus be problematic. Such formalist accounts of outcome can be therefore “positively distorting, for they can suggest convergence when appearances of law on the books belie the reality of law in action” (Halliday and Osinsky 2006, p. 448). The lack of or unsystematic character of empirical research about outcomes constitutes the basis of a formalist view of the law (Twining 2005a, p. 35 Halliday and Osinsky 2006, p. 466; Suchman and Edelman 1996, p. 929).

This set of criticisms of the assumptions underlying dominant forms of analyzing the *process*, the *agents* and the *outcomes* of legal reform can be applied to the narratives about competition policy reform discussed in the previous sections. In Table 1, I merge the review of the narratives systematized in subsections 1.4.1 and 1.4.2 with the criticisms just discussed. In the rows, I summarize the narrative provided by the three sources in each dimension (process, agents and outcomes of reform), and in the two last columns I present their corresponding “questionable assumptions” and shortcomings.

The four elements identified by Twining in the “standard model” for studying the *process* of “diffusion of law” are present in how institutional narratives, legal and economic scholarships and diffusion perspectives tend to approach competition policy reform. All three streams tend to offer an “enthusiastic” and/or “instrumentalist” view of competition law reform. They describe the process of reform in evolutionary terms, as a necessary technical move toward a “better” legal and institutional model, a modernization to fill a gap, to solve the problems of other forms of economic governance and to adapt to a new context. Some narratives, such as L&D scholarships and diffusion scholars, emphasize that reform is part of a convergence of diffused legal reforms. Although more contextualized than institutional and doctrinal views, these sources also describe reforms in an evolutionary narrative, as a process of a generalized adaptation of less developed legal systems toward an upgraded form<sup>41</sup>.

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<sup>41</sup> The emphasis on evolution and modernization found in the narratives of Law & Development scholarship may be connected to its roots in modernization theory (Ginsburg 2000; Galanter 1966). The “theoretical underpinning” of modernization theory is that “the development process entail[s] a shift away from traditional institutions and culture”, and normatively implies that “developing countries should adopt systems of social organization as well as technologies from the modern West” (Ginsburg 2000, p. 832).



**Table 1.** Narratives about reform, their assumptions and shortcomings

	Institutional narratives	Legal and economic scholarships	Diffusion perspectives	Assumptions	Shortcomings
<b>Process:</b>	Evolution; Necessity; Modernization	Evolution; Necessity; Modernization; Convergence; Consensus	Evolution; Necessity; Convergence; Consensus	Reform is uncontested; Fills vacuum; Synchronic; Technological product; Solves problems	Local conditions and political struggles ignored; Obfuscate purposes of reform and pretends that the ends are uncontentious;
<b>Agents:</b>	Absent; Governments	Absent; Government; International actors	Governments; International actors; Transnational actors	Governments and global agents propel reform	Abstract notion of government erases political struggles; Miss the roles of local actors;
<b>Outcomes:</b>	Control the market; Promote competition; Protect consumers; Universal benefits; Success; Autonomy from politics;	Control the market; Promote competition; Protect consumers; Success; Effectiveness; Autonomy from politics;	Control the market; Moderate and socialize capitalism; Promote competition; Autonomy from politics;	“It works” or “it fails”; Law is objective, explicit and authoritative; Law does what it says	Vague notions of success and failure; Impressionistic empirical analysis; Legal formalism; Functionalize outcomes;

**Source:** elaborated by the author

Such necessary evolution is generally portrayed as a consensual process. Contestation of and struggles around reform are absent in diffusion perspectives, and at best peripheral in institutional narratives and the descriptions of lawyers and economists. When exceptionally mentioned, tensions seem not to have affected the reform process, i.e. how competition policy is actually reformed and practiced. A synchronic view of reform also permeates these narratives. Reform occurs when competition laws are enacted, and subsequent laws are seen as the continuation of the evolutionary process that began in the 1990s. Exemplary of such narratives is how institutions, lawyers and economists interpret the enactment of the new competition law in 2011. This latest reform appears as an “enhancement”, a correction of

“mistakes” committed in the first wave of transformations<sup>42</sup>. As suggested in the criticisms discussed above, such a narrative of reform as an uncontested, synchronic, and technological process to “fill vacuums” and “solve problems” ignores how local conditions and political struggles may affect reform and dispute its practice and outcomes. In doing so, these narratives depoliticize the process of reform.

Another convergence among the identified narratives that resonates with the criticisms presented here is in respect to the *agents* of reform. In institutional narratives, as well as in legal and economic scholarship, reform is often depicted as an agentless process. When they do not characterize reform in such way, these narratives identify the “government” as the agent that transforms competition policy. This is specially the case for legal and economic scholarship. Reform is depicted as a process triggered by governments due to a need resulting from the changing economic context and with the objective of controlling the market and assuring its proper functioning. Diffusion approaches, in turn, present a more sociologically grounded view of diffusion. Together with governments and international organizations, they emphasize the role of individual agents in propelling reform. The focus, however, tends to be on international organizations and global “epistemic communities” such as transnational networks of professionals.<sup>43</sup> As in an agentless account, or in the abstract focus on “governments”, the local contexts and agents of reform are often absent in this view, as well as disputes surrounding the diffusion of a certain institution and its importation. Such undersocialized views of reform, informed by an abstract notion of “government” or by the focus on global expert agents, misses the roles of local actors and potentially erases political struggles. Together with the dominant narratives about the *process* of reform, it contributes to depoliticize the reform of competition policy, and complements the portrait as a necessary transformation that occurs spontaneously, or by the mobilization of abstract entities and technical agents.

Also with respect to the *outcomes* of a reformed competition policy the three assessed sources of narratives resemble the problematic assumptions of the “standard model”. The impacts produced by CADE and by regulatory and competition agencies in general are mostly

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<sup>42</sup> The evolutionary and functionalist accounts of legal doctrine and economic scholarship may be motivated by the fact that they are produced by those who acted as reformers, and/or are the practitioners and producers of competition policy. In narrating reform in such ways, they give unity and coherence to a set of institutions and practices (a “system”) that they built and operate. In the case of institutional narratives, the straightforward and depoliticizing discourse is a comprehensible and even obvious path, as CADE intends to assure its stability, affirm and justify its very existence as an impartial and technical institution.

<sup>43</sup> Such a focus on international and global actors can be related to the fact that once regulatory reform is approached as a global process by diffusion perspectives, “it is usually assumed that the agents that create global norms are themselves global or transnational institutions” (Halliday and Osinsky 2006, p. 450).

assessed in terms of what “works” and what “fails”, i.e. to what extent they are successful and effective. The reference to determine what constitutes a successful implementation is what the law says its objectives are – often defined in these narratives as being to promote competition and protect consumers. In institutional narratives and legal and economic scholarship, Brazilian competition policy is said to be an effective instrument of the state that technically produces decisions of universal benefit to its main “stakeholders” – competitors and consumers – despite some occasional “errors”. In a broader sense, diffusion perspectives identify “regulatory capitalism” as a model of economic governance that is autonomous from politics and produces the moderation and socialization of the economy. Similarly to the other narratives, diffusion scholarship tends to take the “regulatory” roles announced by institutions such as competition agencies as evidence of the very existence of regulation and control. Moreover, it implies that once regulatory and competition agencies exist, and their outcomes are clear-cut in their institutional functions, it is necessary to neglect the veracity or the utility of neoliberalism as an analytical tool.

When based on empirical evaluations, the assessment of outcomes is often impressionistic. Especially in legal and economic scholarship, empirical analysis is generally based on an unsystematic selection of “important cases” that would illustrate the general behavior of CADE and therefore evidence of its roles in the economy and society.<sup>44</sup> Eventual shifts in the behavior of CADE, such as what institutional narratives, lawyers and economists detect as the shift of emphasis from merger reviews to conduct cases since the early 2000s, are said to be part of a process of its enhancement and adequacy to international standards. Assessing how and if the political context affects outcomes is thus generally alien to these narratives, as competition policy is taken to be in a constant process of evolution. Based on such forms of evaluating outcomes, these narratives portray a reformed competition policy as a successful enterprise in controlling the market. By measuring outcomes with reference to the formal objectives of the law, or in an unsystematic empirical way, these narratives end up functionalizing and depoliticizing the roles of competition policy. Although competition policy is a form of economic governance that has direct impacts on powerful agents such as corporations, and determines their interaction with the state, disputes and divergent interests

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<sup>44</sup> Several studies resort to CADE’s decisions database to assess how competition policy is practiced and extract conclusions about the Council’s behavior. They identify shifts in its history (for instance, the fluctuation of the number of Merger Reviews, changes in types of decisions over time, the shift of emphasis toward Administrative Procedures), and certain patterns (such as that CADE decides accordingly to the international standards). However, there is rarely a detailed and systematic investigation of the cases themselves, beyond superficial information provided by the institution. A possible exception is Salgado’s (1997) work on the practice of competition policy in Brazil, which nevertheless focused on a very limited period of time before the 1994 reform and only on a specific type of decisions, the Administrative Procedures.

that may surround its reform and practice are often absent in these narratives. Together with the depoliticization of the *process* and *agents* of reform, the available narratives therefore also depoliticize its *outcomes*.

If such assumptions sustain the naturalization of reform and the consequent rejection of the notion of neoliberalism to understand it promoted by these narratives – be it by tacitly ignoring it, functionalizing reform within it or explicitly neglecting its conceptual adequacy –, the puzzle posed at the beginning of this chapter remains: what is the role of competition policy as part of neoliberal reforms? How and why was competition policy reformed and what are its outcomes? Since I argued that the implications of these “questionable assumptions” are the depoliticization of the *process*, *agents* and *outcomes* of reform, an alternative narrative to answer these questions must be able to re-politicize competition policy reform and its roles. In the next chapter, I delineate a different conceptual and methodological framework to study neoliberal legal reforms and its impacts on the state, the economy and society – one that I argue is capable of overcoming the shortcomings identified in the available narratives.

## CHAPTER 2

### Regulation, politics and neoliberalism: concepts for an alternative narrative

Having identified the shortcomings underlying the descriptions proposed by mainstream narratives about competition policy reform, its roles and alleged incompatibility with neoliberalism, in this Chapter I design a theoretical framework to circumvent these limitations. As these narratives promote a disconnection between competition policy reform and neoliberalism through discourses about the *process* of reform, its *agents* and *outcomes*, I propose a set of conceptual tools that leads to the reframing of each of these dimensions. From this framework I derive more refined and operational research questions that, if tackled through empirical inquiry, enable visualizing the roots and roles of competition policy within the neoliberal project of transforming states, economies and societies. The framework I designed combines conceptual and substantive insights of the sociology of law, economic sociology and critical political economy into two distinct and interconnected approaches to revisit those dimensions identified in mainstream narratives.

The first is an actor-centered framework that re-politicizes the *process* of reform and the very practice of competition policy through a thick theory of agency. Based on the perspective of a reflexive sociology, I reframe the process of reform as the constitution of a field of practice whose structuring and structure depend on the agents that integrate it. In the case of competition policy, these are notably lawyers and economists who act both as reformers and, since the establishment of the field, as the producers of competition law. The sketch of this approach, which serves as an alternative for the study of the *process* and the *agents* of reform, and also incorporates a dimension of practice, is the content of section 2.1.

Besides describing the analytical structure of such approach, I also present substantive elements that illustrate the concrete roles performed by lawyers and economists as agents of neoliberal reforms. In section 2.2, I revisit studies of the sociology of law and economic sociology that explain how are lawyers and economists connected to the creation and transformation of fields of practice close to the state and the economy, especially during neoliberalism. These illustrations are sought to provide parameters for interpreting the data that was collected through the actor-centered approach designed in the first section.

The second, and complementary approach builds on a tenet of the sociology of law to reframe the analysis of the *outcomes* of competition policy: the “law in action” perspective. In contrast to the often formalist and unempirical narratives found in mainstream discourses, in section 2.3, I describe such perspective for a systematic and empirical assessment of the roles

performed by the field of competition policy in the economy and society. This framework repositions the study of outcomes in terms of what kind of economy is facilitated by competition policy, and what model of society is constituted by it, thus opening way to understand its roles vis-à-vis the neoliberal project of transforming the economy and society.

In section 2.4, the analytical frame of the “law in action” is complemented by a substantive theory about the defining traces of the neoliberal intellectual and political project for the economy and society, with a special focus on Latin America and Brazil. I rely on studies that develop a critical political economy of neoliberalism to assess its main characteristics as a political, economic and societal model. These are elements that inform what can be expected from the outcomes of competition policy if it is compatible with and functional to neoliberalism.

This framework therefore interpolates the analytical structures to approach the *process* and *practice* of regulatory reform through its *agents* (section 2.1), and to study the *outcomes* of the field (section 2.3), with substantive elements that enable connecting these formal schemes to the political project of neoliberalism (sections 2.2 and 2.4, respectively). In each analytical section, I present the refined research questions that stem from the broader puzzle that motivates this research, and which guide the empirical inquiry presented in the subsequent chapters.

## **2.1 An actor-centered approach to reform and practice**

In the previous chapter, I argued that mainstream narratives depoliticize the process of reform because local conditions and struggles are mostly ignored, and reform is often depicted as an uncontentious process of technological evolution. I also sustained that such narrative is associated with a theory of *agency* (most of the times tacit) that proposes an abstract notion of “government” as the propeller of reform, or at best highlights the roles of transnational or global networks of “expert” actors. In both cases, potential struggles around reform are erased, and as a consequence, these assumptions obfuscate the possible connections of competition policy reform with political positions, notably with neoliberalism.

An alternative framework must therefore overcome these shortcomings. I here sustain that a useful form of transcending a functionalist view of the *process* of reform is precisely by addressing the role of concrete *agents* in the reform process and their connections to broader political disputes, i.e. beyond the treatment as a matter of impersonal or “technical” work to solve a problem. As Twining (2005a, p. 22) suggests, the study of reform must analyze “more

precise agents”, instead of an abstract notion of government. Similarly, Halliday and Osinsky (2006, p. 450) advocate for a need to “identify the agents that create, propagate, and *receive* global norms and organizations” in order to “explicate where global norms and templates originate and how they are conveyed to sites across the world where they are differentially integrated into local institutions and practices”.

By focusing on concrete agents and how they condition the “diffusion” or “globalization” of law – or, in the terms I put it, regulatory reform –, it is possible to avoid the “questionable assumptions” identified by Twining in studying the *process* of reform. When reform is assessed through the agents that articulate it, its object is not taken to be immutable, but subject to the “broad political struggles” (Twining 2005a, p. 25). In stressing how local agents condition reform, the problematic idea that it “fills a vacuum” is also refuted, once the local conditions of where reform occurs are brought to the forefront of analysis. Such focus also helps to avoid “enthusiastic” and “instrumentalist” perspectives on the *process* of reform, conforming an ideological approach in which reform reflects political values and interests mobilized by concrete agents. In such perspective, “the most important factors in a reception [or reform] are the underlying values, principles and political interests that motivate it rather than the details of particular rules or provisions” (Twining 2005a, p. 27). Not only the *process* of reform gains new contours through a detailed study of agency, but also the *practice* of the institutional setting inaugurated by it can be assessed on different grounds.

Although these criticisms support the potential advantages and even the need of analyzing the role of concrete agents in the process of reform, they offer no practical guidance on how to do it schematically. I therefore rely on the framework of a reflexive sociology, as developed by French sociologist Pierre Bourdieu and several works within this theoretical tradition, for the construction of a “thick” theory of agency. As I understand it, the “actor-centered approach” proposed by Bourdieu (Dezalay and Garth 2002a, p. 9) is highly consistent with the criticisms posed to the assessed narratives, but with an additional advantage: it provides a systematic and operational framework for the study of competition policy reform and practice, that is capable of supplanting the shortcomings associated with mainstream narratives’ undersocialized view of reform.

Bourdieu’s approach entails a heuristic model of imbricated concepts that renders the task of a schematic description extremely difficult. However, despite the risks of falling into what Bourdieu himself criticized as “professorial definitions” (Bourdieu and Wacquant 1992, p. 96), I understand that presenting the general guidelines that compose his framework in an analytical form is a necessary condition to their profitable and clear application in actual

research. My aim is not to provide an extensive or detailed review of these concepts, or dig into the broad debates with which this theory engages, something already done by Bourdieu himself (e.g. Bourdieu and Wacquant 1992), his collaborators (e.g. Dezalay and Madsen 2012), commentators (e.g. Thompson 1991; Calhoun et al 1993; Swartz 1997), and that can be repeatedly found in dissertations working within the framework of a reflexive sociology. Rather, I intend to make explicit, whilst in a succinct form, the central elements that I extract from this “toolbox” to design an alternative approach to study the reform of competition policy. These concepts are “designed to put to work empirically in systematic fashion” (Bourdieu and Wacquant 1992, p. 96). Therefore, after presenting them in a schematic and somehow “professorial” form, I will explain how I intend to articulate them in a proper reflexive sociological approach, and how they help shedding light into my object of empirical research.

### 2.1.1 *The framework of a reflexive sociology*

The central conceptual tools I borrow from Bourdieu’s framework are the notions of field, capital and habitus. Through these concepts, Bourdieu’s approach enables framing what I have been calling the *process* of competition policy reform as the constitution of an arena of social practices – a field –, in which understanding what are the concrete *agents* of this space is crucial. Bourdieu’s framework re-politicizes the object of study by putting in evidence the agents that constitute and occupy this arena, the positions they occupy vis-à-vis other agents, their profiles, strategies, interests, and practices. In this perspective, the task for research becomes to unveil the structure of a certain arena of struggle over power.

The field is the basic unit of analysis for such framework: it is “is primary and must be the focus of the research operations” (Bourdieu and Wacquant 1992, p. 107). The idea of field is an analytical escape from two theoretical alternatives. On the one hand, perspectives according to which to study a certain object it is “enough to read the texts”, i.e. “there is nothing else to be known, be it in a philosophical text, in a legal code or in a poem, beside the letter of the text” (Bourdieu 2004, p. 19)<sup>45</sup>. On the other hand, the notion of field is an attempt to distinguish from approaches that assess the object of analysis solely in terms of its

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<sup>45</sup> Bourdieu is here referring to a “fetishism of autonomized text” that would have originated in French semiotics and spread to other postmodernist theoretical traditions (Bourdieu 2004, p. 17).



correspondence to the “social or economic world” (Bourdieu 2004, p. 18)<sup>46</sup>, i.e. as pure expression of economic power, not mediated by any other forms of social interaction. The field, in turn, would be an “intermediate universe” between text and context, which is inevitably influenced by broad social and economic impulses, but also relatively autonomous from them, as it also has its own internal logics, and does not respond to economic and political impulses mechanically. The “degree of autonomy” among different social arenas constitutes precisely one of the “great questions that emerge regarding fields” (Bourdieu 2004, p. 21).

An example of such distinction is how a Bourdieusian analysis of law in terms of a legal field differs from both instrumentalist (notably Marxist) and “normative functionalist accounts” of the law (Bourdieu 1987; Dezalay and Madsen 2012, p. 439). While the first operates with the assumption that “law is [...] instrumentalized political ideology”, the latter approaches law as “modern society’s substitution of morality with a liberal ideology of rights as the device for social coherence” (Dezalay and Madsen 2012, p. 439)<sup>47</sup>. Instead, the study of law as a field underscores its nature as a social space that is relatively autonomous from the broader social environment, meaning that the law “functions in close relation with the exercise of power in other social realms and through other mechanisms”, but also has its “own complex, specific, and often antagonistic relation to the exercise of such power” (Terdiman 1987, p. 808). It is to say that although the practices that take place within the legal field are related, for instance, to economic and political imperatives, they are “significantly unlike the practices of any other social universe” because they take the specific form and language of the law, and are “strongly patterned by tradition, education, and the daily experience of legal custom and professional usage” (Terdiman 1987, p. 806-807).

As a relatively autonomous social space, the field is conceived as a “network, or a configuration, of objective relations between positions” (Bourdieu and Wacquant 1992, p. 97), a “place for struggle between different agents where different positions are based on the amount and forms of capital” (Dezalay and Madsen 2012, p. 441). In a less abstract definition, “the field of inquiry following a Bourdieusian research logic” entails “specific and specialized *areas of practice*” (my italics) (Dezalay and Madsen, p. 436). As recognized by

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<sup>46</sup> On the other pole of these broad antagonist perspectives, Bourdieu situates a tradition “frequently represented by people affiliated with Marxism”, which tries to establish a direct connection between “text and context” (Bourdieu 2004, p. 18-19). Although such approach cannot be noticed in the surveyed mainstream narratives about competition policy reform, I take Bourdieu’s criticism as a “vaccine” for the alternative narrative I intend to propose.

<sup>47</sup> It is interesting to note that such “normative functionalist” perspective is similar to the accounts of competition policy reform often found in legal and economic scholarships, to the extent that they rely on “the letter of the text” – in this case, of the legal text – to extract conclusions about how it works and what roles it performs.

Bourdieu, “the concept of field can be used at different levels of aggregation” (Bourdieu and Wacquant 1992, p. 104)<sup>48</sup>. Bringing the examples closer to the object of my research, the field may refer to a broad social space, such as the legal field (Bourdieu 1987), or specific areas of legal practice, such as human rights, international commerce arbitration, international criminal law (Dezalay and Madsen 2012, p. 436) – and it could be added: competition law and policy.

Determining the boundaries of a field is a matter of empirical inquiry, and thus in analytical terms its limits can only be defined as those “within which an effect of field is exercised, so that what happens to any object that traverses this space cannot be explained solely by the intrinsic properties of the object in question” (Bourdieu and Wacquant 1992, p. 100). What gives the field unity, i.e. what makes a specialized arena of practice a distinguishable field, is the specific form of capital (or power) that is at stake in that field. In the legal field, to keep the example, it is the power to determine what the law is (Bourdieu 1987). In contrast, in an arena such as the economic field, it is economic capital that is disputed by the agents that interact in that arena. What defines that certain agents are part of the same field is thus that they dispute the stakes that are proper to that field.

Disputes, as it has repeatedly been mentioned without any clarification, are a key form of interaction within fields, and also among fields. The “functioning of a field”, or its “principle of dynamics” is that of struggles among agents, in at least two senses: “in its representation and in its reality” (Bourdieu 2004, p. 29). On the one hand, struggles “in reality” are those for the specific stakes of the field: “struggle[s] between agents over gaining dominant positions in this social space, a process fueled by interest, dedication, belief, etc, in the issues at stake” (Dezalay and Madsen 2012, p. 441). On the other hand, the very structure of the field, its rules as a space for struggle are being disputed: “above all, it is a struggle concerning the dominant visions and division of the field itself, which conversely helps create not only the field’s logic and taken for granted limits but also its consecration mechanisms” (Dezalay and Madsen 2012, p. 441). Agents, their claims and strategies are oriented not only towards a dispute over a stake, but also towards establishing and generalizing its views or the views they represent as “legitimate” about that dispute. They are competitors for the monopoly over objectifying their very social practices (Bourdieu and Wacquant 1992, p. 259). Here is where Bourdieu’s framework reveals itself as one that takes interests and

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<sup>48</sup> Sometimes, in the case of lower levels of aggregation, Bourdieu uses the notion of “subfield”, as a more restrict space within a broader social field (e.g. Bourdieu 2004, p. 44).

conflicts as central elements of social practices, something eliminated from formalist or functionalist accounts.

These disputes, however, do not occur in a vacuum, but are determined by the very structure of the field. This structure is given, in turn, by the positions existent in the field and by the agents who occupy them. Positions and capitals are precisely what give structure to a certain field to exercise its effects, revealing the centrality of agency for such framework. As it was mentioned, the field is a space of positions occupied by agents or institutions (Bourdieu and Wacquant 1992, p. 97; 105), it is “a social space composed of competing positions” (Dezalay and Madsen 2012, p. 441). Positions, in turn, are defined “in their existence and in the determinations they impose upon their occupants (...) by their present and potential situation in the structure of the distribution of species of power (or capital)” (Bourdieu and Wacquant 1992, p. 97). The place of agency in Bourdieu’s field theory is thus central: “agents (...) create the space, and the space only exists (...) through agents and the objective relations among the agents that are placed there” (Bourdieu 2004, p. 23). As the field is an often conflictive space of practice, it is the “state of the relations of force between players that defines the structure of the field” (Bourdieu and Wacquant 1992, p. 99). It is to say that the positions agents occupy in a certain field are determined by the distribution of power among them, i.e. what in the jargon of a reflexive sociology is called capital.

In Bourdieu’s framework, there are three main species of capital, each entailing its own subtypes: economic capital, cultural capital, and social capital (Bourdieu and Wacquant 1992, p. 119). Economic capital “is readily converted into money and sometimes institutionalized in the form of property rights” (Bourdieu 1986, p. 241). Cultural capital, also named informational capital (Bourdieu and Wacquant 1992, p. 119), exists in three forms: embodied (“long-lasting dispositions of the mind and body”), objectified (in the form of “cultural goods”, such as books, instruments, tools indicative of education and training), and institutionalized (such as educational qualifications which confer “entirely original properties on the cultural capital which it is presumed to guarantee”) (Bourdieu 1986, p. 242). Social capital, in turn, entails the belonging to a group not only by holding capitals similar to other agents, but also a set of interpersonal relations (Bourdieu 1980, p. 2). It refers to the possession of “durable network of more or less institutionalized relationships of mutual acquaintance and recognition” (Bourdieu and Wacquant 1992, p. 119) – i.e. “membership in a group”, including, for instance, the family (Bourdieu 1986, p. 246).

This “typology” of forms of capital is not static in Bourdieu’s framework, as conversions that happen among the different species are a central dynamics to explain the

functioning of a field. For example, economic capital is converted into cultural capital when an advantageous economic condition of an individual is what enables her to achieve certain educational standards and earn titles. Also, an agent holding a high amount of legal capital probably profits from an advantageous position in the legal field, and can thus “reconvert” it into economic capital through profits earned, for example, as a lawyer in a prestigious law firm.

Each field is the space of constitution of a specific form of capital derived from this typology (Bourdieu 2004, p. 26). For instance, in the legal field, a particular form of capital is crucial to determine the position occupied by its typical agents (lawyers): legal capital. Legal capital can be seen as a composition of different strands of cultural capital, such as the embodied capital given by the know-how in certain areas of the law, objectified capital given by the publication of influential legal treatises, and institutionalized cultural capital brought by a PhD earned in a recognized university. All together, these “valuable properties” held by an agent constitute her legal capital, i.e. what enables her to occupy certain positions within the legal field. The more legal capital an agent possesses, a better position she can achieve within the field.

When a specific set of capitals is recognized and valued as legitimate in a certain field, and thus becomes a particular form of capital, it constitutes what Bourdieu called symbolic capital. It does not entail a fourth species of capital, but rather the form that one of the fundamental forms of capital is “grasped through categories of perception that *recognize* its specific logic, or [...] misrecognizes the arbitrariness of its possession an accumulation” (Bourdieu and Wacquant 1992, p. 119). Symbolic capital comprises the “wealth” accumulated by an agent, not in the form of economic capital, but in non-material values that grant her access to certain positions in a determinate field. Symbolic capital appears in the form, for instance, of “authority, knowledge, prestige, reputation, academic degrees”, among others (Terdiman 1987, p. 812).

The relationship between agents, capitals and positions is not, however, unidirectional. In Bourdieu’s framework, the idea that the possession of certain capitals determines the positions of agents in the field is only one side of the story. This structure of relations among different agents – i.e., the positions determined by the distribution of capital – is also what “commands the points of view”, what “they can and cannot do” (Bourdieu 2004, p. 23) and the strategies agents deploy in pursuing their interests in that field (Bourdieu and Wacquant 1992, p. 101). In other words, the position occupied by agents in the objective structure composed by a network of positions captured by the concept of field orients position-taking

(Bourdieu 2004, p. 23). Agents therefore occupy positions in the field accordingly to the species of capital they possess, and their action is conditioned by their position in the field.

At this point is where the objective dimension of Bourdieu's theory (i.e. his characterization of the field as an objective structure of positions determined by forms of capital) also opens itself for a subjective dimension, i.e. in respect to the practices of the agents. In this framework, agents do not act mechanically in response to their positions in the field and thus accordingly to the capitals they possess and those they seek to obtain, such as the *homo economicus* of rational action theory (Bourdieu and Wacquant 1992, p. 120-123). For Bourdieu, social action performed by the agents that occupy positions in the field cannot be explained solely by the forms and volumes of capital possessed or aimed by them. His theory also takes into account the "structures of preference that inhabit them [and that] are constituted in a complex temporal dialectic with the objective structures that produced them and which they tend to reproduce" (Bourdieu and Wacquant 1992, p. 123), "internalized schemes guiding agents' behavior (...), a practical sense of reality" (Dezalay and Madsen 2012, p. 442), "habitual, patterned ways of understanding, judging, and acting" (Terdiman 1987, p. 811). This is what defines the Bourdieusian concept of habitus.

These subjective structures are not innate or immutable, but are part of the "individual and collective *history* of agents" (Bourdieu and Wacquant 1992, p. 123), "throughout the agent's particular and individual trajectory" (Dezalay and Madsen 2012, p. 442). As "different conditions of existence" (such as "different educational backgrounds, social statuses, professions, and regions") that "give rise to forms of habitus characterized by internal resemblance within the group", the habitus is a factor that contributes for the establishment of a group as such (Terdiman 1987, p. 811). Once the agents of the field may share such "internalized schemes", the notion of habitus thus enables framing the social practices that take place within a field as both "stable and adversarial" (Dezalay and Madsen 2012, p. 442). Despite being an arena of conflict, the field therefore also implies that actors share some fundamental understandings and practices about what defines the field, a common "sense of the game" (Bourdieu 1990).

Having presented the central concepts of Bourdieu's framework, it is still necessary to discuss how can these tools be put to work. According to the author himself, "an analysis in terms of fields involves three necessary and internally connected moments" (Bourdieu and Wacquant 1992, p. 104). First, it is necessary to locate the position of the field studied "vis-à-vis the field of power" (Bourdieu and Wacquant 1992, p. 104). It means understanding how close to arenas of power such as the state and the economy the analyzed field is situated.

Bourdieu mentions the literary field as the example of a field that “occupies a dominated position” within the field of power (Bourdieu and Wacquant 1992, p. 104). A contrasting example would be the legal field, which has clearly a different connection to power, as it is directly imbricated with the economic and political fields.

The second step identified by Bourdieu comprises “map[ping] out the objective structure of the relations between the positions occupied by the agents or institutions who compete for the legitimate form of specific authority of which this field is the site” (Bourdieu and Wacquant 1992, p. 105). In other words, it means unveiling the very structure of the field: its agents, and the positions they occupy, capitals they hold, strategies they deploy and struggles they fight. As the concepts themselves are imbricated in a non-linear, dialectical fashion, applying them leads to a sort of hermeneutic circle: “in order to construct the field, one must identify the forms of specific capital that operate within it, and to construct the forms of specific capital one must know the specific logic of the field” (Bourdieu and Wacquant 1992, p. 108).

According to Bourdieu, sociology shall “construct the space of objective relations (structure) of which the communicative exchanges we directly observe (interaction) are but the expression” (Bourdieu and Wacquant 1992, p. 256). Such “exchanges” come in the form of strategies that “agents deploy to win the symbolic struggle over the monopoly of the imposition of the verdict, for the recognized ability to tell the truth about the stake of the debate” (Bourdieu and Wacquant 1992, p. 256). In this sense, a sociological approach to these struggles shall not be one discourse among others disputing this monopoly. Rather, sociology must grasp what principles structure the field, what are the positions of the field, what are the actors that occupy it, how are capitals distributed among actors, what are the stakes of the dispute and through which strategies actors aim at achieving them.

A sociological analysis therefore differs from “partial and interested objectivations promoted by the agents of the field” by objectifying the “set of points of view” and the very struggles for objectification of that field (Bourdieu 2004, p. 44). This is where the proposal of a “reflexive sociology” and the utility of the notion of field for such purposes become clear. The concept of field, and the framework built around it, is an analytical tool that enables avoiding the confusion between the discourses of the researcher with those of the agents of the field, and thus rupturing with “intuitive readings and spontaneous classifications that

always offer themselves as the point of departure for analysis” (Dezalay and Madsen 2012, p. 437)<sup>49</sup>.

Third, the researcher must identify the habitus of those agents that integrate the field, i.e. “the different systems of dispositions they have acquired by internalizing a determinate type of social and economic condition, and which find in a definite trajectory within the field under consideration a more or less favourable opportunity to become actualized” (Bourdieu and Wacquant 1992, p. 105). This step incorporates the subjective dimension into the analysis, addressing one of the elements that help to explain social action within a field. As Bourdieu puts it, “the field of positions is methodologically inseparable from the field of stances or position-takings [...], i.e. the structured system of practices and expressions of agents” (Bourdieu and Wacquant 1992, p. 105).

### 2.1.2 *Visualizing the field of competition policy and its agents*

In several ways, the described conceptual toolbox constitutes a helpful framework for the task of constructing an alternative narrative about how the *process* of reform of competition policy occurred and who were the *agents* that propelled it. In a more general level, it enables an epistemological rupture with mainstream narratives assessed in Chapter 1, especially those produced by institutions, lawyers and economists. The perspective of a reflexive sociology implies visualizing those narratives not simply as knowledge available to understand reform and its outcomes, but discourses produced by the very agents that are part of the field and that struggle to objectify it. As Bourdieu puts it, these social representations that are “lived and given as objective and universal [...] are in fact weapons in internal struggles” (Bourdieu 2004, p. 46). It is thus possible to understand why those narratives frequently depoliticize competition policy reform and its outcomes: once they are often produced by the very agents that integrate the field, narrating reform as a technical and

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<sup>49</sup> The “rupture” with the agents’ attempts of objectification promoted by a reflexive sociological approach does not imply an “epistemological superiority” of the discourse produced *about* the field vis-à-vis those discourses produced *within* or *by* the field. Rather, it serves as an epistemological *distinction* between these narratives. While the descriptions produced by the agents of the field – which are at the same time its “theoreticians” – can hardly be distinguished from normative assertions about how the field *should* work, a sociological approach to the field aims to go “beyond these stakes and interests” (Dezalay and Madsen 2012, p. 437). This is not to say such endeavor is “aseptic”, free of political values. A reflexive sociology does not subscribe to “the utopian hope that each individual can free himself from the ideologies that weight on his research by the sheer strength of a self-imposed reform of a socially conditioned understanding” (Bourdieu et al 1991, p. 74). Its purposes are rather achieved through a permanent “epistemological vigilance” in the research process, made feasible by the conceptual tools so far described.

evolutionary process, free of interests and interested agents, is crucial for their legitimation within the field and *of* the field as a whole.

Bourdieu's framework also provides a useful alternative to the shortcomings identified in how those narratives articulate the *process* and the *agents* of reform. A reflexive sociological approach to competition policy brings a thick theory of agency that re-politicizes reform. Within this perspective, reform becomes the creation of a field, and the focus on concrete agents is a crucial mean to understand this process, as well as how the inaugurated arena of practice works and therefore what it serves. This is because, as Dezalay and Garth (2002b, p. 307) maintain, "the content and the scope of rules produced to govern the state and the economy cannot be separated from the circumstances of their creation and production". These circumstances of production, determined by the agents that structure the field, do not mechanically determine its functioning, but "shape the range of possibilities that are likely to be contemplated and implemented – or ignored" (Dezalay and Garth 2002b, p. 307).

This framework thus circumvents agentless accounts, or narratives that rely on an abstract notion of government. Similarly, the limited narrative that explains reform solely on the basis of global and expert agents (such as diffusion perspectives) is also complexified. What such literature focusing on "epistemic communities" and "advocacy networks" as agents of reform takes as homogenous and politics-free groups, a field approach highlights as agents that are part of a hierarchical arena of practice plenty of internal disputes (Dezalay and Garth 2002a, p. 184, Picciotto 1997). Also, while "diffusion perspectives" privilege the focus on global actors in detriment to the role of local agents, Bourdieu's framework – notably in its later developments by his collaborators (e.g. Dezalay and Garth 2002a; Dezalay and Madsen 2012) – enables the linkage of national and international dynamics: the international depends on the national, and that the national is affected by the international (Dezalay and Garth 2002a, p. 13).

By putting the struggles among agents as a crucial dynamic to understand the field, the actor-centered approach of Bourdieu therefore does not incur in "enthusiastic" or "instrumentalist" views of reform. Rather, it places interests and conflicts at the core of the endeavor of understanding how reform takes place, how the instituted field works and what it serves. It also expands the possibilities for analyzing the field beyond the process by which it is created, opening way to study how it is actually practiced, i.e. who are the agents that integrate and reproduce this field after it was established. It thus enables a diachronic perspective for the study of reform.



The emergence and structuring of a field of practice, however, does not occur through a process of abiogenesis. As Dezalay and Madsen (2012, p. 441) put it, “the emergence of a new field almost always has its roots in other fields”. In this sense, competition policy can be seen as a field, or a “subfield” originated at the intersection of least four more consolidated and broader fields: the economic field, the political field, the legal field and the field of economics. Its linkages to the economic and political fields are quite evident: competition policy entails a model of economic governance led by state institutions with the role of defining norms of interaction among economic agents. CADE’s institutional status as a “competition authority” connected to the Ministry of Justice, the ministerial secretariats that compose the SBDC and the role of the President in selecting commissioners are just a few examples that illustrate how competition policy is connected to the dynamics of the political field. Similarly, corporations that struggle (or “compete”, in the economic sense particular to competition policy) in the economic field are the very agents subjected to the institutional framework responsible for producing antitrust law.

As a relatively autonomous field of practice, however, competition policy is fundamentally rooted in the fields of law and economics. It comprises an arena of professional practice occupied by agents that are typical of those fields: lawyers<sup>50</sup> and economists. The agents of the legal and economics fields are those who perform roles at the governmental institutions responsible for producing competition policy (i.e. as commissioners in CADE, and in different ministerial positions), as well as those who represent and assist corporations before state institutions. Moreover, law and economics constitute the very “language” of the exchanges and interactions that take place within this field. The struggles within the field of competition policy occur through legal battles and struggles over economic science. Lawyers and economists are therefore the ones responsible for mediating the interaction of this field with the political and economic fields. That most of the available narratives about the history of competition policy, its purposes and outcomes are produced by lawyers and economists is an indication of their prominent role in the field.

So far, the translation of the reflexive sociology approach to my object has accomplished the task of locating the subfield of competition policy in relation to other fields of power. As sustained by Bourdieu, the use of this framework in research demands other two steps: to map the objective structure of relations between the positions occupied by the agents

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<sup>50</sup> The concept of “lawyers” refers not only to the professionals of litigation, who practice law, such as attorneys or counselors. Rather, it encompasses indistinguishably those who possess a legal degree, and it is used interchangeably with the notion of “jurists”.

of the field, and identify their habitus. These are precisely the tasks that I will tackle in my empirical research. At this point, it is necessary to explain how I translated them into refined research questions.

Following the approach of a reflexive sociology, I derive two sets of empirical questions to guide the research of the reform and practice of the field of competition policy in Brazil. First, to understand the process of constitution of the field through the agents that construct it, the research questions under a field approach become the following: *Who are the agents of competition policy reform in Brazil? What are their positions, capitals, and habitus? How did they shape the reform process?* If, as I suggested, the field of competition policy is a space of intersection born out of four other fields, answering these questions demands identifying who are the agents that acted in the process of reform, what were their positions in the fields of origin, what sorts of capital they possessed, and what were their “systems of dispositions”. As I will argue in Chapter 4, agents of the economic and political fields attempted to impact reform in different ways. The agents of the fields of law and economics (lawyers and economists) were, in turn, the “architects” of the institutional arrangement set up for producing competition law. The study of the constitution of the competition policy field in Brazil thus demands mapping the objective structure of positions from where it emerges, and assessing who were the agents involved in reform is a means to do so.

Through these questions, it will be possible to visualize what are the struggles around reform and what concrete agents were hegemonic in determining the structure of the field created, its rules of functioning and thus the roles it may and may not perform. By knowing who the agents are, understanding the struggles in which they engage, and locating the positions from where they depart to act as reformers, the process of reform is re-politicized, and the connections of these agents to political stances about how the state should regulate the economy – the core issue in the field of competition policy – can be thus revealed. In doing so, the depoliticizing notion of “the government” as the agent of reform, or the excessively global perspectives focusing on the role of purely “technical agents”, are circumvented, and the process of creation of the modern field of competition policy in Brazil is explained through the concrete agents that produce it, the political perspectives they represent, and the content they infuse into the field that is created.

Second, to understand how the field is structured after its constitution, that is, what are the objective relations that structure its practice, I propose the following question: *Who are the agents of practice of competition policy in Brazil? What are their positions in the field,*

*their capitals, and habitus?* As already anticipated, lawyers and economists occupy the arena of professional practice comprised by antitrust policy. They act in several positions of the field: both in state functions, as CADE's commissioners or in ministerial secretariats that, together, compose the SBDC, and in law firms and economic consultancies representing and assisting corporations in cases decided by CADE. Therefore, lawyers and economists are the agents that possess the power to determine what the law is – in this case, competition law – and who struggle over the monopoly to define it.

On the side of the state (the SBDC), the analysis of the capitals possessed by these agents and, consequently, of the positions they occupy in the field enables revealing what kinds of agents are recruited to produce competition policy, what entitles them to be so, and what is the dominant habitus that is institutionalized in the field. By mapping the objective structure of relations that these agents compose, it will be possible to assess what are the hegemonic profiles entitled of the power to produce competition law in Brazil, and to connect them to political positions, interests and struggles, thus re-politicizing the very production of competition regulation.

The analysis of the agents of the market is a necessary complement to the picture. Through the mapping of who are the agents that represent corporations before antitrust authorities, it is possible to assess how distant from the state – in terms of social connections, profiles and habitus – are the subjects that competition policy is said to control. In other words, the analysis of the “professional” dimension of competition policy is a means to overcome mainstream narratives attempt to characterize competition policy as clear-cut separation between the state and the market, an instrument through which the abstract entity of the “state” controls another impalpable category: the “market”. It is precisely based on the assumption that competition policy embodies a separation between the state and the market that these narratives ignore the possible functionalities of competition policy to the market logics embedded in neoliberalism, or even neglect it.

Following the approach of a reflexive sociology, mapping the structure of relations among the agents that produce competition regulation – in the state and in the market – is a means to assess what stances can be expected from the field after it was reformed. Such framework depicts what Trubek et al (1994) called the “mode of production of law” – in this case, of competition law and policy. The mode of production is determined, among other factors, by the allocation of roles among the various positions in the field, the way in which the field (re)produces its habitus, the importance of social capital in recruitment to the field, and its dominant mode of legitimation (Trubek et al 1994, p. 419).

Through these refined research questions elaborated on the basis of a reflexive sociology approach, different conclusions about the roles of competition policy reform and practice with neoliberalism can be reached. For this purpose, analyzing the roles of lawyers and economists in the creation and operation of the field of competition policy emerges as a central task. In the next section, I provide several illustrations of how an actor-centered approach that focuses on the study of lawyers and economists as agents that construct power relations in society and propel political transformations is useful to understand the construction of fields of practice, its structures and connections to political projects. The examples presented also serve as parameters to interpret the data collected about the agents of competition policy reform and practice in Brazil, and thus to evaluate the possible linkages of this field's structure to neoliberalism.

## **2.2 Lawyers and economists as agents of neoliberalism**

Sociological approaches to the study of lawyers and economists constitute a vast branch of research in the sociology of law and economic sociology, respectively. The study of these professional groups may, however, focus on different aspects of their connections to society. The literature on lawyers is exemplary of such diverse forms of studying these agents. Some authors have approached lawyers in professional terms, underscoring the “power structure of the legal professions” (Cain and Harrington 1994, p. 1). These are efforts close to the sociology of professions that emphasize how social, economic and political aspects are reflected by and affect lawyers and the organization of their work (Abel 1995, Abel and Lewis 1988, 1989, 1995, Heinz and Laumann 1994). Topics such as the social conditionings of the work performed by lawyers (Larson 1977, Powell 1989) and the interaction with other professions in the market of professional services (Abbott 1988) have been privileged by this literature.

Criticisms to this sociology of the legal professions have stressed that a strictly professional approach on lawyers would reflect a sort of “occupationist orientation” (Cain and Harrington 1994, p. 1), a “professional narcissism” (Halliday 1987) with no “macro-sociological” agenda (Halliday 1998, p. 245) about the role of law, lawyers and legal expertise in society. A more comprehensive study of “lawyers in society” has been thus called for as necessary to explain what makes lawyers distinctive from other professions, what do lawyers know, and how they relate to society and the economy as a whole (Abel and Lewis

1995, p. 282). In line with this critique, several studies develop an effort to understand what Cain and Harrington (1994, p. 01) call the “constitutive role [lawyers’] work plays in shaping power relationships in society”. Within this strand, some authors have focused on understanding “the ways in which lawyers represent working-class and underprivileged clients”, or the “alternative forms of law work that are carried out on behalf of those typically excluded from the control of capital and from influence in the central state” (Cain and Harrington 1994, p. 01-02). Others, in turn, have privileged the study of the hegemonic roles played by lawyers, stressing the ways in which they contribute to the “creative institution building on behalf of capital” (Cain and Harrington 1994, p. 01-02).

The kind of approach that illustrates my focus on lawyers and economists as agents of neoliberalism is precisely the one that underscores the constitutive roles of these agents in society, especially in constructing, transforming and operating hegemonic social relationships and institutions. In the sociology of law, these are studies that reveal the roles of lawyers as institutions builders and statesmen. In economic sociology, it entails a growing scholarship that theorizes the rise of economists into positions of power and their active roles in structuring new forms of economic governance. These studies do not abandon the understanding of the internal structuring of each professional field, but rather link professional dynamics to political stakes – which is precisely the task that stems from the translation of the reflexive sociology approach to the study of the field of competition policy. As I will try to show in the next subsections, a vast literature from sociology of law and economic sociology has identified how lawyers and economists occupying certain positions within their fields of origins, and thus possessing a specific set of capitals and habitus have been crucial for the structuring of neoliberal reforms.

### *2.2.1 Lawyers as institutions builders and statesmen*

My proposal to understand the linkages between the constitution and practice of the field of competition policy to neoliberalism through the roles of lawyers is based on sociology of law’s extensive contributions about the historical importance of these agents for the creation, transformation and management of political and economic institutions. I depart from the assumption that lawyers are not only the operators of the legal system, acting in different functions in the judiciary or as professionals that represent clients. Rather, lawyers are also active agents in creating and transforming institutions and fields of practice that shape the state and the economy.

They are “institution builders” whose work entails constituting the institutional contours of society, the state and the economy (Halliday 1987, 1998, p. 269-270, Halliday and Karpik 1997). As “conceptive ideologists” of capitalism (Cain 1979, 1994), they create the “regulatory forms in and through which corporate capitalism develops” (McCahery and Picciotto 1995, p. 244). Lawyers promote an ideology that simultaneously constitutes and is constituted by the power relations based on economic factors (Cain and Harrington 1994). As already suggested in Weber’s seminal sociological approach to the law, lawyers and their expert knowledge create the subjects and the boundaries of market transactions; constitute the forms and limits of commodification; promote legal innovations that induce transformations in economic behavior; and provide legitimacy and an appearance of control and justice to the markets (Halliday 1998, p. 250-254). These roles can be observed in a variety of examples about the construction of regulatory systems that structure economic transactions, such as financial regimes (Hartmann 1995), international taxation (Picciotto 1995), insolvency and bankruptcy regimes (Halliday and Carruthers 1993, 2009), international arbitration (Dezalay and Garth 1996), and more importantly to this work: antitrust regulation (Dezalay 1992, 1995, Dezalay et al 1995).

In line with the framework sketched in the previous section, I understand that the construction and transformation of institutions and fields by lawyers depends on who they are: that is, on their positions within the legal field, the sorts of capitals they possess, habitus they share and disputes they fight. The shape of any field is conditioned by the agents that structure it, and when lawyers are these agents it is no different<sup>51</sup>. Based on this assumption, my research deals with lawyers who reform and manage a field of economic governance located within the state apparatuses. The “role of lawyers in the exercise of power” has been observed at the national, regional and local levels in the “formal organization of collective decision-making” (Rueschmeyer 1973, p. 78) as early as in the nineteenth century. Since Tocqueville (2010 [1835]) and Weber (2004 [1919]), a vast literature has described and explained how and why the legal professions have historically performed such broad roles in

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<sup>51</sup> Exemplary of the application of such framework of a reflexive sociology for the study of the role of lawyers in constructing and transforming of fields of practice are the studies conducted by Dezalay (1990) and Dezalay and Garth (2004) about how the struggles among the different “models of professional practice” entailed by law firms, multidisciplinary consultancies, and audit companies helped to shape business practices around the world. In a similar sense, the book edited by Dezalay and Sugarman (1995) presents several studies that interpret shifts in the corporate world as a function of the agents that construct it and their struggles, especially lawyers and the “professionals of numbers”, such as accountants and managers. Dezalay and Garth (1996) also provide an illustration through the study of the construction of the field of international arbitration, and Dezalay (1992, 1995) provides yet another example by focusing on the battles between American and European lawyers in the shaping of the field of antitrust policy in Europe.

the state and the economy. Empirical research on the United States has corroborated Tocqueville's perception that lawyers have been "overrepresented" in North American political institutions<sup>52</sup>. Similar accounts about the role of lawyers in state apparatuses have been produced in reference to other countries of the global North, such as Germany (Rueschmeyer 1973), the United Kingdom (Podmore 1977; Sugarman 1994), and France (Weber 2004 [1919]; Karpik 1999).

The phenomenon has also been observed in the global South, notably in Asia (Dezalay and Garth 2010) and Latin America (Dezalay and Garth 2002a), where lawyers have historically dominated state structures. In countries such as Argentina, Brazil, Chile, Colombia and Mexico, lawyers conformed the vast majority of presidents, ministers, government cabinets, senators, representatives and bureaucrats during most part of the nineteenth and twentieth centuries. They were the very "builders of nations (...), in charge of creating and interpreting the rules of the game for national politics and business" (Pérez-Perdomo 2006, p. 94).

Brazil is no exception to the historical rule of lawyers in the state apparatuses, as many local studies developed by political sociology and the sociology of elites, notably between the end of the 1970s and the mid 1980s indicate (e.g. Venancio Filho 2004, Falcão 1979, Simões 1983, Adorno 1988, Carvalho 2012). Jurists have been pointed as hegemonic in performing political roles in the country in different historical periods: during Portugal's colonial control over Brazil (from the sixteenth century until 1822), in the Imperial period inaugurated by independence (from 1822 to 1889), and in the so called Brazilian first Republic (from 1889 to 1930). Lawyers were central in the process of state building that followed independence, as many jurists were appointed to "perform the tasks of government" (Carvalho 2012, p. 36; 99).

The creation of law schools (i.e. the production of lawyers), as elsewhere in Latin America, was an integral part of the construction of the independent nation. Lawyers had a historical role of architecting liberalism in Brazil<sup>53</sup>, ideologically consolidating a national elite, and legitimating the control of the state apparatus by turning a *de facto* power into *de iure* power (Falcão 1979, p. 373). As Dezalay and Garth (2002a, p. 18) explain, lawyers have

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<sup>52</sup> For instance, the studies of Eulau and Sprague (1964), Miller (1995) and Freidson (1986, p. 193) detect the prominent roles of lawyers as presidents, legislators, and officials of regulatory agencies in the first half of the twentieth century. Lawyers have also been prominent in positions of economic policy-making (Khademian 1992), and as managers of corporations (Larson 1977, p. 167-170).

<sup>53</sup> As Falcão (1989, p. 434) maintains, although Brazilian lawyers have historically presented themselves as the heirs of liberalism and the rule of law, playing prominent roles in resisting to authoritarian rule in certain moments (for instance, against Vargas' dictatorship in the 1940s), their actual legal practice have also "helped to implement most of the authoritarian legislation".

historically represented a “kind of aristocratic ideal of government”, and relied on their “general legal training and practical wisdom” to play many roles in Brazilian politics: as intellectuals, politicians, business leaders, and, above all, intermediaries between public and private, the learned world and the world of affairs” (Dezalay and Garth 2002a, p. 18). In the discussed periods, legal education was less a skill that enabled an individual to pursue a legal career (as a judge, as a prosecutor or lawyer), than to enter state politics (Dezalay and Garth 2002a, p. 19). Despite qualitative changes (for example, the passage from the dominance of magistrates to the prominence of lawyers) and a relative decay in the number of lawyers occupying high positions in Brazilian political institutions, this literature indicates that an elite trained in law was permanently present in the political arena. Such constant prominence has motivated narratives both in the academic and in the political fields regarding the dominance of “bachelorism” in the Brazilian state, i.e. the overrepresentation of bachelors, notably in law, in political institutions.

This prominence would have implied the dominance of lawyers’ “forma mentis” in government – a rationality characterized by its “appeal to the forms” and “rhetorical distancing from research” (Venancio Filho 2004, p. 294). Legal expertise achieved “the highest standard of political knowledge” in Latin American countries during most of the nineteenth and the twentieth centuries because it comprises a sort of “science of the state – that is, a science for and of the state” (Dezalay and Madsen 2012, p. 438). The defining characteristic of law as symbolic capital (the typical capital provided by the legal field) is that it provides “a rhetoric of universality and neutrality” that operates as “a tool for ordering politics without necessarily doing politics” (Dezalay and Madsen 2012, p. 438). Not by chance, lawyers have been historically entitled to work as “public men”, guiding public opinion and articulating social demands and the state’s responses to it (Pérez-Perdomo 2006, p. 93-94).

The historical roles of lawyers in shaping and managing the state apparatuses have nevertheless undergone important changes in the context of economic internationalization of the 1980s and 1990s. As Dezalay and Garth (2002a) suggest, the neoliberal transformations that occurred in the period were related to disputes of models to govern the state and the economy that contested the historical sovereignty of lawyers as statesmen and of law as a governing expertise. The paradigm of the “politicians of the law” started to be challenged in the new economic context that emerged in the 1980s. A battle between “an old knowledge, found in the courts and law faculties” and a “new knowledge coming from the North” (Dezalay and Garth 2002a, p. 43) was installed in parallel to and propelling the transformation



of the state. On one side, the generalist knowledge possessed by lawyers formed in the European tradition. On the other side, “technopols” – individuals entitled with an innovative form of cultural capital to govern the state: economic science, especially that produced in the U.S. (Dezalay e Garth 2002a, p. 28). In Dezalay and Garth’s view (2002a, p. 286), this was conflict against law schools in order to determine who had the necessary abilities to govern.

The economic crisis that affected Latin American countries by the end of the 1970s, which constituted an important justification for neoliberal reforms (see section 2.4), opened way for jurists who historically dominated the field of state power to be discredited as “anachronistic”, and incapable of promoting “economic progress” (Dezalay e Garth 2002a, p. 35-36). This contestation, mostly promoted by economists, implied a new “hierarchy of knowledge”, determined, in turn, by the international market of expertise in which the U.S. had hegemony (Dezalay e Garth 2002a, p. 57). As a consolidated expertise in the U.S. field of state power, economics gained legitimacy in states that were undergoing reforms. To Latin American countries, this hierarchy implied what Dezalay and Garth (2002a, p. 15) characterized as the “retooling of state elites”: the shift of the legitimate capital to govern – from law to economics –, and a change in the main source of this capital – from the European legal tradition to the North American new economic orthodoxy. The expertise to govern the state was thus “dollarized” in two senses: it became more economic, and in the intellectual currency of the U.S. (Dezalay and Garth 2002a, p. 247).

The ascendancy of economists to dominating positions within the field of state power thus represented a battle against generalist lawyers, and the attempt to consolidate a new professional symbolic power as the legitimate technology of government<sup>54</sup>. In political terms, these struggles paralleled the dismantlement of developmental states produced since the 1930s, and the consequent consolidation of regimes suitable for the neoliberal project of constructing free markets. The clashes among generalist lawyers and economists constitute, in this sense, the “general history” of the transformation of the state in Latin America (Dezalay and Garth 2002a). As Dezalay and Garth (2002a, p. 17) suggest, “the people who serve developmental states [...] do not have the same profile as those who serve the neoliberal democracies”.

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<sup>54</sup> In the study of the transition from dictatorship to democracy in Brazil, Faria (1993) also identifies a tension between lawyers and economists. A polarization between law and economics as two “criteria of rationality” would have emerged in the early 1990s, when several anti-inflationary programs, the sanitation of public finances and public debt, and the stabilization of the economic system were implemented (Faria 1993, p. 21). This was a tension between the “imperatives of the economy” – seeking allocative efficiency – and the “exigencies of the law” – and its attention to the legal-rational framing of power (Faria 1993, p. 12).

It is not to say that lawyers ceased to be relevant for the transformation and management of state structures in neoliberalism. As Shivji (2006) maintains, “neoliberalism generates a transnational legal intelligentsia to serve and oil it”. They pave the way for the globalization of corporate capital in several ways: through the drafting of legislation on privatization, by setting up “enabling institutional frameworks in which corporate capital can function without let or hindrance [...], in drafting contracts to enable corporate capital to exploit underground minerals and overground bio-resources [...], in facilitating commodification of education and health; water and energy”, among others (Shivji 2006).

Exemplary of the renewed roles of lawyers in neoliberal reforms in Latin America is how the “global neoliberal project”, which began being implemented in the late 1980s mostly through measures of economic liberalization, started to incorporate elements of institutional and legal reforms by the 1990s (Rodríguez-Garavito 2011, Dezalay and Garth 2002b). Such “institutional turn” of the Washington Consensus sought to promote “market-enhancing institutions” seen as necessary for neoliberal transformations of the economy, and “entailed an unprecedented investment in judicial and rule of law reform” (Rodríguez-Garavito 2011, p. 159)<sup>55</sup>. As Dezalay and Garth (2002a, p. 170) maintain, “in order to consolidate the policy gains of the neoliberal revolution, it appeared essential to reconstruct some level of regulation”. Lawyers thus became key-agents to design and perform reforms that sought to promote economically efficient legal institutions (Dezalay and Garth 2002a, p. 164; 171; Gordon 2010)<sup>56</sup>. Globalization implied, in this sense, an increased juridification and judicialization of Latin American societies, and thus the demand for legal services and for the active roles of lawyers grew, especially in the new regulatory arenas opened by neoliberal policies of deregulation and privatizations (Pérez-Perdomo 2006, p. 121-129)<sup>57</sup>.

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<sup>55</sup> The “institutional turn” comprises the second of what can be seen as three “periods” of the state reform agenda propelled by the World Bank. According to Santos (2006, p. 267-268), the first phase, from the 1980s to 1990, would be that of “structural adjustments”: a series of market shock and trade liberalization measures. The second phase, from 1990 to 1999, would be the “governance period”, in which the Bank incorporated recommendations of institutional nature into its agenda of state reform. The third phase, from 1999 onwards, would be that of a “comprehensive development”, which “seeks to reconceptualize development by going beyond its macroeconomic and financial aspects to focus on structural, social, and human concerns” (Santos 2006, p. 268).

<sup>56</sup> It is important to note that, in the case of Brazil, the “comeback of lawyers” precedes the institutional turn of the neoliberal agenda. This is because the process of drafting the Constitution of 1988 “brought together the elite and the traditional language of law, favored in the setting of debates about government” (Dezalay and Garth 2002a, p. 158). In many senses, the Constitution consolidated an active role of the government in participating in and regulating the economy, and provided several social protections in the form of rights. Neoliberal reforms started short after its promulgation, and were intensified in the mid-1990s through several constitutional reforms for liberalizing the economy. Neoliberalism was thus “constitutionalized” in the 1990s (Schneiderman 2008).

<sup>57</sup> Other examples of such prominent roles of lawyers in fields of practice transformed or created in the context of economic globalization are the roles of jurists as the key-agents in the NAFTA panels for dispute resolution, how lawyers have displaced the “diplomatic culture in favor of a more law-oriented one” in the World Trade

In the neoliberal restructuring of Latin American states, legal expertise was therefore central – but also fundamentally transformed (Pérez-Perdomo 2006, p. 123). A defining characteristic of this transformation is the alignment to the standards of American legal thinking and institutional models of regulation. What is distinctive about the form of legal expertise demanded by neoliberal reforms is its orientation by the orthodox economic institutional and cognitive models of the United States, and the lower influence of the historical European sources, as it was the historical case of Brazil (Dezalay and Garth 2002a, p. 42). As suggested by Mattei (2003, p. 383) the post-Cold War period, precisely the context from which neoliberal reforms emerge, can be seen as “a general process of Americanization in legal thinking”. The American economic and political global hegemony reaffirmed in this period produced impacts on the legal field in the form of “the diffusion of professional ways of thinking about the law and to address such major intellectual changes as results of the ideological apparatuses of global governance” (Mattei 2003, p. 408)<sup>58</sup>.

Such process of Americanization can be explained by the increasing hegemony of American law as a better-adapted model “to neoliberal needs as compared, for instance, to European black-letter law” (Nader 2005, p. 210). In the case of Latin America, where such European tradition has been historically influential, the new regulatory arenas opened by neoliberalism created a need for lawyers both in the market and in the state with “knowledge and skills that many law schools have been unable to provide” (Pérez-Perdomo 2006, p. 121). For lawyers to take part in the creation and management of fields of practice opened or transformed by neoliberalism several transformations in the legal field occurred. The dollarization of state expertise in Latin American countries therefore also affected the law, although in a lower intensity, or with more resistances than in economics (Dezalay and Garth 2002a, p. 56-57)<sup>59</sup>.

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Organization (Costa 2011), and their higher importance in the World Bank since the late 1990s and early 2000s (Pérez-Perdomo 2006, p. 132).

<sup>58</sup> Some of the defining traces of such Americanized legal thinking in the period of neoliberal globalization can be found in the work of Heydebrand (2003a, 2007). This author identifies a correspondence between the process of economic and political globalization and the emergence of a new type of legal rationality that would be functional to neoliberal globalization, as it provides a strategic combination of hard and soft procedures, and expand the scope of discretion in legal, political and economic decision-making and governance (Heydebrand 2007, p. 93), as well as promotes the depolitization of government, a selective deregulation of economy, the deformatization of law, the deinstitutionalization of justice and the privatization of public spheres (Heydebrand 2003a, p. 335).

<sup>59</sup> As Dezalay and Garth (2002a, p. 47-48) explain, the impact of the so-called “dollarization” in the legal field was less incisive than in economics because there is a “much longer history of legal institutions in Latin America and their strict embeddedness in historical structures of power. The positions of the faculties of law and the courts are thus the product of long histories producing patterns of behavior and hierarchies of power that are very difficult to change”.

The dollarization of law and lawyers in Latin America can be noted in the consolidation of the American model of “business law” in legal education, and in professional practice. As the skills demanded of the lawyer tuned with the pulses of an internationalized economy have been often absent of the European legal tradition dominant in countries such as Brazil, new techniques for the practice of the law and the construction of institutional and legal models have been imported (Engelmann 2011, p. 39). Several initiatives to reform legal education accordingly to these ideals took place in the region, promoted especially by private institutions, with the objective of training business lawyers on modern areas of economic regulation and judicial reform (Pérez-Perdomo 2006, p. 109, Dezalay and Garth 2002a). In Brazil, such roles have been exemplarily conducted by the Fundação Getúlio Vargas (FGV), both in São Paulo and Rio de Janeiro, which often adopt both the structure and pedagogical canons of American universities, have a staff mostly composed by professors who obtained doctoral degrees in the US, and focus on undergraduate and graduate courses on innovative areas of economic regulation (Engelmann 2011, p. 27-29).

In the world of legal practice, the process of Americanization of law entails the diffusion of the model of the American law firm, and the consolidation of a “new class of lawyers” (Nader 2005, p. 202). The historically dominant model of law firms as family enterprises found in most of Latin American and European countries (Dezalay and Garth 2002a, p. 49, Dezalay 1995), started to change within the context of economic internationalization. In Brazil, elite law firms that emulate the U.S. corporate model have been “a key agent and product of the Americanization of the legal landscape” (Dezalay and Garth 2002a, p. 198). In a small yet elite group, large business law firms composed by lawyers often trained in American institutions and with an internal organization similar to its U.S. homologues started to emerge. Even some of those that remained with a familial structure often became a “hybrid”, incorporating American legal expertise into its practice (Dezalay and Garth 2002a, p. 199).

Corporate lawyers who work in these firms have themselves undergone a process of Americanization. In the case of Brazil, for instance, and in comparison to lawyers in traditional legal careers such as the Supreme Court’s justices (Almeida 2010), or Brazilian legal academics (Engelmann 2008), the capitals possessed by corporate lawyers are much more “dollarized”. While the former are less internationalized, and tend to concentrate eventual international educational experiences in the Continental European legal tradition, elite corporate lawyers often pursue graduate studies in the United States, are frequently

proficient in English and licensed to practice the law in other jurisdictions, especially the U.S. (Engelmann 2011, p. 25).

As Engelmann (2011, p. 39) suggests, the pole of “business lawyers” in Brazil, its professional practices, and relations with the constitution of legal and judicial institutions aligned with the demands of the economic sphere expanded throughout the 1990s and 2000s. As neoliberal measures of privatizations and deregulation opened new arenas of economic activity and paved the way for the entrance of multinational corporations into liberalized markets, it also engendered new fields of practice for this legal elite of corporate lawyers to become mediators among corporations, and between them and the government (Seong-Hyun 2011, Pérez-Perdomo 2006, p. 121, Dezalay and Garth 2002a, p. 50).

The roles of corporate lawyers are thus not restricted to the market of professional services, as they often occupy positions in regulatory arenas, such as chambers of commerce and arbitration, governmental institutions responsible for producing economic regulation (Engelmann 2011, p. 25), and are key-vectors of the import of new technologies, such as court reforms and legal education (Dezalay and Garth 2002a, p. 198; 205). These two dimensions of the roles of corporate lawyers are frequently intertwined: acting in governmental and regulatory positions provides capital to corporate lawyers to work in the professional market, especially when they deal with business regulation while in the state (Pérez-Perdomo 2006, p. 119).

Another front of Americanization that has been functional to reposition the role of lawyers in neoliberalism is the diffusion of a form of legal reasoning that relies on the application of economic methods and theory, especially microeconomics, to “examine the formation, structure, processes, and economic impact of law and legal institutions” (Mercuro e Medema 2006, p. 01): the so-called “Law and Economics” movement (L&E)<sup>60</sup>. As it originated in the US in the 1950s, and later consolidated in the 1970s (MacKaay 1999), L&E is born out of a criticism to the alleged incapacity of traditional legal expertise in responding adequately to economic phenomena<sup>61</sup>. As different models of rationality, economics and the

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<sup>60</sup> Although until the 1980s L&E had a relative “consensus about method and agenda” built around neoclassical economics (MacKaay 1999, p. 67), there are currently several nuances in the perspectives that mobilize microeconomic methods to approach legal phenomena. According to Mercuro e Medema (2006), contemporary L&E includes the orthodox economics developed at the University of Chicago, public choice theories, institutional and new institutional economics.

<sup>61</sup> As it is explained by one exponent of the L&E tradition – Richard Posner –, although the economic analysis of the law was initially restricted to antitrust law in the United States until the 1960s, it started to expand to other areas of American law in the 1970s (Posner 2003, p. 23), and eventually to other countries and legal traditions (Posner 1999). Indicators of such diffusion are the multiplication of specialized journals, the formation of academic associations specialized in L&E, and its institutionalization in law schools and economic faculties as undergraduate courses and graduate programmes in the US, Europe (Mercuro e Medema 2006, p. 03), and more

law would diverge in the level of analysis (empirical versus formalist), in the form of analysis (inductive versus deductive), and in respect to the focus on allocative versus distributive aspects of the economy (Mercurio e Medema 2006, p. 34-52). L&E seeks precisely to solve the “problem” of such epistemological divide through the reliance on the scientificity of economics and its attention to the promotion of efficiency<sup>62</sup>. For the legal field, the development of such expertise implies an innovative form of legal rationality to the study and the production of law and legal institutions, one that is opposed to the exegetic and formalist approaches notably dominant in the European legal tradition.

L&E is not solely an academic enterprise, as it also entails “a positive program [that] provide[s] a set of prescriptions to deregulate through law” (Dezalay and Garth 2002a, p. 170), which fit precisely the demands subjacent to neoliberal policies. In the U.S., for instance, “leading new-orthodox legal academics” connected to the L&E tradition moved into power positions in the judiciary and other regulatory arenas precisely during the “wave of the conservative revolution” in the 1980s (Dezalay and Garth 2002a, p. 170). In Brazil, such “ideology of business law” has promoted new regulatory models tuned with the goals of economic efficiency and the objective of overcoming the “problem of institutions” and the “inefficiency of the judicial system” characteristic of neoliberalism (Engelmann 2011, p. 29-30).

Through this brief overview about the roles of lawyers in society, I made explicit two assumptions from where I depart to incorporate these agents into the actor-centered approach on the reform and practice of competition policy. First, I take lawyers’ work to go beyond the operation of the legal system, as it also comprises roles of creating fields and transforming and managing several arenas of governance. Second, the shape taken by those arenas depends on the positions lawyers occupy in their field, the sorts of capital they possess and habitus they share, which are infused into the arenas where they act. Analyzing who are those agents “in position to exercise the symbolic power of law” (Dezalay and Madsen 2012, p. 438), their capitals, positions and struggles, is thus crucial to understand the very structure of the arenas shaped by these agents. As I argued, the forms of capital and habitus that are often related to the reform and creation of fields in a neoliberal line are frequently tributary to legal

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recently, in Latin America. In Brazil, since the 2000s, journals, academic networks, courses or entire graduate programs dedicated to the L&E approach have emerged (Engelmann 2011, p. 29).

<sup>62</sup> The interaction between legal and economic expertises embodied in L&E is not, however, pacific. It has been extensively criticized as a “one-way traffic” (Goodhart 1997), “intellectual imperialism” (Stigler 1984, Cooter 1982, 2008), and the “colonization of law by economics” (Campbell and Picciotto 1998).

credentials, ideologies and institutional models acquired in and inspired by expertises originated in the United States.

### 2.2.2 *The rise of economists*

Dezalay and Garth's claim about the association between neoliberal institutional reforms of the 1990s and the repositioning, both internally and externally, of the professional fields of law and economics converges with an extensive literature focused on the role of economists in politics. Although more recent than the literature on lawyers<sup>63</sup>, this scholarship has produced several studies that reach similar conclusions to those of a sociology of lawyers, i.e. that the agents of the field of economics, their positions, capitals and struggles affect the constitution and configuration of fields of practice close to state power – notably in neoliberal reforms. The increasing importance of economists and economic science in the field of state power has been pointed by economic sociology as a relatively recent and global phenomenon (Markoff and Montecinos 1993, Montecinos and Markoff 2009), observable in several regions, such as Latin America (Domínguez 1997, Babb 2001), Europe (Lebaron 2000, Fourcade 2009), Australia (Petridis 1981), and the United States (Fourcade 2009a, 2009b).

Based on appeals to rationality and scientificity (Centeno and Silva 1998, Domínguez 1997), economic expertise became a legitimate “technique of government”, a “tool for the exercise of public expertise” (Fourcade 2009b, p. 3), especially in the wake of neoliberal reforms. As a “form of expertise relevant to the state administration” (Fourcade 2009b, p. 238), economics not only explains the functioning of markets. Rather, as often addressed by anthropological perspectives, it *performs* the very realities it claims to describe, constructs and reconstructs the economy, models and coordinates practices and decision-making by the state in the economic sphere (Callon 2006, Heredia 2008). Mobilizing this form of expertise of government, economists offer “technical justifications” to the foundations of political and social orders (Montecinos 1998, p. 128). Similarly to lawyers and legal expertise, economists and their “economic ideas give rise to certain types of societal projects, such as the transformation of state structures and capacities” (Fourcade 2009b, p. 29). Based on academic credentials (and even more than lawyers, it can be said), economists have been increasingly

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<sup>63</sup> This may be related to the different histories of the two fields. While the legal professions date of several centuries, economics as an autonomous and professional and academic discipline started to be established only in the 19th century (Fourcade 2006, p. 2). In Latin American countries such as Brazil, this autonomization is even more recent, dating of the 1940s, when economics became independent from law and engineering, and consolidating in the 1970s, with the creation of the first graduate programs (Loureiro 1997, p. 32-44).

influential in the “state building process” (Fourcade 2009b, p. 61), and the possession of economic expertise even became a requirement for the participation in the debates about the economy (Heredia 2008).

As Fourcade (2009b, p. 237) puts it, the defining characteristics of economists’ knowledge since the 20<sup>th</sup> century has been “the discipline’s increasingly assertive scientific style and growing methodological consensus, on the one hand, and its jurisdictional expansion and internationalization, on the other”. Such consensus is mostly around an orthodoxy developed by U.S. economists, which is characterized by the importance of quantitative skills, profound roots in the academic world, and a “market-oriented” knowledge, “both cognitively and professionally” (Fourcade 2009b, p. 8-9)<sup>64</sup>. This can be seen as the dominant “habitus” of what has spread since the 1980s as mainstream economics, a “professional culture that identifies [mathematic methods] with objectivity and the pursuit of efficiency” (Fourcade 2009b, p. 90). The “reliance on numbers” has been a crucial component of American economists’ habitus, and of those influenced by this tradition as “a means to eschew political differences” (Fourcade 2009b, p. 127).

As Dezalay and Garth (2002a) explain, the internationalization of this model of economic science, as well as the positioning of economists possessing this sort of capital is connected to disputes within the field of economics in the U.S. in the 1950s and 1960s. These were professional disputes among Keynesians and what became known as neoliberal economists. Aligned with the Kennedy administration and thus occupying positions in the establishment, Keynesians started to be contested by a group of economists that did not enjoy the same amount of political power, coming from less privileged social origins and investing in extremely mathematized theories and methods (Dezalay and Garth 2002a, p. 73-77). The interest of professional ascendancy by this group, combined with political disagreements and intellectual battles against the Keynesians made a perfect marriage with attempts to redefine the state mobilized by the opposing political forces. In the 1970s, the winners of this battle in the field of economics – neoliberal economists – mostly coming from the University of Chicago, hegemonized the field and started to dominate positions within the state apparatuses. Not by chance, the arrival of these economists to positions until then occupied by agents with different profiles is connected to the development of neoliberal policies.

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<sup>64</sup> As Fourcade (2009b, p. 64) recognizes, American economics “harbors many churches”, but has “one dominant religion”: “applied quantification”. To this author, “the modern history of American economics is fundamentally a history about ‘rival ideals of quantification’ [...] rather than rival ideals of economic analysis” (Fourcade 2009b, p. 83).



Exemplary of such connection between the increase of power of a certain type of economist and the shifts in state policies is precisely competition policy. An arena of practice historically dominated by lawyers, U.S. antitrust policy became growingly economicized since the 1970s, with the increased influence and presence of economists in the state apparatuses responsible for implementing it (Fourcade 2009b, p. 120)<sup>65</sup>. Eisner (1991) and Davies (2010, p. 77) observe the intensification of the economicization of antitrust in the 1980s, culminating in the “Chicago revolution”, through which a gradual shift in the relative powers and presence of economists versus lawyers within the enforcement agencies occurred, in parallel and due to the ascendancy of the Reagan administration. Similarly to the conflict between lawyers and economists in the reform of Latin American states noticed by Dezalay and Garth (2002a), Davies (2010) evidences how the struggle of economists tackled precisely the dominant legal expertise. Chicago economics represented a criticism to legal rationality in several senses: legal rationality would have a formalist view of economic processes, a quasi-idealist perspective on “competition” and the “market”, distant from the empirical reality, and would deal with normative criteria informed by transcendental concepts of justice and fairness (Davies 2010, p. 80). A proper economic reasoning to competition policy would rather avoid the non-stable “formal-legal” categories that could not be expressed objectively, and would deploy rigorous empirical and mathematical analysis to achieve the sole goal that should be pursued by antitrust policy: economic efficiency (Davies 2010, p. 74-75).

In political terms, the clash between legal and economic expertise, and between lawyers and economists with different profiles within the American antitrust field was translated into shifts in the very practice of competition policy. The dominance of Chicagoan economics and economists in the field of competition policy implied, for instance, that vertical mergers investigations should be abandoned as they were understood to produce no harm, that there should be an agnostic view on restrictive practices such as collusion, that monopolistic practices are not necessarily inefficient, and that the burden of proof of inefficiencies is of the state, not of corporations (Davies 2010, p. 76).

The growing influence of economists in political arenas and governmental institutions has also been noticed outside the U.S. An elite of economists, mostly trained in the universities aligned with those who won the battle in the American field of economics, gained space in the field of state power in the 1980s and 1990s. Economists with this profile were

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<sup>65</sup> Besides the increase of the number of economists, also the “economicization of lawyers’ training [...] both in law schools and in government” is also pointed by Fourcade (2009b, p. 120) as a factor contributing to the economicization of antitrust in the U.S.

particularly central to the formulation and implementation of neoliberal reforms in Latin America (Babb 2001, Montecinos 2009), and have increasingly exercised a monopolistic control over several areas of economic policy (Montecinos 1997).

Economic and financial experts started to exercise an almost “monolithic” power in Latin American economic policy-making in the 1990s (Centeno and Silva 1998). As Schneider describes (1998, p. 78; 84), there was “near universal recourse to neoliberal technocrats in Latin America in the late 1980s and early 1990s”, a “correlation between neoliberal reform and the delegation of policy authority to technocrats”. Similarly, Montecinos’ (1998, p. 127) study focusing on the “relevance of actors and ideas” to understand neoliberal reforms maintains that “the diffusion of new ideological forms and new policy proposals in contemporary Latin America” is related to “the increasingly influential role played by economists within political and policy elites”. This would be so because since the mid-1970s economists offered “technical justifications to attempt the foundation of a new social and political order” (Montecinos 1998, p. 128) – that of neoliberalism.

This trend has been empirically observed in several countries in the region. Chile is an emblematic example mentioned by Montecinos (1998) to illustrate how the prominent positions of economists in the field of state power evolved since Allende’s government, becoming hegemonic during Pinochet’s dictatorship (the so-called Chicago Boys), and later leaders of political parties after the authoritarian period. Ai Camp (1998) and Ibarra (2006) studies on the transformation of the Mexican state and economy reaches similar conclusions to Dezalay and Garth’s (2002a) perspective on the association between the shifts of the profiles of state elites and the emergence of neoliberalism. Conaghan (1998, p. 142), despite observing a less pronounced ascent of economists in Peru in the late 1980s, identifies the roles of economists as “hired guns” and “intermediaries” of political disputes. Van Dijck (1998, p. 98) discusses how different types of expertise were connected to different stages of neoliberal reforms by assessing the composition of the World Bank, a key-institution in the promotion of state reform. When the Bank’s policy was “program approach”, engineers dominated, and when it shifted to structural adjustment in the 1980s, it coincides with the rise of economists (Van Dijck 1998).

In Brazil, the study of Loureiro (1997, p. 86) converges with these findings, as the author identifies a growing presence of economists in Ministerial positions, organs of research and statistics, national accounts, price and salaries control, public banks, international negotiations, among others. Their roles in government increased since the authoritarian government initiated in 1964, as a tool of legitimation of the regime, and peaked during

neoliberal reforms (Loureiro 1997, p. 84; Dezalay and Garth 2002a, p. 99). Similarly to the approach of Dezalay and Garth (2002a), Loureiro's research enables visualizing how struggles within the field of economics were associated with macro political shifts in the Brazilian state. In the 1980s and 1990s, an old polarization of the field of economics in Brazil, which dated of the 1950s<sup>66</sup>, was reinvigorated: that between structuralists and monetarists. On the first side, economists formed at heterodox economic departments, such as that of the University of Campinas (UNICAMP), an institution created by disciples of the Economic Commission for Latin America and the Caribbean (ECLAC), which remained faithful to structural, historical and socio-political approaches to economic problems, and to a mathematically non-formalized language (Loureiro 1997, p. 70).

On the other side, economists connected to the Fundação Getúlio Vargas of Rio de Janeiro (FGV-Rio) and the Catholic University of Rio de Janeiro (PUC-Rio), which are heirs of the orthodox monetarist schools (Loureiro 1997, p. 70). This group has historically invested in mathematical modeling, and has been highly internationalized, especially through doctorates in U.S. institutions (Loureiro 1997, p. 70; Dezalay and Garth 2002a, p. 102), and aligned with the mainstream produced in American universities<sup>67</sup>. Loureiro (1997 84; 87) shows that it was precisely this last group who achieved prominent positions in power with the agenda of reform of the 1980s and 1990s: that of the “economist political leader” – often young academics coming from São Paulo and Rio de Janeiro with graduate degrees obtained in the U.S. By discrediting both the developmental economics adopted by the military dictatorship, and the generalist lawyers in power, these economists became “key players in the governance of the state”, when the contextual conditions appeared (Dezalay and Garth 2002a, p. 102). Now in the a position to apply the knowledge to a great extent imported from the U.S., these economists “moved to the forefront in the attack against inflation, the call for deregulation and privatization, and the emphasis on opening up Brazil to foreign investment” (Dezalay and Garth 2002a, p. 102).

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<sup>66</sup> As Bielchowsky (2007) puts it, in the period between 1945 and 1964, three broad strands of economic thought can be identified in Brazil: socialists, developmentalists (the structuralist approaches that defended an active role of the state in regulating the economy, especially in promoting industrialization), and neoliberals (which contrasted with developmentalists in supporting free markets as a priority to reach economic efficiency). During this period, developmentalism was the hegemonic “economic ideology” (Bielchowsky 2007, p. 33), but the scenario started to change during the military dictatorship and notably in the 1980s, when neoliberals became dominant in economic thinking in Brazil.

<sup>67</sup> Economists graduated at the University of São Paulo (USP), according to Loureiro (1997, p. 84), would be in an “intermediate point” between these structuralist and monetarist extremes.

Besides being economists, these groups who accented to power in these diverse settings had even more in common. The new political elites of “technocrats”<sup>68</sup> often “shared values” and had a “similar intellectual pedigree” (Centeno and Silva 1998, p. 3). These values and pedigree – or this habitus, in Bourdieusian terms – were mostly acquired through educational experiences, especially graduate courses in U.S. institutions (Conaghan 1998, p. 147). They were “technical experts” (Van Dijck 1998, p. 98), “men of science” (Schneider 1998, p. 79) who differed from politicians on the basis a distinct “type of political skills they possess” (Ai Camp 1998, p. 201). As the “most cosmopolitan elite” in the region (Montecinos 1998), these economists also often converged in beliefs that the market is the best suited mechanism of organizing the economy (Centeno 1998, p. 47), and that there are superior forms of knowledge than the political debate, thus some decisions must be made through expert rule (Centeno 1998, p. 47). Loureiro (1997, p. 117), for instance, detects the “strength of the belief in the opposition between democracy and efficiency” by Brazilian economists in the 1980s and 1990s. Such overreliance on technocratic claims was functional to make “democracy safe for neoliberalism”, as the important decisions regarding economic policy were delegated to experts (Centeno and Silva 1998, p. 12). The expert rule over economic debates put forward by technocratic, neoliberal economic thinking – or “economism” – entails, in this sense, a way to exit politics (Teivanen 2002).

Not only their beliefs, but also their careers have shared common characteristics in the region. Often, economists who rose to state power in the 1990s wore many hats (Conaghan 1998, p. 152-156), and their passage by the government enabled “establishing connections and developing insider knowledge”. In Brazil it was no different: similarly to lawyers, the economists that architected neoliberal reforms had in the passage by governmental positions a capital to be later explored in the market, by the opening of consultancies firms in which they have the “opportunity to profit from the informational and knowledge capital accumulated in their experience in governmental organisms” (Loureiro 1997, p. 90). The roles of economists in government is often “transitory”, an intermediate stage in their careers, which start in the university, goes to government and then to the private sector (Loureiro 1997, p. 88).

The arrival of these agents into hegemonic positions in the field of state power, not by chance, coincides with the structuring of neoliberalism. They possessed a form of knowledge

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<sup>68</sup> As Baud (1998), Silva (1998) and Ai Camp (1998) show, the phenomenon of technocracy is not inherently or necessarily restricted to neoliberal economists, nor to the neoliberal period, as professionals such as engineers and “social engineers” performed similar roles in different moments. Technocracy is connected to “neoliberal economic strategies”, but it entails a broader phenomenon (Ai Camp 1998).

(or capitals) and habitus fit to legitimate and perform neoliberal reforms, and their extensive appointment was a symbolic resource of governments in order to regain the confidence of foreign agents, notably corporations (Schneider 1998, p. 87), by signaling the respect to the rules of a liberalized market. As the examples illustrate, economists – and a specific profile of this professional group – are agents associated with the occurrence of certain reforms and the directions they take.

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As the examples illustrate, lawyers and economists are historically associated with the creation, management and transformation of several fields close to state power. Moreover, experts in law and economics holding a specific set of capitals, with a particular habitus and occupying certain positions within their professional fields have been active vectors of neoliberal reforms worldwide. Transposing the framework delineated in the previous sections to the attempt to assess the connections between competition policy reform and practice to neoliberalism, two research tasks emerge. First, to map who are the agents that construct and operate this field, what are their habitus, strategies and political preferences. Second, to compare the data collected about these agents with what the reviewed literature point to be the profiles of lawyers and economists that have historically performed neoliberal reforms. Through this comparison, it will be possible to assess how the field of competition policy is structured, and thus what political project it is intended to serve. It is still necessary, however, to delineate the conceptual tools I will mobilize to construct an alternative narrative about the *outcomes* of the field of practice constituted through reform. This is the objective of the next section.

### **2.3 A “law in action” perspective on outcomes**

For the purposes of producing an alternative narrative to those described in Chapter 1, the framework of a reflexive sociology provides a useful foundation for studying the *process* and the *agents* of reform as intertwined dimensions, as it enables assessing the relation between concrete agents and the structure (and structuring) of competition policy as a field, thus opening way for discussing its potential connections to neoliberalism. However, the remaining dimension to which I intend to provide an alternative narrative, that of *outcomes*, cannot be properly tackled through this approach, once it offers no operational tools to analyze the products of this arena of practice, i.e. what the field produces and therefore what

it serves. In Picciotto's (2011, p. 448-449) evaluation of the Bourdieusian approach proposed by Dezalay and Garth, this gap becomes clear:

The content of political and economic changes and conflicts, which provide the essential motive forces for change, are exogenous to their perspective [...]. For them, the conflicts are between 'factions contending for the definition and control of the state', but this does not explain the nature or content of those struggles.

Such criticism converges with what Harrington (1994) has identified as a need to bridge the study of the role of lawyers in politics with the attention to the content of the law. According to this author, while law-centered approaches that deal with doctrine and decisions rarely make references to agency (precisely what was identified in mainstream narratives), sociological perspectives that "investigate the role of lawyers and their professional power in politics, however, exclude the obvious – information on what lawyers do, the content of the law they forge" (Harrington 1994, p. 50). As I see it, this criticism can also be applied to those studies focusing on the role of economists in politics and economic policy, be it connected or not to the law. In both cases, the "emphasis on studying *who* and *how* tends to disregard or discount the questions of *what* and *why*" (Picciotto 2011, p. 449). The task for a more complete understanding of the field of competition policy can therefore only be pursued if an alternative narrative is complemented by an investigation of what the field and the agents that compose it actually produce: its *outcomes*.

As discussed in the previous chapter, there are several shortcomings underlying the dominant narratives about the *outcomes* of competition policy: their tendency to endorse a formalist perspective of the law, and to assess the impacts of regulatory practice in functional and technocratic terms, i.e., as "universal compliance", or as "what works" and "what fails", often based on impressionistic or unsystematic data. It is based on these limited accounts that these narratives often sustain a view of the roles of competition policy that is extremely functional, and thus depoliticizes a field at the core of arenas of power. This form of addressing *outcomes* – both in respect to the economy and society – is the basis taken by mainstream narratives to affirm the roles of competition policy as a device to control neoliberalism, to counter-balance it, or even as evidence to neglect its very existence neoliberalism as social phenomenon or its utility as an analytical tool.

The task for an alternative narrative is thus to delineate conceptual tools that enable conducting research on *outcomes* on different grounds, avoiding the pointed shortcomings. In the next subsections, I present a framework that builds on the idea of "law in action" to

overcome the limits implied by formalist accounts of *outcomes*. In this perspective, the *outcomes* of the field of competition policy are analyzed in terms of the *facilitative*, *regulatory* and *constitutive* roles of the law in the economy and in society (Edelman and Suchman 1997; Edelman and Stryker 2005). These notions will serve as a “formal” structure of analysis, to be later translated into concrete empirical questions concerning my research. Through this framework, I believe it will be possible to understand, on different grounds, what the field of competition policy actually produces. This is not only a necessary step regarding the specific dimension of *outcomes*, but also a means to establish parameters that can be dialectically confronted with data about the *process* of reform and its *agents*, accordingly to the framework designed in the previous section. Taken together, these three dimensions may illuminate what I hypothesize to be crucial connections between competition policy and neoliberalism, something ignored or neglected in literature.

### 2.3.1 *The facilitative-regulatory and constitutive roles of law*

The authors I mobilized to present a general critique to mainstream narratives give a hint on how an alternative framework for the study of *outcomes* of a regulatory arena can be built. When describing the shortcomings underlying how the literature on the “diffusion of law” (Twining 2005a, 2005b), “globalization of law” (Halliday and Osinsky 2006), and neo-institutionalist perspectives (Suchman and Edelman 1996; Edelman and Suchman 1997) discuss the “impacts” of law, they point to a way of overcoming it. In fact, they converge in proposing a tenet of the sociology of law as a useful means to do so: the analysis of the “law in action”<sup>69</sup>.

As Halliday and Osinsky (2006, p. 466) suggest, “empirical researchers need to maintain a studied skepticism about excessive claims made of globalization and its impact

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<sup>69</sup> The notion of “law in action” is said to have originated with the tradition of American legal realism, notably sociological jurisprudence, between the end of the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> century (Treves 2004, p. 140-145). Roscoe Pound, a representative of that tradition, in a seminal article dated of 1910, would have coined the idea of “law in action”, in opposition to “law in books”. The distinction was crucial for Pound’s agenda of “social engineering” through the law. Sociological jurisprudence was a reaction against legal formalism, and the concept of “law in action” would underscore the inability of the “law in books” perspective to deal with social problems. As Deflem (2008, p. 100) describes, Pound’s idea was that the study of law solely through legal doctrine and “law-internal theory” would be responsible for “a general lag of law relative to social conditions, the failure of legal thought to take into account advances in the social sciences, the rigidity of legislation, and defects in the administration of law”. Based on sociological insights about the “actual working, including the causes and effects, of law”, legal decisions could “be adapted to adequately respond to changing societal conditions” (Deflem 2008, p. 100-101). Despite being connected to an instrumentalist view of the law, Pound’s concept has been appropriated by law and society scholars as an analytical device to distinguish the discipline’s approach from legal doctrine.

[...] [t]he criterion of impact must be *law in action*, not law on the books” (my italics). Similarly, Suchman and Edelman (1996, p. 929) maintain that the law on the books is something different than the “*law in action*”, which “reflects a crazy-quilt of pluralistic normative orders and overlapping regulatory jurisdictions” and that it is in reality “malleable, contested, and socially constructed”. Twining (2005a, p. 33), in turn, argues that the analysis of impact involves a necessary “shift from legislation to enforcement”, which “represent[s] significant moves away from surface law to increasingly realistic concern with the *law in action*” (my italics)<sup>70</sup>.

As Deflem (2008, p. 150) puts it, the idea of “law in action” implies conceiving the law not just as “formally enacted rules (“law in the books”)", but rather to adopt “a broader conception of law as also involving variability in application, differentiability in enforcement, pluralism in authority, and ambiguity in meaning”. Instead of seeing law as monolithic and authoritative, and to measure its impacts as the translation of clear-cut rules, or a process of “universal compliance”, the “law in action” approach understands that “law is made as it is enforced” (Suchman and Edelman 1996, p. 933-934). The focus of research is thus repositioned to the “politics of enforcement”, that is, to study how the malleability and indeterminacy of the law is “resolved”, how and what decisions are actually made (Suchman and Edelman 1996, p. 934). The notion of “law in action” thus constitutes a sort of “epistemological attitude” for the study of legal objects, one that is suspicious of any attempt to characterize the products of a regulatory arena solely based on what the law and institutions declare to be its objectives – precisely the major problem found in mainstream narratives<sup>71</sup>. Although it helps detaching from the pitfalls implied by these narratives’ formalist assumptions in describing *outcomes*, the idea of “law in action” must nevertheless be concretized. By itself, it does not offer an operational structure to be applied in the study of competition policy.

The framework that Edelman and Stryker (2005) propose for the development of a “sociology of law and the economy”, based on Edelman and Suchman (1997), is particularly

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<sup>70</sup> The contrast between the “law on the books” and the “law in action” stands in parallel to the distinction proposed by Abel (1973), and referred in Chapter 1, section 2, of “law books” and “books about law”. It is precisely through a “law in action” analysis of the outcomes of competition policy that the formalist perspective of “law books” epitomized by legal scholarship can be avoided.

<sup>71</sup> It is important to note that in subscribing to the distinction between “law on the books” and “law in action”, I am not affiliating with perspectives that are “over-preoccupied with discrepancies between legal rules and legal practice”, i.e. to study the “gap” between how the law *should* operate and how it *actually* operates (Nelken 1984, p. 169-170). These are accounts close to Pound’s instrumentalist agenda, and lead to a dead-end, as they demand a normative ideal about what the law is. Rather, I understand that this distinction is useful for overcoming formalist perspectives about the law such as the ones reviewed in Chapter 1, and does not necessarily imply incurring in the “gap problem” (Nelken 1981)



helpful – if submitted to some adaptations – to operationalize the analysis of the “law in action” of competition policy. These authors design a “political-institutional framework on law and the economy” directed to “theorizing and empirically investigating the *multiple social mechanisms or processes* through which legal and economic action and institutions become part of an *interconnected causal dynamic*” (authors’ italics) (Edelman and Stryker 2005, p. 527; 535). The idea of interconnectedness means that, on the one hand, “legal constructs, principles and institutions shape the organizational forms and identities of economic actors, and they shape central element of capitalist economic fields”, and on the other, that “law is shaped within economic fields by the very actors whose interactions the law seeks to *constitute, facilitate, and regulate*” (my italics) (Edelman and Stryker 2005, p. 535).

The highlighted terms – to constitute, facilitate, and regulate – are precisely the conceptual tools offered by these authors that can be put to operationalize a “law in action” approach. In the attempt to bridge the sociology of law and institutionalist perspectives of the sociology of organizations, these authors suggest that the “legal environment” (Edelman and Suchman 1997), or the “legal field”<sup>72</sup> (Edelman and Stryker 2005, p. 530), operates in three basic dimensions: as facilitative, regulatory, and constitutive environments (Edelman and Suchman 1997, p. 482; Edelman and Stryker 2005, p. 535). As the proponents of these conceptual tools suggest, these dimensions are ideal types, only analytically distinguishable, as in practice they “affect each other through interrelated institutional and political processes”<sup>73</sup> (Edelman and Stryker 2005, p. 543). From each dimension the authors extract a set of research questions that, if taken together, lead to a “law in action” approach to the study of the legal field.

As a *facilitative* tool, “the legal system is merely an arena – albeit an arena whose shape may dramatically affect the course of the game”, in which organizations are the players (Edelman and Suchman 1997, p. 483). In this dimension, the legal field “provides an exogenously generated, but fundamentally passive set of tools and forums” (Edelman and Suchman 1996, p. 482) that organizations mobilize to “resolve disputes, to structure their relations with other organizations, to govern their employees, to influence the behavior of regulatory agencies, and to gather information” (Edelman and Stryker 2005, p. 535). The

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<sup>72</sup> Edelman and Stryker (2005, p. 531) explicitly endorse a Bourdieusian approach in suggesting that the “legal field” is used as the “unit of analysis” for a sociological study of law and the economy. Through this framework, and similarly to what I argued in the previous section, Edelman and Stryker (2005, p. 531) maintain that the “sociology of law and the economy can portray the social embeddedness of both law and markets”.

<sup>73</sup> As Edelman and Stryker (2005, p. 543) exemplify, “changes in the constitutive legal environment affect the legal tools available through the facilitative environment and the meaning of rules in the regulatory environment, and the reverse is true as well”.

facilitative environment is said to entail procedural rules that furnish “legal vehicles for organizational initiatives” (Edelman and Suchman 1997, p. 483). These are “legal procedures that facilitate economic activity for some actors [and] often constrain the economic activity of other actors” (Edelman and Stryker 2005, p. 537).

Illustrations of what these authors call facilitative procedures are legal tools such as the idea “juristic of legal person” identified by Weber, which provides predictability and calculability for capitalist interactions, the “enabling aspects of corporation law”, such as limited liability and its role in “promoting shareholder investment and economic growth in the early history of the United States”, and the use of different mechanisms of dispute resolution, from litigation to “alternative techniques” such as business arbitration (Edelman and Stryker 2005, p. 536-537). As a facilitative arena, the legal field thus enables “organizations to structure their relations with competitors, customers, and suppliers”, and institutionalizes “forms of economic exchange, association, and competition” (Edelman and Stryker 2005, p. 535; 537). In this dimension, the core questions for sociological approach to the legal field are to identify “what the law facilitates and for whom” (Edelman and Stryker 2005, p. 537).

The *regulatory* dimension of the legal field entails “edicts actively imposing societal authority on various aspects of economic life” (Edelman and Stryker 2005, p. 535). While the facilitative environment underscores *procedural* tools provided by the legal field, the regulatory facet highlights that law produces *substantive* rules that affects the economy, and “places law in a far more active posture” (Edelman and Suchman 1997, p. 483). As a regulatory environment, the law becomes a site for “overt contestation over normative rules, as well as for mobilizing these rules as resources” (Edelman and Stryker 2005, p. 537). The agents of the economic field “incorporate and respond to the normative ideals of their regulatory environments (Edelman and Stryker 2005, p. 537). Examples of the regulatory dimension provided by the authors who propose this framework are norms produced in a variety of arenas and institutional arrangements responsible for creating and enforcing them, such as antitrust, health and safety and environmental regulations, and labor and employment statutes (Edelman and Stryker 2005, p. 537). The focus of a research on the regulatory environment is thus on how “political processes and more subtle institutional processes shape the form and impact of regulation on the economy and infuse economic interests into the law”, and vice-versa (Edelman and Stryker 2005, p. 539).

Finally, the *constitutive* facet of the legal field entails the roles of law in constructing the “basic typologies that identify the legally cognizable components of the social world and that explain the natures and attributes of each” (Edelman and Suchman 1997, p. 483). It is an

arena of “meaning-making with regard to both law and the economy” (Edelman and Stryker 2005, p. 540). This dimension operates a “subtle and often invisible role” in providing “cognitive possibilities and values that influence the structure, form, and strategies of organizations” (Edelman and Stryker 2005, p. 540), in establishing “taken-for-granted labels, categories, and ‘default rules’ for organizational behavior” (Edelman and Suchman 1997, p. 483).

The “legal categorizations” provided by the legal field have several roles: they “define opportunities and limits for economic actors”, and “which economic disputes may be resolved within the legal system and which are outside the purview of law”, they legitimize and institutionalize “various organizational institutions”, and they “shape abstract economic thinking about the nature of markets, of capitalism and of how economy and polity are distinct, differentiated realms” (Edelman and Stryker 2005, p. 540). Exemplary of such constitutive roles of the legal field are the “many conceptual dichotomies that are central to the economy, such as employer/employee, public/private, procedure/substance, capital/labor” (Edelman and Stryker 2005, p. 540), among others. As suggested by Edelman and Stryker (2005, p. 542), research on the constitutive dimension of the legal field shall “explore the interplay between overt political contestation of meanings and more covert institutional diffusion of meanings”.

### *2.3.2 Framing the outcomes of competition policy in the economy and society*

As I mentioned earlier, my appropriation of this framework presupposes an adaptation concerning the facilitative and regulatory dimensions. When talking about the different “environments” provided by the legal field, these authors often associate them to different branches of the law, e.g. litigation is seen as an illustration of the “facilitative” dimension, while regulation and antitrust are exemplary of the “regulatory” facet. Also, these dimensions seem to underscore different causal dynamics: while the facilitative environment leads to the study of how organizations use the law, the regulatory dimension emphasizes how the law impacts organizations (Edelman and Suchman, p. 1997, p. 487).

However, several of the examples offered by Edelman and Suchman (1997) and Edelman and Stryker (2005) could fit both definitions of facilitative and regulatory environments. One of these illustrations concerns precisely antitrust law. Edelman and Stryker (2005, p. 536) exemplify the facilitative roles of the legal field through Sklar’s (1988) study about antitrust law in the U.S., stressing that it “highlights the many contradictions and

inconsistencies in legal doctrine [...] established both legal and intellectual grounds for the corporate reorganization of property, while antitrust law still worked to inhibit this very same economic reorganization”. The same study by Sklar (1988) is mentioned as an illustration of research on the regulatory dimension that underscores “that legal rules may produce unintended economic results” (Edelman and Stryker 2005, p. 538). In both cases, the object of study fits the definition of “regulatory environment”, while at the same time responds to questions proper of the facilitative dimension.

What the law facilitates explains how it regulates the economy, and conversely, the substantive regulations produced by the legal field facilitate certain outcomes to the actors regulated by it. What Edelman and Stryker (2005, p. 537) identify as the central question for the study of the facilitative environment – “what the law facilitates and for whom?” – is a means to understand the processes that define the regulatory dimension: how “political processes and more subtle institutional processes shape the form and impact of regulation on the economy and infuse economic interests into the law”, and vice-versa (Edelman and Stryker 2005, p. 543). Hence, the questions each of these dimensions raise must be taken together for a fully apprehension of how the roles of the legal field in the economy. The facilitative and the regulatory environments are two facets of the same coin, and their distinction in terms of branches of law, or procedural and substantive rules doesn’t seem very helpful. I therefore deliberately “subvert” the typology proposed by Edelman and Suchman (1997) and Edelman and Stryker (2005) by merging the notions of facilitative and regulatory environments into a single dimension: what I will call the facilitative-regulatory role of the legal field.

Transplanting the conceptual tools that compose such political-institutional framework to the analysis of my object of study, it is possible to construct an alternative narrative to how the *outcomes* of competition policy to the economy and society are described in the discourses reviewed. According to mainstream narratives, the field of competition policy, through the CADE’s decisions and the acting of the governmental apparatuses, promotes competition, prevents or corrects market failures such as monopolies and oligopolies, and thus produces benefits of universal interest. Once neoliberalism is mostly ignored in these narratives, said to be controlled through competition law, or strictly defined as the absence of regulation and thus said to be necessarily contrary to competition policy, the outcomes of this arena of regulation are abstractly and apolitically defined as “successful”, despite some episodic “mistakes”.

However, given what I sustained to be the often formalist, unempirical and impressionistic evaluation of *outcomes*, the decisions made by CADE must be analyzed in an empirically-grounded and systematic way, incorporating variables that re-politicize its roles in the economy. The framing of the *facilitative-regulatory* dimension is particularly useful to assess the roles performed by the field of competition policy in the economy in the context of neoliberalism. The institutions that compose the SBDC, notably CADE, as an administrative court, are entitled to decide about the legality of certain economic operations involving corporations. Several phenomena originated in the economic field enter the field of competition policy to be appreciated by the agents and institutions that structure it. These decisions are taken in processes of different kinds, such as Merger Reviews (MR) and Administrative Proceedings (AP). Thus, a useful way of assessing what are the *outcomes* of the field of competition policy to the economy is to evaluate the facilitative-regulatory results of CADE's decision-making. In this sense, the empirical research question that guides the inquiry about the *outcomes* of competition policy becomes: *What competition policy facilitates and for whom, and how economic interests both affect regulation and are impacted by it?* By seeking answers for these questions, it is possible to provide an empirically grounded evaluation of what kind of economy is facilitated through competition policy's regulation, i.e. how the economic phenomena that enter the field exit it.

As it was reviewed in Chapter 1, competition policy's outcomes are not restricted to the economic field, but also reach individuals and society. In mainstream narratives, together with producing a competitive and healthy economic environment, competition policy is said to have the role to protect those who are the true "subjects" of this regulatory arena, its indirect beneficiaries: consumers. The promotion of competition policy by CADE and the institutions of the SBDC would avoid corporations to exploit damaging prices, protecting consumers and thus generating *outcomes* to society as a whole. The social group of "consumers" – and not other forms of classifying society, as done by other regulatory arenas (for instance, "workers" or "minorities") – is thus according to mainstream narratives the category that organizes the cognitive possibilities and the values that orient the functioning of the field and the evaluation of the *outcomes* of competition policy to society. As maintained by those sources, competition policy must take into account the impacts to consumers of the economic phenomena it regulates. Conversely, as identified in mainstream narratives, other social categories – notably that of "workers" – are often reputed as alien to the domain of competition policy, and when incorporated to decision-making, constitute a sign negatively charged of politicization.

Following the political-institutional framework sketched in this section, I take the framing of the *constitutive* dimension of the legal field to analyze how certain social categories are incorporated into the field of competition policy, and others are repelled. The focus here relies on how the meanings of constitutive legal categories, notably those of *consumers* and *workers* (and related categories such as *employees*, and *jobs*), are disputed by the agents of the field and bear on them. Similarly to the exercise proposed to the analysis of competition policy's outcomes to the economy, also regarding society it is worth asking how *social categories* enter the field and how they exit it, i.e. how competition policy "digests" notions such as "consumers" and "workers" and, in doing so, constitutes the society it claims to protect. Hence, the empirical research question that emerges from the deployment of the constitutive analysis of competition policy in society is the following: *How are the social categories of "consumers" and "workers" incorporated and/or repelled by the field of competition policy and what model of society is constituted by it?*

The understanding of the facilitative-regulatory and constitutive roles of the field of competition policy demands an empirical inquiry of the concrete functioning of this arena of practice in each dimension, beyond what the legal text declares to be its objectives. It also infuses political conflicts in the evaluation of the roles performed by the legal field, as the facilitative, regulatory and constitutive environments are immersed in a theory that understands the law as both an arena of and a set of tools for social disputes. In this way, it is possible to produce a narrative that doesn't fall into technocratic or depoliticizing evaluations of competition policy's *outcomes*, which ignores or neglects its potential connections to neoliberalism.

As already anticipated, framing the *outcomes* of the field of competition policy in terms of its facilitative-regulatory and constitutive roles provides a "formal" scheme for studying the law in action of its roles in the economy and society. However, selecting what variables are worth analyzing in a certain branch of practice, and determining parameters for interpreting these roles depends on substantive elements pertinent to that field. In the case of competition policy, and given the purposes of my research, these substantial elements require a theory about the defining traces of neoliberalism in the economy and society, one that explains what should be expected from this field's outcomes if, according to the hypothesis that guides this thesis, it is an integral part of neoliberalism.

## 2.4 Neoliberalism through the lens of a critical political economy

To analyze if and how the *outcomes* of competition policy identified through the “law in action” perspective fit into neoliberalism, it is necessary to provide “substantive” elements of what I understand to be the defining characteristics of a neoliberal economy and society. Hence, in this section I present the assumptions from where I depart to interpret the outcomes of competition policy vis-à-vis neoliberalism. I rely on studies that develop a “critical political economy” of neoliberalism, putting forward several hypotheses about its defining features as a theoretical and political project to transform economies and societies. As in the previous section, I will give special attention to the particular conformations that neoliberalism takes in the global South, notably in Brazil.

The idea of a “critical political economy” contrasts to what could be called a “classic political economy” (“a theoretical approach which situates the economy within a broader context in order to create a more wide-ranging social theory”), as well as to economics (especially the neo-classical strand) and “social theory which focus on cultural or ideological issues to the exclusion of concern with economic questions” (Browning and Kilmister 2006, p. 1). What makes it “critical” is the “recognition, when the economy is placed within a wider context, of the need for radical revision of conventional economic concepts in the light of their inadequacy in dealing with the questions generated by that context” (Browning and Kilmister 2006, p. 2). In the case of what I called a “critical political economy of neoliberalism”, it comprises studies that approach the concepts of neoliberal economics (and neoliberal political theory) as part and product of a broader social context, its political struggles and history.

An illustrative example of how a political economy perspective is helpful for the analysis of the roles of competition policy to the economy and society is provided by Sklar’s (1988) classic book about the emergence and development of antitrust policy in the United States between the end of the nineteenth and the beginning of the twentieth centuries. In this study, Sklar (1988) discusses the roles of antitrust policy in what he calls the “corporate reconstruction” of the American economy. As this author explains, the intense economic depression that affected the American economy by the of the 1800s was “accompanied and followed by social and ideological turbulence and political realignment in the society at large as well as by upheavals and realignments within the immediate sphere of business activity itself” (Sklar 1988, p. 32).

This process fostered a “change in the organization of the capitalist property-production system”, from the “small-producer, competitive capitalism”, or proprietary capitalism, to that of “corporate capitalism”, or “corporate liberalism” (Sklar 1988, p. 34). Large-scale corporations became the dominant form of economic activity, and were perceived as a necessary development of American capitalism, consubstantiating a “cross-class ideology” among several sectors of society (Sklar 1988, p. 35). The formation of large conglomerates and the association of corporations were seen as advantageous forms if compared to small businesses and a competitive system for several reasons: they provided “broader access to, and some centralized control over, marketing and innovation”, and offered “a relatively more stable earning power combined with limited liability, [and] stronger inducements that the insecurities of the autonomous firm, whether competing alone or entering ephemeral or unreliable cartels” (Sklar 1988, p. 165)<sup>74</sup>. As Sklar (1988, p. 166) enunciates it, “[t]he resort to the corporate form of enterprise based upon negotiable securities and limited liability as a mode of property ownership became increasingly more compelling”.

It was in this context that the “antitrust question” emerged in American politics. Sklar (1988, p. 2) maintains that the construction of American competition policy, initiated with the discussion and enactment of the Sherman Act, was “in essence about the passage of American capitalism from the competitive to the corporate stage of its development”. Competition policy was a “settlement [...] sufficiently satisfactory to the major concerns and interests among” groups of the capitalist class (Sklar 1988, p. 173). Although the Sherman Act originally reflected a struggle between farmers (small-producers) and railroad companies (the trusts) – precisely the poles of the transformation by then in course – and thus allegedly sought to control the power of big business, it never aimed at abolishing large corporations and the combination of capital (Sklar 1988, p. 109). Moreover, Sklar suggests that its enforcement went even further in *supporting* the consolidation of corporate capitalism, especially due to the role of the courts in its implementation.

Although antitrust policy did not “cause the resort to tight combinations of capital” (Sklar 1998, p. 166), the author identifies several roles of the actual enforcement of

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<sup>74</sup> As Picciotto (2011, p. 108-110) explains, corporate capitalism is defined by the dominance of the corporation or company as “the main form developed under capitalism for carrying on business”. If compared to the previous forms of capital organization, such as proprietary, family firms, the corporation presented several advantages that explains why it became “a key social institution”: “[i]t provides an institutional framework which enables business to be organized on a large scale, and to coordinate a variety of activities, even across the world. Institutionalized firms can coordinate and plan activities which are both more extensive and potentially long-term than individual or family business” (Picciotto 2011, p. 108). The consolidation of corporate capitalism in substitution of laissez-faire capitalism in advanced economies meant that large scale, monopolistic capital (Baran and Sweezy 1966), became the dominant form of economic activity.



competition law in that domain. Here is where Sklar's approach reveals its utility as a model for the analysis of the "law in action" of competition policy. In Sklar's (1988, p. 159) view, "[t]he development of the law – in its legislative and judicial phases – constituted [...] a major arena in the construction of, and in the conflict over, the corporate reorganization, the effective causes of which lay elsewhere": in the market and in politics. The development of antitrust policy in that period, especially after its consolidation by 1911, "legalized corporate consolidations, as well as cartelization on a "higher basis" (Sklar 1988, p. 167). Competition policy, "while regulating corporate administration of the market to keep it within the bounds of reasonableness and the claims of the public interest, sanctioned and legitimized it" (Sklar 1988, p. 168).

Sklar thus finds that the practice of antitrust law in the United States "*facilitated* change as the American capitalism has developed, while validating the certainty and security of capitalist property and social relations as such" (Sklar 1988, p. 174) (my italics). Other authors have suggested similar findings about the actual roles performed by American competition policy in the economy, beyond a formalist evaluation of the law. Close to Sklar, Picciotto (2011, p. 109) affirms that competition policy, "although born from a populist impulse to restrict oligopolistic economic power, has largely become a means of legitimating it". Freyer (1992, Conclusion) converges with this assessment, stating that antitrust policy "ironically nurtured giant corporate enterprise". Dobbin and Dowd (2000, p. 653), in a study focusing on the railroad sector in the late 1800s and early 1900s, note the "remarkable role" played by competition policy in "constituting the modern market" by extinguishing "a form of industrial cooperation that was widely viewed as the way to the future" and spawning a "new business model".

What can be seen as the *outcomes* identified by Sklar and others in the intertwined process of corporate reconstruction of American capitalism and the structuring of antitrust policy are not restricted to what economy they facilitated. The reform of American capitalism, legitimized and sanctioned by antitrust, also entailed the consolidation of a societal model. In Sklar's (1988, p. 436) narrative, it also "prepared the ground for the reconstruction of capital-labor relations" (Sklar 1988, p. 436). Although the rise of corporate capitalism affirmed the role of a collective entity (the corporation) in place of individualized capitalists as the "basic unit of the economy", it however reinforced, and even took to a new level, individualism, by assuring the composition of the firm through shares and contract. As Sklar affirms (1988, p. 437), "[i]n principle and at law, rights and obligations remained fundamentally individual, not corporate; the basic categorical concepts remained the individual, society, and government,

not “the people”, or “the class”, and the state”. These can thus be seen as *outcomes* in a *constitutive* dimension of society.

#### 2.4.1 *Defining neoliberalism*

This brief overview of Sklar’s work reveals that evaluating the *outcomes* of competition policy demands identifying contextual economic, societal and political elements in which this regulatory arena was created and within which it is practiced. The “law in action” is the “law in context”. The task for my work is similar: in order to discuss the possible connections between competition policy and the consecration of a neoliberal economy and society, the elements that I take to be relevant in the context in which the field of competition policy in Brazil was created, and in which it produces its effects must be explicated. As I have been sustaining, this is a context of neoliberalism.

Although considerably different from that of the corporate reconstruction of American capitalism in the beginning of the twentieth century, the historical moment in which competition policy reform emerges is also a period of important transformations and adjustments in the capitalist system. In the following pages, I therefore present what I understand to be the defining traces of this context in both the economy and in society. These definitions will serve as parameters for interpreting the empirical results of my research on the facilitative-regulatory and constitutive roles of the field of competition policy, i.e. to compare if and how the outcomes I find in Brazilian competition policy relate to what I understand to be the defining characteristics of a neoliberal economy and society.

I bring the notion of neoliberalism as an analytical alternative to a dominant concept often mobilized to characterize the economic, political and social changes that emerged in the last three decades of the twentieth century: that of globalization. I understand that neoliberalism is more precise to identify the defining traces of these phenomena, as opposed to the polysemous character and homogenizing effects that the idea of globalization may imply<sup>75</sup>. It is not to say that this latter concept does not point to some important aspects of the historical moment in question. It does highlight, for instance, the element of scale, which has been crucial in the period. However, as I understand it, the notion of neoliberalism, or at least

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<sup>75</sup> The notion of globalization would also be inaccurate to define the distinctive capitalist transformations of the late decades of the twentieth century because “globalisation, or the internationalisation of the world economy is an old process [...], an inner tendency of capitalism” (Duménil and Lévy 2005, p. 10).

the qualification of globalization as being predominantly neoliberal<sup>76</sup>, provides more accurate definitions of what has actually globalized, due to what reasons, and with what purposes.

Almost every author who mobilizes the notion of neoliberalism attaches to the first pages of her work a libel about the difficulty of defining this concept<sup>77</sup>. Nevertheless, despite some nuances of scope and emphasis, it is possible to identify relatively consensual elements around what would be basic features of neoliberalism<sup>78</sup>. A first point of convergence is that neoliberalism entails, on the one hand, a theory (Saad-Filho and Johnston 2005, p. 4; Harvey 2007, p. 64; Kotz 2002, p.1), an “ideology” (Anderson 2000, p. 13; Colás 2005, p. 70), a “thought collective” (Mirowski 2009, p. 428-431; Plehwe 2009, p. 4), an “intellectual face” (Mudge 2008), or doctrine (Clarke 2005, p. 59; Shaikh 2005, p. 50). On the other, it also comprises a set of more or less coherent concrete policies, “new rules of functioning of capitalism” (Duménil and Lévy 2005, p. 10), a “strategy of governance” (Munck 2005, p. 68), a “policy stance” (Kotz 2002, p. 1), “bureaucratic” and “political” faces (Mudge 2008), or a “political project” (Campbell and Pedersen 2001, p. 1).

As a theory, neoliberalism has its “prehistory” rooted in the 1930s and 1940s. The first meetings of the so-called Mont Pèlerin Society are often mentioned as a landmark of the development of neoliberal thinking (Harvey 2007, p. 19-20; Plewhe 2009, p. 4)<sup>79</sup>. Since 1947, within the post-war context, the meetings of intellectuals of different disciplines such as Friedrich von Hayek and Ludvig von Mises fostered the development of a “vehement theoretical and political reaction against the interventionist and welfare state” that spread all over Europe and in the United States, with the New Deal (Paulani 2005, p. 122). As an intellectual enterprise, this was a movement that objectified to restore the power of liberal

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<sup>76</sup> I here subscribe to Saad-Filho and Johnston’s (2005, p. 2) understanding that “neoliberalism is inseparable from imperialism and globalisation”. Without the concept of neoliberalism, globalization becomes inaccurate, or even a celebratory concept.

<sup>77</sup> See, for instance, Plehwe (2009, p. 1), who opens the introduction of a book about neoliberal thinking by stating that “[n]eoliberalism is anything but a succinct, clearly defined political philosophy”, or Mirowski (2009, p. 421) who writes in the closing chapter of the same volume that “[n]eoliberalism turns out to be anything but an easily and clearly defined contemporary political philosophy”. Similarly, Saad-Filho and Johnston (2005, p. 1) point out several reasons due to which “[i]t is impossible to define neoliberalism purely theoretically”.

<sup>78</sup> As Mirowski (2009, p. 433) puts it, “there really is something distinctive that holds the neoliberal thought collective together other than mere expediency, and further, that it has enjoyed very real doctrinal purchase in the modern political arena”.

<sup>79</sup> It is important to note, as Plewhe (2009, p. 14) argues, that neoliberal “thought collective” has no single identifiable “birthplace”, as it “had a diverse number of places of origin”. Also, it is not a “*pensée unique*” (Plewhe 2009, p. 14) or “entirely coherent” (Harvey 2007, p. 21). The development of neoliberal theory “drew on different theoretical approaches (e.g., the Austrian school, the incipient Chicago School of Economics, the Freiburg school of ordo-liberalism, Lippmann’s “realism”), which continue(d) to coexist, but also served to cross-fertilize these and other approaches” (Plewhe 2009, p. 14).

economic thinking, for years displaced and in a “defensive position” (Paulani 2005, p. 122) due to the dominance of Keynesianism and the shadow of socialism (Crouch 2011, p. 5-6)<sup>80</sup>.

The neoliberal intellectual tradition, as it developed since the 1940s until the 1980s, unites several theories about how the market, the state and society should work. A basic assumption of neoliberal thinking, which distinguishes it from classic liberalism, is that the conditions for its model of a “good society” “must be constructed and will not come about ‘naturally’ in the absence of concerted political effort and organization” (Mirowski 2009, p. 434). In neoliberal thinking, the definition of a “good society” has often been accompanied by the notion of freedom: for individuals, markets, corporations, contract and trade. In this sense, neoliberalism is a theory that enunciates the conditions in which the market and society as a whole could be “set free” from what would be the harmful ties of state interventionism and the even more dangerous chains of socialism.

What is to be constructed, in turn, entails a specific understanding of the market and the state. In neoliberal thinking, “the market always surpasses the state’s ability to process information”, and thus a “market society must be treated as a ‘natural’ and inexorable state of humankind” (Mirowski 2009, p. 435). Governmental intervention, in this sense, harms the efficient functioning of the market and as a consequence jeopardizes liberty (Munck 2005, p. 61). The central rationale of neoliberalism is that of an orthodox theory of free trade that maintains that if economic agents are free to compete, this competition will automatically generate benefits for all the economy (Shaikh 2005, p. 42). This assumption has two corollaries. First, if the market, in detriment of the state, is the best setting to “process information”, “capital has a natural right to flow freely” (Mirowski 2009, p. 438).

Second, if the free movements of capital are a necessary condition for a “good society”, “corporations can do no wrong, or at least they are not to be blamed if they do” (Mirowski 2009, p. 438). If let to compete freely, corporations will generate a healthy market. Here is where Mirowski identifies another illustrative divergence between classic liberalism and neoliberalism. While the first was highly suspicious of “joint-stock companies and monopoly”, neoliberalism “began to argue consistently that not only was monopoly not

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<sup>80</sup> As Paulani (2005, p. 116-129) and Harvey (2007, p. 20) maintain, neoliberalism was majorly about a reaction against interventionist perspectives embodied by Keynesianism and socialism, but it also encompassed several “adjustments” in classical liberalism. The basis for such distinction in respect to liberalism was the adherence to free market principles developed by neo-classical economics since the second half of the nineteenth century (Harvey 2007, p. 20).

harmful to the operation of the market, but in any event, it was an epiphenomenon attributable to the misguided activities of the state and interest groups” (Mirowski 2009, p. 438)<sup>81</sup>.

This is a facet of neoliberal thinking that touches directly on competition policy. The shift in the liberal tradition concerning monopoly – from the classical suspicion to the neoliberal acceptance – was associated to the approach notably developed by scholars at the University of Chicago interested on the relation between law and economics, during the 1940s and 1950s, and later incorporated into the actual practice of U.S. antitrust authorities by the 1980s (Davies 2010; Van Horn and Mirowski 2009).

This perspective maintains that monopoly is not necessarily harmful to the functioning of the market due to several reasons. Corporations, “even behemoth corporations”, are taken to be “relatively benign entities that naturally gave rise to the market conditions that would eventually undermine them” (Van Horn 2009, p. 229). Anticompetitive results of a monopolistic or oligopolistic economy, such as exclusionary practices, are ephemeral, and eventually come to an end if market mechanisms are let to work freely (Van Horn 2009, p. 229). Moreover, Chicagoan law and economics provides intellectual grounds for the understanding that monopoly is justifiable if it proves to be efficient, and that it can actually be a result of a more efficient corporation surpassing less efficient ones (Davies 2010, p. 75). The assumption underlying this view is that once corporations rationally pursue concentration only if “they were convinced that they could achieve efficiencies”, “mergers and amalgamations, leading to the emergence of giant corporations, will always lead to improved efficiency” (Crouch 2011, p. 56). Government intervention through antitrust can therefore distort the market, which in the end possesses the superior capability to correct its own eventual problems implied by free competition – precisely *through* free competition.

In neoliberal theory, a market free of distorting governmental interventions is also a condition for guaranteeing the freedom of individuals. Since its origin, neoliberalism became a champion of individualism (Mirowski 2009, p. 428) and attempted to recast the prevalence of individual liberties that would have been jeopardized by the collectivist trends of welfarist and socialist models of government. As the “private” is taken to be superior to the “public”, the values of individualism and freedom of choice compose the core of neoliberal doctrine (MacGregor 2005 p. 143). The corollary of this assumption is that any kind of governmental

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<sup>81</sup> Mirowski notes that this position has not, however, been constant in neoliberal thinking. Early in the first meetings of the Mont Pèlerin Society, neoliberalism “set out entertaining suspicions of corporate power, with the ordoliberals especially concerned with the promotion of a strong antitrust capacity on the part of the state” (Mirowski 2009, p. 439). However, due to the influence of the Chicago school of economics, these worries were washed up from this intellectual project, being confined to the ordoliberal strand of thinking.

interference on the sovereignty of the individual must be eliminated in order for both the market and society to work properly. The main targets of neoliberal theory, in this sense, were the collectivist entities embodied by “social protectionist laws”, viewed as “indirect barriers to trade” (MacGregor 2005, p. 143), and labor unions, which would hold an “artificial position of being able to manipulate wages in relative terms” (Steiner 2009, p. 195). They would hamper the freedom of choice of individuals, and thus distort the market’s role as “a device for signaling changes in supply and demand” (Steiner 2009, p. 195).

In the neoliberal intellectual enterprise, it is thus only the market that can promote solutions to any problem generated within its boundaries, and secure freedom for individuals. If a *laissez-faire* market operating in these terms is a necessary condition for a “good society”, the state has the sole role of protecting its functioning. To do so, neoliberal thinking maintains that it is necessary to “redefine the shape and functions of the state”, although – it is important to notice – not to “destroy it”<sup>82</sup> (Mirowski 2009, p. 436).

It was only in the late 1970s, and notably throughout the 1980s and 1990s, that the neoliberal “scientific programme” found objective conditions to be actualized as a “plan of political action, an immense political project” (Bourdieu 1998). Neoliberalism ceased to be an entity solely in the “world of ideas”, in which it was “confined for almost three decades, and became an objectified reality” (Paulani 2005, p. 115). The political and economic objective conditions that opened room for the ascendancy of neoliberalism were the economic crisis of the 1970s (Paulani 2005, p. 124), which was a crisis of capital accumulation, unemployment, and rampant inflation (Harvey 2007, p. 12), the affront to the interests of giant corporations perpetrated by welfarist governments (Crouch 2011, p. 54), and the shadow of communism, which in the previous decades gained terrain in Europe and was a source of pressure for more intervention in capitalist economies (Harvey 2007, p. 15). In Latin America, the context of economic crisis had its particular contours. By the early 1980s, the model of “import-substitution industrialization” – “the emblematic economic policy in Latin America between 1930 and 1980” – started to collapse due to internal limitations (such as an

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<sup>82</sup> In conceptualizing neoliberalism as an intellectual project that calls for the reform of state structures to “protect [the] ideal market from what [is] perceive[d] as unwarranted political interference” (Mirowski 2009, p. 436), not its abolishment, I oppose to how diffusion perspectives reviewed in Chapter 1 define it. While those accounts provide a narrow concept of neoliberalism, which would only encompass phenomena such as deregulation and privatization (i.e. policies oriented to reduce the presence of the state), I follow Mirowski’s advice (2009, p. 436): “[o]ne should not confuse marketization of government functions with shrinking the state, however: if anything, bureaucracies become more unwieldy under neoliberal regimes. In practice, “deregulation” cashes out as “re-regulation,” only under a different set of ukases”.

inflationary outburst) and to the international debt crisis (Saad-Filho 2005, p. 222-224)<sup>83</sup>. Hence, similarly to the corporate reconstruction of capitalism in the aftermath of the 1880s crisis discussed by Sklar (1988), neoliberalism stemmed as a solution to struggles internal to capitalism, to solve its crisis of accumulation (Filgueiras 1997, p. 906).

#### *2.4.2 Features of a neoliberal economy and society*

Although the theoretical roots of the neoliberal project are mostly located in the global North, and its early appearances as a set of concrete policies can also be identified in this region (for instance, Ronald Reagan's government in the U.S. and Margareth Thatcher's in the U.K.), neoliberalism rapidly spread worldwide<sup>84</sup>. As Saad-Filho and Johnston (2005, p. 2) suggest, neoliberalism is inseparable from globalization. The global promotion of neoliberal policies to the South became known as the "Washington Consensus" (Munck 2005, p. 65; Lapavitsas 2005, p. 38), due to the "convergence of three institutions based in Washington, D.C., the World Bank, the IMF and the US Treasury Department, around neoclassical economic theory and neoliberal policy prescriptions for poor countries" (Saad-Filho 2005b, p. 113).

It was not by chance that the implementation of neoliberal tenets as a solution to the crisis of capital accumulation was a global project, promoted across the South through the Washington Consensus. The rise of neoliberalism in the 1970s converged with a new stage of capitalist development: that of "globalization of capital", which differs from the imperialist stage of the 1880-1913 period, and the Fordist model in place since the aftermath of World War II (Chesnais 1996). The solution to the crisis of capital accumulation led to a new, global stage of capitalist development, to which neoliberalism provided a functional intellectual and practical vehicle. But what are the defining traces of the global neoliberal reconstruction of the capitalist economy? How was the neoliberal scientific programme embodied in the Washington Consensus translated into concrete measures in the economy and society, especially in Latin America and, even more specifically, in Brazil? I identify four major traces of the historical period opened by the emergence of neoliberalism as a dominant

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<sup>83</sup> In this period, as Saad-Filho maintains (2005, p. 224), "[e]conomic growth stalled, wages plummeted and inflation skyrocketed in the wake of the crisis. It became easy to accept that [import-substituting industrialisation] had collapsed, and equally easy to argue that it should be replaced by neoliberalism. This was the viewpoint promoted by the US government, the IMF, the World Bank and important sections of the Latin American elite".

<sup>84</sup> Chile was in fact an early "laboratory" of neoliberal policies, which were later "re-imported" into countries of the center, where they were theoretically elaborated (Dezalay and Garth 2002a).

political and economic model that are of special interest for the studying the roles of competition policy.

First, this is a model of *global concentration and expansion of capital*. As Chesnais argues (1996, p. 14; 91), the 1970s initiated a period of “extreme centralization and concentration of capital”, as the physiognomy of large groups originated in the center of capitalism (the U.S., Europe and Japan) substantially grew throughout the 1980s<sup>85</sup>. In a similar line, Harvey (2007, p. 80) notes that although neoliberal theory underscores the “virtues of competition”, “the reality is the increasing consolidation of oligopolistic, monopoly, and transnational power within a few centralized multinational corporations”. The degree of interpenetration between capitals of different nationalities increased in the period, generating highly concentrated structures in the international level. Global oligopoly produced in several sectors, mainly ruled by American, European and Japanese firms, created a limited “space of industrial rivalry” that is dominant in the world today (Chesnais 1996, p. 36)<sup>86</sup>. Concentration was to a great extent conducted through foreign direct investment in the form of mergers and acquisitions<sup>87</sup> (Chesnais 1996, p. 91), and during the 1980s it was mostly restricted to cross-country transactions among advanced economies (Picciotto 2011, p. 119; Chesnais 1996). In the 1990s, the movements of concentration expanded even further, as new frontiers of accumulation were opened in the periphery of the capitalist system, of which Latin America is emblematic.

The expansion and concentration of capital in the 1990s is related to a second important trace of neoliberalism: the policies of *privatization*. If, according to neoliberal theory, the state distorts the optimal functioning of the market, its direct interference in the

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<sup>85</sup> As Chesnais argues, concentrated forms of production and commercialization are not a distinctive feature of this period. They can be observed since what Sklar called the corporate reconstruction of capitalism. What is new in this historical moment as a global one is the “extension of highly concentrated structures of offer to most part of high intensity research and development industries, as well as to numerous sectors of large scale manufacturing” (Chesnais 1996, p. 94-95). The degree of concentration is, in turn, associated with a qualitative transformation of capitalist competition in this period. Competition reached an unprecedented global scale, as large corporations that until the late 1970s had operated “in relatively controlled oligopolistic domestic markets now face competition from other large corporations based abroad, both in domestic and foreign markets” (Kotz 2002, p. 12). Concentration thus became a means of survival in this new level of international competition.

<sup>86</sup> Chesnais and most of the authors that I here quote are obviously writing in a period in which China had not yet achieved the economic prominence it nowadays enjoys. Harvey (2007), nevertheless, already points to the Chinese insertion in the international market in this period as reflections of this process of global expansion and concentration of capital.

<sup>87</sup> Similarly to Sklar (1988), Chesnais explains that the reasons for resorting to mergers and acquisitions as a means for the expansion and concentration of capital are mostly economic. Mergers and acquisitions became advantageous in the context of neoliberal globalization for several reasons: in sectors of high technology, M&A enables circumventing barriers to entry posed by the possession of a certain technology (Chesnais 1996, p. 101); it is also a means to reduce transaction costs of operating globally by internalizing it into a single corporation (Chesnais 1996, p. 102); and as an efficient strategy to conquer new markets by acquiring existing commercial labels, distribution networks and clients (Chesnais 1996, p. 64).



economy must be reduced. The role of the state shall be transformed, stepping out of direct participation in the economy. The privatization of state-owned enterprises, accompanied by the deregulation<sup>88</sup> of certain economic sectors, and the liberalization of finance and trade<sup>89</sup> are traditional neoliberal solutions to this “problem”. These measures can be observed worldwide, and more intensely in Latin America, where the model of import-substitution industrialization entailed several governmental restraints to capital flows, and an important participation of state-owned enterprises in the economy.

In Brazil, for instance, the 1990s were the period when a major wave of privatizations took place in strategic sectors such as petrochemicals, steel, mining, fertilizers, railways, harbors, banking and finance, energy and telecommunications (Filgueiras 2006, p. 194)<sup>90</sup>. The creation of new markets through the privatization of state-owned corporations and the liberalization of economic sectors previously dominated by the government opened way for new mergers and acquisitions to occur (Picciotto 2011, p. 120), being thus potentially functional to the neoliberal trend of capital expansion and concentration already mentioned. As the study of Rocha and Kupfer (2002, p. 28) on the transformation of the structure of corporations in Brazil during the 1990s indicates, mergers and acquisitions following privatizations were associated with the expansion of multinational capital into a recently liberalized market. Azpiazu and Basualdo’s (2004) study about privatizations in Argentina, in turn, underscore how it consecrated a monopolistic control of strategic economic sectors. Privatization measures have thus been a “signal feature of the neoliberal project”, as its primary aim is to “open up new fields for capital accumulation in domains hitherto regarded off-limits to the calculus of profitability” (Harvey 2007, p. 160).

A third trace of neoliberalism that is relevant for discussing the *outcomes* of Brazilian competition policy is the process of *financialization*, which is related to the neoliberal

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<sup>88</sup> I here follow Munck’s (2005, p. 63) definition of deregulation as the “removal of state regulatory systems” through the creation of “new forms regulation with new market-oriented rules and policies to facilitate the development of the ‘new’ capitalism”. Again, I thus explicitly oppose the notion proposed by diffusion perspectives which equates neoliberalism with the mere absence of regulation.

<sup>89</sup> Trade liberalization entails, for instance, the lowering of tariffs and non-tariff barriers (Deraniyagala 2005, p. 99), such as import restrictions characteristic of the import-substituting industrialization model (Saad-Filho 2005a, p. 225). Financial liberalization comprises measures such as “encouraging money centre and stock market activities in developing and newly industrialised countries” (Toporowski 2005, p. 110). Both are seen as key measures for market devices to work properly and consequently promote competition, technological change, production, growth and even reduce poverty (Deraniyagala 2005).

<sup>90</sup> Between 1991 and 2001, more than a hundred companies owned both by the federal government and the states, were privatized, and shares were sold in other companies, mobilizing amounts estimated between 92 and 88,3 billion dollars (Anuatti-Neto et al 2005, p. 152; Filgueiras 2006, p. 194)

restructuring of the economy in three different, yet interconnected senses<sup>91</sup>. One dimension of financialization concerns the unprecedented extension of financial capital in the contemporary economy. As Epstein (2005, p. 3) defines it, in this respect “financialization means the increasing role of financial motives, financial markets, financial actors and financial institutions in the operation of the domestic and international economies”. Indicators of such shift are the “massive expansion of financial systems in relation to the real economy, [...] an unprecedented growth of financial assets and leverage, [...] the emergence of highly complex financial instruments, and [...] the extraordinary levels of financial trading” (Picciotto 2011, p. 261). The quantitative shift of finance is also directly connected to the processes of expansion and concentration of capital, as the financial sector was extremely functional, for instance, in funding mergers and acquisitions in the 1980s, and became a new sector of activity for industrial groups (Chesnais 1996, p. 239-240). In the neoliberal era, financial capital has thus faced “a quantitative expansion of its activities and profits” (Kotz 2008, p. 5).

Beside a shift in extension, the process of financialization also entails a qualitative transformation. Financialization comprises a movement toward a relative autonomization of finance as a sphere of capitalist accumulation (Chesnais 1996, p. 239)<sup>92</sup>. As Chesnais (1996, p. 239) argues, “the financial sphere represents the advanced post of the movement of capital globalization”. Under the neoliberal paradigm, the “industry of finance” globalized as one of the key fields of capital accumulation and valorization (Chesnais 1996, p. 240-241). While during most of the twentieth century the financial sector was “closely linked with productive capital” (Picciotto 2011, p. 259), under neoliberal hegemony financial institutions surpassed its former roles as “servant of nonfinancial capital” and increasingly started to pursue “their own profits through financial activities” (Kotz 2008, p. 5-6). Neoliberal policies starting in the 1980s thus reflected the “increasing autonomy and dominance of finance capital over productive or commercial capital” (Heydebrand 2003b, p. 160). Exemplary of such autonomization are the derisory proportion of operations involving international trade in the foreign exchange market (Chesnais 1996, p. 244), the growth of financial assets in comparison to “capital tied up in the form of exchange commodities or in the form of the

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<sup>91</sup> As several authors note, the role of financial capital in the economy is not an exclusive feature of neoliberalism. As early as the consolidation of corporate capitalism in the nineteenth century, financial capital plays a significant role in capitalist development and accumulation (Picciotto 2011, p. 258; Kotz 2008, p. 8; Heydebrand 2003b, p. 164-171). What is new in the neoliberal era is the extension of financialization, and as I will argue later, its relative autonomization as a space of capital accumulation and its dominance in the world economy.

<sup>92</sup> Even in the neoliberal era financial capital is still connected to the productive economy. According to Chesnais (1996, p. 246), the autonomization of the financial sphere is only *relative*, to the extent that the “capital that valorizes itself in the financial sphere was born – and still is – of the productive sphere”.

fixed capital of the means of production” (Heydebrand 2003b, p. 162), and the revival of “specialized markets” for investing in and negotiating governmental and private bonds and obligations, notably public debt (Chesnais 1996, p. 247; Chesnais 2005, p. 37).

The expansion of financial capital into new domains, its increased importance in the flows and concentration of capital, as well as its relative autonomization as a sphere of capital accumulation reveal yet a third sense of financialization as a crucial element of neoliberalism, of political nature: the dominance of financial capital. As Duménil and Lévy maintain (2005b, p. 1), there are several indications pointing to the “return of finance to hegemony”, i.e. to the “crucial position of finance, at the center of the new neoliberal setting”<sup>93</sup>. Such dominant position was achieved by several institutional arrangements constructed under the auspices of neoliberal theory. Increasingly since the 1980s, measures of financial liberalization (Picciotto 2011, p. 263; Chesnais 1996, p. 261), deregulation (Kotz 2008, p. 8; Heydebrand 2003b, p. 172; Chesnais 1996, p. 261), and the opening and creation of national financial markets in emerging economies (Chesnais 1996, p. 264-266) spread worldwide<sup>94</sup>.

These were measures that “tended to encourage rather than control the forces leading to financialization and speculation” (Picciotto 2011, p. 266), setting “the financial sector free, and allowing the process of financialization to develop” (Kotz 2008, p. 8). Another typical neoliberal measure to secure the free flow of financial capital is related to one major theoretical tenet of neoliberalism: monetarism (Heydebrand 2003b, p. 160). The financial accumulation through investments in public debt, one of the key areas of financialization, as it was mentioned, is associated with monetary policy, i.e. the control of inflation through interest rates. This, in turn, is the task of central banks. Not by chance, therefore, one of the recurrent neoliberal policies in this area has been the promotion of central banks’ “autonomy” from politics (Arestis and Sawyer 2005). In peripheral countries, the creation or reform of “independent central banks” is mostly dated of the 1990s (Carruthers et al 2001). Autonomous central banks following international standards of monetary policy have guaranteed high interest rates, which represent a major attractive for financial operations.

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<sup>93</sup> Examples of the dominant position of finance given by Duménil and Lévy (2005b, p. 1) are such as “[t]he rise of interest rates is obviously favorable to lenders; the new global distribution of production is clearly directed by large banks; the stock market is center stage; the managers of corporations are compelled to target their activity, even more strictly than before, toward the maximizing of the market value of corporations and the distribution of large fractions of profits as dividends”

<sup>94</sup> The concept of deregulation may be misleading because, as Picciotto (2011, p. 261), “finance has become highly regulated in many countries and internationally, but in forms favoring private or quasi-public self-regulation”. I here rely on Chesnais’ (1996, p. 261-262) use of the term, which understands deregulation as a series of measures by which the state ceased to have a strict control of the financial market, for instance, on interest rates, price fixing of banking services and the creation of new financial products.

Besides the expansion and concentration of capital, privatizations and financial hegemony, the fourth defining trace of neoliberalism that I understand to be useful for studying the outcomes of competition policy are its impacts on *social groups*. As Harvey (2007, p. 75) puts it, neoliberalism “is hostile to all forms of social solidarity that put restraints on capital accumulation”. According to the neoliberal intellectual project, key forms of “social solidarity” that distort market mechanisms are social and labor rights, and the organization of labor in unions. Not by chance, thus, they have become central targets of reforms. If the market is to function freely, labor must be freed from restraints that impede its proper circulation as a commodity.

The effects of neoliberalism on workers and labor unions have been extensively documented. Following its theoretical project, neoliberalism imposed several measures to weaken labor unions, and to flexibilize social protections and labor markets (Palley 2005, p. 25; Munck 2005, p. 65; Johnston 2005, p. 137; Sinha 2005, p. 166; Bush 2007; Crow and Albo 2005). These trends have been observed in the case of Brazil, where the restructuring of capital-labor relations promoted by neoliberalism implied high rates of unemployment, precarization and flexibilization (Filgueiras 2006, p. 186-189; Pochman 1995, p. 245; Pochmann 2004; Antunes 2005), and the weakening of labor unions (Pochmann 2003, 2005, Saad-Filho 2010, p. 24).

Neoliberalism entails, in this sense, “a programme of the methodical destruction of collectives” (Bourdieu 1998). Although the model of “neoliberal governance” silences several social and political categories, it also mobilizes alternative concepts. It also comprises a “positive” agenda in this respect, actively constructing a substitutive model of social organization, as several studies following a Foucauldian tradition, or the approach of a “cultural critical political economy”<sup>95</sup> have emphasized. In these views, neoliberalism substantially transforms the concept and composition of citizenship (Haque 2008), and produces a particular “neoliberal subjectivity” (McWhorther 2012, p. 71). It engineers a “paradigm shift in which collectivist ideas are abandoned and replaced by ideas of individual responsibility” (Ireland 2011, p. 10). The neoliberal rationality “tries to render the social domain economic [by] the increasing call for ‘personal responsibility’ and ‘self-care’” (Lemke 2001, p. 203). Individualism, which is a methodological and philosophical tenet of neoliberal theory, becomes a model of society by the extension of market principles to the

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<sup>95</sup> Such approach reincorporates a “cultural” or “social” dimension into the approach of a critical political economy, thus avoiding a purely economicist perspective. As Sayer (2001, p. 688) states, a “critical cultural political economy” “couples its interests in the social and cultural embedding of economic processes with a focus on the powerful *disembedding* forces of economic systems and the problems they cause”.

social world. The constitution of an “ethos of self-governing” that promotes “individualism and entrepreneurialism” engenders a particular “regime of citizenship” (Ong 2006, p. 3-8) in which the “good neoliberal subject” is a successful enterprise-unit that maximizes utility (McWhorther 2012, p. 72).

In the industrial capitalist model, production served “as a marker of identity and class divisions” and citizenship was equated with government (Munck 2005, p. 65). As Santos (2005, p. 36-37) describes, in this model the state “selected two well-defined social actors (capital and labor) and brought them to the negotiating table”, so the “political formation thereby generated was one of institutionalized conflicts rather than of stable flows.” Neoliberalism, however, subverts this model. A functional means to do so is through the conversion of such model of citizenship into categories such as that of consumer (Barnett 2010), the “citizen-consumer” (Clarke 2004; Rose 2004; Barnett 2010, p. 286), the creation of “a regime of market citizenship” composed by “market” and “economic” citizens (Schneiderman 2008).

The consumer is an individual economic agent capable of freely expressing and pursuing his or her identities, interests and choices (Munck 2005, p. 65), and “his or her activity is to be understood in terms of the activation of the rights of the consumer in the marketplace” (Rose 2004, p. 165-166). Citizenship is thus repositioned, from its original location within the state, to a “variety of private, corporate and quasi-public practices from working to shopping” (Rose 2004, p. 166). As the “citizen-consumer” is a basic social unit compatible with (and governable under) with the market logic, it is thus functional to the neoliberal intellectual and political project of substituting collectivist forms of organization, such as those embedded in labor unions and governmental social protections. Moreover, as Schneiderman (2008, Ch. 7) puts it, consumers “are understood to be a main beneficiary of expanded global free trade and investment”, and these alleged benefits are precisely what provides legitimacy to the rules of free trade. Through this social categorization, strong markers of social division such as capital and labor, and its well-delimited political tensions are eliminated, and matters of inclusion and exclusion are depoliticized, turned into problems of technical coordination through the logics of the market (Santos 2005, p. 37).

This brief excursion through what I understand to be defining traces of a neoliberal economy and society can be summarized in how Duménil and Lévy (2005, p. 10) describe the political, economic and social transformations that started in the late 1970s:

neoliberalism refers to new rules of functioning of capitalism, which affect the centre, the periphery, and the relationship between the two. Its main characteristics include: a new discipline of labour and management to the benefit of lenders and shareholders; the diminished intervention of the state concerning development and welfare; the dramatic growth of financial institutions; the implementation of new relationships between the financial and non-financial sectors, to the benefit of the former; a new legal stand in favour of mergers and acquisitions; the strengthening of central banks and the targeting of their activity toward price stability, and the new determination to drain the resources of the periphery toward the centre.

Also, as Saad-Filho (2005a, p. 225) underscores, these policies were implemented with some particularities in Latin America – notably the reference to the tasks of “inflation control”:

It is a peculiarity of Latin American neoliberalism that the transition was frequently justified obliquely, by reference to the imperatives of inflation control. Neoliberal policies were, correspondingly, often disguised as ‘technical’ anti- inflationary measures. [...] Throughout Latin America, financial, trade and capital account liberalisation, the wholesale privatisation or closure of state-owned productive and financial firms, and profound fiscal and labour market reforms along neoliberal lines were imposed, allegedly because they were essential for short-term macroeconomic stability (i.e. inflation control) and long-term economic growth.

As I argued, it is necessary to transpose these elements as parameters to discuss the *outcomes* of competition policy in Brazil, once the reform and practice of antitrust law in this country is integral to the context of neoliberal reforms of the 1990s. In Brazil, the development of neoliberal policies is frequently associated with the governments of Collor de Mello (1989-1992), Itamar Franco (1992-1995) and Fernando Henrique Cardoso (1995-2002). After more than twenty years since the first manifestations of neoliberal reforms, and in face of the ascendancy of the Workers’ Party (PT) to the presidency in 2003 and its maintenance in power for three mandates, a growing literature started to discuss the occurrence of a possible reversion of neoliberalism in Brazil<sup>96</sup>.

Some authors have defined the period starting with Lula da Silva’s government (2003-2010) and his successor’s, Dilma Rousseff (2010-2014), as years of “post-neoliberal governments” (e.g. the collection edited by Sader [2013]). Others have detected signs of the emergence of a “new developmental state” (Mattos 2007, Boschi 2010, Bresser-Pereira 2007, 2010), or of a “new state activism” (Trubek et al 2013) in Brazil. In this view, a new

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<sup>96</sup> The assessment of the reversion of neoliberal policies in Latin America is not restricted to Brazil. As Boschi (2010, p. 2) maintains, “in Brazil, Chile and Argentina, center-left governments started to adopt practices that revitalized the role of the state, indicating a return to certain developmentalist principles characteristic of the period that preceded market reforms, but redefined and adapted to the new times”.

economics of development would have been adopted, encompassing measures such as the reanimation of industrial policy through efforts to create globally competitive national champions, a highly selective use of tariffs, taxes and subsidies to jump-start industries (Trubek 2008, p. 12), and the increasing role of state banks as key-agents in financing Brazilian industrial policy as well as innovation (Trubek et al 2013, p. 299-301). Other authors have underscored continuities of the neoliberal project in the governments elected since 2003, especially in macroeconomic policy (monetary, exchange and fiscal policies), as evidence of the absence of any deep rupture (Paulani 2008; Morais and Saad-Filho 2005, 2011). Under this view, new developmentalist proposals such as industrial policy would have been only partially institutionalized, achieving a complementary character to neoliberal measures that remained intact (Morais e Saad-Filho 2011, p. 516; Gonçalves 2012, p. 11).

It is not my purpose, at this point, to engage with the debate about the possible continuities and ruptures of neoliberalism in Brazil. However, as I rely on the elements offered by a “critical political economy” of neoliberalism to contextualize the neoliberal model of the economy and society, it is important to take into account these potential qualitative shifts when applying this framework into empirical research.

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In section 2.3, I complemented the actor-centered approach to the *process* and *agents* of reform through a framework that enables the empirical analysis of the *outcomes* of competition policy. I sustained that through a “law in action” perspective that focuses on the facilitative, regulatory and constitutive roles of a regulatory arena such as competition policy in the economy and society, the depoliticizing and often unempirical evaluations of *outcomes* present in mainstream narratives can be circumvented. By mobilizing these operational concepts, I understand it will be possible to empirically assess the connections of competition law reform with neoliberalism, something secondary or even neglected by the knowledge produced by lawyers, economists and diffusion perspectives. The assessment of the *outcomes* captured through the operational concepts of the facilitative, regulatory and constitutive roles of competition policy in light of neoliberalism demand, however, the establishment of parameters of what characterizes this economic, political and social model.

Hence, in section 2.4, what I take to be the defining traces of a neoliberal economy and society were described. I relied on “critical political economy” perspectives that point to the concentration and expansion of capital, privatizations, the financialization of the economy and the mutual dismantlement and engendering of social categories as characteristic elements

of the processes of neoliberalization that became hegemonic since the late 1980s, and notably in Latin America and Brazil, starting in the 1990s. These, I argued, are substantive elements that contextualize what can be expected of competition policy reform and practice if, as I sustain, it is an integral part of neoliberalism.

Together with the actor-centered approach sketched in section 2.1, and the theories about the roles of lawyers and economists in neoliberalism described in section 2.2, these elements comprise the general framework that I deployed to construct an alternative narrative about the *process*, the *agents*, and the *outcomes* of competition policy reform and practice in Brazil. It is still necessary, however, to explain how I “translated” the research questions generated by this framework into specific empirical tasks, and the methodological strategies that were adopted in the search for answers. This is the object of Chapter 3.



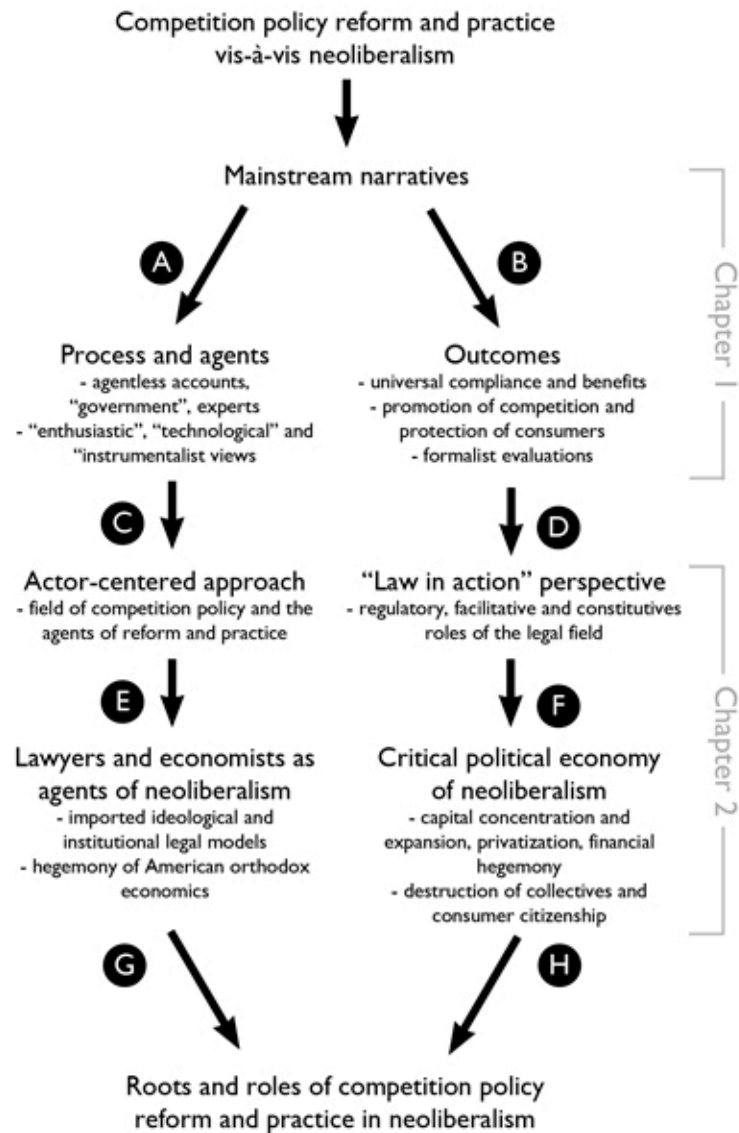
### CHAPTER 3

#### Methodological strategies for studying the politics of regulation

To situate and explain the methodological strategies adopted in this research, it is useful to recapitulate the path so far covered, as summarized in Figure 1 below. With the puzzle that motivates this inquiry in mind – the linkages of competition policy reform and practice with neoliberalism in Brazil – in Chapter 1 I surveyed what are the narratives offered by institutions, lawyers, economists, and diffusion perspectives to understand this relationship. As I argued, based on descriptions about the *process* and *agents* of competition policy reform (A), as well as its *outcomes* to the economy and society (B), these sources depict competition policy as a successful form of state control over the market that contradicts, or even neglects the very existence of neoliberalism, and its utility as an analytical concept.

Departing from a criticism to the often agentless, instrumentalist and technological approaches these narratives frequently mobilize to explicate reform, and to the formalist and celebratory evaluations of its outcomes, in Chapter 2 I sketched a framework to circumvent what I see as their shortcomings. This framework points to two general strategies for re-politicizing the reform and practice of competition policy and thus evaluating its connections to the political and economic project of neoliberalism. First, framing the *process* of competition policy reform as the constitution of a field of practice, in which lawyers and economists are the concrete *agents* that determine the structure and thus the functioning (and the roles) of this field (C). Second, assessing the *outcomes* of competition policy as the “law in action” of what this field of practice facilitates, regulates and constitutes in the economy and society (D). From these conceptual tools, I derived four empirical research questions that translate the broad research *problematique* into an operational inquiry. Still in Chapter 2, I described theories that provide “substance” to this formal structure, as they enable visualizing lawyers and economists as agents of neoliberalism (E), as well as the defining traces of a neoliberal economy and society (F). These are theories that give parameters to guide the search for answers to the formulated questions, as they state what should be expected in the analysis of who are the agents of competition policy reform and practice, and what are its outcomes to the economy and society if it is rooted in and functional to neoliberalism.

**Figure 2.** Research path



**Source:** elaborated by the author

In general terms, thus, the construction of an alternative narrative about the linkages of competition policy with neoliberalism in Brazil is structured as the application of the theoretical framework designed in sections 2.1 and 2.3 (C and D) in an empirical study, and the comparison of the data obtained with the substantive theories about the agents of neoliberalism (section 2.2, E) and the defining characteristics of a neoliberal economy and society (2.4, F). Through these steps, it is possible to assess what are the roots and roles of competition policy reform and practice in neoliberalism. What is still to be explained are the letters “G” and “H” of Figure 1, that is, the methodological strategies adopted to put these conceptual tools to work empirically. Or, in other terms, it is necessary to describe what is to

be asked more concretely, according to the conceptual framework sketched, that provides answers to the question of how is competition policy reform and practice related to neoliberalism.

As Bourdieu (Bourdieu and Wacquant 1992, p. 225) suggests, “the most ‘empirical’ technical choices cannot be disentangled from the most ‘theoretical’ choices in the construction of the object”. In this chapter, I thus present how the research questions derived from the conceptual tools designed in the previous chapter were operationalized into a concrete empirical research. As I will discuss in the sections below, the data demanded by each set of questions is extremely diverse. I therefore mobilized different methodological strategies to conduct the study. In this sense, this dissertation can be seen as a “multi-method research” (Nielsen 2010, Bryman 2004), or “mixed methods research”, as it “combin[es] both quantitative and qualitative research and methods” (Creswell 2003, p. 203).

My use of such strategy is not, however, what is often understood as a mixed-method approach, i.e. a means to cross-validate findings obtained through different methods, or to cover the weaknesses of certain methods with others (Creswell 2003, p. 213). This strategy normally refers to the *mixing* of methods for the analysis of the same research question, and the discussion of the potential similarities and differences among the data obtained through each method. As Creswell and Plano Clark (2007, p. 7) put it, the “mixing of data is a unique aspect” of the definition of a mixed-method approach, and enables “a better understanding of the problem than if either dataset had been used alone”.

In this research, however, the resort to multiple methods is in the form of a combination, rather than a mixture. I combine different methods because the set of empirical questions translated from the broad research puzzle demands data of distinct types. The use of multiple methods therefore responds to the need, derived from how the research problem was operationalized into concrete empirical questions, to approach the different dimensions that compose the object of investigation. Although different, and despite the fact that they are not intended to provide validation or refutation *among* themselves, the different sets of data are therefore necessary because together they provide indicators to tackle the more general research question – that of the roots and roles of competition policy in neoliberalism. Thus, following Bryman (2004, p. 678), although the multi-method research may entail the application of two or more sources of data and methods to the investigation of a single research question, it also comprises the combination of distinct methodological strategies to “different but highly linked research questions”. Similarly, Nielsen (2010, p. 953) explains

that the multi-method approach also entails the use of more than one research technique or strategy to study several closely related phenomena.

To present the multi-method approach applied, I organize this chapter accordingly to the empirical research questions formulated in Chapter 2. For each set of questions, I describe what kinds of data were identified as useful to answer it, and present the correspondent instruments designed to collect and analyze the empirical material. The questions that stem from the actor-centered approach were tackled through similar methodological strategies, and are thus grouped below. Those generated by the critical political economy of the law in action, in turn, are here dismembered, as they entailed different methods for data collection and analysis. The chapter is structured as follows: in section 3.1, I present the methodological strategies implied by the actor-centered approach; in section 3.2, I describe the quantitative study designed to investigate the facilitative-regulatory roles of competition policy in the economy; and in section 3.3, I discuss the set of qualitative instruments deployed to complement the study of *outcomes* to the economy, and also applied to produce indicators of competition policy's constitutive roles in society.

### **3.1 Relational biography of the agents of reform and practice**

From the actor-centered approach to the process of constitution of the field of competition policy and its practice discussed in section 2.1, I derived two sets of research questions which imply similar tasks for empirical research: to identify the relevant agents involved in it, the positions they occupy, their capitals and habitus, and how they condition the structuring and the structure of the field. The nature of the empirical data demanded by these questions is clearly qualitative: it is necessary to identify certain individuals and properties associated with them. As anticipated, my focus relies on lawyers and economists as key-agents for the creation and the operation of the field of competition policy. To depict the profiles of these agents, three forms of capital were taken as indicative of their positions and potential dispositions: cultural, social and political capital. Inspired in Bourdieu (1984, p. 227-242), I selected several "indicators" of the elected forms of capital, and a systematic set of sources to collect data about them.

Cultural capital was operationalized through five indicators of academic and professional trajectories. These indicators comprise the three forms of cultural capital identified by Bourdieu: embodied (dispositions, of which the command of foreign languages is exemplary), objectified (products indicative of education and training), and institutionalized

(such as educational qualifications and professional experiences), as summarized in the table below.

**Table 2.** Indicators of cultural capital

Indicators of cultural capital	Definition
<b>Undergraduate studies</b>	institutions and areas of undergraduate studies
<b>Graduate studies</b>	institutions, countries and areas of graduate studies
<b>Academic experience</b>	areas of interest and practice of academic work, encompassing publications, teaching, supervisions, and research projects
<b>Professional experience</b>	areas of “practical” work, be it in the private and public sectors, and in international organizations
<b>Foreign languages</b>	command of languages other than Portuguese

**Source:** elaborated by the author

Taken together, they enable visualizing the academic and professional backgrounds of those agents that engage in reform and are recruited to manage the state apparatuses responsible to produce competition law. These are both the “credentials” possessed by these agents to become relevant agents of the field, and potential indicators of their predispositions. For instance, through the analysis of objectified cultural capitals such as publications, it is possible to map the agents’ stances toward competition policy, i.e. which “theoretical” tradition they endorse in the field.

Beside cultural assets, I also collected data about the social capitals possessed by these agents. These entail three forms of membership to groups or networks determined by the nature of the social ties established: professional, social and familiar. These forms of interpersonal relations illuminate the proximity among the relevant agents of the field, thus helping to assess if and how social ties help to determine its structure, i.e. who are the agents “authorized” to become part of the architecting and practice of the field. Social ties are also taken as indicators of the sharing of dispositions toward the state and the economy.

**Table 3.** Indicators of social capital

Indicators of social capital	Definition
<b>Professional ties</b>	professional interpersonal relations among agents, embodied in networks constructed in their professional experiences
<b>Social ties</b>	friendship interpersonal relations among agents, embodied in long-term relationships constructed in both academic and professional experiences, or even outside it
<b>Family ties</b>	familiar interpersonal relations among agents, both parental and matrimonial

**Source:** elaborated by the author

Political capital was operationalized through one indicator: the occupancy of political positions, encompassing elective mandates, appointments to roles in government (in all spheres of governments) and in political parties. Although these elements could be placed as part of cultural capital, once it entails elements of trajectory, and also social capital, to the extent that it comprises membership to certain (political) groups, I decided to construe a distinct variable for political capital for two reasons. First, as a trajectory asset, political capital is not legitimated in the same way as academic or professional credentials, which have a relatively autonomous hierarchy and logics of functioning. Second, as a form of membership to a political group or network, the social ties built around politics are also connected to dynamics that are not necessarily the same as those of a professional, friendship and familiar basis. However, as discussed in the description of the reflexive sociology approach, these forms of capital are not static: conversions take place all the time, and the possession of one form of capital is often accompanied by others. Similarly to cultural and social capitals, political assets also confer a means to locate the agents in the social space where they act in relation to the dominant political groups, their strategies and interests. Also, as an element of trajectory (political positions previously occupied), it permits constructing the agents' potential dispositions toward the field.

Through these sets of capitals, and following the theoretical framework sketched in section 2.1, I tried to position these agents within their fields of origin and to identify their “structures of preference” toward the state and the market (Bourdieu and Wacquant 1992, p. 123), the “internalized schemes” that guide agents' behavior (Dezalay and Madsen 2012, p. 442) – i.e. the dominant *habitus* shared by the agents involved in reform and in the practice of

competition policy. Given that the core issue at stake in the establishment and practice of the field of competition policy is the extent of control of the state over the economy, these dispositions are reflected on their general perceptions of the state-market relation, and on specific stances concerning competition policy. Following the theoretical framework sketched, these schemes of perception and its corresponding position-takings are connected to the positions occupied by these agents, which in turn are determined by their capitals.

It is important to notice that these indicators are not of a purely quantitative character. My aim is not to identify who possess *more* or *less* cultural capital, or a *higher* or *lower* amount of social connections. Rather, what interests me is identifying *what kinds* of capitals these agents hold, in order to position them in their fields and within the field of competition policy, and thus assess the very structure of this field and the hegemonic dispositions it opens space to. Through the mapping of who are these agents – their capitals, positions and structures of preferences – I contextualize what are their interests and strategies, and what they can and do mobilize towards what ends (Dezalay and Garth 2002a, p. 9).

### 3.1.1 *Trajectory study*

The research strategy adopted to capture those forms of capitals, and the positions and habitus they crystallize was that of a “relational biography” (Dezalay and Madsen 2012, p. 448, Dezalay and Garth 2002a). The resort to a “biographic” method is justified by the character of the data demanded by the variables elected in the inquiry. It is the study of their trajectories that enable collecting the information about what kinds of capitals are possessed by the agents that construct and operate the field, and what positions they occupy. As Dezalay and Madsen (2012, p. 448) put it, “the biographies of the players suggest which capital and resources have been brought into play at the different stages of [the field’s] structuration”. Trajectories reveal “what moves groups into the field of state power, what they bring in terms of expertises and networks, how they operate, how they are oriented on terrain characterized by intense competition and constant change” (Dezalay and Garth 2002a, p. 10).

The potential of such method lies beyond the explanation of isolated and “specific actions of individuals” (Dezalay and Madsen 2012, p. 448). This is why the method is qualified as “relational”. Individual trajectories are assembled into a “cumulative story that can be established by comparing a high number of trajectories within a particular field” (Dezalay and Madsen 2012, p. 448). It is the combination of several individual trajectories that “provide a way to examine and decode the complex fights and divisions that characterize

a particular field at a particular time” (Dezalay and Garth 2002a, p. 10). As the field’s structure is documented and inscribed in the agents’ trajectories and actual practices (Dezalay and Madsen 2012, p. 448), assessing what are the trajectories of these agents opens room for revealing the very structure of the field.

I deployed such “relational biography” method to analyze both the agents involved in the process of reform of competition policy in the early 1990s, which resulted in the law 8.884 of 1994, and those who occupied the field since reform until the year of 2011, comprising more than 80 agents. To identify who were the relevant agents in the process of reform, I combined two strategies. First, I resorted to official documents and secondary sources that mention lawyers and economists who were officially appointed to draft bills, and conduct the legislative construction of the field of competition policy. An example of that is an ordinance of the Ministry of Justice, dated of 1993, through which a commission of experts was appointed to formulate the legal project that eventually resulted in the law 8.884 of 1994<sup>97</sup>. These sources served as an entry-point to the field, and were eventually complemented by interviews conducted with lawyers and economists, in which I asked respondents who were the relevant agents in the process of reform.

Such framework was applied in the historical reconstruction of the creation of a “modern” field of competition policy in Brazil, which comprised the period from 1984 to 1994. Most of the relevant episodes included in this historical reconstruction were selected based on what mainstream narratives point to as the landmarks of competition policy in Brazil, such as the Constitution of 1988, the laws of 1991, and the competition act of 1994. I hence analyzed the legislative construction of these norms. However, during fieldwork I also identified other episodes that were referred to by the agents of the field as integral to the field’s history, and were thus included in the analysis

Identifying the relevant agents of the practice of the field was much easier, as they comprise a finite set of individuals institutionally delimited. I selected agents appointed to the following positions between 1991 and 2010: all commissioners and presidents of CADE, Secretaries of the Ministry of Justice’s Secretariat of Economic Law (SDE), and Secretaries of the Ministry of Finance’s Secretariat of Economic Monitoring (SEAE). Interviews also enabled the identification of what the field itself reputes as key-agents of competition policy, who were eventually incorporated into the trajectory study. In the end, the trajectories of more

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<sup>97</sup> This is an ordinance of the Brazilian Ministry of Justice: Portaria do Ministério da Justiça n. 28, of January 27th 1993.



than 60 agents that composed the field of competition policy in the period were reconstructed and analyzed.

The trajectory study developed to gather biographical information relied on several sources: the *Lattes Platform*<sup>98</sup>, an information system maintained by the Brazilian government which congregates curricula of Brazilian academics; *LinkedIn*<sup>99</sup>, a mix of information system and social network congregating professional curricula; *Who's Who Legal*<sup>100</sup>, an international publication that “features over 16,000 of the World's leading private practice lawyers from over 100 national jurisdictions”; and personal and professional websites (such as those of law firms and economic consultancies).

In the case of those agents appointed as CADE's commissioners or presidents, the primary source of information was the curriculum each of them submitted in the process of appointment. These curricula are attached to the so-called “Messages to the Federal Senate” (MSF)<sup>101</sup>, through which the President sends the nomination for approval by the Federal Senate. I analyzed 46 curricula available in 40 MSFs presented to the Senate between 1991 and 2010<sup>102</sup>. Another auxiliary source was a book edited by Dutra (2009), an antitrust lawyer, which congregates interviews with 23 former commissioners, and includes biographic questions.

### 3.1.2 *Qualitative elite interviews*

Besides the analysis of curricula based on the mentioned sources, I also conducted a total of 43 interviews, encompassing agents involved in the process of reform of competition policy, individuals appointed to CADE, SDE and SEAE, CADE's staff, and lawyers and economists that work in the field as professionals representing corporations (listed in Annex II). The selection of interviewees obeyed two criteria. First, I tried to interview all those agents that were identified as relevant for the trajectory study, i.e. those involved in reform, and those that had occupied positions in the SBDC. The list of “relevant” agents, especially in the case of reformists, evolved with fieldwork, as the interviewees themselves revealed names that weren't anticipated in my initial mapping. In the end, my list of invitations for interviews

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<sup>98</sup> Available at: <http://lattes.cnpq.br>

<sup>99</sup> Available at: <http://linkedin.com>

<sup>100</sup> Available at: <http://whoswholegal.com>

<sup>101</sup> *Mensagem ao Senado Federal*.

<sup>102</sup> The MSFs dated from 2001 onwards were obtained through the search system of the Senate's website (under the option “Legislative activity” at the address [www.senado.gov.br](http://www.senado.gov.br)). The MSFs submitted before 2001 were not available in digital form, and were obtained after being required to the Senate's Archive.

comprised 60 agents that somehow fit into this criterion. I was able to interview 31 of them<sup>103</sup>. The other 29 agents that were invited but not interviewed either did not respond to the attempts I made to contact them<sup>104</sup>, or did respond but my research schedule didn't match their availability.

The second criterion stems from Dezalay and Garth's (2002a, p. 10-11) suggestion that the study of the field must "obtain multiple points of entry in order not to be captured by one point of view". In the course of research I decided to bring in voices that were not of those agents that participated in reform, or that ended up occupying positions in government. Thus, I incorporated the views of lawyers that work in the field of competition policy representing corporations before CADE. To select "relevant agents" of this type, I mapped those lawyers who are "repeated players" in CADE based on a database about CADE's decisions in merger reviews (which will be discussed in the next section)<sup>105</sup>. I decided to adopt such delimitation based on the assumption that the more experience the agent has in the field, the more information he/she will be capable to provide.

I listed 40 names that are most frequent in cases decided by CADE between 1994 and 2010, excluding eventual agents that appeared in the database but were already comprised by the first criterion (i.e. were either reformists or producers of competition policy)<sup>106</sup>. I sent invitations for interviews for this group, and was able to interview 9 of them. Most lawyers did not respond to the interview invitation, and some of them replied but were not available for scheduling the interview at the time. The inclusion of these agents that were not directly involved in reform, nor occupied positions in the SBDC proved to be a valuable choice. It assured the multiplication of points of entry, and enabled assessing their perceptions of the functioning of the field. As I will discuss in Chapter 4, interviews with those agents of the "market" (as opposed to the agents of the "state") enabled visualizing a shared habitus of the field, and the porous boundaries between the state and the market – what I will take as an indicator of the structure of the field and its roots in neoliberalism.

Late in the fieldwork process, I also had the opportunity to interview staff members of CADE. Excluding those who fit the other criteria, I mapped 18 agents who have occupied

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<sup>103</sup> The number of invitations is lower than the agents that compose the trajectory study for several reasons. Four of these 68 agents were already deceased when this research began. I was also unable to locate any contact information for another 5 agents.

<sup>104</sup> For each of the identified agents, I made at least two attempts of contacting, by email and phone.

<sup>105</sup> In most cases, several lawyers of the same firm are listed in a single case. I placed them individually in my interviewees list.

<sup>106</sup> Out of the 31 agents interviewed as reformists or producers of competition policy, 15 develop professional activities representing corporations before CADE. Some of them figured within the top 40, but were excluded from my mapping of lawyers, as they were already comprised by the other criterion.

positions in CADE's bureaucracy as attorney general, and as economists who assist the work of commissioners. While the former are appointed by the President, just as CADE's commissioners and presidents, the latter are civil servants. Similarly to the other cases, most of the invitations were not replied. Interviews were conducted with only 2 of these agents, both economists and civil servants currently working in CADE. The low number of interviewees certainly does not allow delineating any conclusions about these "mid-level" agents who produce competition policy. However, these two interviews provided interesting indications about the habitus and the dynamics of the field, especially in the case of an economist who has occupied different positions in the SBDC practically since the 1994 reform, and was thus able to provide a vast "institutional memory". Assessing the role of the bureaucracy that compose the field, and who are these agents and how they affect the production of competition policy, would nevertheless be an invaluable contribution for a more complete understanding of the field, and constitutes a possible venue for expanding this research.

The set of 43 interviews with this variety of agents responded to different objectives. First, interviewing the agents that are object of the trajectory study enabled exploring in detail the information about their capitals and positions identified through documental sources. Second, interviews with the agents who architected the field in the early 1990s served to gather information about the history of reform and their practical involvement in the construction of the 1994 law. Questions that sought to grasp how the reform process actually took place, what were the struggles around it, why certain institutional designs were chosen and why the field took a certain direction helped to illuminate the connection of these agents' profiles with their positions-taking. Third, as already mentioned, bringing in other voices helped to understand the habitus of the field, to map what were important moments of development of the field after its reform in the 1990s, and to shed light into the very practice of those agents entitled of producing the law, as they do so in interaction with lawyers representing corporations. In all cases, interviews made possible the gathering of direct data about the construction of competition regulation, on what are the struggles of the field, and to locate the struggles, and these agents' perceptions and political stances within the field. Interviews of this type, as Tansey (2007, p. 2) explains, do not aim to "make generalisation of the full population", but most notably to "draw a sample that includes the most important political players that have participated in the political events being studied" – i.e. to conduct a "process tracing".

I conducted what Weiss (1994) calls “qualitative interviews”. Besides providing access to trajectory information, the qualitative interview was also fit to my research purposes as this is a method suited to develop detailed and holistic descriptions, to integrate multiple perspectives, to describe a certain social process (“how events occur or what an event produces”), to learn how events are interpreted by social agents (Weiss 1994, p. 8-11), and how agents make sense of themselves and what they do (Hermanovicz 2002, p. 484). Interviews were semi-structured through a guide elaborated in advance, which provided “a listing of areas to be covered in the interview, along with, for each area, a listing of topics or questions that together will suggest lines of inquiry” (Weiss 1994, p. 48).

The guide was composed by a basic axis (Annex III), which was applied to all interviewees, and a set of specific questions, determined accordingly to the different roles played by the agents interviewed (Annexes IV to VI). The basic axis explored three topics: (a) personal, academic and professional trajectory of the interviewee; (b) perceptions about CADE’s composition and decision-making; and (c) stances about the boundaries of the field of competition policy. Topic (a) objectified gathering data for the trajectory study, and in the case of those that do not integrate it, to position them in the field in order to interpret their responses to the other topics. In the case of those agents involved in reform or appointed to positions in the SBDC, trajectory questions also intended to identify what roles they assumed after acting as reformers or producers of competition policy, and to identify mechanisms of recruitment, i.e. how they ended up occupying such central roles in the reform and practice of competition policy. Given the centrality of biographic elements for my theoretical framework, and that it was also often a useful way to “break the ice” and establish a rapport with the interviewee, all interviews begun with a question about the respondent’s trajectory.

Topics (b) and (c) were intended to grasp the agents’ dispositions toward the field of competition policy. I formulated questions that provoked the respondents to express their perceptions of the functioning of the field. On topic (b), I asked how they perceive the historical appointments to CADE (commissioners and presidents), and how they evaluate the decisions historically made by CADE (if there were variations in time, if they saw it as “correct” or not and why, among others). On topic (c), I made questions that, although not directly, induced respondents to express their views on how the field *should* work, that is, their normative assertions and political stances about the boundaries of the field. Questions were formulated to assess their views on two substantive themes that, following the theoretical framework elaborated in the previous sections, are connected to potential political cleavages and stances of the field: on how they evaluate the regulation of the financial sector

by CADE, and on how they evaluate the appreciation of issues related to labor in CADE's decisions. On the one hand, this data enables connecting the agents' capitals and positions with position-takings within the field. On the other, as I will discuss later on this section, it is also intended to portrait the dominant views on the roles of competition policy to the economy and society, which illuminate the connection between the field's habitus and the political and economic tenets of neoliberalism.

Besides the basic set of questions applied to all interviewees, I elaborated three specific axes for the following groups: reformers, producers (CADE's commissioners, presidents and staff, and former SDE and SEAE agents), and professionals. The specific questions of the axis of reformers sought to explore questions about the process of reform, such as: *what were the landmarks of the process of reform; who was involved; who, if anyone, opposed reform and why; and what were his/her concrete contributions to the design of a new competition policy* (Annex IV). Through these questions, I intended to grasp factual elements that could be connected to the agents' profiles and positions, and to locate possible political struggles around the reform process. I also elaborated questions about how and why crucial decisions of institutional design of the field were made. These questions explored six themes: the decision to establish the criterion of 400 million Reais as the threshold for submitting merger reviews to CADE; the definition of criteria for allowing economic concentrations (such as the limit of market share allowed, and the efficiency generated by the operation); the institutional design of CADE and the SBDC (mechanisms to guarantee "autonomy", and composition); the decision to establish a post-merger notification system, instead of a pre-merger system; the decision to include economic analysis as a method of decision-making; and the influence of international agents and experiences in the process of reform.

In mainstream narratives, these are substantive elements that are said to define the institutional design and the boundaries of competition policy, and have been debated in terms of "success" and "mistakes". As I will argue, by asking the reformers to explain how and why such decisions were made, and connecting these to their backgrounds, positions and stances toward the field, it is possible to re-politicize crucial substantive elements of the construction of competition policy in Brazil, and thus evaluate its connection to neoliberalism.

In the second specific axis, that of the producers of competition policy, I sought to explore the agents' views on the institutional structure of the SBDC and on the decision-making process (Annex V). To address the first topic, I formulated the following questions: *How was the [CADE, SDE or SEAE] structured when you got there in terms of staff and conditions of work?; and How was your cabinet staff composed?.* These questions provided

an entry to the institutional history of CADE, its developments after reform and, most importantly, to more routine and daily conditions that, as I will argue, provide several indications of how competition policy is produced. The second topic was intended to explore what struggles happen within the field and how they take place – another potential indicator of positions, hierarchies and of the very structure of the field. To trigger the discussion of this theme, I asked former commissioners, SDEs and SEAEs what were the most important or controversial cases that happened when they occupied those positions.

Finally, in the axis of professionals, I formulated questions that sought to explore how the professionals of the field of competition policy organize their work in law firms (Annex VI). This was a necessary step to understand who are the law firms that compose the field, and how they engage with the state apparatuses. To depict a profile of their form of organization, my questions explored issues such as: in what areas the law firm works; how many lawyers work in the firm, especially in competition policy; what are the origins and sectors of clients; and how do lawyers and economists interact in formulating legal strategies. As I will discuss in Chapter 4, these questions offered insights of the structure of the field in at least two senses: in how agents that occupy positions as reformists and producers are often close to the professional market, and in how law firms are active agents disputing and shaping the structure of the field of competition policy.

Interviews were mostly conducted in two different moments of the research, and the very *problematique* of the investigation actually evolved with it. I did a first and small set of interviews between June and September of 2012, comprising 9 agents. The second set, conducted between May and July of 2013, included other 32 agents. Other two interviews were conducted in a late stage of research, in December 2013, as only then I was able to contact these interviewees. The period between these two major sets was one of intense reflection about the research, and of refining and, to some extent, redefinition of the research questions based on the first group of more exploratory interviews, in which the interview guide was tested and certain topics that weren't anticipated revealed to be crucial for the understanding of the field. For the second set of interviews, these topics were thus incorporated.

All invitations for interviews were sent by email, with a brief presentation of the research topic and information about my institutional affiliation, and the agencies funding the research. Attached to it I also sent a two-pages "Letter of presentation" (Annex VII) that stated, in a general form, the research topic, the purpose of the interview, and how the information provided would be used. I mentioned the possibility of protecting the

interviewee's identity, if necessary, and/or restricting the use of any passages that the interviewee understood to be confidential. I also informed the respondents that, if possible, I wanted to record the interview, as well as that all materials obtained in the interview (digital recordings, notes, and transcripts) would be kept on file only by me.

Previously to the interview, I always did a brief analysis of the interviewee trajectory, based on documental sources. On the one hand, this preparation turned out as useful, once I was able to explore trajectory elements that sometimes were not spontaneously mentioned by the respondent. On the other, as already discussed, it was extremely necessary to engage in an interview relationship that, given the nature of respondents, depended on the interviewer being seen as entitled of attention – a relevant interlocutor. Before starting an interview, I handed respondents two copies of a “Consent Form” (Annex VIII) that re-stated the objectives of the research, the purposes of the interview, informed what kinds of questions would be asked, and disclosed my personal contact information, as well as my supervisors'. In the bottom of the form, the respondent was asked to fill two boxes stating if it was necessary or not to protect his/her identity, and if any passage of the interview was deemed confidential or not. By the end of the interview, the respondent and I signed the form, and each of us kept a copy.

Out of the 43 agents interviewed, all of them authorized recording, three of them asked that his/her identity should be kept anonymous, and several of them asked that some extracts of the interview should be kept confidential or at least not attributed to them directly. I will therefore not present any passage that was classified as confidential or identify those for anonymity was required. In order not to enable the identification of interviewees by exclusion and thus to jeopardize anonymity, when quoting extracts that present an evaluation of competition policy, an appraisal of CADE's composition or direct criticisms to the field, I decided to keep them all anonymous. In quotes that report “factual” elements, such as historical episodes about the reform of competition policy, knowing who described them was important to connect the agent's trajectory with his/her position-taking. As described by Walford (2011, p. 4), researching the powerful has the specificity that “the interviewees are chosen specifically because of who they are and the positions they hold”, and thus it is “difficult to offer anonymity to such people for it is not only what is said that is important but also who said it”. Hence, when interviewees did not explicitly require extracts to be confidential or anonymous, extracts were identified.

Interviews were conducted in the cities of Brasília, Rio de Janeiro, and São Paulo, and two occurred through Skype and one by email. Most of these interviews were conducted at

law firms and economic consultancies, and a smaller part of them took place at universities, governmental institutions, public places or at the home of the interviewees. I also conducted some interviews at CADE, where I stayed for three weeks between June and July 2013 as a research visitor, after obtaining authorization of the institution's president. In the end, the 43 interviews generated a total of 3.260 minutes of recording, with an average length of 75 minutes per interview. All interviews were transcribed for the systematization and analysis of the data collected. Given the extension of the transcribed materials, I used the software of qualitative data analysis Atlas.ti to organize the information. My use of the software, however, was less to generate any kind of analytical exercise, such as content analysis, but only to organize responses into categories connected to my empirical research questions.

Given the character and positions occupied by the subjects researched – highly reputed lawyers and economists, and government officials – the interviews conducted can be seen as exemplary of what has been called “elite interviewing” (Aberbach and Rockman 2002, Odendahl and Shaw 2002, Kezar 2003, Tansey 2007, Mikecz 2012), “researching the powerful” (Walford 2011), or “studying up” (Nader 1972, Hunter 1995). This brand of interview often poses two connected challenges for research, which were experience during my fieldwork. One of them concerns the access to interviewees. As Nader (1972, p. 302) puts it, this is the “most usual obstacle” for conducting interviews with the powerful, as they are “out of reach on a number of different planes: they don't want to be studied, it is dangerous to study the powerful, they are busy people, they are not all in one place, and so on”. Access may also be difficult due to the “positionality of the researcher” (Mikecz 2012, p. 484), i.e. the asymmetry of power between interviewer and interviewee, and the distinct and often conflictive ideological perspectives they hold about the object researched. As Mikecz (2012, p. 484-485) suggests, “the background characteristics of the researcher and the researched have a significant impact on the dynamics of the interview”.

In this sense, access is more likely to be granted if the interviewer is capable of projecting a “positive image in order to gain [the interviewee's] respect” (Harvey, 2011, p. 434), and at the same time being seen as “perfectly harmless” (Waldorf 2011, p. 2). One way to circumvent this obstacle and to establish trust with the interviewee is for the researcher “to emphasize his or her academic and professional credentials and institutional affiliations” (Mikecz 2012, p. 485). During my fieldwork, interviewees almost always spontaneously demanded these “credentials”. In fact, nearly all interviews began with me being interviewed. The first 10 minutes of every interview frequently entailed questions about my trajectory (even including, in at least two cases, questions about my parents' and grandparents'



professions), and my professional goals. Very often, I was asked to justify my interest in competition policy, especially because although I was a law graduate, I was not a competition lawyer, nor wanted to become one. The question “*If you’re not a practicing lawyer, why are you researching competition policy?*” appeared several times. Interviewees also often asked for my own opinions about the questions I raised, and inquired what was my objective with the some of the questions presented. Moreover, they frequently asked what was the research problem of the dissertation, and the overall argument that intended to develop.

My “credentials” often appeared to me as not exactly strong to balance the asymmetric relationship established in interviews: I came from a city outside the economic and political circle in which competition policy is produced in Brazil, the institutions in my background were not part of the ones normally seen as “top universities”, and my affiliation as a doctoral student was in a sociology of law program. Nevertheless, I believe that being a white male, wearing suits, and being affiliated to a foreign university contributed for opening access to these interviewees. If these conditions were different, it is possible that the obstacles in conducting interviews could be harder to transpose, as noted by other researchers<sup>107</sup>.

In answering the preliminary questions raised by my interviewees, however, an ethical dilemma was frequently present – and here is where the second major challenge in my experience of “researching the powerful” appeared: “the degree to which the researcher should make clear his or her own views” (Waldorf 2011, p. 3). In preparing the “Letter of presentation” that I attached to the invitations sent to my interviewees, this dilemma was already installed: should I explicitly enunciate the objective of assessing the roots and roles of competition policy in neoliberalism, or not? The simple mention to neoliberalism appeared to me as a potential harm to the very possibility of interviewing these subjects, as I thought it could already express a position about the object, and thus jeopardize responses and even access to interviewees. The doubt was incremented by the fact that many of the mainstream narratives that I problematize in this dissertation were produced by those who I intended to interview. As Waldorf (2011, p. 3) maintains, although some authors suggest that a confrontational style of interview that challenges differing viewpoints is advisable in studying the powerful, being too explicit about the researcher’s views may not be the best option. Hence, in announcing the objectives of interviews, I chose to present it in a “general”, and as “neutral” as possible form: “investigating the roles of lawyers and economists in reforming

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<sup>107</sup> For instance, in a study about educational policies in the UK, Neal (1995) conducted interviews with elite agents responsible for policy-making, and noted that a female researcher may be not taken as seriously as a male one by interviewees.

antitrust policy, and in producing competition regulation in Brazil”. This choice in no way it put interviewees in a harmful position, jeopardized their privacy, or hid my role as a researcher.

Based on interviews and the other sources mentioned, I undertook the trajectory study of those agents involved in the reform of competition policy, and those recruited to be producers of competition law in Brazil. To link these profiles to concrete position-takings and to the habitus of the field, I also relied on official documents produced by the SBDC, such as CADE’s annual reports, and legislation enacted in the period analyzed. The detailed description of these agents’ profiles and their roles in shaping the field of competition policy is presented in Chapters 4 and 5. As the core objective of the research is to understand, through concrete agents, how the field was and is structured, and therefore what are its principles of functioning, the data collected through the trajectory study is analyzed in comparison to the profiles and roles of lawyers and economists in neoliberalism, as identified in the literature described in section 2.2. These studies provide substantive parameters about who are the lawyers and economists that have historically being connected to neoliberal reforms, the kinds of capital they hold, the positions they occupy in their fields, the strategies they often deploy and the stances toward the state and the economy they represent.

### **3.2 A quantitative approach to the outcomes to the economy**

The question that reframes the analysis of the outcomes of the field of competition policy to the economy, as stated in section 2.3, is the following: *What competition policy facilitates and for whom, and how economic interests both affect regulation and are impacted by it?* As discussed earlier, the study of the outcomes of competition policy to the economy is framed as the “facilitative-regulatory” roles of the field of competition policy. The objective, in this dimension, is to grasp what economy the field of competition policy facilitates, and for whom, and thus to assess how economic interests both affect and are impacted by this regulatory arena. What I called the “traces of a neoliberal economy” (section 2.4) are taken as parameters for constructing the variables that were analyzed, i.e. to distinguish what are the elements that can be expected from competition policy if it is compatible to the impulses of a neoliberal economy. I identified three elements that characterize the neoliberal economic model: the *global concentration and expansion of capital*, *privatizations*, and the hegemony of financial capital, or *financialization*. In general lines, my objective with the analysis of the

facilitative-regulatory impacts of the “law in action” of Brazilian competition policy is therefore to evaluate how the field responds to these characteristic impulses of neoliberalism.

To do so, I adopted two strategies: to analyze how CADE decides, and how are the competences of competition policy disputed and defined. As I will explain, these topics are fruitful entry points to assess the facilitative-regulatory roles of competition policy in respect to the defining traces of the neoliberal economy. On the one hand, I take the analysis of CADE’s decisions as a means to evaluate how the field responds to the pressures of capital concentration, expansion and privatizations. On the other, as discussed in section 3.3, to assess how the field of competition policy deals with the hegemony of financial capital, I analyze the disputes surrounding CADE’s competence to regulate the financial sector. I sustain that, taken together, the study of these phenomena provides indicators to evaluate how the field of competition policy responds to the processes that, according to the critical political economy from where I departed, are defining traces of neoliberalism.

### *3.2.1 The universe of decisions*

As stated in the last section of Chapter 1, to evaluate how the outcomes of Brazilian competition policy fit into the neoliberal economic tenets, it is necessary to go beyond the formalist accounts often found in mainstream narratives, and the frequently impressionistic uses of data they make in the scarce occasions when descriptions are allegedly empirical. These narratives about the outcomes to the economy are based on the evaluation of the decisions made by CADE, which crystallize the law produced in the Brazilian field of competition policy. My proposal is similar in respect to the object of analysis: I assess what are the outcomes of the field to the economy through the study of the facilitative-regulatory roles of these decisions. This is because CADE’s decision-making is a privileged space to observe the production of effects by the field of competition policy, as decisions are the genuine “legal products” of this regulatory arena.

However, to overcome the shortcomings associated with mainstream narratives in this dimension, it is necessary to depict in a systematic and empirical form what characterizes the decisions produced in the Brazilian field of competition policy. The analysis of outcomes with the purposes stated in this research demands a study capable of showing the historical trends in decision-making, and of identifying what elements are associated with the types of decisions made in competition policy – i.e., to determine how does CADE respond to certain economic agents and processes in its decisions. I believe that a useful way to achieve such

purposes is through a quantitative study of CADE's decisions. Such approach enables a historical analysis of what decisions have been made throughout time, and avoids the impressionistic approach of basing the description of outcomes solely on selected decisions, grasping general trends in the overall regulatory practice. Moreover, it is also suitable to address an object that comprises a vast population, as it is the case of CADE's decisions. The main hypothesis to be tested through the quantitative approach is if the facilitative-regulatory roles of CADE's decisions are tuned to the impulses of neoliberalism, as sketched in Chapter 2. In other words, the objective is to assess if the processes of *capital concentration* and *expansion*, especially the arrival of foreign capital through *privatizations*, is facilitated by CADE's decisions or, conversely, if it tends to be regulated as any other case.

In this research, the quantitative study of decisions was circumscribed to the two types of procedures that are most frequent in CADE and that comprise the core of its practice: Merger Reviews (MR) and Administrative Procedures (AP). Merger Reviews are the procedures through which CADE evaluates the legality of corporate concentrations that occur, for instance, through mergers, acquisitions, and joint-ventures<sup>108</sup>. The analysis of MR corresponds to what institutional narratives describe as the "preventive" roles of competition policy. According to the law of 1994, and as presented in Chapter 1, any operation of concentration that meets the notification thresholds has to be submitted to CADE's evaluation. These criteria were, alternatively, that the resulting economic entity accounted for at least 20% of the relevant market, or that any of the participant economic agents held a total turnover of 400 million Reais in the previous year. Once the merger review is submitted to CADE, it is sent to both SEAE and SDE for these Secretariats to issue "technical opinions" on the merger. When back to CADE, a rapporteur is randomly assigned, issues his/her opinion and the case is presented to the "administrative court", in which the other five commissioners and the president discuss the matter and vote. Decisions in MR can be unanimous or majoritarian, and with different results: to dismiss the merger without analysis of merit (for instance, if the thresholds weren't met and therefore the merger was seen as not needed to be evaluated), to approve it in its integrity, to approve it with conditions, or to reject it in its totality.

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<sup>108</sup> In the Brazilian competition policy system, they are called *Atos de Concentração* ("Concentration Acts"), and have its legal basis and provisions stated in article 54 of the law 8.884 of 1994. With the legal reform of 2011, substantive changes were incorporated in the regulation of merger reviews, accordingly to the articles 53 to 65 of the law 12.529 of 2011. However, as the temporal circumscription of the quantitative study is between 1994 and 2010, I will not deal with merger reviews submitted under the new law.

Through AP, in turn, CADE evaluates several types of “anticompetitive conducts” and “restrictive practices”, other than those of encompassed by merger reviews<sup>109</sup>. These include phenomena such as cartel formation, predatory prices, price discrimination, exclusive dealings, and other sorts of “abuse of economic power” and “infringements of the economic order”, as defined by article 21 of the law 8.884 of 1994. Here competition policy is closely related to criminal law, although CADE has no persecutory or jurisdictional powers on that matter. Nonetheless, AP decisions ruling that a violation occurred can be pursued in the criminal sphere by the Attorney’s Office, in the Federal and States levels. AP are thus emblematic of what institutional narratives name the “repressive” roles of competition policy.

The path of an AP in the SBDC is slightly different from an MR. It starts at the SDE, provoked by the organ itself or motivated by the requirement of a third party (individuals, other corporations and state institutions, for instance)<sup>110</sup>. SDE undertakes the investigation about the potential anticompetitive conduct and decides if it is fit to be judged by CADE, in case it understands there is sufficient evidence of a violation, or to dismiss it. If the SDE dismisses it, the law establishes the need for a “mandatory appeal”, by which SDE “appeals” of its own decision to abandon the cause. Once this appeal arrives in CADE to decide whether or not to maintain the dismissal, whatever the decision made by SDE, it is the Council who decides if and how an AP will unfold. When in CADE, the procedure of an AP becomes similar to that of an MR: a commissioner is assigned as rapporteur, issues an opinion, and the other commissioners also position themselves<sup>111</sup>. Decisions in AP can also be unanimous or majoritarian. The results, however, are of a different kind. CADE can recognize the inexistence of any infringement, dismissing the AP, following or not the SDE position, or, on the contrary, if any violation is observed, it can impose measures to revert the conducts held illegal and fines to the corporations involved. In both MR and AP, CADE’s Attorney General also issues an opinion on the case.

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<sup>109</sup> Administrative proceedings are called *Processos Administrativos* in the Brazilian competition policy legislation, and were defined by the articles 30 and 53 of the law 8.884 of 1994. The provisions about the anticompetitive conducts regulated through AP were comprised in article 20 and 21 of the same act. Similarly to the regulation of merger reviews, APs underwent substantive changes with the law of 2011 (articles 66 to 83). Also in the case of this type of procedure I didn’t collect data after 2010.

<sup>110</sup> The AP could be originated from a Preliminary Investigation (*Averiguações Preliminares*) undertaken by the SDE. CADE analyzed these investigations through a distinct type of procedure, but in this research, for reasons of feasibility and time limitations, I decided to study only AP, as they often are a subsequent stage of a Preliminary Investigation. Also, AP constitute a parallel to MR in the case of conducts, while any Preliminary Investigation that lead to a conviction becomes an AP.

<sup>111</sup> Another difference is that in the AP, SEAE *can* issue a technical opinion on the case, while in the MR it is mandatory.

As anticipated, MR and AP constitute the majority of procedures decided by CADE. Although decisions comprise a finite universe, determining what is the number of MR and AP decided between 1994 and 2010 is not an easy task. The main source of data often used in other researches are CADE's annual reports, produced since 1996, which present information about the number of procedures analyzed by the Council in each year, the types of decisions, and its forms (if unanimous or not)<sup>112</sup>. Martinez (2010, p. 39), for instance, recollects data based on these reports and finds that 6409 MR were decided by CADE between 1994 and 2010. If her database is crossed with Salgado's (2004, p. 366) study focusing on decisions made between 1994 and 2002, a slight difference can be noted: while Martinez identifies 2093 decisions, Salgado observes 2082.

Also in the case of AP divergences can be observed. Aggregating the data from CADE's annual reports and Salgado's (2004), between 1994 and 2010 CADE decided 885 AP. However, even among CADE's reports it is possible to observe discrepant numbers: while the 2010 annual report identifies 23 AP decided in 2003, that year's annual report states that the number was 22. These discrepancies both in the case of MR and AP may be related to three problems: first, that CADE's reports started to be issued only in 1996, so there is no direct data on the years of 1994 and 1995; second, that in its first versions reports were of a precarious quality; third and most importantly, that data collection by CADE itself was enhanced in the course of the years.

Despite of the divergences, what stems from this brief description is that, given the vast "population" of decisions, a systematic and comprehensive analysis must rely on a sample. It would be simply impossible, due to the time and economic constraints of this dissertation, to cover the whole universe of decisions. For the purposes of thoroughly analyzing these decisions, discrepancies in the numbers of MR and AP are nevertheless not the only problem. CADE's reports and secondary sources such as Salgado (2004) and Martinez (2010, 2011) only present aggregated data, not a list of all cases decided. It is not possible to identify, in these databases, what decisions correspond to what cases, and thus to scrutinize the factors involved in each process. This is a problem because sampling demands that this finite universe of decisions must be accessible individually, so cases can be randomly selected, avoiding any bias. During my visit in CADE, I tried to obtain the listing of cases decided by the Council, but I was informed that the institution itself did not have that kind of

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<sup>112</sup> Annual reports can be accessed at CADE's website, following the path "*Página Inicial > Acesso à Informação > Auditorias > Relatório Anual*".

information. Thus, the only solution for overcoming this difficulty was directly reconstructing the universe of CADE's decisions.

To map the universe of CADE's decisions, I reviewed 562 reports of trial sessions, available online<sup>113</sup>, which constitute a source of homogeneous information about what cases CADE has decided, and enables individualizing each procedure. These reports comprise decisions made between June 19<sup>th</sup> 1996 and December 15<sup>th</sup> 2010. There are no reports available for the years of 1994 and 1995, either online or in CADE. Also, 10 reports comprised in the period between 1996 and 2010 were unavailable for consultation, and couldn't be obtained in my visit to CADE<sup>114</sup>. Each report stands for a single judgment session, and provides the summary of the cases decided by CADE on that day. The summary informs the type of procedure (MR and AP, for instance), its number, the corporations involved and their lawyers, the rapporteur, the type of decision and its form (unanimous or not). To reconstruct the universe of decisions, for each MR and AP observed in the reports I collected data about the date of the trial, the type and form of decision, the corporations involved, their lawyers, and the rapporteur.

To complement the mapping of decisions in the period not covered by the reports, I resorted to Franceschini's (2004) recollection of CADE's jurisprudence. As the author is a competition lawyer, this repository is intended to be a systematic source of jurisprudence for practical uses, and decisions are organized according to thematic topics of special interest for litigation. It is not, therefore, a database presenting a complete listing of decisions. However, it enabled me to map decisions taken since 1994 (more precisely June 13<sup>th</sup> 1994, when the law 8.884 came into force) until June 19<sup>th</sup> 1996 (the initial landmark covered by the trial sessions reports). Through Franceschini's repository, I was able to identify other 15 MR, and 6 AP that were not present in judgment session reports<sup>115</sup>.

Based on these sources, I mapped a total of 6378 MR and 852 AP decided between June 13<sup>th</sup> 1994 and December 15<sup>th</sup> 2010. In this 17 years period, the annual average of MR decided by CADE is around 375. However, as the figure below illustrates, in the initial years

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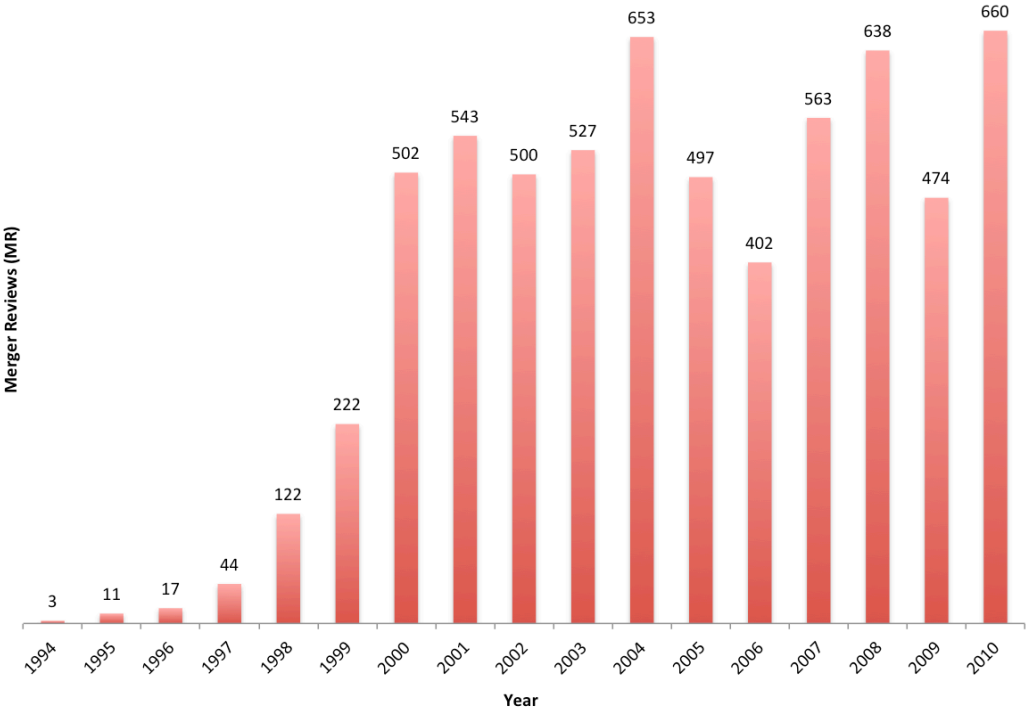
<sup>113</sup> The reports are available at CADE's institutional website, and can be accessed by following the path "*Processual > Sessões > Sessões de Julgamento > Atas*". I analyzed 482 reports of "Ordinary Judgment Sessions" (*Atas de Sessões Ordinárias*), 38 reports of "Extraordinary Judgment Sessions" (*Atas de Sessões Extraordinárias*) and 42 reports of "Reserved Sessions" (*Atas de Sessões Reservadas*).

<sup>114</sup> These are the reports of 6 Extraordinary Judgment Sessions (numbers 01, 02, 03, 04, and 06 of 1996, and 17 of 1998), and the reports of 4 Reserved Sessions (numbers 01, 06, and 08 of 1998, and 22 of 2000).

<sup>115</sup> For the period between 1994 and 1996, I identified 31 decisions in Franceschini's repository. However, 10 were not included in the mapping, for different reasons: 5 were covered by my mapping through trial sessions report; in 2 cases the procedure number was not recognized by CADE's database; and in other 3 cases I could not retrieve from CADE's website any document about the decision, so I was unable to confirm if and when the decision was made.

(1994-1998) the number of decisions is very low if compared to the overall average. Also, from the year 2000 onwards, the number of MR decided by CADE is above the average, reaching more than 600 cases in certain years, and almost never below 500.

**Figure 3.** Number of Merger Reviews (MRs) decided by CADE (1994-2010)

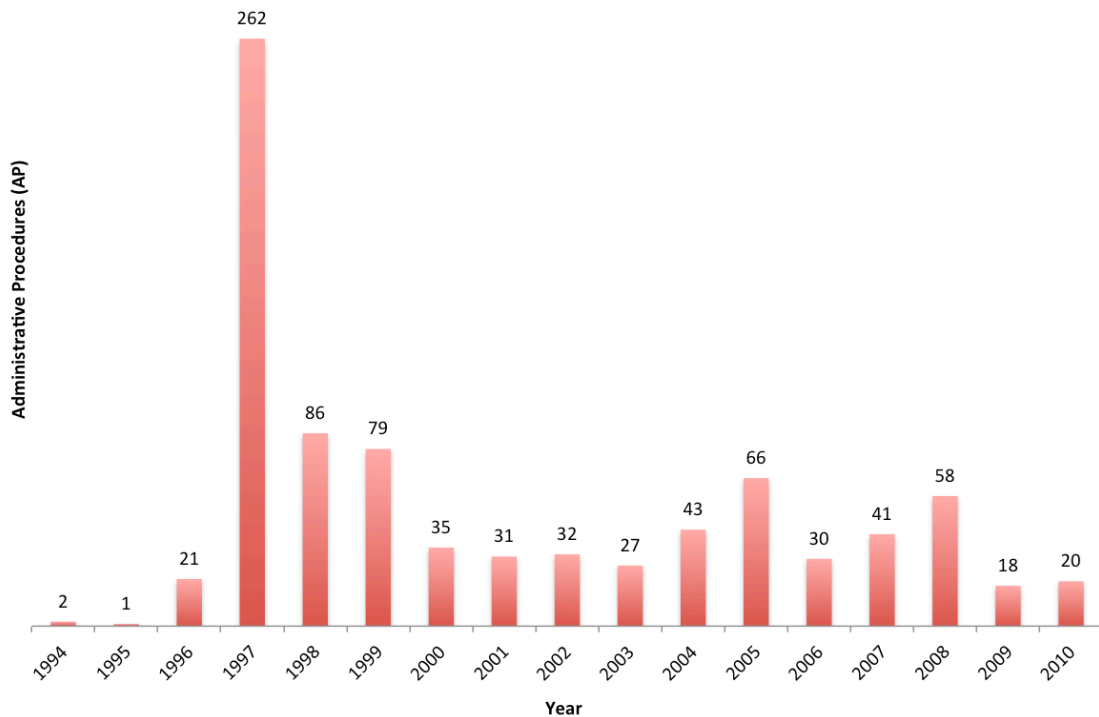


**Source:** elaborated by the author

Administrative procedures present a similar trend, despite some nuances. The average of procedures decided per year is around 50. However, as it can be observed in Figure X, a small number of AP was mapped in the initial years. Also, in the fifth year of the analyzed period, the number is way off the average: in 1998, CADE decided 284 cases, which corresponds to a third of the total of AP decisions between 1994 and 2010.



**Figure 4.** Number of Administrative Procedures (APs) decided by CADE (1994-2010)



**Source:** elaborated by the author

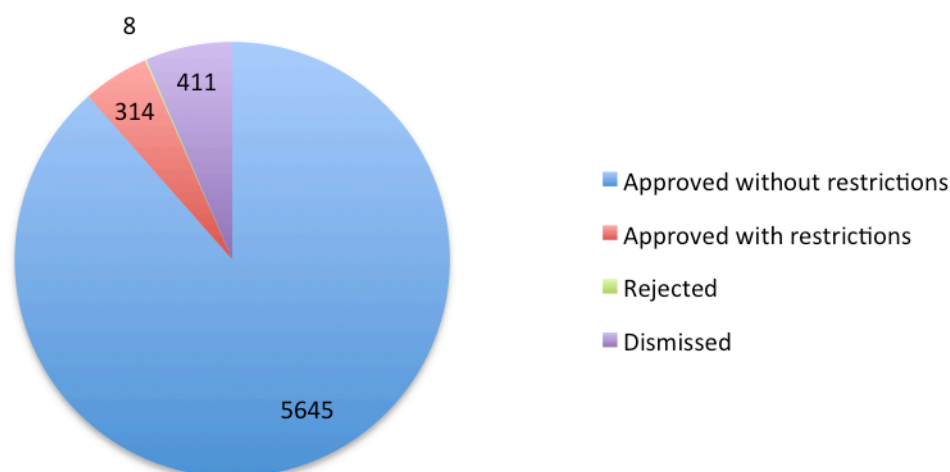
In the reconstruction of the universe of decisions, I also looked at the types of decisions taken in each procedure. In classifying the types of decisions in MR, I relied on CADE’s typology, as described in each decision summary presented on the judgment session reports. I classified decisions in four types: *Approved without restrictions*: decisions in which the MR was approved in its integrity; *Approved with restrictions*: decisions in which the MR was subjected to some conditions to be approved (it included decisions classified by CADE as “approved with restrictions” and “approved with conditions”)<sup>116</sup>; *Rejected*: decisions in which the MR was rejected in totality; and *Dismissed*: decisions in which CADE did not analyze the merit of the MR (it included decisions classified by CADE as “archived”, “not subsumed”, “not admitted”, “loss of object”, “operation withdrawal”, “extinct without judgment of merit”,

<sup>116</sup> In the original classification, cases here placed as “approved with restrictions” entailed, respectively: “Aprovado com restrições”, and “Aprovado com condições”.

or “lack of jurisdiction” – in practice, the effect of this type is the same as an “approval without restrictions”, as the operation is cleared)<sup>117</sup>.

As the graph below illustrates, most decisions mapped in the population of MR – 5645 or 88,5% - were of the first type: “approved without restrictions”. The second most frequent type of decision identified was to “dismiss” the MR, with a total of 411 procedures, or 6,4%. I identified another 314 decisions to “approve with restrictions”, which correspond to 4,9% of MR decided between 1994 and 2010. Finally, out of the universe of 6378 MR mapped, only 8 were of the “rejected” type (0,1%), which stands for the thinnest portion of the graph below.

**Figure 5.** Types of decision in MRs (1994-2010)



**Source:** elaborated by the author

In the case of AP, decisions were classified in two broad types, as it was not possible to identify from the judgment summaries if, for every case, the decision was to “absolve” or to simply “dismiss” the charges without analysis of merit. The types of decisions thus were: *Convicted*: decisions in which the AP recognized a violation of the economic order and imposed penalties and/or remedies to corporations<sup>118</sup>; and *Dismissed*: decisions in which the AP did not recognize any violation of the economic order, did not impose any kind of penalty,

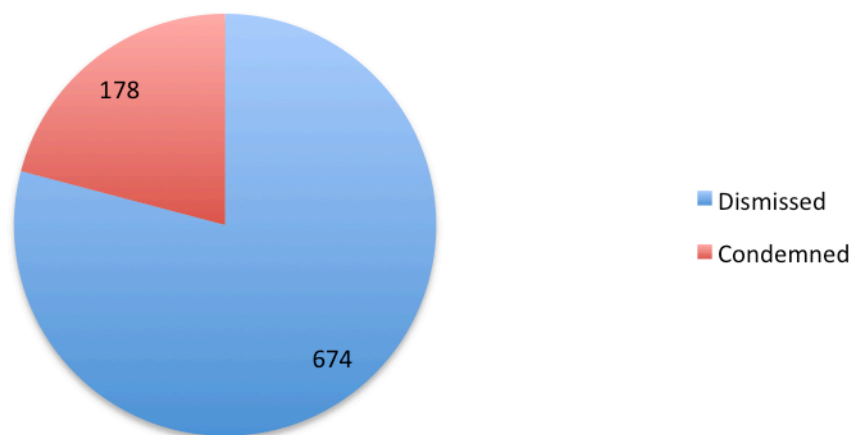
<sup>117</sup> In the original classification, “dismissed” cases entailed the following expressions, respectively: “Arquivado”, “Não subsunção”, “Não conhecido”, “Perda do objeto”, “Desistência da operação”, “Extinto sem julgamento de mérito”, and “Incompetência do CADE”.

<sup>118</sup> I also classified under this category all cases in which the corporations celebrate a compromise with CADE to cease certain conducts, the so called *Termos de Cessação de Condutas*.

and/or dismissed the procedure without the analysis of merit for formal reasons (it included, for instance, decisions classified by CADE as “Archived” and “Appeal dismissed”)<sup>119</sup>;

As the graph illustrates, 674 of the 852 AP decisions were to “dismiss”, comprising 79,1% of the population. Conversely, 178 decisions (20,9%) imposed some sort of penalty or remedy, and were thus classified as “convicted”.

**Figure 6.** Types of decision in APs (1994-2010)



**Source:** elaborated by the author

### 3.2.2 Variables, sampling and method of analysis

I adopted two delimitations for analyzing CADE’s decision-making. For the study of MR, once there is a type of decision in which the merit of the case is not analyzed (those classified as “dismissed”), I decided to exclude them from the population. In practical terms, it meant excluding 411 cases classified as “dismissed” from the universe of 6378 decisions. The population of MR taken into account thus dropped to 5967 cases. I chose to exclude this type of cases for two reasons.

First, although decisions to “dismiss” may reveal a dimension of CADE’s decision-making (i.e. what it understands that falls into its jurisdiction), it comprised cases that weren’t analyzed for a variety of reasons: due to formal or procedural reasons, because the

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<sup>119</sup> The cases in which CADE’s decisions were classified as “Archived” or “Appeal dismissed” entailed the mandatory appeals issued by SDE, in which that Secretariat concluded in its investigation that no violations were committed. Thus, these are types of decisions in which CADE agrees with the SDE. Cases in which CADE did not agree with the SDE in dropping the charges, I looked at the final decision made by the Council, which could be of the form of “Condemn” or “Absolve”. In the original, these classifications correspond to, respectively, “*Determinou o arquivamento*”, and “*Negou provimento ao recurso*”.

commissioners saw no potential harm to competition, because the operation was not concretized (“loss of object”), among others. However, from the summary of decisions it was impossible to know if the decision to “dismiss” was of substantive content (such as those that are grounded on an evaluation of the potentials to competition), due to formal reasons, or because the corporations withdrew the operation. Second, given the difficulty to assess the motives of this type of decision, it would be extremely time-consuming to select those that are relevant for the research purposes. Nevertheless, it is worth mentioning that analyzing thoroughly these decisions in future research may be an interesting avenue to complement the findings I will herein present.

Besides ignoring the “dismissed” type in MR cases, I also excluded from the sample the 8 cases “rejected” by CADE. Given their minimal representation in the universe, creating a single category for this type of decision wouldn’t add to the analysis, as no firm conclusions could be extracted. Nevertheless, in Chapter 6 I analyze these 8 cases separately. Finally, before constructing a sample, the universe of decisions without the “dismissed” and “rejected” cases was reviewed in order to identify possible repetitions. In doing so, I spotted 8 MR and 20 AP that were repeated in the universe. Hence, excluding double cases, the consolidated universe of decisions was of 5951 MR, and 832 AP.

From the description of the reconstructed universe of procedures and types of decisions, it is possible to observe two imbalances that constitute an additional difficulty for sampling. On the one hand, the uneven distribution of MR and AP across time. Merger Reviews appear in a small number in the first years of the analyzed period if compared to the average, and AP are highly concentrated in the year of 1998. On the other, there is an imbalance in the number of decisions of each type. Especially in the case of MR, decisions to “approve with conditions” and to “reject” represent a minuscule proportion of the universe. As I will discuss in Chapter 6, this constitutes in itself valuable information of CADE’s decision-making practice. However, together with the important differences in the number of decisions made in each year, it poses a problem for sampling. If a simple random sample were constructed from this universe of decisions, it is very likely that it would mirror the majoritarian groups of the population: in the case of MR, mostly decisions from the year 2000 onwards, and of the type of “approve without restrictions”; in the case of AP, an overrepresentation of decisions made in 1998. Nevertheless, as the objective of the quantitative analysis of decisions herein sketched is precisely to address the historical tendencies embedded in CADE’s decisions to facilitate or not certain economic phenomena, it is crucial to have decisions representative of different periods and of distinct types.

To circumvent this problem, I resorted to a sampling technique that guarantees a minimum representation of decisions from different periods of time and of different types: stratified random sampling. This method of sampling is suited for populations in which a “straight-forward random sampling may leave out a particular class of cases” (Cramer and Howitt 2004, p. 162). Instead of generating a random sample from the whole population, stratified sampling implies creating random samples from sub-groups that can be observed in this population. The population is divided in different *strata* accordingly to certain properties, and a sample is randomly produced for each of those disjoint groups. The great advantage of this technique is that it assures the inclusion of certain types of individuals that compose the population into the sample. Two disadvantages, on the other side, are that it increases the size of the final sample, and it adds complexity to the analysis, as each case will have to be “weighted” accordingly to its real presence in the population (I address this issue below).

As Gorard (2004, p. 68) explains, selecting the number and the type of strata is a choice that must be made on theoretical grounds of relevance to the study. Therefore, in the case of my research, given the purpose to evaluate in a historical perspective what factors are related to the different types of decisions, and having observed the imbalanced distribution of decisions across time and types, two strata were selected: the political context of the decision and its type. By political context I mean the government in which the decision was enacted, which was operationalized in two broad groups: Itamar Franco and Fernando Henrique Cardoso (1994-2002), and Lula da Silva (2003-2010). Once Cardoso was Franco’s Minister of Finance before becoming president, I considered them as part of the same political context. This delimitation was an alternative to stratifying the sample by each year of analysis, which would significantly increase the size of the sample. By considering the “government”, I was able to both guarantee representativeness for the initial years that entail a small count of MR, and at the same time infuse a political content in the sample.

In the case of MR, the distribution of cases in the universe of decisions according to these two strata was the following:

**Table 4.** Universe of MRs according to government and type of decision

	Franco-FHC	Lula
Approved without restrictions	1841	3796
Approved with restrictions	56	258

**Source:** elaborated by the author

In AP, the distribution is depicted in the table below:

**Table 5.** Universe of APs according to government and type of decision

	Franco-FHC	Lula
Dismissed	454	208
Convicted	90	80

**Source:** elaborated by the author

To calculate a representative sample for these strata, I began applying the regular formula for sample size ( $n_0$ ) determination of an infinite population (Bolfarine and Bussab 2012):

$$n_0 = z^2 \cdot \frac{p_0 \cdot (1 - p_0)}{E^2}$$

I adopted the standard parameters for the calculation of a conservative sample size, in order to minimize error. Hence, sampling error ( $E$ ) was determined at 5% (or 0,05), and the confidence level was of 95%, which implies a  $z$  of 1,96. Once the analysis is interested in assessing the profile of binary decisions (approved without conditions or approved with conditions, in the case of MR, and dismissed or convicted in the case of AP),  $p_0$ , which indicates the parameter of variance of the population, was estimated at 0,5 – as if the population was equally distributed between the two types of decisions. In doing so, the risk of constructing a non-representative sample is diminished.

Applying these values to the formula, the sample size ( $n_0$ ) estimated is of 384:

$$n_0 = 1,96^2 \cdot \frac{0,5 \cdot (1 - 0,5)}{0,05^2} = 384$$

However, once this is a formula to calculate the sample size for an infinite population and in the present case the universe is already known, it is possible to correct it for a finite population. To do so, the following formula was applied, where  $N$  stands for the finite population and  $n_0$  for the sample size calculated before:

$$n = \frac{N \cdot n_0}{N + n_0}$$

For a stratified sample, the correction must be applied for each stratum as if they were distinct populations. Hence, the  $N$  corresponded to the total of MR or AP in each cell of

Tables 4 and 5. In the case of MR, the resulting sample size for each stratum was the following:

**Table 6.** Sample size in MRs according to government and decision type

	Franco-FHC	Lula
Approved without restrictions	318	349
Approved with restrictions	49	155

**Source:** elaborated by the author

In AP, the sample size calculated is depicted in the table below:

**Table 7.** Sample size in APs according to government and decision type

	Franco-FHC	Lula
Dismissed	208	135
Convicted	73	66

**Source:** elaborated by the author

The resulting sample size for MR was thus of 871 decisions, and for AP it was of 483. Based on the samples calculated for each stratum, cases were randomly selected from the universe. These were the samples taken to collect data about the profile of the cases decided by CADE and, based on it, to analyze what kind of economic phenomena enters CADE and how it exits the field, i.e. what decisions are made in what kinds of cases.

Once the sample was stratified for grasping cases that could hardly be analyzed through a simple random sample, the proportion of cases in the sample is much higher than in the universe. For instance, while the 155 MR approved with restrictions during Lula’s administration correspond to 17,8% of cases in the sample, in the population this type of decision corresponds to only 4,33% of MR. Hence, any analysis of this data must balance the sample sizes according to its known presence in the universe. To do so, I calculated the “weights” of each stratum through a simple formula: by dividing the percentage of  $N$  (cases in the population) of each stratum by the percentage of  $n$  (cases in the sample) in each stratum. These weights were attributed to each case according to its stratum, and incorporated into the generation of the descriptive statistics analyzed in Chapter 6.

As summarized on the table below, I operationalize CADE’s responses through decisions in three variables: the types of decision and types of restrictions in MR, and the types of decisions in AP. The variable of types of restrictions in MR was operationalized according to what the specialized literature on competition policy often refer to as the “remedies” imposed to a corporation in a case that is not entirely cleared. These remedies can

be of two types: “structural” and “behavioral”. Some remedies are said to be “structural” because they affect the proprietary structure of the corporations involved in the operation. They comprise the relocation or transfer of property rights of shares through, for instance, divestiture, the split of corporations, the selling of shares or intellectual property rights. Other remedies are called “behavioral” to the extent that they impose restrictions to the *exercise* of these rights. For instance, measures that modify the relationship with end-consumers, establish supply commitments, prohibit tying or bundling, impose restraints on predatory pricing and prevent the use of exclusive and/or long term contracts, among others. In this research, the variable “types of restrictions in MR” adopts this binary classification of remedies. Once remedies of different types can be imposed in the same operation, I classified the data in the following way: *Structural remedies*: a case that involved at least one structural remedy or decisions to prohibit the operation in its integrity; and *Behavioral remedies*: a case that *only* involved behavioral remedies.

**Table 8.** Variable: types of decisions and restrictions in MRs and APs

Variables	Values
Type of decision in MR	“Approved without restrictions”
	“Restrictions imposed”
Type of restriction in MR	“Structural remedies”
	“Behavioral remedies”
Type of decision in AP	“Dismissed”
	“Convicted”

**Source:** elaborated by the author

To assess what factors may be related to the types of decisions made by CADE, I constructed nine variables to which data was collected from each case of the samples of MR and AP. The definition of these variables was informed by the critical political economy of neoliberalism discussed in Chapter 2. The phenomena that, according to that theoretical view, can be expected of a neoliberal economy are: the concentration and expansion of capital, especially through privatizations, and the hegemony of financial capital. Although some variables were used for both MR and AP, each kind of procedure also entailed a specific set of factors.

Through these variables, I aimed at constructing a profile of the economic agents, sectors and operations that “enter” the field of competition policy. The first variable was the *sector of economic activity* of the MR, in which I classified each case within 29 categories of



economic sectors, as defined by CADE’s official typology<sup>120</sup>. Each case received a number from 1 to 29, and if the sector was not comprised by these categories, I assigned the number 99 as “Others”. Second, the *type of operation*, classified in five groups, as defined in the table below: acquisition or incorporation, merger, joint-venture, concession, or “others”.

**Table 9.** Variable: type of operation

Value	Description
Acquisition or Incorporation	Operation in which an economic agent acquires shares of another economic agent.
Merger	Operation in which two or more independent economic agents form a new economic agent, ceasing to exist as separate entities.
Joint-venture	Operation in which two or more economic agents unite to create another economic agent or to pursue joint economic activities, without the extinction of the agents that originate the union or the acquisition of shares among them.
Concession	Cases that discuss the concentration implied by the concession of public services.
Others	Other types of operations (such as increase of capital, distribution contracts, restructuring, etc).

**Source:** elaborated by the author

Third, the *scope of the operation*: national or global. I classified as “national” those operations that concerned solely the Brazilian market, and as “global” any type of operation that transcended the Brazilian economy, including it or not. Fourth, the *countries of origin* of corporations involved in the operation. In this variable, I mapped what was the nationality of the controlling capital of the corporations that submitted the operation to CADE. If the capital control was equally divided between agents of different countries, I attributed all origins.

Fifth, based on this last variable, I classified each MR according to the *path of capital movement*. It comprised 7 mutually exclusive categories. As summarized in the table below, four of them take into account the order of the movement, i.e. who occupies each pole of the relationship. These were an operation in which a Brazilian corporation acquires or

<sup>120</sup> CADE’s classification of economic sectors was published on the resolution number 15 of 1998.

incorporates a foreign corporation; an operation in which a Brazilian corporation acquires or incorporates another Brazilian corporation; an operation in which a foreign corporation acquires or incorporates a Brazilian corporation; and an operation in which a foreign corporation acquires or incorporates another foreign corporation. The other three categories comprise movements of capital combination, in which the order was not taken as relevant. They entailed the combination of Brazilian and foreign capital; among Brazilian corporations; and among foreign corporations.

**Table 10.** Variable: path of capital movement

Value	Description
Brazilian > Brazilian	Operation in which a Brazilian corporation acquires or incorporates another Brazilian corporation.
Brazilian > Foreign	Operation in which a Brazilian corporation acquires or incorporates foreign corporation
Foreign > Brazilian	Operation in which a foreign corporation acquires or incorporates a Brazilian corporation
Foreign > Foreign	Operation in which a foreign corporation acquires or incorporates another foreign corporation
Brazilian – Brazilian	Operation in which Brazilian capital is combined with Brazilian capital (e.g. mergers and joint-ventures)
Brazilian – Foreign	Operation in which Brazilian capital is combined with foreign capita (e.g. mergers and joint-ventures)
Foreign – Foreign	Operation in which foreign capital is combined with foreign capital (e.g. mergers and joint-ventures)

**Source:** elaborated by the author

Sixth, the existence and *type of concentration* in the operation. In this variable, I sought to identify if the MR implied any sort of vertical or horizontal integration. Vertical integration occurs when a company acquires assets within the supply chain in which it is economically active. Horizontal integration, in turn, occurs when a company acquires assets in the same productive sector where it acts – often a competitor.

Seventh, in cases where horizontal concentration was detected, I also collected data about the *degree of economic concentration* implied by the MR. In this variable, I mapped the percentage of market concentration observed by the Council in cases in which horizontal integration was detected. As several cases comprised more than one number of market concentration, once they dealt with more than one “relevant market”, I adopted the highest market concentration implied by an operation. Thus, in a hypothetical example, if a merger between two corporations that produce office supplies implied a market concentration of 23% for paperclips, and of 39% for staples, I selected 39% to be the market concentration of that operation. I chose to consider the highest level of concentration as in this variable the most interesting information for the purposes of the research is to identify the trends of CADE in tolerating economic concentrations. I classified operations in five percentiles: 0-20% of concentration of market share, 21-40%, 41-60%, 61-80%, and 81-100%. These intervals are of course artificial, but their construction was based on the fact that the competition act of 1994 defines the share of 20% as the legal limit tolerated by competition policy. I thus decided to incorporate equivalent intervals for this variable, in order to facilitate data collection and analysis.

The definition of market shares by CADE depends on the delimitation of the relevant markets included in the operation. This delimitation is a crucial part of regulatory policy, and in many cases entailed controversies among commissioners and within the SBDC. For instance, depending on the definition of the relevant market as global or national, market shares can increase or decrease, thus altering the regulatory response. The politics that occurs around the definition of the relevant market and thus market shares constitutes an interesting object of research that can be explored in further inquiry. In this research, however, I left this debate aside in order to have a more operational definition. To do so, the first source of information was how the winning vote in CADE’s decision determined market shares. If this information was not available, I resorted, respectively, to the opinions enacted by SEAE and SDE. It is worth mentioning that additionally to market shares it could be interesting to have data about the market power implied the operation in relative terms to that market, as measured, for instance, by the Herfindahl-Hirschmann Index (HHI) or the Concentration Ratio (C4). However, as these calculations were not undertaken by the SBDC in all cases, I decided not to include it as a variable.

Eight, connected to the degree of concentration, I also identified the variation of market share implied by an MR in which horizontal integration was observed: the *delta market share* of an operation. This variable entailed the percentage of market share

incorporated in operations, and together with the degree of concentration it helps visualizing the character of concentrations analyzed by CADE. To classify operations according to their delta market share, I dismembered the intervals constructed for the variable degree of concentration in more detailed strata: 0-10%, 10.1-20%, 20.1-30%, and so on until 100%. Ninth, the occurrence of the operation in a *privatized sector*. In this variable, I mapped if the operation was one of privatization, based on the Brazilian National Bank of Development's (BNDES) list of privatized corporations in both federal and state levels between 1991 and 2002, which comprised 129 corporations<sup>121</sup>.

The variables constructed for the study for AP are, to a great extent, similar to those so far reviewed. I collected data about the *sector of economic activity*, the *scope* of the conduct, the *countries of origin* of the corporations involved, and if the conduct analyzed in the procedure occurred in a *privatized sector*. Once the object of an AP is different from that of an MR, I also constructed three specific variables for procedures dedicated to regulate conducts. First, the *period in which AP was originated*. I classified AP according to three periods: those initiated prior to the 1994 reform, once many cases analyzed after that date were already in CADE; those initiated between 1994 and 2003; and those initiated after 2003, when according to mainstream narratives the “shift” toward conducts would have happened. This variable sought to enable a “political” control of the regulation of conducts, and assess if it changed in time and how.

Second, the *type of conduct* that was the object of the AP. The data gathered to fill this variable was how CADE's decision defined the potential violation. I defined the type of conduct accordingly to the documents that initiated the procedure, often the representations offered to the SDE as “complaints”. Third and final, I created a variable of political nature specific to AP: the *author of complaint*. Once AP may be originated through several means – by SDE's own decision, by CADE, by other governmental institutions, individuals and even other corporations – it is worth analyzing who mobilizes the regulatory arena of competition policy in this dimension. Moreover, this variable enables discussing if, depending on who activates the system, the responses differ. I created four values for this variable: the SBDC

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<sup>121</sup> The BNDES' sources used for the construction of this catalogue were: the list of corporations owned by the national government totally or partially privatized between 1991 and 2002 (available at: [http://www.bndes.gov.br/SiteBNDES/bndes/bndes\\_pt/Institucional/BNDES\\_Transparente/Privatizacao/pnd.html](http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Institucional/BNDES_Transparente/Privatizacao/pnd.html)); the list of corporations owned by state governments privatized between 1996 and 2002 (available at: [http://www.bndes.gov.br/SiteBNDES/bndes/bndes\\_pt/Institucional/BNDES\\_Transparente/Privatizacao/estaduais.html](http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Institucional/BNDES_Transparente/Privatizacao/estaduais.html)); and the list of privatized corporations of the telecom sector owned by the federal government between 1991 and 2002 (available at: [http://www.bndes.gov.br/SiteBNDES/bndes/bndes\\_pt/Institucional/BNDES\\_Transparente/Privatizacao/telecomunicacoes.html](http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Institucional/BNDES_Transparente/Privatizacao/telecomunicacoes.html)).

(when the AP originated at SDE, SEAE or CADE); governmental organs (such as the Attorney’s Office, in both federal and state levels, and the National Congress); individuals and NGOs (when it started with a complaint from civil society); and corporate agents (when the AP originated from a complaint of another corporation), subdivided into national and foreign corporations.

Through this set of variables summarized in the table below, what I called the defining traces of a neoliberal economy in section 2.4 can be confronted with the actual practice of competition policy in CADE’s decisions, as depicted by the samples of MRs and APs. On a descriptive level, it is possible to assess what kind of economy is facilitated and, conversely, restricted by competition policy.

**Table 11.** Summary of variables for the quantitative study of decisions

Merger Reviews (MRs)	Administrative Procedures (APs)
Types of decision	Types of decision
Types of restriction	Sector of economic activity
Sector of economic activity	Scope of the conduct
Type of operation	Countries of origin
Scope of the operation	Privatized sector
Countries of origin	Period initiated
Path of capital movement	Type of conduct
Type of concentration	Author of complaint
Degree of economic concentration	Government
Delta market share	–
Privatized sector	–

**Source:** elaborated by the author

These variables enable analyzing if there are correlations among the economic phenomena that demand CADE’s regulation and the responses they get from it. In other words, it is possible to “test” if and how decisions are affected by the selected economic and political variables. The trend of *capital concentration* can be “tested” through the variables of *degree of economic concentration* and *type of operation*, in order to see if there is a trend in what CADE has historically understood as a concentration that deserves some sort of restriction. Also, the movement of *expansion* of capital into a recently liberalized economy, especially through *privatizations*, can be assessed by the variables of *sector of economic activity*, *scope of operation*, *path of capital movement*, *privatized sector* and *state-owned capital*. Together, these variables construct a portrait of the patterns of operations that mobilize CADE in certain periods, and if these patterns resemble what the critical political

economy of neoliberalism predicts: the arrival of foreign capital, notably in privatized sectors, through mergers and acquisitions.

Also concerning AP these variables can be used to assess if decisions made by CADE are functional to the pulses of a neoliberal economy. The trend of *capital expansion* can be discussed through the mapping of how CADE decided conduct cases involving foreign corporations (informed by the variables *countries of origin*, and *scope of operation*), and privatized sectors (through the variable *privatized*). It also enables assessing if political factors such as the *author of complaint* involve distinct economic agents or imply different decision outcomes.

To present and analyze the data gathered through these variables, I rely solely on descriptive statistics, i.e. frequencies of each variable and correlations among them. A more complete study about decisions should be able to dissect this data through statistical methods of inferential analysis, constructing models that are capable of testing how these variables affect the types of decision simultaneously – something I was not able to do due to time constrictions and my own methodological limitations. Nevertheless, the descriptive statistics generated in the course of the analysis enable a comprehensive view of the profile of economic phenomena regulated by competition policy in Brazil, and how it regulates it. As this kind of information is not available in other sources, this research can be seen as an exploratory endeavor. Even if not based on inferential statistics, as I will argue in Chapter 6, several conclusions can be drawn from the data collected about CADE’s practice in producing competition policy.

Data used to fulfill the variables created was collected through CADE’s institutional website. After constructing a stratified random sample, and with these variables in hand, I consulted each of the selected MR and AP in CADE’s “Process Research” database. Most of the information was not available in the summaries of judgment, so in all cases I had to consult the integral versions of votes issued by commissioners, and even the full procedure. An often useful source of data about the operation profile in the case of MR was the initial presentation of the merger review by the lawyers of the involved corporations. As they have to submit a form with systematic and descriptive information about the operation, this was a useful resource for most cases. It is important to notice that this analysis has only been possible because CADE’s database of processes is almost completely digitalized.

### **3.3 A qualitative inquiry into the outcomes to the economy and society**

Besides the quantitative study of decisions made by CADE, the proposed analysis of the *outcomes* produced by the field of competition policy also followed a qualitative path. In respect to the facilitative-regulatory roles of competition policy to the economy, I complemented the analysis of decisions with a study about jurisdictional disputes involving the competence of CADE in regulating economic agents – most notably the financial sector. This was a necessary methodological strategy to assess how the field deals with one dimension predicted by the critical political economy of neoliberalism that could not be grasped through a quantitative study of decisions: that of *financialization*. The study of the *outcomes* to society was undertaken through a similar qualitative approach. Following the framework of the constitutive roles of law discussed in section 2.3, I sought to identify how two legal categories – those of “consumers” and “workers” – are incorporated into the field of competition policy.

In both cases, the approach is said to be qualitative due to the nature of the data collected and the method of analysis. In this sense, the research “does not depend on statistical quantification, but attempts to capture and categorize social phenomena and their meanings” (Webley 2010, p. 928). With these objectives in mind, the qualitative study of the *outcomes* to the economy and society deployed similar strategies. On the one hand, I aimed at grasping the agents’ perceptions and normative stances toward both the jurisdictional disputes involving the financial sector, and the legal categories of “consumers” and “workers” in competition policy. These were collected through the interview method discussed in section 3.1. On the other, I sought to identify the extent to and the forms through which these perceptions have been institutionalized in the field’s actual practice. I thus relied on a content analysis of selected decisions, and documental analysis of several institutional initiatives undertaken by CADE concerning jurisdictional disputes and the legal categories mentioned. In the next subsections, I detail the methods deployed to study jurisdictional disputes and its connections to *financialization* and the constitutive roles of competition policy in respect to the legal categories of “workers” and “consumers”, respectively.

### 3.3.1 *Jurisdictional disputes*

As it may have been noticed, one of the defining traces of a neoliberal economy, as theorized through the critical political economy of neoliberalism sketched in section 2.4 – the *hegemony of financial capital* –, was not discussed in the framing of the quantitative study of decisions (section 3.2). The reason for that is simple: financial capital is largely absent of

CADE's decision-making. Understanding the reasons for this absence constitutes precisely the objective of the empirical research I undertook to assess what are the facilitative-regulatory roles of the field of competition policy in respect to the financial sector, and thus to investigate its possible connections to the neoliberal tenets.

The presence of the financial sector in the field of competition policy constitutes a subject of intense disputes among the agents of the field. The irrelevance of this sector in terms of number of decisions (as I will discuss in Chapter 6, around 1% of the sample of MR involved this sector) is connected to several battles to establish the boundaries of the field of competition policy, i.e. to define which economic phenomena are to be understood as part of its jurisdiction, and which are not. The disputes that occur around the appropriateness of the regulation of the financial sector can be roughly grouped in two poles of positions: on the one side, agents who affirm the competence of the SBDC to regulate concentrations in this area of economic activity, on the other, those who defend that CADE has at best an accessory role, and that the Brazilian Central Bank (BACEN) should be entitled to regulate the sector.

The absence of the financial sector from the field of competition policy is thus actively disputed and constructed by agents that compose the field, and are external to it. I understand that the jurisdictional disputes around the competences to regulate the financial sector provide an indicator of how the field of competition policy deals with neoliberalism's characteristic financial hegemony. My focus was on assessing on what grounds the jurisdiction of the field of competition policy is established in respect to both the Brazilian Central Bank and the Judiciary, through what means and with what results.

The methodological strategies applied to undertake such study comprised two steps. First, I mapped the different stances toward the jurisdiction of competition policy in respect to the financial sector through qualitative interviews with the agents of the field. As discussed in section 3.1, the basic axis of the interview guide contained questions about how lawyers and economists understand the boundaries of the field. One of the themes explored in this dimension were precisely how agents evaluate the regulation of the financial sector by CADE. Through open questions that demanded the interviewees' evaluation of this subject, I provoked them to express their preferences and normative stances about what should be under the jurisdiction of competition policy and why. These stances were also gathered from publications authored by lawyers and economists that disputed the issue, and connected to a historical reconstruction of the controversy, and its consequences in terms of institutional and legal arrangements.



Second, to go beyond the agents' stances depicted from interviews, I also gathered data that illustrate how these disputes are institutionalized in the practice of competition policy, notably by those responsible for producing competition law. In the case of the tension between CADE and BACEN, I construct indicators of such institutionalization through the analysis of decisions in MR and AP that involved the financial sector. I assessed cases that compose the sample used for the quantitative study. The objective, in this dimension, was to identify if and on what terms the struggle between CADE and BACEN appears in decision-making, i.e. how CADE has historically responded through its decisions to the financial sector.

Through the mapping of the agents' stances, and the indicators of how this dispute was institutionalized, I sustain it is possible to analyze if and how the field of competition policy facilitates the hegemony of financial capital. Together with the quantitative study of decisions, the qualitative study of jurisdictional disputes therefore completes the dimension of the proposed alternative narrative about the *outcomes* of competition policy to the economy. What is still missing is the definition of the methodological strategies adopted to study the outcomes of competition policy to society.

### 3.3.2 *Conceptual dichotomies*

Besides the economic dimension of the *outcomes* of competition policy, the proposed approach to the “law in action” of the field also highlighted its impacts on a societal level. These were framed as the constitutive roles performed by the field of competition policy, i.e. a dimension of “meaning-making” in which the law establishes the cognitive possibilities and values that compose the structure of the field. As it was discussed in section 2.3, such constitutive roles can be observed in several “conceptual dichotomies” embedded in legal and economic categories. By framing the constitutive dimension of competition policy in society in such terms, I aim at problematizing what mainstream narratives describe as the uncontested roles of the field in “protecting consumers”.

Transposing this framework for the study of the field of competition policy and its outcomes to society, I sustained that by assessing how the categories of “consumers” and “workers” are mobilized within this regulatory arena, it is possible to investigate its connections to the pulses of neoliberalism. Thus, the question formulated to guide the inquiry in this dimension was the following: *How are the social categories of “consumers” and*

*“workers” incorporated and/or repelled by the field of competition policy and what model of society is constituted by it?*

In section 2.4, I described how the “traces of a neoliberal society” touch directly on these two societal categories. In general lines, the objective pursued in this dimension of analysis was to assess if and how the field of competition policy responds to these characteristic phenomena of neoliberalism, i.e. to what extent the ways in which it mobilizes the categories of “consumers” and “workers” replicate what was theorized as the defining elements of the neoliberal project in a societal dimension. To do so, I adopted methodological strategies that were similar to those mobilize in the study of the *outcomes* of competition policy vis-à-vis financial hegemony.

First, I tried to assess what are the hegemonic structures of preference of the field of competition policy in respect to the categories of “consumers” and “workers” through qualitative interviews, as presented in section 3.1. The basic axis of the interview guide contained a question that sought to induce respondents to present their normative views on who are the subjects to be protected by this regulatory arena. I asked all interviewees if they have ever dealt with a case in CADE in which labor issues were raised, and how they evaluate the appreciation of such topics in competition policy. The openness of the question was deliberate. I did not want to posit the tension between the categories of “consumers” and “workers” beforehand, once what interested me was precisely to see if and how they relate these concepts as an actual dichotomy. It is interesting to notice that, even if not directly demanding an elaboration of the category of “consumers”, in almost all cases respondents ended up discussing the tensions between this legal category and that of “workers”. Interviews therefore provided an entry to what Edelman and Stryker (2005, p. 542) define as one of the elements that shall be explored in the study of the constitutive roles of law: the “overt political contestation of meanings”.

However, as these authors suggest, to fully grasp the constitutive dimension of law, the contestation of meanings shall be discussed as part of an interplay with “more covert institutional diffusion of meanings” (Edelman and Stryker 2005, p. 542). Hence, the second methodological strategy in the study of the *outcomes* to society explored how the legal categories of “consumers” and “workers” are actually institutionalized in the regulatory production of the field of competition policy. To do so, I sought to determine both the extent of the presence of labor-related issues, and the way in which they appear in regulatory practice.

I circumscribed the analysis to three sets of procedures. First, MR in which a Performance Agreement was celebrated. The Performance Agreements, or “TCD” in the original acronym<sup>122</sup>, are the legal means through which corporations that present an MR to CADE acquiesce to certain conditions in order for the operation to be approved. As discussed in section 3.2, these conditions may entail structural and behavioral measures to be adopted by these corporations during a certain period of time – among them, conditions related to employment. I complemented the analysis by identifying the MR covered in the sample used for the quantitative study that entailed labor-related conditions, in which TCD were not necessarily celebrated. Finally, I also reviewed all “Agreements to Preserve Reversibility of Transaction”, or APRO, enacted by CADE between 1994 and 2012. The APRO is a “precautionary order” celebrated between CADE and the corporations involved in an operation in which the Council detects a high potential of anticompetitive effects. Through the APRO, corporations agree to preserve the corporate structures existent prior to the concentration, until the analysis of the MR is concluded by the authority. Among the conditions established in an APRO, employment clauses may be included.

In each of these sources, I sought to identify if and in what circumstances the categories of “workers”, “labor”, or “employment” appear, i.e. how does CADE incorporate or repel these categories as cognitive possibilities of the decision-making process. Based on this mapping, I compared to how the category of “consumers” is mobilized in decision-making, as depicted by mainstream narratives reviewed in Chapter 1. Through these strategies, it will be possible to assess how the categories of “consumers” and “workers” are both mobilized in the normative stances of the agents of the field of competition policy, and institutionalized in the regulatory practice of CADE. Rather than automatically accepting the reading that mainstream narratives make of what the law announces as its objectives in society – to “protect consumers” –, such qualitative study of the constitutive dimension of competition policy problematizes the very establishment of the subjects that are to be guarded by the field. Moreover, it enables assessing if the ways in which these categories appear or are absent of this regulatory arena resemble the neoliberal trends of disrupting collective entities connected to labor, and of performing the constitution of a consumer citizenship.

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<sup>122</sup> It stands for *Termo de Compromisso de Desempenho*.

### 3.4 Empirical hypotheses of the study

In this chapter, I described the methodological strategies deployed to put to work the theoretical framework sketched in Chapter 2. Through the designed multi-method empirical approach, I sustained that it will be possible to assess the roots and roles of competition policy reform and practice in Brazil vis-à-vis neoliberalism. Based on the combination of the theoretical framework and the methods designed in this chapter, I can now enunciate, in brief terms, what are the hypotheses discussed in the forthcoming chapters.

From the actor-centered approach designed in sections 2.1 and 2.2 to offer an alternative narrative about the *process* of reform and the *agents* of the field, later translated into the relational biography described in section 3.1, the hypothesis that stems is the following: *Competition policy reform and practice in Brazil is rooted in the neoliberal project to the extent that the agents who have architected and historically occupied the field have professional and political trajectories which are mostly aligned with neoliberal ideology of market sovereignty, and infuse and replicate a habitus that is functional to the tenets of the neoliberal political project, such as market freedom, economic expansion and concentration, privatization and the related ideal of efficiency.*

In the dimension of *outcomes*, a set of three hypotheses can be formulated if one departs from the framework of the facilitative-regulatory and constitutive roles of the legal field, combined with the substantive theoretical elements of the critical political economy of neoliberalism. First, in respect to the quantitative study of CADE's decisions, the hypothesis that guided empirical research was that: *The outcomes of competition policy to the economy are to facilitate the impulses of neoliberalism, by enabling and legitimizing the expansion and concentration of capital in Brazil, especially through privatizations.*

Second, still in the level of the facilitative-regulatory roles of competition policy to the economy, a complementary hypothesis derived from the study of jurisdictional disputes is that: *By limiting its jurisdiction over the financial sector, and affirming the entitlement of the Central Bank to regulate the concentration of financial capital, the field of competition policy facilitates and legitimates the neoliberal trace of financial hegemony.*

Finally, from the framing of competition policy's impacts in society as the constitutive roles performed by the field in respect to the legal categories of "consumers" and "workers", the key hypothesis assessed is that: *In selectively incorporating "workers" and "employment"– key-components of the capital-labor relation regulated by the field – as subjects to be protected by competition policy, and in parallel affirming "consumers" as the*

*sole beneficiaries of regulation, the cognitive boundaries and values institutionalized in the field of competition policy contribute to the constitution of the model of “consumer citizenship” vaunted by neoliberalism.*

In the forthcoming chapters, these hypotheses are discussed in light of the data collected through the methodological strategies here designed. In Chapter 4, I present the data obtained through the relational biographic method to reconstruct the historical process of construction of a modern field of competition policy in Brazil, and evaluate the enunciated hypothesis about the agents of reform. In Chapter 5, I describe the results obtained through the actor-centered approach deployed to map the structure of the field after reform. In Chapter 6, the hypotheses about the outcomes of competition policy to the economy and society are analyzed through the methods sketched in sections 3.2 and 3.3. Together, these hypotheses, backed up by their corresponding empirical material, are taken as potential indicators of the roots and roles of competition policy reform and practice in neoliberalism, which constitutes the thesis’ central argument.

Although the linkage between competition policy and neoliberalism has been ignored or actively deconstructed by what I called mainstream narratives, my research is not alone in investigating this connection. In departing from the conceptual framework sketched in Chapter 2, and in applying the methodological strategies presented for the study of the construction and practice of competition policy in Brazil, this dissertation engages with a heterodox, although growing literature that has stressed the “politics of regulation” that takes place around competition policy. Hence, in presenting and discussing the results of the empirical study that forms the backbone of this work, I will compare my findings to what others have argued to be the roots and roles of competition policy in neoliberalism in other contexts, such as the US (Eisner 1991, Davies 2010), Europe (Hermann 2007, Wigger 2008, Buch-Hansen and Wigger 2011), and Turkey (Türem 2010). I also seek to extend the knowledge about this connection in the case of Brazil, marginally addressed by the works of Bello (2005) and Onto (2009).

## CHAPTER 4

### The creation of competition policy as a “modern” regulatory arena

*“Everyone sticks their nose in, the law has no owner”*. This was how a prominent Brazilian competition lawyer explained, in an interview, how several initiatives to reform competition policy in Brazil since the early 1990s happened. Also talking about the reformist initiatives of the period, another lawyer claimed: *“We, lawyers, are not legislators”* – to which he nevertheless added – *“we never miss an opportunity to point out how things could be enhanced”*.

The idea that “the law has no owner” calls attention to the multiple channels of influence operating in the historical episodes of reform. Reforming the Brazilian competition policy system was indeed a complex process in which several agents – professionals such as lawyers and economists, representatives in Congress and corporations – tried to impact. It is quite convincing in this sense that no “paternity test” is possible or even useful to understand the process of legal reform. However, in conducting fieldwork it became quite clear that a small group of professionals was decisive in mobilizing the reformist agenda, and in making crucial choices of institutional and policy design. Following the proposed framework to understand the roots and roles of competition policy reform in neoliberalism through the study of the agents that propelled it, in this chapter I map who were those agents that *“stuck their noses”* into reform, and who didn’t *“miss an opportunity to point out how things could be enhanced”*. In other words, I present and discuss who were the architects of reform, what were their channels of influence, the struggles they took part in, and the contents they infused into the transformation of a regulatory arena.

The focus of the chapter is thus to assess who were the agents involved in reform – their professional, academic and political profiles – and how they influenced the shape of the institutions designed to produce competition policy in Brazil. In doing so, I believe it will be possible to visualize the connections of competition policy reform to several economic and political impulses that are characteristic of the neoliberal reforms that were being undertaken in Brazil by that time.

In contrast to how mainstream narratives explain the process of reform, and as anticipated by the conceptual framework sketched in Chapter 2, these connections were not straightforward or undisputed. Several struggles around the format of a reformed competition policy were identified. In the 1990s, there were cleavages between the group of professionals more directly involved in the drafting of the competition acts, the government, and

corporations. Even within this group or within the government itself several divergences about the design of Brazilian competition policy occurred. As I will argue in this chapter, these struggles are illustrative of the linkages of reform with the broader transformations fostered by neoliberalism.

Moreover, reform did not occur in a linear, synchronic way. There were at least three attempts to transform competition policy in Brazil, with different agendas and degrees of success. As it will be discussed in the next chapter, reform also did not cease with the enactment of the law. Several topics of divergence were not resolved by the institutional design consolidated in 1994, and were only advanced in the years that followed the reformist initiatives of the early 1990s.

To depict the numerous struggles around reform, and the several reformist initiatives in time, I present the reconstruction of reform in a chronological fashion. I start by discussing the reformist initiatives started already in the late 1980s and early 1990s to transform the Brazilian competition policy established in 1962. Interviews revealed that there were two important attempts of reform in this period: in 1988 and in 1990/1991. However, before presenting the specific reformist initiatives of those years, I take a step back, and start the reconstruction of this period by analyzing the debates surrounding competition policy in the Constituent Assembly that resulted in the Brazilian Constitution of 1988 – a landmark of the transition from the dictatorial period.

The study of this period enabled assessing the almost automatic connection that mainstream narratives make between the reform of competition policy of 1994 and the “democratization” of Brazilian institutions embedded in the Constitution of 1988. As reviewed in Chapter 1, these narratives often associate the redefinition of the state’s roles in the economy to the period of transition from the dictatorial period, allegedly market by a strong interventionist state, to a democratic stage, supposedly accompanied by a liberalized, market economy. As economic liberalization was a heated topic in the Constituent Assembly, many dilemmas that would permeate the “modern” field of competition policy in Brazil were already raised in the drafting of the Constitution, although they were only resolved by the specific reformist initiatives in the subsequent years. The struggles within the Constituent Assembly contained, in this sense, the embryos of several disputes that were later tackled by the architects of reform in 1988, 1990 and finally in 1993/1994, with the enactment of the law 8.884. This is precisely what I describe in section 4.1.

The second period, discussed in section 4.2, comprises the mentioned initiatives to reform the 1962 competition act that took place between 1984 and 1991. As I will present

below, they were not successful in advancing what is often reputed as a modern system of competition policy, which was only established in 1994. One of these initiatives, probably precisely because it was not successful (i.e. it was not converted into a new law), is normally not mentioned in mainstream narratives as part of the history of competition policy in Brazil, but, as I will argue, provides important elements to understand how reform occurred and how it took the paths that led to the 1994 legislation. The third period of reform is analyzed in section 4.3, and is circumscribed to the production of the 1994 antitrust act. As the law 8.884 of 1994 is said to have consolidated an innovative and modern system of competition policy in Brazil, I analyze how the reform process that resulted in this legal framework occurred. In section 4.4, I present a set of conclusions about the neoliberal roots of competition policy reform in Brazil based on the identification of its architects, and of the historical process of the field's creation.

This chapter therefore intends to contrast what mainstream narratives often depict as an evolutionary phenomenon of technological modernization induced by the government. The core hypothesis that I aim at maintaining with the data provided in the pages that follow is that the reform of competition policy in Brazil was a contentious process which, in its decisive stages, was propelled by a small group of professionals close to the market and/or ideologically aligned with the neoliberal imperatives of economic liberalization. Instead of a “necessary” or “consensual” process, reform comprised positions that were defeated, and others that ended up victorious. Reform was constructed through political compromises that are central to understand the institutional design taken by the Brazilian competition policy, and which provide evidences of its linkages to the broader neoliberal reforms. Also, the “government” – an abstract entity frequently presented as the main agent of reform – was often not only far from mobilizing the transformation of the field of competition policy, but even acted as an opponent of the reformist agenda pushed by a group of experts.

#### **4.1 Embryos of reform: the Constituent Assembly of 1987-1988**

In mainstream narratives, the reform of competition policy in Brazil in the early 1990s is often explained as part of the context of democratization and economic liberalization that followed the decay of an authoritarian political system and economically interventionist model of state. The Constitution of 1988, still in place, is pointed to as the symbol of such transition. Between articles 170 and 181, it establishes the “*General Principles of Economic Activity*”. On article 170, it states the principles that shall guide the economic order, among



which can be found “free competition” and “consumer protection”. In article 173, which defines the possibility of direct state participation in economic activities, the fourth paragraph contains a norm concerning the so called “abuse of economic power”: “*The law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase of profits*”. As mainstream narratives often explain, the competition act of 1994 would be precisely the translation of such command into an operational legal and institutional framework.

Although the Constitution and the subsequent legislation that consolidated the reformist impulses of the 1990s are smoothly tied together in these sources, such relationship is not straightforward. The constitutional norm to which the modern Brazilian competition policy is linked was subject of several disputes in the Constituent Assembly that produced the 1988 Constitution, until it took the final form inscribed in the constitutional text. As I will argue in this section, these disputes contained the embryos of broader tensions between distinct positions regarding the state and the economy, many of which would be revived in the specific reform efforts of the early 1990s, and in the development of Brazilian competition policy after its transformation. The debates around the Constitution, nevertheless, were silent on various other topics that would eventually be tackled by the reforms that would begin a few years later.

The National Constituent Assembly (ANC) was convened in November 1985, under the presidency of José Sarney, as a symbol of the political opening after more than 20 years of military dictatorship. One year later, in November 1986, 536 representatives were elected, and together with 23 Senators that were already members of the Congress, they comprised the 559 constituent representatives of the ANC. The majority of representatives of the Assembly were part of a “conservative block”, while the “progressive” or “center-left” block constituted a minority (Pilatti 2008)<sup>123</sup>.

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<sup>123</sup> I rely on Pilatti’s (2008) analysis of the ANC’s composition to define the positions occupied by the agents that participated in the elaboration of the new Constitution. As this author explains, parties such as the *Partido Comunista do Brasil* (PC do B), *Partido Democrático Trabalhista* (PDT), and the *Partido dos Trabalhadores* (PT) could be defined as “left-wing” parties in the ideological spectrum of the ANC, while the *Partido Democrático Social* (PDS), *Partido da Frente Liberal* (PFL), and the *Partido Liberal* (PL) could be placed as “right-wing” parties. This classification is based both on “the common sense and on the self-perception of the [agents] and their adversaries, that they were so [left or right-wing] *in that moment and in that context*” (Pilatti 2008, p. 4). The picture is completed with the party with most seats in the ANC: the *Partido do Movimento Democrático Brasileiro* (PMDB), which encompassed a wide ideological spectrum, from conservative to progressive representatives, with some representatives being “moderate”. Mainwaring and Liñan (1998) converge with this classification almost completely. Parties classified as left-wing, together with a group of center-left politicians of the PMDB, called themselves the “progressive” group, while those of center-right formed what Pilatti (2008, p. 13) defined as the “conservative block”, which later was self-entitled the “*Centrão*” (large center).

#### 4.1.1 *The progressive hegemony: repressing oligopolies and monopolies*

Installed on February 1<sup>st</sup> 1987, the ANC finished its work on October 5<sup>th</sup> 1988. The production of the new Constitution took place through five main stages, as described below<sup>124</sup>. At the “preliminary” stage, which lasted until April 1987, the representatives discussed and voted the internal regulations of the ANC: the procedures and design of the deliberative spheres. Also during this period, the elected representatives, civil society organizations, and citizens in general could make suggestions to the constitutional text. At this stage, only two explicit references to CADE and competition policy can be identified on the ANC historical database. One was the proposal signed by a citizen who, among suggestions that included changes concerning mining activities and penalties for drunk drivers, presented a general claim for the “end of corruption and the strengthening of CADE through income tax”<sup>125</sup>.

The other proposal was submitted by the constituent representative Brandão Monteiro, the leader of the Democratic Labor Party (PDT) at the ANC, elected by the state of Rio de Janeiro. Monteiro was an active representative at the ANC. Monteiro was a lawyer, graduated from the Federal University of Rio de Janeiro (UFRJ) in 1964, and was involved with political movements since high school. While in law school, he presided the local students’ union, and between 1962 and 1963 he was the vice-president of UNE, the Brazilian National Students Union. In 1964, Monteiro’s political rights were revoked by the military dictatorship shortly after it was installed, on April of that year. Detained several times and tortured by the military regime, with the end of bipartisanship and the beginning of the political opening, Monteiro helped to create the PDT.

On May 1987, he submitted a set of 40 suggestions to the ANC, which dealt with a variety of topics. Monteiro, for instance, proposed the mandatory participation of workers in the administration of state-owned corporations (Suggestion number 4.537), replicated the guarantee of state monopoly over oil and gas, as was the case since the 1940s (Suggestion number 4.531), and the prohibition of mass media oligopolies (Suggestion number 4.528)<sup>126</sup>.

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<sup>124</sup> The complete description of these stages can be found at the National Congress’ website. At this source, seven stages are identified – two in addition to the five I mentioned: the “*Redaction Commission*” and the “*Promulgation*” stage – but are herein ignored, as they did not comprise moments of legislative elaboration.

<sup>125</sup> Between March 1986 and July 1987, almost 73 thousand suggestions were made by civil society organizations and individual citizens. In my research at the National Congress’ database of suggestions made by citizens, I found only one that explicitly mentioned CADE.

<sup>126</sup> All proposals made by the elected representatives to the ANC at the preliminary stage are available at the National Congress’ special website about the Constituent Assembly, in the section “Suggestions by Constituent

His proposal on competition policy is therefore part of a set of measures that aimed at the construction of an economically interventionist model of state.

Monteiro's suggestions concerning competition policy came under the number 4.530, in which he claimed for the inclusion, in the Constitution, of an article establishing that:

The Administrative Tribunal for Economic Defense, composed by 5 members of notorious legal or economic knowledge and immaculate reputation, chosen by the National Congress for a 5-years mandate, is entitled of repressing the abuses of economic power and of promoting the set of constitutional principles of the economic order, under the terms of the supplementary law.

This proposal still had a more juridical facet, if compared to the 1994 version of CADE, which was attuned with the model of a regulatory agency. On an additional paragraph proposed by Monteiro, the legal vein of his project becomes clear: the members are called "Ministers", like the members of the higher courts, and they are explicitly equated to the Ministers of the Superior Court of Justice in their responsibilities and rights.

Like all suggestions made at the preliminary stage, Monteiro's proposal followed its path to the second phase of the ANC: the thematic sub-commissions<sup>127</sup>. Between April and May 1987, the representatives debated the more than 12 thousand proposals made by their peers, and almost 73 thousand suggestions received from the population at 24 thematic "sub-commissions" that were entitled to produce a preliminary version of the Constitution on different topics. Each sub-commission was composed by a President and two vice-presidents, who had the role to preside the discussion and the voting sessions, and to organize the work of the commission. Another important character in each commission was the rapporteur, who was in charge of presenting an initial draft of the articles concerning the sub-commission's theme, and of systematizing the results of the amends and discussions into a final draft.

As Pilatti maintains (2008, p. 14), although the composition of the ANC and, as a corollary, of each sub-commission and commission, was vastly dominated by a "conservative block", there were institutional nuances of the Assembly that guaranteed possibilities for the progressive minority to influence the constitutional process. The decentralization of the work into sub-commissions and commissions, as well as the figure of the rapporteur were

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Representatives" (*Sugestões dos Constituintes*). Monteiro's proposals were consolidated between the numbers 4.500 and 4.539, including them.

<sup>127</sup> All texts (amends, drafts, and legislative debates) quoted in this section are available at the House of Representative's special website about the ANC: <[http://www2.camara.leg.br/atividade-legislativa/legislacao/Constituicoes\\_Brasileiras/constituicao-cidada/o-processo-constituente](http://www2.camara.leg.br/atividade-legislativa/legislacao/Constituicoes_Brasileiras/constituicao-cidada/o-processo-constituente)>. Last accessed on November 12<sup>th</sup> 2013. To locate a document here referred, it is necessary to select the stage of debates to which it belongs. As in this chapter's exposition, the website is in chronological order.

exemplary of these peculiarities (Pilatti 2008, p. 14). On the one hand, decentralization opened more opportunities for members of the minoritarian group to impact the decision-making process. On the other, a political agreement between the different forces of the ANC established that the conservative block would hold all presidencies of sub-commissions and commissions, while those of the progressive group would be entitled to the positions of rapporteur – who were provided with a great “power of agenda” (Pilatti 2008, p. 14).

The topics related to competition policy were discussed by Sub-commission VI-A: “*Sub-commission of General Principles, State Intervention, Property Regime of the Subsoil and Economic Activity*”. The composition of this sub-commission replicated the general correlation of forces in the ANC: the “conservative block” held most positions, and the progressive group a minority (Pilatti 2008, p. 106). In accordance to the political agreement of division of positions, the president and rapporteur of sub-commission VI-A were, respectively, part of the conservative and progressive groups.

The president was Delfim Netto, an economist who served as Minister of the Economy during the military dictatorship (more precisely, from 1967 to 1974), and later as Minister of Planning, from 1979 to 1985, in the transitional period. Netto is placed in the ideological spectrum of the ANC as a “moderate” by Pilatti (2008, p. 106), although he was a member of the PDS, the political heir of the ARENA – the regime’s official political party during the years of bipartisanship in Brazil, from 1966 to 1979. The “czar” of Brazilian economic policy-making for more than 10 years (Macedo 2001, p. 375), he was historically aligned with the monetarist economic tradition (Loureiro 1997, p. 92), a line of thinking that in the 1940s and 1950s was in direct conflict with the structuralist approach best represented by Celso Furtado and the Economic Commission for Latin America and the Caribbean (ECLAC).

The rapporteur of sub-commission VI-A was Virgildásio de Senna, an engineer from Northeast Brazil, and member of the “progressive” fraction of the PMDB. In 1963, he was elected mayor of Salvador, the capital city of the state of Bahia by the PTB, the labor party created by Vargas in the 1940s. The different trajectories of both the president and the rapporteur in sub-commission VI-A evidence what Pilatti (2008) maintains to be, respectively, the defining positions of the conservative and progressive groups.

The works of sub-commission VI-A started with the presentation of the rapporteur’s initial draft. In this document, Senna included the notions of “consumer protection” and “free initiative” (still not free competition) among the principles that should guide the economic order. Also, as part of an article dedicated to define the extension of state intervention in the

economy, the draft established that (article 6A10, First Paragraph of the draft): “The law will repress the formation of *private monopolies*, oligopolies, cartels and any other form of abuse of economic power” (my italics). The rapporteur justified the text of a norm targeting competition by saying that “the suppression of imperfect market forms, as other modalities of abuse of economic power” was to be foreseen because “a free market does not always lead to an optimal allocation and distribution of production factors”<sup>128</sup>.

If compared to the version that would eventually become the current text of the Constitution, the first draft of what is referred to as the foundational norm of Brazilian competition policy was considerably different. The repression to monopolies, oligopolies and cartels are explicitly mentioned in that first draft. As the description of the subsequent stages of the ANC that follows evidences, such a version of the constitutional norm was hegemonic until the very end of the Assembly’s work, and most frequently mobilized by members of the progressive group, although at times endorsed by some representatives of the conservative block. Another important detail was highlighted in the transcript: according to the rapporteur’s first draft, only *private monopolies* were to be repressed. The reason for that is understandable: one of the major issues being discussed in the ANC was the maintenance of state monopoly over certain economic sectors (or even its extension to new areas), such as oil and gas, which were established since the 1940s. This was one of the major areas of conflict between the conservative and the progressive groups. In Senna’s draft, the restriction of repression to the *private* form of monopolies was a matter of consistency with the guarantee of *state* intervention in the economy that he and other representatives would repeatedly try to insert in the Constitution.

Submitted to the other members of sub-commission VI-A, several proposals to change the rapporteur’s draft were presented in the form of “amendments”. Seven representatives of the conservative block, and other two of the progressive block presented a total of eleven amendments that were related to the rapporteur’s proposal on competition policy<sup>129</sup>. Most of the amendments proposed by representatives of the conservative block implied substantive changes on the text submitted by Senna. For instance, Antonio Carlos Franco, an economist, and member of the conservative fraction of the PMDB (Pilatti 2008, p. 61), proposed the transformation of article’s 6A10 first paragraph to: “The law shall suppress any form of abuse of economic power” (Amendment number 6A0156-9). Virgílio Távora, of the PDS, a military

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<sup>128</sup> Excerpts from the rapporteur’s initial draft, available in the Report of Sub-commission VI-A rapporteur (Volume 165 of the ANC documents).

<sup>129</sup> A total of 377 amends were presented to the rapporteur’s draft, including the 11 concerning the article on competition policy.

engineer long involved with the former regime's party ARENA and other political organizations of the right, proposed that article 6A10 adopted the same text of the Constitution of 1967: "The law will repress the abuse of economic power, characterized by the domination of markets, the elimination of competition, and the arbitrary increase of profits" (Amendment number 6A0196-8). His proposal aimed to "imprint in the Constitution the liberal regime of the rule of law to be effectively implemented in Brazil".

Antonio Ueno, an economist and lawyer of the PFL, proposed a similar change (Amendment number 6A0262-0), justifying that "the country has witnessed a gigantic growth of the state in the economy. Today there is an excess of regulation, from general issues to particular questions of low importance". And he added: "State-owned corporations that hold monopoly, *de jure* or *de facto*, shall also be subjected to the sanctions of the law when they practice abusive acts by taking advantage of their monopolistic condition". The amendment of Afif Domingos, a manager from the PL of São Paulo, preserved some aspects of Senna's original draft, but implied an important shift, covering state-owned corporations (Amendment number 6A0286-7). The amendment of Jalles Fontoura, an engineer affiliated to the PFL and a former member of the regime's party – the ARENA – merged the texts of Senna's proposal with that of the 1967 Constitution (Amendment number 6A0226-3). The motivation of such amendment was, according to its author, the fact that "the repression of the abuse of economic power is the norm in the whole civilized world, and cannot be ignored in Brazil"<sup>130</sup>.

Finally, The only two congressmen of the so-called progressive block to present amendments were both of the PDT of Rio de Janeiro, and each submitted two proposals. Luiz Alfredo Salomão, an engineer, proposed amends that aimed to include the expression "the repression of the abuse of economic power" among the principles of the economic order, and did not alter the rapporteur's draft of article 6A10 (Amends number 6A0008-2 and 6A0016-3). Similarly, Brandão Monteiro – the same author of the mentioned suggestion at the preliminary stage – submitted two amendments (Amends number 6A0339-1 and 6A0340-5). One was similar to Salomão's, as it suggested the inclusion of the 1967 Constitution text among the principles of the economic order, and kept the rapporteur's initial proposal. The second amendment proposed by Monteiro replicated his initial suggestion, now at the level of the sub-commission, recommending the inclusion of an article creating the Administrative Tribunal of Economic Defense, "similar to the American Federal Trade

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<sup>130</sup> Two other amendments of the conservative block implied provisions concerning competition policy of a much more general character in comparison to Senna's proposition: Amendment number 6A0253-1, by Rubem Medina, of the PFL, and Amendment number 6A0325-1, of Luiz Roberto Ponte, a member of the conservative fraction of the PMDB (Pilatti 2008, p. 61).

Commission”. Monteiro’s proposal was, in this sense, consistent with Senna’s initial draft, and meant an instrumental provision to put to work the norm on the repression of private monopolies, oligopolies and cartels originally present on the rapporteur’s draft.

The rapporteur recommended the rejection of all mentioned amendments, on distinct grounds<sup>131</sup>. The rejection of the proposals of Távora (PDS), Fontoura (PFL) and Domingos (PL) were based on formal arguments, such as “regimental reasons”, or due to “legislative technique”. Similarly, the rapporteur understood that the purpose of Ponte’s (PMDB) suggestion was already included in the original draft. Senna also rejected the amendments of the two progressive representatives that included the repression of the abuse of economic power as a principle of the economic order on similar grounds. For him, the two proposals of Salomão and one of Monteiro’s suggestions were already encompassed by the original draft.

Three amendments of the conservative block received a more substantive opposition by the rapporteur. For instance, in analyzing Medina’s (PFL) amendment, Senna argued that “[i]t is important to make explicit that the law will repress private monopolies, oligopolies and cartels, because these could otherwise be interpreted as not being forms of abuse of economic power”. In respect to the amendment proposed by Monteiro, the rapporteur justified the rejection by stating that the Constitution would not be the adequate mean to “define the competences and the composition of sectorial organs of the administration”.

The rapporteur’s opinion on each of the amendments was submitted to the plenary of the sub-commission to be voted. As Pilatti (2008, p. 108-112) shows, in the voting session of May 24<sup>th</sup> 1987, the conservative group was able to reverse many of the central issues of the rapporteur’s draft, which were initially blocked by Senna through the rejection of amendments. In a “massacre” against the rapporteur’s draft (Pilatti 2008, p. 112), amendments that were rejected by Senna and which aimed at attacking the draft on questions such as the definition of a national corporation, the preferential treatment of the national capital, and the creation of state monopolies on certain areas were eventually approved. Similarly, out of the 13 amendments that were approved by Sena – all proposed by representatives of the progressive block – 12 were rejected in the voting session (Pilatti 2008, p. 113).

In the case of the amendments concerning competition policy, however, there were no conflicts with Senna’s decisions. The rapporteur’s rejection of all 11 proposals was endorsed

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<sup>131</sup> Out of the 377 amendments submitted, only 13 were approved by the rapporteur. Senna’s opinions on the amendments submitted are available, in alphabetical order accordingly to the proponent, in the Report of Commission VI’s rapporteur (Volume 167 of the ANC documents).

by the plenary, and thus the original text of the draft was approved. This is an indication that, at least at this point of the ANC, although there were divergent conceptions around the norm on competition policy, the issue was still not at the center of the struggles between the different political forces. Rather, questions such as the distinction between national and foreign capital, as well as the affirmation of state monopoly over certain areas were the major arenas of clashes.

Renumbered as article 7, first paragraph, of the sub-commission's VI-A final draft<sup>132</sup>, the article on competition policy entered a new stage: the debate on the Commission of the Economic Order (Commission VI). Together with the drafts of sub-commissions VI-B (Urban Question and Transports) and VI-C (Agrarian Policy and Agrarian Reform), the draft was to be discussed by a larger forum, composed by 65 representatives. In Pilatti's (2008, p. 123-124) classification, Commission VI was also dominated by members of the conservative block. Similarly to the sub-commissions' composition, a member of the conservative group was entitled to the Presidency of Commission VI (José Lins, of the PFL), and what Pilatti (2008) defined as a "progressive" was appointed rapporteur (senator Severo Gomes, of the PMDB).

The work of Commission VI started on May 27<sup>th</sup> 1987, with the presentation of amendments to the drafts that came from the sub-commissions. In the case of the article concerning competition policy, three amendments were proposed, all by members of the conservative block<sup>133</sup>. Ueno (PFL) presented the same amendment he had submitted at sub-commission VI-A (Amendment number 00231). Domingos (PL) also revived the amendment he had presented at the previous stage, but in a slightly different way. Instead of explicitly naming private and public monopolies as forms of abuse of economic power, he proposed a text that adopted a general rule, which could encompass both forms of his previous amendment (Amendment number 00699). The last amendment was presented by Cunha Bueno, an economist of the PDS, who merged the text of different dispositions into one paragraph, adopting a version that was similar to Ueno's proposal and to the 1967 Constitution (Amendment number 00644).

Rapporteur Gomes declared to have approved the amendments of Ueno and Bueno, and to have approved integrally the proposal of Domingos. On June 1987, he submitted to the Commission a first substitutive project, consolidating the drafts coming from the three sub-

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<sup>132</sup> "Anteprojeto da Subcomissão VI-A" (Volume 171 of the ANC documents).

<sup>133</sup> The text of all amendments are available in Volume 160 of the ANC documents (*Emendas Oferecidas à VI Comissão da Ordem Econômica*).



commissions<sup>134</sup>. However, article 6, paragraph 4, of this document stated a version that was similar to Senna's draft. An important difference to the draft elaborated by the sub-commission's rapporteur was that the explicit mention to *private* monopolies was absent of Commission's rapporteur version. This fact generated a debate with Senna, who was also a member of Commission VI. Senna directly criticized the Commission's rapporteur, stating that the suppression of the word *private* conflicted with other dispositions of the Constitution, which guaranteed state monopoly over certain areas<sup>135</sup>. Gomes replied, explaining that the (legal) monopoly would be created by the law, and since it could happen that a state corporation becomes monopolistic, if this monopoly was not created by law, "evidently it should be treated as any other monopoly".

Another representative who called attention to the contradiction – but for different reasons – was Roberto Campos, senator of the conservative PDS, and a renowned economist in Brazil who occupied several prominent positions since the late 1950s and throughout the military regime. He served as president of Brazil's Development Bank, BNDES (1958-1959), Ambassador of Brazil in the US (1961-1964), and Minister of Planning (1964-1967). With graduate training in economics at the University of Columbia, Campos was part of a line of thinking that became known as "orthodox monetarist" or "*entreguistas*" (Loureiro 1997, p. 43)<sup>136</sup>. Campos presented a harsh criticism of Gomes' draft, classifying it as a report that

aggravates state intervention, and transforms the state in a controller and planner, while the world evidences that the state tends to decrease its interventionist pressures, not only in capitalist regimes, but also in socialist regimes, due to its obvious demonstration of incompetence.

Campos attacked what would be the incongruence of the article on competition policy as exemplary of such interventionist role of the state. For him, according to the rapporteur's draft, "in one article the state can create monopolies, and in the other, the law will repress monopolies".

In the same voting session, Vladimir Palmeira, an economist and lawyer of the Worker's Party (PT), pointed to another contradiction in Gomes' draft proposal concerning competition policy. Palmeira, however, explicit distanced himself from Campos' arguments.

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<sup>134</sup> Available at Commission VI first Substitutive draft (Volume 161 of the ANC documents).

<sup>135</sup> The debate between Gomes and Senna occurred on June 8<sup>th</sup> 1987, and is available in the session transcripts published on the ANC Diary, published on July 9<sup>th</sup>, 1987, between pages 140 and 141.

<sup>136</sup> This group of economists was called *entreguistas* by their nationalist and/or structuralist counterparts because their views on economic policy, such as tolerance and openness to foreign capital and investment, would imply the "surrendering" of Brazil's economic sovereignty.

To that representative of the progressive block, the rapporteur's draft contained a "permanent contradiction": that "[modern capitalism's] declarations [of free initiative] and the formation of oligopolies and monopolies are characteristic of the modern economy". For him, while "everyone comes here and ask for free initiative, capitalism itself generates monopolies and oligopolies". Thus, to suggest the end of oligopolies in Brazil would imply the "extinction of the capitalist regime", something that the project did not intend to do, as it established "free initiative" as a key principle of the economic order. For him, these would be "empty words", a purely "formal question" sustained by "electoral interests"<sup>137</sup>.

While in sub-commission VI-A divergences around competition policy were restricted to the amendments, at this point they were translated in direct tensions among the representatives. What can be roughly grouped as two sets of positions that would be transversally present during the development of the ANC can already be perceived at this point: on one side, the conservative group pushing for a text that revived the 1967 Constitution's norm, and did not mention oligopolies, monopolies, and cartels; on the other, proposals mostly coming from the progressive block, which recommended the explicit mentioning of those economic phenomena.

On June 12<sup>th</sup> 1987, the rapporteur presented a second draft<sup>138</sup>. According to Pilatti (2008, p. 126), the second version incorporated central issues proposed by the progressive block, such as the limitation of control of national corporations by Brazilian nationals, but maintained the general content of the first draft. In respect to competition policy, a shift can nevertheless be noticed, one that is consistent with the criticisms of the conservative group. Gomes' new draft erased the article that repressed oligopolies, monopolies and cartels, and consolidated the conservatives' proposal in the text<sup>139</sup>.

Gomes' second draft generated many reactions (Pilatti 2008, 127-129). The conservative block presented three ample amendments that, together, redefined practically the whole draft in consonance to their expectations. As they held the majority of the seats on Commission VI, the amendments were easily approved. One amendment that encompassed the disposition on competition policy was proposed by Senator Irapuan Costa Junior, an engineer of the conservative fraction of the PMDB<sup>140</sup>. Despite proposing substantive changes in the rapporteur's draft, such as a more "elastic definition of national corporation" and the

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<sup>137</sup> Both Campos' and Palmeira's declarations are available in the session transcripts quoted on footnote number 27, between pages 156 and 169.

<sup>138</sup> "*Comissão VI – Substitutivo (Nova Redação)*" (Volume 163 of the ANC documents).

<sup>139</sup> Article 1, item V, of the rapporteur's second draft.

<sup>140</sup> Amendment number 6S0471-0, available in the document "*Emendas Oferecidos ao Substitutivo – VI Comissão da Ordem Econômica*" (Volume 162 of the ANC documents).

“denationalization of the exploration of hydraulic energy and of mineral reservoirs in indigenous lands” (Pilatti 2008, p. 132), Costa Junior’s amendment surprisingly resuscitated Gomes’ original text in respect to competition policy – even going beyond it. The amendment defined that “The law shall repress monopolies, oligopolies, cartels, and any other form of abuse of economic power, *admitted the exceptions made in this Constitution*”<sup>141</sup>.

The highlighted text is where the major difference from Gomes’ first draft can be noticed. While the commission’s rapporteur erased the distinction between private and public monopolies in the first draft, Costa Junior’s amendment replicated the text, but explicitly prevented state monopolies from the control implied by that article. Moreover, while Gomes’ second draft incorporated the text that the conservative block was trying to consolidate since the debates in sub-commission VI-A (i.e., not talking about monopolies and oligopolies explicitly), Costa Junior’s amendment reincorporated the original text. Approved by 37 votes against 7 (and 1 abstention), Costa Junior’s amendment became the final draft of Commission VI.

#### 4.1.2 *The conservative comeback: a general and encompassing legal text*

The draft then entered the third stage of the ANC: the Commission of Systematization. This Commission had the role to prepare the final text that was to be voted by the ANC plenary. This stage encompassed a period in which the ANC “lived a long phase of agony”, as “all expectations convulsed, all schedules were delayed, and all conflicts intensified” (Pilatti 2008, p. 147). Composed of 93 of the 559 representatives, it begun its works on June 26<sup>th</sup> 1987, when the rapporteur delivered the first draft of the Constitution to be discussed. Following Pilatti’s description (2008, p. 168), the political forces in the Commission of Systematization were more balanced at this stage especially because all rapporteurs of sub-commissions and commissions were automatically incorporated. However, the conservative block needed only 1 extra vote to attain the majority in any voting poll.

The Commission’s president was a representative from the conservative block: senator Afonso Arinos, of the PFL, a lawyer, law professor, and member of a prominent Brazilian family. The rapporteur, in turn, was a representative of the progressive group: Bernardo Cabral, of the PMDB, also a lawyer, and a representative at the National Congress who had his political rights revoked by the military regime in 1967. After the ANC, in 1990, Cabral

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<sup>141</sup> Article 6, paragraph 1 of Amendment number 6S0471-0.

was appointed Minister of Justice by President Collor de Mello, when the attempts to reform competition policy in Brazil started to intensify, as I will describe in the next sections.

On the first draft that Cabral presented to the Commission of Systematization (article 310, paragraph 1), the text that came from Commission VI on competition policy was integrally replicated<sup>142</sup>. Five amendments were offered to this document, three by representatives of the conservative block, and other two by the progressive group<sup>143</sup>. Ueno, of the PFL, replicated the same amendment he had presented at the previous stages, excluding any mentions to monopolies, oligopolies and cartels (Amendment number 63), and Eraldo Trindade, of the same party, replicated the rapporteur's proposal, but excluded "oligopolies" from the article's text (Amendment number 240). A third amendment of the conservative block, proposed by Nilson Gibson, and economist and lawyer of the PMDB, added a disposition that characterized as crimes usury, the arbitrary increase of profits and the elimination of competition (Amendment number 1953).

On the side of the progressive block, Abigail Feitosa, a doctor of the PMDB, proposed a slightly different version from that coming from the Commission of Systematization (Amendment number 2121). Instead of saying that the abuses of economic power should be repressed, respecting "*the exceptions made in this Constitution*", she changed to "*the exceptions made for state-owned corporations*". Apparently minor, this shift, however, could imply that even state-owned corporations that achieved monopoly but were not granted so by the Constitution would be exempt of competition policy control – something feared by many representatives of the conservative block, as evidenced in various amendments proposed in the previous stages. Also, Mauricio Correa, of the PDT – a lawyer who eventually became Minister of Justice in Itamar Franco's government (1992-1994), when the 1994 competition act was gestated, and was later appointed by the same president as a justice at Brazil's Supreme Court – proposed a version that was virtually equal to the draft coming from Commission VI, and implied only minor textual changes (Amendment number 4239).

Having analyzed the amendments, the rapporteur proposed a second draft<sup>144</sup>. The text on competition policy, then article 304, paragraph 1, was the same of the first draft, and thus equal to that coming from Commission VI. A new round of amendments begun, open to

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<sup>142</sup> "*Anteprojeto de Constituição*" (Volume 219 of the ANC documents).

<sup>143</sup> These were the "*Emendas de Mérito e Adequação ao Anteprojeto de Constituição*" (Volumes 221 and 222 of the ANC documents).

<sup>144</sup> "*Projeto de Constituição*" (Volume 223 of the ANC documents).

proposals from both representatives and society as a whole<sup>145</sup>. I identified a single proposal that was external to the ANC in respect to competition policy. The amendment was authored by the Industrial Federation of São Paulo (FIESP), the Center of the Industries of São Paulo (CIESP), and the Commercial Federation of São Paulo – some of the most powerful associations of industrialists and business owners of the country<sup>146</sup>. Subscribed by more than 30 thousand citizens, the amendment proposed a text that was in consonance with most of the conservative block’s proposals concerning competition policy, i.e. in consonance with the text of the 1967 Constitution.

Another 20 suggestions were made by representatives at this stage. Out of these, 9 were proposed by representatives of the conservative block. They replicated most of the clashes that occurred in the previous commissions, in which the conservative group mostly converged around the submission of state-owned corporations to the control of competition policy, the reduction of the scope of state intervention in the economy, and/or the elimination of explicit mentions to monopolies, oligopolies and cartels.

Trindade (PFL), for instance, submitted two amendments containing the same proposal he had presented at the beginning of the Commission’s works, which excluded “oligopolies” from the norm<sup>147</sup>. In that representative’s views, such suppression would be necessary because “the modern economy is typically oligopolized”, and it is not “the origin of the abuses of economic power are not the existence of oligopolies *per se*”. Oligopolies, in his justification, are “an expression of economic power”, and “the Brazilian legislation is not contrary to economic power, but only to the abuses of economic power”. For rapporteur Cabral, such amendment was to be rejected because “if the modern economy is oligopolized, it is only in the existence of these oligopolies that it is possible to find the origins of the abuses of economic power”<sup>148</sup>. Another example was the amendment proposed by Ricardo Izar, a lawyer of the PFL, whose text was practically the same as the one repeatedly presented by Ueno. His amendment also stated that “both private and state-owned corporations are submitted to this rule”<sup>149</sup>.

The most dissonant proposal within the conservative group was made by Sotero Cunha, a businessman of the PDC, which not only preserved the draft’s text, but expanded it,

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<sup>145</sup> These were the “*Emendas de Plenário e Populares*” (Plenary and Popular Amendments), available at the House of Representatives’ special website on the ANC (Volumes 227 to 231 of the ANC documents).

<sup>146</sup> Amendment number PE00035-1 (Volume 231 of the ANC documents).

<sup>147</sup> Amendments number 1P00217-6 and 1P12498-1 (Volume 227 of the ANC documents).

<sup>148</sup> The rapporteur’s opinions on the presented amendments are available in the document titled “*Parecer sobre as emendas oferecidas em Plenário ao Projeto de Constituição*” (Volume 234 of the ANC documents).

<sup>149</sup> Amendment number 1P12969-9.

proposing the inclusion of “financial conglomerates”, together with monopolies, oligopolies and cartels, as forms of abuse of economic power (Amendment number 1P06669-7). The position of a conservative in proposing such inclusion was surprising, given the tendency of other agents of the same group to converge around less specific norms. However, the rapporteur’s decision on the amendment was also not converging with the progressive block’s attempts to define the text. Cabral, a member of the progressive fraction of the PMDB, rejected the proposal, stating that “the nature of a financial conglomerate is highly diverse from that of a cartel, or of an oligopoly”. For him, there are “critical moments of economic and financial conjuncture of a country in which it is necessary to stimulate mergers, incorporations and other forms of gigantic corporations”. The “size of corporations” was not to be subject of “prejudice” in the Constitution, as “one of the healthy postulates of capitalism is the scale economy, which enables decreasing costs, and at the end benefitting consumers”.

The amendments coming from the so-called progressive block were also more incisive at this point of deliberations<sup>150</sup>. Four of them proposed a more strict and explicit version of the text attacking monopolies, oligopolies and cartels: in the amends of Percival Muniz (a cattle breeder of the PMDB), Olivio Dutra (a labor union leader of PT), Maurício Correa (PDT), and Haroldo Saboia (a journalist and public official affiliated to the PMDB), these forms of economic concentration were to be “*banned*”<sup>151</sup>. In the view of these representatives, practices such as monopolies, oligopolies, and cartels must be “explicitly prohibited in the Constitutional text”<sup>152</sup>, in contrast to what the draft defined as a “repression”. In all cases, the exceptions for state monopoly were made in the amendments.

The rapporteur responded in different ways to this group of proposals. In the case of Correa’s amendment, Cabral rejected the suggestion, stating that monopolies were not to be prohibited *a priori* for three reasons: because there were monopolies granted by the Constitution; the concession of public services often imply monopolies; and because these are activities which are “natural monopolies”. The response to the amendments of Muniz and Saboia were different: in Cabral’s view, the intention of prohibiting certain practices was already embedded in the draft’s original text.

Other amendments by the progressive group infused more encompassing elements into the text defended by their peers. Geraldo Bulhões, a lawyer of the PMDB, proposed an

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<sup>150</sup> Besides the amendments described below, Abigail Feitosa, a progressive of the PMDB, presented the amendment number 1P02003-4, which was practically equal to the draft’s text, diverging only in the final section, where it proposed to “repress [...] any kind of economic exploration, except from state-owned corporations”.

<sup>151</sup> Amendments number 1P001798-0, 1P02583-4, 1P03992-4, and 1P04615-7, respectively.

<sup>152</sup> Excerpt form the justification of Maurício Correa’s amendment.

amendment that was very similar to the one presented by the conservative Sotero Cunha, which included “financial conglomerates” among the forms of abuse of economic power to be repressed by the state (Amendment number 1P17869-0). Haroldo Saboia and Vilson Souza, a progressive and a moderate lawyer of the PMDB, respectively, proposed amendments that included provisions that were similar to those of a structural control over corporations exercised in cases of merger reviews – but in a much more incisive form<sup>153</sup>. In their proposals, when an abuse of economic power was detected, the state could perform “takeovers” of corporations, and determine the split of conglomerates. They were both rejected by the rapporteur, stating that these would be inappropriate specifications for the Constitution, and that some of its content was actually against the principles that “characterize a free and fluid economy”.

On August 26<sup>th</sup> 1987, the rapporteur Cabral presented a third draft, systematizing the proposals presented in reference to the Constitution Project<sup>154</sup>. To some extent, this draft was identical to the previous versions, but it nevertheless encompassed the proposals coming from both forces of the ANC. On article 229, first paragraph, the text determining the repression of monopolies, oligopolies and cartels – “admitted the exceptions made in the Constitution” – was maintained. Additionally, on article 228, third paragraph, Cabral included the text that the conservative block was trying to implement, which stated that “the law shall repress any form of abuse of economic power that aims at dominating national markets, eliminating competition and arbitrarily increasing profits”. As Pilatti explains (2008, p. 163), the draft presented by Cabral at this stage of the ANC generated intense reactions of the conservative group, as it still consecrated many of the core proposals made by the progressive group, such as a strict definition of and several privileges for the national corporation, which basically illegalized ownership by foreigners; the amplification of labor rights; and the limitation of the roles of the military.

A new round of amendments was opened. In comparison to the previous stage, a smaller number of proposals targeting the articles on the abuses of economic power was made to the latest draft<sup>155</sup>. Out of the 17 proposals presented, 8 were made by members of the conservative block, replicating the trends observed in the previous stages. For instance, Ueno, of the PFL, once again presented an amendment to eliminate the explicit mention to oligopolies, monopolies and cartels, incorporating the text of the 1967 Constitution

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<sup>153</sup> Amends number 1P17767-7 and 1P13731-4, respectively.

<sup>154</sup> “*Substitutivo I do Relator*” (Rapporteur’s First Substitutive) (Volume 235 of the ANC documents).

<sup>155</sup> “*Emenda (ES) ao Substitutivo I*” (Volumes 236 to 239 of the ANC documents).

(Amendment number 23430). Domingos (PL) presented the same amendment he had proposed at sub-commission VI-A, which was consistent with the draft's text, but did not distinguish between private and public monopolies (Amendment number 34442).

On the side of the so-called progressive block, the position consolidated was once again present. Most of the amendments kept the explicit reference to the repression of oligopolies, monopolies and cartels. Six of the 9 amendments presented implied the repression on oligopolies, monopolies and cartels. However, two of them merged this text with what article 228 of the then most recent draft stated, thus consolidating a version that combined what was being frequently proposed by the conservative block with what most of the progressive representatives were suggesting. These were the amendments of Severo Gomes (PMDB), the rapporteur of Commission VI, which had oscillated between the two texts in the drafts of the previous stage, and of senator and sociologist Fernando Henrique Cardoso, also of the PMDB, who later became Minister of Finance in Itamar Franco's government and was one of the designers of the Plano Real, one of the stabilization measures of the early 1990s<sup>156</sup>. In 1994, Cardoso was elected President of Brazil. Their amendments proposed the following text:

The law shall repress the formation of monopolies, oligopolies, cartels and any other form of abuse of economic power that aims at dominating the national markets, eliminating competition, or arbitrarily increasing profits, admitted the exceptions provided in this Constitution.

The rapporteur then publicized his opinions on the presented amendments, stating that he partially approved 8 of the proposals. These were all amendments that combined the texts of articles 228 and 229 into a single norm, i.e. merging the provisions inspired by the 1967 Constitution (normally sustained by the conservative block) with the explicit repression of oligopolies, monopolies and cartels (frequently mobilized by the progressive group). On September 18<sup>th</sup> 1987, Cabral presented his second substitutive project<sup>157</sup>. In this version's article 194, third paragraph, the project stated a text that was identical to the amendments presented by Gomes and Cardoso, with one important difference: there was no explicit reference to the "exceptions" to state monopoly.

The only attempt to change the text consolidated by the second substitutive in respect to the article on the abuse of economic power was made by Monteiro, of the PDT. Through

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<sup>156</sup> Amends number 33672 and 35041, respectively.

<sup>157</sup> "*Substitutivo 2 do Relator*" (Volume 242 of the ANC documents).



the motion number 0581<sup>158</sup>, Monteiro suggested the incorporation of the text that was repeatedly presented by him at the ANC, since its first stage: that an Administrative Tribunal was to be created to “repress the abuses of economic power” and “concretize the constitutional principles of the economic order”. On the session of November 6<sup>th</sup> 1987, this proposal was once again debated<sup>159</sup>. Cesar Maia, an economist of the same PDT, made an initial defense of the project. Maia called for the support of other representatives to Monteiro’s amendment by stating that:

In the last years, CADE – the administrative tribunal that had the responsibility to execute [the] attributions [to repress the abuses of economic power and the action of monopolies and oligopolies] – was practically extinct. Today, it is still, subordinated to the Ministry of Justice, swollen and without any functions to which it is entitled by law.

This was the first time, since the initial references of the very same Monteiro at the early stages of the ANC, that CADE was mentioned on a substantive debate. Maia added that such proposal would be a solution to CADE’s ineffective situation, since

[...] the Legislative power, through this administrative tribunal, and superseding the complicity that may occur with the Executive power, will be able to effectively perform the task to repress and monitor [the abuses of economic power].

José Jorge, an engineer of the conservative PFL, rebutted the defense of Monteiro’s proposal by Maia. In his view, the Judiciary would be “enough to effectively put in practice what is provided by the Constitution”. And he added: “We have a new, ample judicial structure, in a certain way modernized due to the new Constitution”. The proposal to create a new organ in the administration, “augmenting the structure of government”, would be unnecessary, as the Judiciary and the Executive, through CADE, could accomplish the objectives stated by the new Constitution. Virgílio Távora, of the conservative PDS, adopted a different position. He supported Monteiro’s proposition, affirming the “absolute need” of such amendment, as “CADE was extinct, and didn’t work”. In a similar line, Francisco Dornelles, of the conservative PFL, manifested that “the creation of such tribunal is an aggression to the Judiciary”, as “[t]here is no sense in creating an administrative tribunal to perform the typical activities of the Judiciary”. Right after Dornelles’ speech, the voting on

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<sup>158</sup> This was a motion that required that the amendment number ES-32032-7 was to be discussed by the whole Commission of Systematization, once it was rejected by the rapporteur.

<sup>159</sup> The transcripts of this debate are available at the Session Report of the 32<sup>nd</sup> Extraordinary Meeting of the Commission of Systematization, published at the Supplement C, pages 143-144, of the ANC’s Diary.

Monteiro's proposal begun. By 45 votes against, 43 in favor, and one abstention, the amendment was rejected.

Following Pilatti's (2008) classification, out of the 43 votes in favor of Monteiro's amendment, 36 came from representatives of the progressive block, 3 of moderate congressmen of the PMDB, and other 4 of conservative parties. These votes included the only 8 representatives of the Commission of Systematization that were affiliated to what Pillati (2008) defined as left-wing parties. On the side of those who rejected the amendment, the predominance was reversed: 36 of the 45 congressmen were of the conservative block, other 5 were moderate representatives of the PMDB, and only 4 were classified by Pilatti (2008) as being progressive (all of the PMDB). Therefore, at this point, those who supported a text *without* explicit references to monopolies, oligopolies, and cartels were mostly contrary to the proposal of reforming CADE.

The norm on the abuses of economic power then advanced to the next and final stage of deliberation of the ANC: the Plenary. At this point, the project of constitution produced by the Commission of Systematization ("*Projeto A da Comissão de Sistematização*")<sup>160</sup> was to be discussed by the whole Assembly. What is deemed as competition policy's foundational text was then inscribed on the fourth paragraph of article 202 of the project.

In January 1988, another round of amendments was opened. In respect to the article on competition policy, three proposals can be identified<sup>161</sup>. One was a collective amendment presented by the so-called "*Centrão*", the union of conservative representatives at the ANC, subscribed by 292 representatives. As Pilatti (2008, p. 233) maintains, in general lines, the amendments proposed by the "*Centrão*" preserved the text of Project A, only including minor alterations and selective suppressions. In doing so, the conservative block incorporated important aspects of the agenda initially mobilized by the progressive group, submitting it to a "treatment that was compatible with the conservative interests" (Pilatti 2008, p. 233). The proposal regarding the abuse of economic power is illustrative of this trend. Through the amendment 2P01043-1, which encompassed the whole chapter on the economic order, the provision on competition policy suffered only a slight change in comparison to the final project submitted by the Commission of Systematization: the mention to the "arbitrary increase of profits" was eliminated<sup>162</sup>.

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<sup>160</sup> Volume 251 of the ANC documents.

<sup>161</sup> "*Emendas (2P) de Plenário e do Centrão*" (Volumes 254 and 255 of the ANC documents).

<sup>162</sup> The text of the amendment is at page 804 of Volume 255 of the ANC documents.

More than two thousand individual amendments were also presented at this stage, but only two affected Project A's article 202, fourth paragraph. Monteiro, of the PDT, once again presented an amendment to include the creation of an Administrative Tribunal in the Constitution (Amendment number 2P01275-2). It was the fourth time since the preliminary stage of the ANC. Maluly Neto, also a lawyer, but member of the conservative PFL, proposed an amendment which implied the most substantive changes on the project that came from the Commission of Systematization (Amendment number 2P01336-8). In consonance with the trends of the conservative block during the previous stages, his amendment did not mention oligopolies, monopolies and cartels, replicating a redaction that was similar to the 1967 Constitution's. Similarly to Monteiro's, it also included "the creation of an agency to repress the abuses of economic power and to protect consumers". The individual amendments of Monteiro and Neto were rejected by Cabral, who was still the rapporteur in charge of systematizing proposals. In both cases, the motivation was that the creation of a specialized tribunal would be "onerous" and "reduce the efficiency of services", and imply an unnecessary "increase of the Judiciary's structure, which is fully capable of achieving the objective of the amendment".

On April 27<sup>th</sup> 1988, together with other dispositions about the economic order, article 202 was to be voted on. At this point, the conservative representatives grouped around the "Centrão" were negotiating with the progressive forces of the ANC, as they faced important defeats in other matters, despite being the majority (Pilatti 2008, p. 237). In the discussion of article 202 it was no different. A merger of amendments that affected that norm was presented, signed by representatives of both the progressive and conservative blocks<sup>163</sup>. The proposal implied a new text for the fourth paragraph of article 202, revitalizing the version that was frequently proposed by the conservative group since the works of sub-commission VI-A: "*The law shall repress the abuse of economic power that aims at dominating the markets, eliminating competition, and arbitrarily increasing profits*". Oligopolies, monopolies, and cartels were absent of the amendment, as well as the explicit reference to the exceptions to state monopoly.

The proposal was approved almost unanimously by the representatives that attended the session: 464 votes in favor, 6 against, and 5 abstentions. Those who opposed the amendment were all of the conservative group. Since the merged amendment encompassed

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<sup>163</sup> As Pilatti (2008, p. 314) maintains, the merger of amendments was the "adequate vector" found by the conflicting forces of the ANC to enable the elaboration of the Constitution to follow "as a rule, the path of consensus, which isn't built unless the majority concedes something".

the whole text of Project A's article 202<sup>164</sup>, and there were no individual manifestations on its merit, it is not possible to conclude that the opposition to this proposal was connected to the article on the abuse of economic power, especially because the content of paragraph four was precisely what representatives of the conservative group were trying to implement since the first deliberations of the ANC.

The text that resulted from this amendment is precisely what became consolidated in the final version of the Constitution. The rapporteur eventually presented a second draft to the plenary – “*Projeto de Constituição B*” –, which restated the approved proposal on the fourth paragraph of article 179. A single a minor amendment was presented to the text<sup>165</sup>. The last two drafts – “*Projeto de Constituição C*” and “*Projeto de Constituição D*”<sup>166</sup> – replicated the text that resulted from the collective amendment, which was submitted to a minor grammatical correction. On September 22<sup>nd</sup> 1988, the final voting session took place, and the latest draft of the Constitution was endorsed by 474 of the 495 representatives who voted. Even those who manifested their opposition to the final text – notably the PT's leader at the ANC, Luís Inácio Lula da Silva – declared that they would subscribe to the text (Pilatti 2008, p. 307).

Thus, on October 5<sup>th</sup> 1988, the Constitution was promulgated. In its article 173, paragraph 4, the text on the abuse of economic power that many representatives of the conservative block were pushing forward since the initial stages, and which was only eventually incorporated through the merger of amends by both forces of the ANC, came into existence: “*The law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase of profits*”. It thus left to a specific law – i.e. the competition act of 1962, or another law to be created – the task of operationalizing the constitutional norm.

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Departing from the legislative process that resulted in the Constitution of 1988, some observations about the actual production of what is said to be the foundational norm of Brazilian competition policy can be sketched. First, although the description above – centered

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<sup>164</sup> Other important and polemic issues were included in the amendment, such as the limits of the direct exploration of economic activities by the state (article 202, *caput*), and the definition of corporate liability (article 202, paragraph 5).

<sup>165</sup> Amendment number 2T01840-1 (par of the “*Emendas (2T) ao Projeto B*” – Volume 301 of the ANC documents). This amendment was proposed by Genésio Bernardino, of the PMDB, and suggested the elimination of the details that defined the abuse of economic power, implying a more succinct text.

<sup>166</sup> Volumes 314 and 316 of the ANC documents, respectively.

on the debates around competition policy – may lead to the wrongful impression that this topic was one of the major arenas of disputes at the ANC, its character was secondary in respect to other topics<sup>167</sup>. The number of amendments presented to the norms about competition policy in comparison to other articles that structured the economic order is an indicator of that. For instance, while only 20 amendments in the Commission of Systematization targeted norms on competition policy, there were 153 proposals to change articles that dealt with the definition of and the establishment of privileges to the national corporation<sup>168</sup>, and 143 in reference to the norms that defined property rights over land, and the conditions of expropriation<sup>169</sup>. If not entirely secondary, competition policy was most intensely disputed when it touched some of these heated issues, as in the struggles to exempt or not state owned monopolies from the control of the so-called “abuses of economic power”.

Second the agenda of competition policy in the ANC, although secondary, contained several crucial aspects in respect to policy-making and institutional design, even if at an embryonic stage. Some embryos were planted, and eventually sprouted in the development of reform in the 1990s and 2000s. One example was the refraction to submit “financial conglomerates” to competition regulation, often articulated as undesirable due to the “need” of concentration in this sector in certain historical moments – something I explore in Chapter 6. Another example was the debate around economic concentration. More than one time, the rejection of the text that explicitly mentioned monopolies, oligopolies, and cartels was based on the idea that the “modern economy” was inheritably (or even desirably, in the case of “scale economies”) oligopolistic, and thus the repression – or, more radically, the “banning” of such form – would be erroneous. These are possible indicators of the embryonic roots of the constitutional norm on competition policy in a neoliberal economic thinking that was starting to develop in Brazil.

Other embryos, however, were aborted at the ANC. The most interesting example of such was the attempt to create a reformed antitrust authority. In the process of elaborating a new constitution, the initiatives to reform what was recognized as an “inexistent” CADE, or to create a new institution with its roles looked like the crusade of a solitary *Don Quijote*,

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<sup>167</sup> As Pilatti (2008, p. 4-5) shows, among the most heated topics, which generated a polarization between the conservative and progressive groups at the ANC, were “the distinction between national and foreign capital, land property, the exploration of oil and other minerals, the potentials of hydroelectric energy, and telecommunication services”.

<sup>168</sup> These amendments included article 226 of the rapporteur’s First Substitutive to the Commission of Systematization, and its three additional paragraphs.

<sup>169</sup> Articles 245 and 246 (including its three paragraphs) of the rapporteur’s First Substitutive to the Commission of Systematization.

fighting windmills. The “*ingenious gentleman*” at the ANC was representative Brandão Monteiro, of the PDT, who presented five amendments creating an Administrative Tribunal to enforce the norm on the repression of abuses of economic power. The proposal, whose institutional design pended to a legal rather economic profile, was often interpreted as unnecessary, and the Judiciary was viewed as the proper arena of regulation.

It seems that the agenda of implementing modern regulatory agencies was still not available as an institutional alternative at the time of the ANC, and would only become a concrete policy alternative later on. Moreover, those who supported the version of the constitutional norm that is said to be the foundational rule of a modern competition policy often rejected the proposal to reform of CADE. As I will argue in the next sections, it would be only later, and through the hands of a small group of professionals with different profiles, that such agenda of institutional reform would converge with the ideals that were embedded in the text that came out victorious from the process of creating a new constitution.

Third, the process of elaborating a new Constitution was far from consensual, even in a secondary arena of debates as competition policy. The creation of an article to repress the abuses of economic power was permeated by several clashes, which, as in other domains (economic or not), tended to parallel the distinct political forces present in the Assembly. On the one hand, the progressive block often supported a text that explicitly mentioned monopolies, oligopolies and cartels as forms of abuse of economic power that were to be repressed, and which exempted state monopolies from such control. On the other, conservatives (and industrial associations) frequently proposed a version that neglected the ban to oligopolies and monopolies, or the establishment of their repression as a constitutional principle, and which tried to submit state-owned corporations to the same rule, or at least didn't exempt them explicitly. The victorious position was that proposed by members of the conservative block since the beginning of the ANC. In turn, those defeated were mostly part of the progressive block, which was trying to push forward an agenda of an economically interventionist state<sup>170</sup>.

Another important aspect that can be observed in the description of the legislative process is that on both sides of the dispute, the debate around competition policy was dominated by representatives who were lawyers and economists of a traditional profile. On

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<sup>170</sup> In some cases, representatives of the conservative group supported proposals of the progressive group in respect to competition policy, including versions of the text that mentioned monopolies, oligopolies, and cartels. A possible explanation for that relies on an element that is hardly captured by the dichotomy progressive/conservative: economic nationalism. As Pilatti (2008, p. 284) identifies in the voting on other articles, the dissidence of members of the conservative block was often facilitated when “interests of statist-nationalist character were at stake”.

different sides of the ideological spectrum, lawyers had what could be seen as the profile of a “politician of the law” (Dezalay and Garth 2002a). Economists who most directly shaped the norm on competition policy were still not those often identified with neoliberalism, as described in Chapter 2. With the exception of Roberto Campos, and Delfim Netto, both economists and lawyers had their source of legitimacy more connected to a long involvement in politics, than to their academic or technocratic profiles.

This may be another reason for the still incipient agenda of reform that took place at the ANC. A substantive and specific initiative to transform the institutional design of competition policy would only appear some time later, through the hands of professionals and experts on competition policy. Most of them, as I will describe in the next sections, had a trajectory that was connected to the academy and/or professional practice, and were aligned with the institutional and economic orthodoxy that was spreading since the late 1980s.

The centrality of these agents that were still absent in the ANC becomes even clearer if the position taken by some agents who were representatives at the Assembly and later became political exponents of the Brazilian government in the early 1990s is compared to the actual development of reform under their rule. Maurício Correa, of the PDT, who presented an amendment that I classified as a “radical” version of the progressive proposal – *banning* the formation of oligopolies, monopolies, and cartels – was also appointed Minister of Justice in Itamar Franco’s government. Fernando Henrique Cardoso, the author of an amendment that merged together the texts of the progressive and conservative blocks, was Franco’s Minister of Finance, and was later elected President.

It was during the period in which both Correa and Cardoso occupied important positions in the national government that the 1994 law started to be gestated. The development of reform under the 1994 law nevertheless conflicted with important aspects of their proposals at the ANC – especially the explicit repression or banning of oligopolies. Thus, if they can be deemed as the best representation of the “government” during which the 1994 reform took place, and their positions in respect of competition policy were those expressed in the ANC, the driving sources of reform probably resided outside of the “government”.

As I will argue in the next section, it wasn’t the “big names” of government who advanced the reformist agenda in the 1990s, but rather agents at an intermediate level of the state administration and professionals who were experts in competition. They were the ones in contact with the institutional, legal, and economic technologies necessary to implement a

“modern” competition policy – something that apparently was still not available at the time of the ANC.

#### **4.2 Specific antecedents of reform in the 1980s**

As discussed, competition policy occupied only a limited space within the broad spectrum of topics dealt by the ANC, and even within the secondary level of importance it received, questions of institutional design were not advanced at that time, and some were even aborted. However, specific initiatives to revert what seemed to be the consensus that CADE was inoperable under the 1962 legislation started already a few years before the draft of a new Constitution, continued in parallel to it, and intensified after its promulgation. These attempts are often absent in mainstream narratives, and when present, they are deemed as unsuccessful or limited in promoting the construction of a modern competition policy in Brazil. In this section, my goal is to describe the specific antecedents of what would eventually become the steps resulting in the successful reform of 1994, and identify possible answers for why they are not seen as representative of a new phase of competition policy in Brazil, and as a corollary, what makes the later movement of 1994 an emblem of a “modern” regulatory system. In doing so, it will be possible to shed light on the novelties brought by the 1994 reform, and, as I will maintain, on its roots in neoliberalism.

I deployed the same strategy of reconstructing the reformist impulses around competition policy through the agents that were involved in these attempts to transform competition policy in Brazil. Three moments in which changes related to competition policy can be identified prior to the 1994 reform. One is frequently mentioned in mainstream narratives as the first initiative of a period of liberalization and deregulation, which would be eventually consolidated by the 1994 competition act: the 1991 legislation creating the National Secretariat of Economic Law (law number 8.158 of 1991). However, during fieldwork I was able to identify two other moments in which a reformist agenda was in place, and which were not anticipated by the available knowledge on competition policy. One occurred between 1984 and 1986, in which a series of presidential decrees was enacted to transform the institutional design of CADE. Another moment was in 1988, in parallel to the ANC, when the project for brand new legislation was written.

These initiatives occurred at an infra-constitutional level, around laws, decrees and ordinances, and were oriented to change the specific legislation on antitrust, its procedures and the institutional design of CADE. By no means, however, can they be automatically



linked as stages of an immutable trajectory. As I will try to show, each moment involved its own idiosyncrasies, to a great extent determined by the political context in which they occurred, and by the agents who struggled around the field of state power. Nevertheless, one important element that was transversally present in all those years, and which also encompassed the reform that resulted in the 1994 law, was the inflationary crisis in Brazil. As the graph below indicates, between 1979 and 1994, inflation rates were extremely elevated in the country.

**Figure 7.** Annual inflation rates (%/year) – 1970-1999 (IGP-DI index)



**Source:** author's elaboration based on IPEA Data (FGV/Conj. Econ. - IGP)

Oscillations and eventual decreases in the period were associated with the implementation of different economic plans of stabilization, in 1986 (*Plano Cruzado*), 1989 (*Plano Verão*), 1990 (*Plano Collor 1*), and 1991 (*Plano Collor 2*). These plans were evidently of limited efficacy, as inflation rose in the months that followed each of them (Fontes et al 1998, p. 78), at least until 1994, when the *Plano Real* was established. The struggle against inflation was determinant in all these episodes, and impacted them in different ways.

#### 4.2.1 A “governmental” policy between 1984 and 1986

The first initiatives to transform the institutional design of CADE in Brazil after the 1962 legislation can be observed in the mid-1980s. In October 1984, President João Figueiredo, the last military figure to govern Brazil, and his Minister of Justice, the lawyer Ibrahim Abi-Ackel, signed a decree that “altered the composition of the Administrative Council for Economic Protection”<sup>171</sup>. In this norm, CADE was linked to the 1962 legislation, and was said to be tasked with “investigating and repressing the abuses of economic power and its implications to the popular economy and to consumer rights”. Although already talking about consumer rights, the decree replicated what mainstream narratives often see as an emblem of the interventionist past of antitrust in Brazil: the protection of the “popular economy”.

The decree fundamentally altered CADE’s composition. While the 1962 law established the participation of a president and four other members with “notable legal or economic knowledge”, all appointed by the President, Figueiredo’s ruling increased the number to seven, and detailed the criteria for appointments: all commissioners had to be public officials and “representatives” of Ministries (quite oddly from an orthodox approach, including organs such as the Ministry of Agriculture and the Ministry of Health) and of the Presidency. CADE was thus clearly supposed to be a *governmental* organ. I was not able to reconstruct through interviews or documental sources the production of this decree, and thus to identify who was actually mobilizing the changes in CADE’s composition and why. However, the timid reform undertaken at this point seems to encompass what mainstream narratives refer to as an organ of governmental intervention. Despite this change, CADE was to a large extent still not operating in 1984, and the composition of seven members imposed by the decree was never actually implemented.

Between 1985 and 1986, under the Presidency of José Sarney, another spasm of timid change can be identified. On May 13<sup>th</sup> 1985, a presidential decree determined the transfer of CADE from Rio de Janeiro to Brasília<sup>172</sup>. In 1986, two other decrees were issued. In January, together with his Minister of Justice, Fernando Lyra, Sarney issued a decree that established the “Regulations of law 4.137/62”<sup>173</sup>. This decree resulted from the work of a commission

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<sup>171</sup> Decreto number 90.283, of October 8<sup>th</sup> 1984.

<sup>172</sup> Decree number 91.293, of May 31<sup>st</sup> 1985.

<sup>173</sup> Decree number 92.323, of January 23<sup>rd</sup> 1986.

assembled by Lyra's Secretary-General of the Ministry of Justice, José Paulo Cavalcanti Filho.

As revealed in an interview with Mauro Grinberg – a lawyer who participated in that commission to produce the decree and was appointed a commissioner to CADE in 1986 – Cavalcanti Filho's father-in-law, Armando Monteiro Filho, was a close friend of Tancredo Neves, with whom Sarney had been elected vice-president in 1985. An engineer from Recife, Monteiro Filho served as Minister of Agriculture in the government of João Goulart between 1961 and 1962, appointed by the then prime-minister Tancredo Neves. Curiously, he was also the son-in-law of Agamenon Magalhães, the author of a legal project of 1948, which would eventually become the 1962 competition act.

**Table 12.** Trajectory: Cavalcanti Filho

<p><b>José Paulo Cavalcanti Filho</b></p> <p>A lawyer graduated from the Federal University of Pernambuco's law school (UFPE), in Recife, and member of the Academy of Arts and Letters of the state of Pernambuco, Cavalcanti Filho was appointed president of CADE in 1985, and was later a member of the Council of Social Communication (an advisory organ of the National Congress), a consultant for UNESCO and the World Bank, and is currently a member of the National Truth Commission, created by the federal government to investigate the crimes perpetrated during the military dictatorship in Brazil.</p>
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**Source:** elaborated by the author

Cavalcanti Filho was of central importance to the initiative of producing a decree on competition policy. Far from being a governmental priority, it was rather the initiative of a lawyer who occupied an intermediate political position in the federal administration. As Grinberg's interview suggests,

It [the proposal for a decree on CADE] started from the initiative of José Paulo, who believed in it. It started from a practically isolated initiative of José Paulo, which was obviously confirmed by the Minister. But I don't believe the Minister had participated actively in it. He just gave support to José Paulo.

Cavalcanti Filho invited six other members to join the commission that would produce the decree. One of them was precisely Grinberg, a lawyer and close friend of Cavalcanti Filho's father. The other members were the lawyers Miécio Oscar Uchoa Cavalcanti Filho, Renato Rodrigues Tucunduva Júnior, Antônio Evaristo de Moraes Filho, and Fábio Konder Comparato. The only non-lawyer to participate in the commission was Clóvis de Vasconcelos Cavalcanti.

**Table 13.** Trajectories: Grinberg, Uchoa Cavalcanti Filho, Tucunduva Júnior, Moraes Filho, Comparato, Vasconcelos Cavalcanti

**Mauro Grinberg**

Grinberg was a law graduate from the University of São Paulo (USP), but began his career as a lawyer and law professor in Recife, Pernambuco, in the area of business law. He was a lawyer (public official) of the National Treasury Attorney's Office (*Procuradoria da Fazenda Nacional*), and in the early 1980s moved to Brasília to work in the area that handed external lending made by the federal government.

**Miécio Oscar Uchoa Cavalcanti Filho**

Graduated in law from UFPE in Recife, and by the time of his appointment a recent Public Prosecutor of the Republic. He previously served as a legal assistant of several subsidiaries of the *Grupo Gerdau*, the biggest Brazilian corporation in the steel sector, in Northeast Brazil. Between 1986 and 1987, he worked with Secretary José Paulo Cavalcanti Filho in two other commissions that drafted legal projects on the expropriation of urban settlements, and access to information.

**Renato Rodrigues Tucunduva Júnior**

A law graduate from the USP, who also held a bachelor's degree in business management from the Fundação Getúlio Vargas of São Paulo, and a master's degree from the University of California, at Berkeley, where he presented a thesis on the protection of consumers in Brazil. By the time he was invited onto the commission, Tucunduva Júnior was a lawyer at a firm founded by his father, and worked in the area of consumer law. In 1986, he also joined the National Council for Consumer Protection, an organ of the by then existent Ministry of Deburocratization.

**Antônio Evaristo de Moraes Filho**

Graduated in law from the State University of Rio de Janeiro (UERJ), Moraes Filho specialized in criminal law, and defended several well-known people politically prosecuted during the military dictatorship. Like his father, who was also a prominent criminal lawyer and founder of the Socialist Labor Party (*Partido Operário Socialista*) in 1910, Moraes Filho was directly involved in politics. He contributed to the creation of the Brazilian Socialist Party (*Partido Socialista Brasileiro, PSB*).

**Fábio Konder Comparato**

Comparato graduated in law at the USP, and held a PhD in law at the University of Paris 1 – Sorbonne. A full time law professor, specialized in business and economic law, he has published extensively on the fields of human rights and legal philosophy. He was an activist lawyer during the military dictatorship, being directly involved with human rights organizations. The interest in business law, mostly academic and critical, is explained by Comparato as a means that “enabled me to enter into the arcane features of capitalism, to un-mount the whole capitalist structure that frames social life”<sup>174</sup>. In his late works on human rights, he has also produced specific criticisms of the effects of economic globalization in Brazil (e.g. Comparato 1999, p. 174).

**Clóvis de Vasconcelos Cavalcanti**

An economist from UFPE, Vasconcelos Cavalcanti held a specialized degree in economic theory from the FGV-RJ, and a master's in economics from Yale University. As he describes his own trajectory in a personal website, “he decided not to pursue a PhD at Yale because he considered that the best doctorate would be experiencing the reality in Brazil, and because he disagreed with the content of the economic theory taught in the U.S.”<sup>175</sup>. He worked as a professor of economics, and later became a permanent researcher at the Joaquim Nabuco Foundation, a public research organism since 1979 part of the Ministry of Education and Culture. A member of the International Celso Furtado Center for Development Policies, a think-tank named after one of the exponents of Latin American structuralism, and of the Board of Directors of CLACSO (the Latin American Council on Social Sciences, renown as an association of academics who are strong critics of neoliberal policies in the region), Vasconcelos Cavalcanti maintained in an interview that he has “always been a heterodox”, who “liked mathematical models, but hated its alienation of reality”, and opposed the “empire of the market in the functioning of the economy”.

**Source:** elaborated by the author

<sup>174</sup> Interview conceded to *Revista Caros Amigos*, number 163, October 2010.

<sup>175</sup> Section “Biography”, available at Vasconcelo Cavalcanti's personal website: <<http://cloviscavalcanti.blogspot.com.br/p/biografia.html>>. Last accessed on October 17<sup>th</sup> 2013.

As the trajectories illustrate, the group formed by José Paulo Cavalcanti Filho was almost entirely composed by lawyers of a similar profile, who tended to combine political involvement against the dictatorial regime, and expertise in traditional areas of the law. The group was also mostly composed of professionals who followed careers as academics or public officials. In their trajectories, two lawyers – Comparato and Moraes Filho – were also long involved with left-wing groups before being recruited to the commission.

Three of the lawyers were in some way connected with the law school of Recife, in Northeast Brazil, the historical heir of the first law school built in the country, together with USP's law school. This common relation to UFPE is a possible indicator of the social ties existent in the group. In the case of Grinberg and Cavalcanti Filho, they were explicitly mentioned in an interview, but it is very likely that Miécio Cavalcanti was also part of a close circle of acquaintances of Cavalcanti Filho. Although three of the agents coming from Pernambuco held the same surname – Cavalcanti – I was not able to identify if they were related or not, especially because it is a relatively common family name.<sup>176</sup> Another common origin for an important part of the commission was the USP: three lawyers were graduates at that law school in São Paulo.

The group was not specialized in competition policy, although two of its members were previously involved with business law.<sup>177</sup> Their traditional profiles, and the hegemony of lawyers in the commission are reflected in the shape of the decree they elaborated. Similarly to the text of the 1967 Constitution, and that which would eventually be approved by the ANC, it defined the abuses of economic power as the domination of markets, the elimination of competition, and the arbitrary increase of profits. The decree also detailed the application of the 1962 law in respect to sanctions, fines, judicial procedures, the participation of the Attorney General's Office, deadlines, and the administrative procedures that should be analyzed by CADE. The commission did not aim to infuse many novelties into the regulatory system in place by that time, but rather to operationalize the 1962 law. As Grinberg explained:

[José Paulo Cavalcanti Filho] was a supporter of the idea that a good law is an old law, one that has undergone interpretation through jurisprudence, that has been read, studied and examined. So instead of creating a commission to produce a new law, [José Paulo] said 'Let's do a decree' – which is an act of

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<sup>176</sup> The economist Vasconcelos Cavalcanti mentioned in his interview that the other "Cavalcanti" were "distant relatives", and that he didn't know any of them in person before being invited to compose the commission.

<sup>177</sup> As Grinberg recalled in an interview (Dutra 2009, p. 18), "the meetings [of the commission] were very rich because, *as nobody had experience in the subject*, we did brainstorming. We put ideas on the table and debated them" (my italics).

the Executive power – ‘Making adaptations so the existent law can produce effects’.

The changes brought by the decree were therefore of a legal character, thought to work within the framework of the 1962 law, and its concerns were restricted to repressing anticompetitive conducts – i.e. there were still no ideas about the regulation of economic concentrations. The language of economics was thus mostly absent from the commission’s work. As Grinberg explained when asked about the presence of an economist in the commission:

At that time, antitrust law was still not seen with the economic concerns it mobilizes today. There was no economic analysis in Brazil, and CADE’s decisions at that time had no economic analysis, as it would eventually include. I would say that decisions were much more crude. [...] It was a process of learning. We were learning to work with economic concepts inside the law.

Still far from what would characterize the reform toward a modern system of competition policy in Brazil, the only economist present on the 1986 commission was more attuned to structuralist economics, macroeconomic issues and the tradition of Celso Furtado, than with what would eventually become hegemonic as the economic theory of neoliberalism. Moreover, as Vasconcelos Cavalcanti stated in an interview, measures of economic deregulation and privatization were not in the horizon of the commission’s work, as “neoliberalism was not prestigious by then”.

Despite the differences of the composition of this commission from those that would eventually be formed in the subsequent years, and the content they would try to infuse into the reform of competition policy, the construction of the 1986 decree is narrated as part of the same reformist struggles that would permeate the late 1980s and early 1990s: to manage inflation through mechanisms other than direct price control, and to make CADE an effective instrument for such purposes. In Grinberg’s explanation of the commission’s initiative, provided in an interview, this narrative is evidenced:

In this commission we created the bases for the new functioning of CADE, which effectively started in the upcoming year, in the Ministry of Paulo Brossard [...] We were swimming against the tide [...] because in the whole world [price control mechanisms] were excrescences. Price control should be made through healthy competition, not through the imposition of governmental authority.

The second reformist initiative that I identified in 1986 was related to another decree, enacted under the number 93.083 of August 7<sup>th</sup>. Still under the presidency of Sarney, but now through the hands of a new Minister of Justice – Paulo Brossard de Souza Pinto –, the decree targeted CADE’s composition. Brossard was a law graduate from the Federal University of Rio Grande do Sul (UFRGS), specialist in civil and constitutional law, law professor, and had a long involvement in regional and national politics.

The decree signed by Sarney and Brossard maintained the general line of the previous texts, which gave CADE the power to “repress the abuses of economic power and its implications to the popular economy”. It nevertheless substantially transformed the mechanisms of appointment. Instead of stipulating the precise origin and functions of the commissioners to be appointed, as was the case in the decree produced in 1984, Brossard’s decree defined the composition of one president and four commissioners, all indicated by the Minister of Justice, and appointed by the President of the Republic. No other criteria beyond the possession of “notable legal or economic knowledge”, an “immaculate reputation”, and being older than 30 years were imposed.

The decree also ended the composition of CADE determined by the 1984 norm, and thus Brossard and Sarney were entitled to reassemble the Council. Although by then José Paulo Cavalcanti Filho had left the Ministry, the new composition constructed by Brossard incorporated Grinberg, who was appointed commissioner in 1986. The appointment to CADE’s president was Werter Rotunno Faria, a friend and companion in political activities at UFRGS of Brossard’s. Faria was a law professor and a retired judge, having specialized in business law. Prior to his recruitment to CADE, he had occupied several directive positions in financial institutions, and acted as a legal assistant to different business associations, such as the Federation of Rural Associations of Rio Grande do Sul (Farsul), and the Federation of Commercial Associations of Rio Grande do Sul (Federasul).<sup>178</sup>

The other lawyers added by Brossard were George Marcodes Coelho de Souza, a former lawyer of the Brazilian Central Bank, and Ana Maria Ferraz Augusto, a specialist in economic law at the Federal University of Minas Gerais (UFMG), who later became a judge and was replaced by Maria Isabel Vianna de Oliveira Vaz, also a lawyer and specialist in economic law from UFMG.<sup>179</sup> The only non-lawyer in CADE was Geová Magalhães

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<sup>178</sup> Information retrieved from the preface authored by his wife, Guiomar T. Estrella Faria, published in a book organized in tribute to Faria, who died in 2005 (Accioly 2008).

<sup>179</sup> The appointment of Maria Isabel de Oliveira Vaz to replace Ana Maria Ferraz Augusto is an illustrative episode of the social ties working in the field of competition policy. In 1989, Augusto withdrew from CADE, as she was approved to be a judge in Minas Gerais. Together with Werter Faria, she consulted the by then Minister

Sobreira, an economist from Ceará, Northeast Brazil. A graduate in Literature, Sobreira possessed master's degrees in economics and economic law, and served in the Secretariat of Economic Planning of the Presidency of the Republic.

Similarly to the commission that elaborated the regulations of the 1962 law between 1985 and 1986, the agents involved in the drafting of the decree altering CADE's composition, and those who joined the first Council under this norm, were mostly lawyers with a profile that combined political involvement and expertise in traditional areas of the law. The only economist was also academically and professionally connected to a developmentalist approach to economics. Social ties were equally important in the formation of the group of commissioners that would stay in CADE until 1990, especially in the case of Brossard and Faria, who were close friends and came from the same academic circle, and in the case of two lawyers from UFMG.

During the period this decree was in effect, CADE met once a month in Brasília, and decided the cases based on the 1962 law. As Grinberg reports in an interview, commissioners didn't have their own offices, and CADE had no permanent structure, library and files (interview with Dutra 2009, p. 22). According to this former commissioner, during the 1980s CADE was still embryonic, and its decisions had no "economic sophistication". Its limited effects on regulating the economy were attributed to the government, as CADE still faced strong opposition from other governmental spheres, especially from the Ministry of Finance, who according to Grinberg "was truly horrified by CADE", and centralized economic decisions.

The content of the initiatives to transform the functioning of CADE started to change in only in 1988, when new agents mobilizing the reformist agenda entered the scene. The political context was also about to shift by the end of the 1980s, and as a consequence, the agenda of constituting a modern competition policy system gained new contours.

#### 4.2.2 *The "modern" yet unsuccessful initiative of 1988*

In 1988, still under the government of Sarney, and in parallel with the final stages of the ANC, another commission of professionals was formed to propose changes in the

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of Justice, Oscar Dias Corrêa, a law professor from UFMG, about her replacement. At that time, Corrêa's personal advisor in the Ministry was Orlando de Oliveira Vaz Filho, a lawyer graduated from the UFMG, who was married to Maria Isabel de Oliveira Vaz. Both Corrêa and Vaz were former member of the Democratic National Union (UDN), a right-wing party that opposed Vargas' regime during the 1940s and 1950s. As Maria Isabel recounts in a memoir about her studies at UFMG (Vaz 2012, p. 55-56), Augusto suggested to the Minister that he invite her replacement "at home". He then invited Vaz to become a commissioner in CADE.



Brazilian competition law. Through an “Order of CADE’s President”, in August 1988 Werter Faria appointed four lawyers to “elaborate, within thirty days, a legal project related to the repression of the abuse of economic power, in light of the project of Constitution”<sup>180</sup>. By that time, the ANC was debating the constitutional text at the Plenary stage, and the norm that would become the constitutional text was already dominant. The lawyers appointed by Faria for the task of operationalizing what was about to be approved by the ANC were Alberto Venancio Filho, Carlos Francisco Magalhães, José Inácio Gonzaga Franceschini, and Washington Peluzo Albino de Souza.

**Table 14.** Trajectories: Venancio Filho, Magalhães, Franceschini, and Souza

<p style="text-align: center;"><b>Alberto Venancio Filho</b></p> <p>Venancio Filho graduated in law from the “National School of Law” of the “University of Brazil”, later named Federal University of Rio de Janeiro (UFRJ), in 1956. A lawyer since 1957, he worked for the Canadian multinational Rio Light, and was also actively involved in academic publications and policy-making in the areas of legal education and economic law. He participated in several governmental and international commissions related to education, and was one of the idealizers and later executive-director of the Center for Study and Research in Legal Education (CEPED), initially launched by the public university of the State of Guanabara in 1966, and later incorporated into two private institutions, the Fundação Getúlio Vargas (FGV-Rio) and the Catholic University of Rio (PUC-Rio), until it ceased its activities in 1973<sup>181</sup>. As Dezalay and Garth (2002a, p. 106-108) explain, the CEPED was an initiative to reform legal education in Brazil under the auspices of the “law and development” movement, with the support of the U.S. Agency for International Development (USAID) and the Ford Foundation.</p> <p>As a lawyer, he worked in what by that time was a large law firm founded by José Luiz Bulhões Pedreira, a prominent Brazilian lawyer who was long involved in politics, as a legal advisor to different governmental Ministries in the 1950s and 1960s, and as the director of the legal department of BNDES (appointed by the economist Roberto Campos). Pedreira participated in the drafting of a number of laws concerning the Brazilian economy, such as the law creating the National Bank of Housing (BNH), the laws creating the Brazilian Central Bank, and the <i>Comissão de Valores Mobiliários</i> (CVM – inspired in the American Securities and Exchange Commission), and is deemed as “the author” of the Brazilian Public Corporations Act (<i>Lei das Sociedades Anônimas</i>), together with Alfredo Lamy Filho, who worked as a professor in CEPED. Together with Bulhões Pedreira, Venancio Filho joined a “Technical Committee” to advise president Jânio Quadros (1961) in the “design of a strategic model of country” (Gatto et al 2009, p. 60)<sup>182</sup>. As Venancio Filho reported in an interview, the invitation to compose the commission to draft a new antitrust legislation was officially made by CADE’s president, Faria, but the initial indication originated from Carlos Francisco Magalhães, with whom he had previously worked in cases presented before CADE.</p> <p style="text-align: center;"><b>Carlos Francisco Magalhães</b></p> <p>A prominent competition lawyer in Brazil, Magalhães graduated from the Presbyterian University Mackenzie, in São Paulo, Magalhães spent his whole career working in law firms. By 1988, he was already considered a specialist in competition law. As an intern at a big law firm in São Paulo in the 1960s, he followed two of the first three cases decided by CADE under the 1962 law, as the corporations involved were clients of the firm, and he was in touch with several foreign publications on antitrust, which were brought to him by lawyers who worked in the firm. In 1976 he opened his own law firm, which since then works in the</p>
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<sup>180</sup> The ordinance (*Portaria*) was published under the number 02, on August 10<sup>th</sup> 1988. Available at the *Diário Oficial da União* of August 12<sup>th</sup> 1988, p. 4909.

<sup>181</sup> CEPED was close to a graduate program in economics held by the FGV-Rio and coordinated by Mario Henrique Simonsen, an exponent of the monetarist, and right-wing tradition of Brazilian economics (Loureiro 1997, p. 50), who eventually taught on the courses promoted by the Center.

<sup>182</sup> The book edited by Gatto et al (2009) is a sort of biographic narrative about Bulhões Pedreira, and received an emblematic title: “*José Luiz Bulhões Pedreira: the invention of the Brazilian modern state*”.

field of competition. As a lawyer, he was early in touch with the experiences of other countries in antitrust policy. In the interview, for instance, Magalhães recalled a visit to the European antitrust authority in the late 1970s to discuss a case of two clients who were exporting their products from Brazil through shared logistics, and who feared the intervention of the European authorities. He discussed the case with the head of the EU Directorate-General for Competition, who eventually became a friend.

Between the late 1970s and the early 1980s, Magalhães was invited by Senator André Franco Montoro, who was involved in a Congressional Investigation Committee about cartels, to draft a proposal to reform the 1962 law<sup>183</sup>. According to Magalhães, the draft he presented to Franco Montoro already contained measures to “revitalize article 74 of the law 4.137/162”, imposing a system of merger review. As I will describe, this aspect would be recast by him in the 1988 commission. Prior to his work in the commission, Magalhães had also contributed to the draft of yet another law: the so-called “Ferrari Act”, legislation to regulate the automobile sector in Brazil. In that opportunity, he was a lawyer representing the association of automobile industries. Magalhães was also a founding member and president of the Brazilian Institute of Studies in Competition, Consumption, and International Trade (IBRAC). As Ubiratan Mattos, a lawyer and another founding member, explained in an interview, IBRAC was created by practising lawyers, after the Consumer Code of 1991 was enacted, to be an “interlocutor from the other side”, i.e. representing corporations. Since the beginning it included corporate lawyers, law firms, and corporations as members, and later incorporated former appointees of the SBDC (such as CADE’s commissioners), including economists.

#### **José Inácio Gonzaga Franceschini**

Also a prominent competition lawyer, Franceschini graduated from USP in 1972, and worked in law firms from 1973. Since the beginning of his career, as revealed in my interview with him, Franceschini was involved with competition law, representing corporations before CADE. Franceschini also eventually became a member of IBRAC, and until today he occupies a directive position at the organization. In his career, he has also been involved in several professional associations, such as the International Bar Association’s (IBA) Antitrust Committee, the Foro ProCompetencia, and is an honorary member of the Latin American Club on Competition.

#### **Washington Peluzo Albino de Souza**

The fourth member, Washington Peluzo Albino de Souza, a law professor of the UFMG since 1949, is a specialist in economic law, and reputed as one of the founding fathers of the discipline in Brazil (e.g. Clark 2012). A critic of neoliberalism in Brazil, Souza created at UFMG a center of production of scholars and lawyers specialized in economic law. Three of them were connected to CADE, at different points of history, as, appointed commissioners to CADE. Souza, however, never took part in the commission, as before the beginning of its work he was appointed Dean of the Federal University of Minas Gerais.

**Source:** elaborated by the author

The political and economic context in which the commission drafted the proposal was still a mixture of an interventionist state with timid initiatives to liberalize the economy. As Magalhães reported in an interview, the government seemed to expect a law fit that context, i.e. which could enable direct control over the economy, especially to regulate prices, but with some modern traces to solve the inefficacy of the 1962 law. Instead of directly responding to that expectation, however, the commission would have pushed for more radical changes. As Magalhães reported:

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<sup>183</sup> In the interview, Magalhães couldn’t precise the exact date that this episode took place, but mentioned that it was probably in the late 1970s. I was not able to locate in the archive of the Federal Senate when the referred Congressional Investigation Committee took place, but it was likely between the late 1970s and the early 1980s because Franco Montouro was a senator between 1971 and 1983.

The [1962] law was not being enforced because we were in an interventionist economy. And they [the government] needed the law. We were a kind of *Don Quijote*, the three of us. We said: ‘Let’s take the opportunity that we were appointed, and let’s make it a market economy’. Through this law, instead of regulating what was in place, we moved forward.

And so they did, or at least tried. The commission divided the tasks of drafting a legal project into different parts: Venancio Filho was in charge of writing the institutional design for competition policy, Magalhães was responsible for drafting the definitions of the objectives, infractions, penalties, and what would be the system of merger reviews, and Franceschini focused on detailing the procedural aspects of the new legislation. As Magalhães reported, the division of work mirrored each one’s interests and expertise:

[Venancio Filho] thought that no major changes in the law 4.137 [of 1962] were needed. It was just enhancements, because it could get worse. Franceschini was very focused on process. He was right, because there was no law for administrative procedures. I had a more European position. I liked the European legislation, which I thought was more modern than the American, more suitable for us. And our legislation, the law 4.137 [of 1962] was too rooted in the American experience. I wanted to go a little further, to insert this preventive part, for justifications. I wanted to insert a clear “rule of reason” in everything.

The commission, presided by Venancio Filho, started its activities on August 25<sup>th</sup> 1988, with an “informal audience” in which the three appointed lawyers, CADE’s president and an economist who worked in the Ministry of Justice were present<sup>184</sup>. The commission had six other meetings in the cities of Brasília, São Paulo, and Rio de Janeiro, between September 14<sup>th</sup> and November 4<sup>th</sup> 1988.

Each of the members produced an initial draft of the parts they were responsible for, and then presented to the other members, who discussed the whole text. The work dynamics of the commission was quite informal. Meetings occurred in CADE, and at the law firms of its members. According to Mario Nogueira, a lawyer at one of the largest Brazilian law firms, specialist in mergers and acquisitions and competition law, and currently a Director of

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<sup>184</sup> This economist was Francisca Belkiss Carneiro Guidi, who was Secretary of Planning of the Ministry of Justice, to which she was appointed on March 1986 by Minister Brossard (DOU of April 1<sup>st</sup> 1986, p. 1518). In the interviews with the members of commission, her name was not mentioned, so it was not possible to confirm if she was still in that position at that time. However, as the “informal audience” was internal to CADE, it is likely that she was still working at the Ministry of Justice. Belkiss Guidi held a PhD degree in economics from the University of Paris 1 – Panthéon Sorbonne, obtained in 1974, on “infrastructure investments in underdeveloped countries”.

IBRAC, much of the accessory tasks to the commission's work were done at Franceschini's law firm, in which Nogueira was an intern in 1988:

Because of the three [members of the commission], ours was the largest firm, the commission's secretariat was in our law firm. So they did all those things, prepared the texts, Franceschini collected it, and his secretary typed it down. At that time, it was typing, with an electric typewriter [...]. And I took [these typed drafts] and corrected them, to see if the typing was accurate.

On December 1<sup>st</sup> 1988, with the work concluded, the Minister of Justice, Brossard, enacted an ordinance that published the content of the draft, a description of the commission's works, and a detailed justification of the proposal presented by its members<sup>185</sup>. The draft contained many novelties in relation to the 1962 law, and to the early 1980s attempts to operationalize or transform it. The draft contained 116 articles, and explicitly aimed to “totally replace the law 4.137 of September 10<sup>th</sup> 1962”.

In the explanatory memoranda prepared by each of the commission's members, and which opened the ministerial ordinance, these novelties are mentioned. The opening explanatory memorandum was authored by Magalhães, and detailed the choices of the commission in respect to what it defined as the law's objectives. Magalhães started the memorandum by recalling that despite of the “vital importance” of competition policy to the country,

[...] it is one of the most ignored and unknown pieces of legislation, not only for the businessmen it regulates, but even for professionals, lawyers and economists who should find in the law suitable instrument to solve the deep problems of competition in our country.

In his memorandum, Magalhães recognized that the draft was inspired by the international experience – “of other more modern legislation, especially Japan's” –, as it proposed a synthesis of its content right in the first articles. International influence was also reported on more substantive aspects of the draft. Magalhães explained article 21 of the draft, which defined the “anticompetitive conduct” to be repressed as the introduction of a norm that

[...] contemplates a classic concept originated in the North American legislation, which is specially directed against the so called cartels and illicit unions of corporations to achieve the distribution of the market and profits among themselves.

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<sup>185</sup> Ordinance 704, DOU December 2<sup>nd</sup> 1988, pp. 23436 and 23452.

These were, however, “concepts and forms perfectly consecrated in the legislation and doctrines of other countries, including our own current law [of 1962]”. Articles 22 and 35, in turn, conceptualized what the commission saw as novelties: the “abuse of dominant market position”, influenced by the “modern European legislations”, and the control of “mergers, acquisitions, and associations”. According to the draft’s article 22, the existence of “dominant position” was to be identified by the antitrust authority – but “without prejudicing the analysis of each case” – in two situations. First, if a single corporation or group of corporations was the “sole supplier, intermediary, acquirer, or funder of a product or service or of its corresponding technology” in a given “regional or national relevant market”<sup>186</sup>. Second, if a single corporation controlled more than 40%, or a group of corporations controlled more than 60% “of the national or regional relevant market of a product or service or of its corresponding technology”<sup>187</sup>. On article 32, the draft detailed how CADE should analyze the cases related to the “abuse of dominant market position”. Similarly, article 35 introduced a mandatory system of merger reviews in Brazil. It established that acts of economic concentration such as mergers and acquisitions that implied “the control of more than 20% of a relevant market of products or services by the entities resulting of the grouping or concentration” should be submitted “within 30 days *after* taking place” (my italics) for CADE’s approval. As can be noticed, the text already adopted a post-merger version, which was later endorsed by the 1994 law, and extensively criticized in the subsequent years. Magalhães’ memorandum highlighted the novelty of a merger review system, underlying the convergence of Brazil with international standards:

By emphasizing the preventive roles [of CADE], the draft followed the unanimous example of the modern antitrust legislations, and brought to the control and supervision of CADE the acts that [...] in theory may constitute abuses. But if motivated by conjunctural or temporary reasons, or even by certain particularities, such as benefitting not only the involved parties, but the general collectivity, [these acts] must be tolerated, even in special situations of deep recession, or of joint efforts to increase exports.

As the quote reveals, the economic concentrations defined in article 35 were to be “tolerated” in certain situations. The same logic was embedded in article 22, concerning the “abuse of dominant position”. In Magalhães’ view, the European tradition that would have inspired this norm provided

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<sup>186</sup> Article 22, paragraph 1 of the draft.

<sup>187</sup> Article 22, paragraph 2 of the draft.

[...] a concept usually accepted in those countries and in the modern economy of not considering monopoly and other positions of market domination as illicit *per se*, but on the contrary, accepting them as an economic reality, and repressing, nevertheless, its abusive manifestation.

The exceptions that authorized CADE both to not classify “monopoly and other positions of market domination” as illicit, and to approve certain mergers were described in the draft’s article 33. They entailed, for instance, concentrations that “increase production, enhance distribution of goods or the supply of services, or *promote efficiency* and the development of technological or economic progress” (my italics)<sup>188</sup>. As an exception to the illegality of economic concentration, the concept of “efficiency” appeared for the first time in the history of Brazilian legislation on antitrust.

Another exception comprised cases in which “benefits resulting from the act or adjustment be evenly distributed among the parties, on one side, and consumers or the final users on the other, even if indirectly”<sup>189</sup>. Other exceptions entailed concentrations that “promote the increase of exports”<sup>190</sup>, or “when the restriction [of competition] contained by those acts is necessary for impelling reasons of the global economy and of common good”<sup>191</sup>.

As Magalhães revealed in an interview, he introduced this idea from the Japanese antitrust legislation, after reading about the formation of “official cartels” to “save the Japanese industry”. The motive for the import of this notion to Brazil was the perception, according to Magalhães, “that we were still in a developing economy, that we would need protection for national industry, preponderantly national interests”.

Specifically in relation to the merger review system (article 35), two other possibilities were established for a concentration to be approved beyond the legal levels of concentration<sup>192</sup>. First, that it didn’t imply “the cessation of activities or the elimination of lines of production of any firm, and if it occurs, there must exist a corresponding increase in productivity or efficiency”. Second, that the concentration did not “result in harms to the public interest, to consumers, or to the final users”.

Another aspect highlighted by the commission in its opening memorandum was the inclusion of an explicit submission of state-owned corporations to the mentioned forms of control, both in cases of “abuse of dominant position”, and merger reviews. As Magalhães stated in the draft, this was a deliberate provision to face “statist gigantism”:

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<sup>188</sup> Article 33, item “a” of the draft.

<sup>189</sup> Article 33, item “b” of the draft.

<sup>190</sup> Article 33, paragraph 1 of the draft.

<sup>191</sup> Article 33, paragraph 2 of the draft.

<sup>192</sup> Article 35, paragraph 3, items “a” and “b” of the draft.

The commission sought to find the most encompassing concept [of corporation] as possible, leaving aside the formal legal consideration to reach all economic agents that can be touched by the restriction of competition, or that can be the active subjects of the violations mentioned in the law. Therefore, the law also encompasses state organisms that exercise economic activity, be it permanently, temporarily, or occasionally, since [CADE's] experience has evidenced that due to statist gigantism, state-owned corporations and even parts of the public administration have perpetrated unjustified restrictions to free competition.

Magalhães went further on the explanation, connecting the draft to what by that time was a recently enacted Constitution:

The commission understood, in this aspect, that from the moment that the state is involved in the economic activity, it is also part of the game of free competition, and is obliged to assume the costs of following the natural or legal laws of the market, without any sinecures or privileges, as established by the principle consecrated on article 173 of the Constitution, and its paragraphs 1 and 2.

In presenting the specific justification of equating private and state-owned corporations in merger reviews, Magalhães characterized the measure as “an innovation that seemed extremely timely for the commission”. In his view:

The innovation departs from the observation and the experience of the last two decades, in which generalized state dirigisme over the economy stood out, through the interference of the state in various of the most significant segments of the market, and the creation regulations that very often conflict with the objective of fully respecting freedom of commerce that an antitrust law seeks to guarantee.

Another of the “major innovations brought by the draft”, as stated by Venancio Filho, concerned the institutional design of CADE, substantially reformed in the proposal. Responsible for structuring this part of the draft, Venancio Filho explained in his memorandum that the goal was to “strengthen and increase the organ’s administrative autonomy”. Article 5 of the draft not only increased the number of commissioners, but also sought to “preserve the indispensable technical character of the organ”, as detailed by Venancio Filho:

From these concerns emerged the formula of creating a list of six names among law graduates and economists that would be chosen by the organ itself, and later submitted to the analysis of a reputed judge, member of the

*Conselho Superior da Magistratura*<sup>193</sup>, in the case of the former, and to the *Conselho Federal de Economia*<sup>194</sup>, in the case of the latter, and reduced to a list of three names, of which one was to be chosen by the President of the Republic.

Venancio Filho's proposal implied a formal control of the professional groups of lawyers and economists over appointments. The composition was also fixated, tending to privilege the legal side: 4 lawyers and 2 economists. The appointment of CADE's president was slightly different from the other commissioners: the Minister of Justice was supposed to recommend a name to the President of the Republic, who would then submit it for the approval of the Federal Senate. In all cases, those appointed to CADE were supposed to be at least 30 years old, and to possess a "notable legal or economic knowledge". Moreover, according to the draft, commissioners would have mandates, and could be only removed under special circumstances determined by the law.

In the publication of the draft containing these novelties, a deadline of 45 days for suggestions to be submitted to CADE was also fixated. Identifying what happened to the draft after this moment was hard. In my interviews, the unfolding of the draft was a bit obscure. Magalhães, for instance, only mentioned that the draft inspired different legal proposals in the National Congress, but it never went further, at least until the construction of the 1994 law. Nevertheless, the first episode that I was able to identify after the publication of the draft is dated of June 1989. Between June 28<sup>th</sup> and 30<sup>th</sup>, CADE organized in Brasília the III National Seminar on Abuse of Economic Power to debate the draft. According to Souto (1992, p. 307), "all segments connected to the subject" were present, such as the National Confederation of Industries, the National Confederation of Commerce, the Council for Consumer Protection, the Brazilian Bar Association (OAB), the Regional Councils of Economists, Managers and Accountants, law professors and competition lawyers. Even "technical experts and authorities" from Japan were "especially invited to give speeches" (Souto 1992, p. 308).

The next link in the path that the draft would have travelled is suggested by Souto (1992, p. 308), who was a participant in the conference held by CADE. According to him, a special commission was designated in the conference to critically assess the draft. The suggestions made by this commission were published in a journal edited by CADE by that

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<sup>193</sup> The *Superior Council of the Judiciary* is a disciplinary organ formed by judges that operates at the state level in Brazil, and is also responsible for appointing the names of candidates to the higher state courts.

<sup>194</sup> The *Federal Council of Economics* is a national professional association that supervises and regulates the exercise of professional economists.



time<sup>195</sup>, and parts of it were eventually incorporated in a bill presented to the National Congress by representative Hélio Rosas (of the PMDB of São Paulo) under the number 3845/1989, on October 17<sup>th</sup> 1989. Rosas' bill specified in a similar way what would be important novelties created by the 1988 commission, but there was no detailed system of merger review, and the institutional design of CADE and the appointment dynamics was considerably different. Rosas' bill was dropped on February 2<sup>nd</sup> 1991, due to regimental reasons, as it stood more than one year without any movement in the National Congress.

Based on the information provided by Magalhães, that the draft was presented as bills “by several representatives and senators”, I conducted a search in the National Congress' legislative database to locate other proposals<sup>196</sup>. Only one was dated of 1989, but it stipulated the repression of abuse of economic power in 3 generic articles, without any similarities to the 1988 draft<sup>197</sup>. Other 5 bills were identified in 1990, of which only one was directly linked to the draft<sup>198</sup>. This was a bill proposed by representative Plínio Arruda Sampaio, of the left-wing Worker's Party (PT), submitted to Congress on June 28<sup>th</sup> 1990<sup>199</sup>. Sampaio's proposal was to a great extent identical to the 1988 draft, and made explicit reference to both the commission who elaborated the draft, and to the Seminar conducted by CADE in June 1989.

Although much more succinct in the procedural norms than the draft, and different in the design of CADE's composition<sup>200</sup>, and despite some minor textual changes, the bill converged in establishing the definitions of abuse of dominant position, and a system to control concentrations. An important distinction in respect to the draft, however, is that Sampaio's proposal did not replicate any of the exceptionalities created in the 1988 document to authorize potentially harmful concentrations. The concept of efficiency was not once mentioned in the bill. As the other two bills presented after the publication of the 1988 draft, Sampaio's proposal was dropped on February 2<sup>nd</sup> 1991, with the end of the legislative term.

Two contextual factors of the late 1980s can possibly explain the lack of immediate success of the 1988 draft in being converted into a law. First, the political agitation of the country. By 1989, a new constitution had been enacted, and in November of that year the first

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<sup>195</sup> According to Souto (1992, p. 308), the suggestions were published on the *Revista de Direito Econômico do CADE* (CADE's Journal of Economic Law), n. 6, of 1989.

<sup>196</sup> I performed a search for the subject in the period 1988-1990 with the following key-words: “competition”, “antitrust”, “CADE”, and “*Conselho Administrativo de Defesa Econômica*”.

<sup>197</sup> This was the bill number 4198/1989, presented by representative Luiz Soyer, of the PMDB on November 11<sup>th</sup> 1989. The bill was dropped on February 2<sup>nd</sup> 1991, for the same reason as Rosas'.

<sup>198</sup> The other 4 bills not detailed at this point were connected to the period that started with Collor's inauguration as President, in 1990, as I will discuss in the next section.

<sup>199</sup> Bill number 5538/1990.

<sup>200</sup> Sampaio proposed that CADE's president and all 6 commissioners be appointed by the President of the Republic, based on the Minister of Justice's suggestion.

direct presidential elections since 1960 were to be held. Candidates representing 22 different parties participated, mobilizing the entire political spectrum, and draining the attention of the Congress, and the government itself<sup>201</sup>. Second, an economy deteriorating in an inflationary crisis. Since 1986, inflation increased at large steps, jumping from 1.037% in 1988 to 1.782% in 1989. In such context, the explanation provided by the architects of reform, that the government in this period was still induced to resort to price control mechanisms – something incompatible with a modern competition legislation – is quite compelling. Exemplary of this trend was the economic stabilization plan enacted by Sarney on January 16<sup>th</sup> 1989 (*Plano Verão*), which determined the freezing of prices and salaries. In other words, the government was either not interested in, or incapable of (or both) advancing the reformist agenda by that time<sup>202</sup>. It was thus only due to the political changes brought by the new decade that another set of confusing episodes related to competition policy reform would take place.

#### **4.3 Toward a “modern” field in the 1990s**

In the year of 1990, Fernando Collor de Mello started his government, after defeating the Worker’s Party leader, Lula da Silva, in the 1989 elections. Collor’s administration was an agitated period, both politically and economically. Elected for a four-year mandate, Collor’s inauguration took place in March 1990, but he was precociously impeached on September 1992, after a long period of troubled relations with the National Congress, and a political scandal of corruption. During this brief period, the economic problems that occupied the governmental agenda in the previous years, notably inflation, were still unsolved. Although inflation decreased more than 300% after Sarney’s last plan of stabilization, rates were still very high, as it reached 1.476% by the end of 1990. Collor’s administration, as its predecessors, was thus struggling to control the inflationary crisis.

Two plans of stabilization were enacted during his government. On March 16<sup>th</sup> 1990, one day after the presidential inauguration, Collor Plan I was enacted, which among other measures included the freezing of financial assets, prices and wages. By the second semester of 1990, inflation rose again, and on January 31<sup>st</sup> 1991, the Collor Plan II was presented,

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<sup>201</sup> Souto (1992, p. 308), for instance, identifies the “disorganization” of the works of the National Congress due to the electoral period in 1989.

<sup>202</sup> On May 10<sup>th</sup> 1989, Sarney’s Minister of Finance in 1987, Luiz Carlos Bresser-Pereira gave a speech at the National Congress that is illustrative of the compelling force that the inflationary crisis exercised in government: “Although during some time in 1988 the discourse of ‘a new price-freezing, never again’ prevailed, a consensus started to form around the idea that a new price-freezing would be inevitable if hyperinflation was to be avoided” (Bresser-Pereira 1989, p. 132).

which “basically consisted of a new freezing of prices and the creation of new financial instruments to replace the ‘overnight’” (Suzigan and Villela 1997, p. 82). The second plan had a short-term impact on inflation, and by the end of 1991 the accumulated of the year was slightly above 480%.

Although the measures deployed by Collor somehow replicated the attempts of Sarney to control inflation, his administration’s economic policy was nevertheless considerably different in other aspects. With his election, “the governmental policy was very much influenced by the so-called ‘Washington Consensus’ of the early 1990. There was advancement in the objectives of deregulation, privatization and opening up of the economy” (Suzigan and Villela 1997, p. 82). These policies were combined, for instance, with several initiatives of industrial policy conducted by government, including the formation of sectorial chambers through which the government negotiated policies for certain sectors (Suzigan and Varella 1997, p. 83-102). As Nassif (2007, p. 154-155) maintains, although in the first months of Collor’s government a group of “radically liberal” economists from PUC-Rio hegemonized economic policy-making, they were gradually substituted by a group of more moderate economists. These were mostly technicians connected to the BNDES, and proponents of the theory of “competitive integration”, which combined initiatives of industrial policy with the promotion of economic opening as tools to promote a competitive integration in the global economy.

It was in this context that the agenda of antitrust reform was again mobilized, and would eventually lead to the consolidation of a “modern” field of competition policy in Brazil. The first initiatives, still of a dubious character, took place between 1990 and 1991, under Collor’s government. In 1993, when Collor was already out of office due to an impeachment process, the final movement that resulted in the 1994 law occurred.

#### 4.3.1 *The dubious agenda of 1990-1991*

The agenda of competition policy reform between 1990 and 1991 mirrored the political and economic context in which it was developed: it entailed dubious movements between the past and the future, between initiatives of governmental coordination, and an orthodox economic policy. Following the impulses of 1988, however, the terrain was already being paved for the decisive movement of 1993.

In 1991, after the first year of Collor’s government, he authored a publication entitled “*Brazil: a project of national reconstruction*”, which stood for a sort of governmental

program of that administration<sup>203</sup>. In the book's chapter V – “Citizenship and fundamental rights” – item 7 was specially dedicated to “Competition and Consumer Protection” (Collor de Mello 2008). In this document, “the reformulation of the economic protection system” was said to be part of the “modernizing project conducted by the Collor administration”, with the objective of “concretizing the constitutional norms” (Collor de Mello 2008, p. 118-119). After describing the existence of “competition protection legislations” in the “advanced market societies governed by democratic principles”, Collor listed several legislative initiatives of his government that would illustrate the “modernizing project” in this area: the law 8.137 of 1990, which defined crimes against the economic order; the law 9.078 of 1990, the Consumer Code; and the law 8.158 of 1991, a “legislation of competition protection”, which is often present in mainstream narratives as a landmark of the historical development of competition policy in Brazil. As former commissioner Mauro Grinberg maintained in an interview, Collor's agenda was directed to transforming the past, and starting over (interview conceded to Dutra 2009, p. 22):

In the beginning of Collor's government a revolution happened within all Ministries, with the objective of erasing the old, and starting the new. That's when the law 8.158/1991 came, because the law 4.137/1962, they said, wasn't useful, it was old.

The first acts undertaken by Collor in respect to competition policy were, nevertheless, prior to these laws. On March 15<sup>th</sup> 1990, the decree number 99.180 was enacted, setting the tone that the administration would imprint in antitrust matters in the next months. The decree established “the reorganization” of Ministerial organs, and those connected to the Presidency. It created the National Secretariat of Economic Law (SNDE), an organ of the Ministry of Justice, and submitted CADE to its structure. CADE's role was defined as to “assist the Minister [of Justice] in the formulation and conduction of the national policy of economic protection, as well as to promote and defend the rights and interests of consumers”. When a new decree was enacted on May 10<sup>th</sup> 1990, this definition was eliminated, but CADE nevertheless remained a hierarchically inferior organ to a Ministerial secretariat, directly subjected to the President of the Republic.

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<sup>203</sup> Interestingly, in the program of government presented by Collor's adversary, Lula, in 1989, there is not a single reference to the word “competition” (PT 1989). Nevertheless, and in accordance with what the progressive group, of which Lula was a member, proposed at the ANC, the program mentioned the intention of controlling the acts of “large corporations of foreign capital”, as well as “Brazilian capital oligopolies” (PT 1989, p. 10). The program went further, and attacked “the country's legal system and the roles of the Judiciary”, which would “permanently preserve the privileges of lucrative capital, monopolies, oligopolies and large land owners” (PT 1989, p. 1).

Following these decrees, a set of “Provisional Measures” (*Medidas Provisórias - MP*) was enacted by the President, which would eventually result in the law 8.158 of 1991. These measures had the force of a law and were authorized by reasons of “relevance and urgency”, but did not demand the approval of the Legislature to be enforced. After 60 days (extendable for another equal period), they had to be submitted to the National Congress, where they could be converted into a law. That is what happened with the 4 MPs submitted by Collor between August and December 1990: on January 8<sup>th</sup> 1991, they were converted by the National Congress into Law 8.158<sup>204</sup>.

The formulation of these measures, as well as the decree, counted with the participation of the Ministry of Justice’s Executive Secretary, Tércio Sampaio Ferraz Junior.

**Table 15.** Trajectory: Ferraz Junior

<p><b>Tércio Sampaio Ferraz Junior</b></p> <p>Graduated in law and philosophy from USP in the early 1960s, Ferraz Junior possessed two doctoral degrees, one in philosophy, obtained in Germany, and the other in law, obtained at USP. After the completion of his PhD abroad, he was a full-time law professor for more than 10 years, and became one of the exponents of Brazilian legal philosophy. In the early 1980s, he started combining his academic activities with professional involvement. Ferraz Junior began his career as a lawyer relatively late, first as the head of FIESP’s legal department, and later as an executive director of the Siemens in Brazil. In 1990, he was appointed Executive Secretary by the Minister of Justice Bernardo Cabral, the former rapporteur of the ANC’s Commission of Systematization. Still in the Collor administration, he was later appointed the Attorney-General of the National Treasury. After leaving the government, in 1996 he joined Magalhães law firm as a partner. In 1991, Ferraz Junior also supported the creation of IBRAC.</p>
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**Source:** elaborated by the author

As the former Executive Secretary reported in the interview, his contact with competition policy occurred while he was in government. The first episode was right after the 1989 elections, when a new institutional design for implementing competition policy was discussed:

I worked on the administrative reform. And it was in the administrative reform that the idea to create the so-called National Secretariat of Economic Law appeared. At first, it was supposed to be a secretariat connected to the Presidency of the Republic, not to the Ministry of Justice. But it was later assimilated by the Ministry of Justice when the proposals were implemented. [...] The Ministry of Justice had CADE. CADE existed since 1962, with all its operational problems. There was no secretariat, CADE did it all, and did it poorly. [...] For reasons of economic policy and public attention, especially the corporate public, we agreed on creating a Secretariat of Economic Law in the Ministry of Justice, and a Secretariat of Economic Policy (SPE),

<sup>204</sup> These were the MP numbers 204 of August 2<sup>nd</sup>; 218 of September 3<sup>rd</sup>; 246 of October 13<sup>th</sup>; and 276 of December 5<sup>th</sup> 1990.

which would later become the Secretariat of Economic Monitoring, in the Ministry of Finance.

The administrative reform mentioned by Ferraz Junior was crystalized in the decree 99.244, which created the SNDE and the SPE. When the government started, and already as Executive-Secretary, Ferraz Junior was called once again to make changes in the Brazilian competition law – the novelty, at this point, was that the invitation came from the Ministry of the Economy, and not from the Ministry of Justice, as in the previous initiatives:

[...] it was when I received the task from the by then Ministry of the Economy to elaborate a change in the law, to make it more effective. It happened in 1990. [...] At first, what triggered the reform of the 1962 law was, on the one hand, its inefficiency, because it didn't really work. That was known. On the other, the quick decision of the government, in the Minister of the Economy, to end state intervention on prices. The demand came from there. We needed capitalist mechanisms to avoid prices getting out of control.

To perform the task, Ferraz Junior assembled a small commission, consisting of him and two other members of the government: a legal advisor of the Ministry of Justice<sup>205</sup>, and the National Secretary of Economic Law, José Del Chiaro – who was also a law graduate from USP, Ferraz Junior's former student, a founder of IBRAC, and who had also previously worked as lawyer in FIESP. Del Chiaro described what were the objectives of this commission:

[We] had two goals: one was the Consumer Code, and it was achieved, we approved it during my term. The other... We wanted to make a revolution, to cease to be a "tepid" organ, and become an instrument of the market economy within the norms of the 1988 Constitution. [...] We sought to spread the consciousness that there was a change of attitude in the economy, leaving an economy controlled by the state, and entering a market economy. It was the goal of opening up.

Ferraz Junior portrayed similar objectives that the commission sought to attain: "the MP had a very immediate objective: liberalizing prices, the end of intervention. We had to create a structure that was capable of handling it". According to Ferraz Junior, the choice for the MP as the legal device to promote the reform was due to the hurry of the government in liberalizing the economy. As he stated, "The message was that: we are opening every price and we need this [law] working".

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<sup>205</sup> In transcribing Ferraz Junior's interview, due to a small rupture on the record, I was not able to capture the full name of the legal advisor.

As he also revealed, since “there were not many specialists [on competition law] by that time”, during the works of the commission he was in contact with the three lawyers who worked on the 1988 draft: Venancio Filho, Franceschini and Magalhães. The influence of these agents on the 1990/1991 reforms was mixed. On the one hand, the commission led by Ferraz Junior did not want to replicate a “procedural” project, such as that of 1988. On the other, as I will detail below, Magalhães’ ideas about the law, already expressed in 1988, would eventually gain space with the 1990 commission.

The first two MPs presented by Collor, and jointly signed by the Ministers of Justice and of the Economy were practically identical, and detailed a vast set of competences of the SNDE. The opening article of MP 204, was emblematic of what was still a worry with prices (and thus inflation), and of a corresponding punitive attitude of the government:

[The SNDE shall] investigate and correct the anomalies in the behaviour of sectors, corporations, commerce, as well as of its administrations and controllers, that are capable of directly or indirectly disturbing the mechanisms of price formation and the availability of goods and services in the market, and of interfering with the constitutional principles of the economic order.

Although MP 218 of September lowered the tone, establishing SNDE’s duties to “investigate and correct” acts that could “harm the economic order and the principles of free initiative and free competition”, the text was virtually identical to the first measure. In both cases, the focus was on repressing conduct that could affect prices. In line with the decree of May 1990, CADE had an accessory role, being responsible for analyzing cases when the recommendations of the SNDE to the investigated corporations weren’t followed. The MPs also detailed CADE’s institutional design, establishing that the SNDE would provide “administrative and human resources support”, and that it was to be composed of a President and 4 commissioners directly appointed by the President after the Minister of Justice’s suggestions, and dismissible at any time. The ideal of autonomy from the administration’s control embedded in the 1988 draft and reflected, for instance, in the norm that guaranteed mandates for commissioners, was thus absent from these MPs.

The MPs 246 and 276, enacted on October and December of 1990, respectively, brought considerable novelties in respect to the preceding measures. It was at this point that the commission led by Ferraz Junior was decisively influenced by the draft of 1988, especially in respect to the notions proposed by Magalhães two years before. The MP replicated, with minor textual changes, the full content of the 1988 draft on the definition of

abuse of dominant position (article 21 of the draft), on the institution of a mandatory and post-merger review system (article 35), and established the same exceptions that enabled the antitrust authority to “tolerate” certain phenomena of economic concentration (article 33), including the notion of efficiency. Magalhães’ proposal also changed CADE’s composition, assuring mandates for commissioners, as in the 1988 draft. The most important difference in respect to that document was that in the MP the SNDE, and not CADE, was the enforcement authority.

Although the last MP enacted by Collor, the 276 of December 5<sup>th</sup> 1990, surprisingly eliminated some of the changes introduced by Magalhães’ contribution, such as the exceptions of article 33, when it was transformed in the law 8.158/91, the text of the MP 246 was resuscitated. On January 8<sup>th</sup> 1991, a new law was approved by the National Congress, that reformed the merger review system of the 1962 law, modernizing it accordingly to the draft of 1988, and at the same time attributing the power to enforce these norms to SNDE, and focusing on violations and on criminal remedies in cases concerning prices.

When published, the dubious character of this legislation, extensively criticized by mainstream narratives, generated worries among both national and foreign businessmen. As Ferraz Junior recalled,

I remember that I, as Executive-Secretary, together with the Secretary of Economic Law, and CADE’s president, we made several conferences at FIESP, at the National Congress, at the American Chamber of Commerce. We started going to the businessmen to explain the law to them. [...] There were worries due to the enlargement of the administrative-penal categories and the new competences that were being given. [...] There was a reaction against it. Businessmen had no idea about it, about what it was, what was its role. There was no consciousness.

If on the side of corporations the reforms promoted between 1990 and 1991 generated fears, among professionals it was generally a cause of dissatisfaction, as some of my interviewees revealed. For one competition lawyer I interviewed, for instance, “The law was very bad. It was bad because it was made to combat high prices. It was a law that created the SNDE, but didn’t do right on changing the merger review system”. Another interviewee maintained that “As a Provisional Measure, it came out very badly! [...] It had not immediate enforceability, and there were no procedures described how to enforce it”.



In February 1991, another and final commission was formed to construct the detailed regulations of the law recently approved<sup>206</sup>. It was a joint-commission between the Ministries of Justice and the Economy, that put together two people who would be decisive in the next episode of the reformist agenda: Neide Teresinha Malard, a lawyer who at the time was an advisor at the Ministry of Justice, and Lucia Helena Salgado, an economist who was an advisor to Antonio Kandir, the Secretary of Economic Policy of the Minister of the Economy. In this commission, Malard and Salgado became friends. As Malard reported on an interview, that group of people in charge of regulating the law of 1991 felt it was a limited instrument:

Soon, very soon we realized that that law had been actually created with the objective of emptying CADE. The decisions were political decisions, and they were taken by the Secretariat of Economic Law, which was a true notary office.

The feeling that the dubious agenda of the 1990/1991 period did not advance the reform of competition policy was shared by many lawyers and economists, both in private practice and in government<sup>207</sup>. Nevertheless, some of the changes that would eventually be consolidated by the 1994 law were already gaining space in the legislation, and most importantly in the minds of several of these professionals, who by that time were already establishing connections among themselves. It was a matter of a new political and economic context for opening the window for a decisive reform.

#### 4.3.2 *Finally reformed: the construction of the competition act of 1994*

On October 1991, Collor made the first appointments to CADE under the law 8.158. With a new composition formed by three lawyers (including the President), and two economists, CADE started its works in February 1992. Within CADE, its President and another commissioner, both lawyers, would have a prominent role in the advancement of the reformist agenda in 1993: Ruy Coutinho do Nascimento, and Neide Teresinha Malard, respectively. Together with other lawyers and economists who were involved in the previous

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<sup>206</sup> The regulations were published by the Presidential Decreto 34, of February 14<sup>th</sup> 1991, involving no major novelties.

<sup>207</sup> Even among those who opposed Collor's administration, Law 8.158 provoked reactions. The bill presented at the National Congress by representative Plínio Arruda Sampaio in 1990 (PL 5538/1990), and which incorporated, although selectively, the content of the 1988 draft, accused the creation of the SNDE through the set of MPs enacted by Collor of having the "objective of emptying CADE", and proposed the extinction of that Secretariat. Similarly, another bill by a representative of the PT, João Paulo, number 4878 of April 1990, also criticized the "emptying of CADE".

attempts to transform the Brazilian antitrust system, they would shape what is reputed as a modern competition policy, as consolidated by the law 8.884 of 1994.

**Table 16.** Trajectories: Coutinho and Malard

**Ruy Coutinho do Nascimento**

Coutinho was a lawyer graduated from the University of Brasília (UnB) in 1969. He was specialized in economics and capital markets by the FGV of Rio de Janeiro, and after already been established as a professional, he completed a master's in finances at UFMG. His professional career was mostly developed in investment banks. Coutinho was an intern at the investment bank Denasa, where he worked with former president Juscelino Kubitschek. After working in another investment bank, Coutinho joined the BNDES, where he stayed for 28 years, before being appointed the director of one of the councils of the Ministry of Industry and Commerce. As friend and a former colleague in Denasa, Coutinho participated in Collor's campaign in 1989, and joined a team of advisors that constructed his governmental program in the months prior to his inauguration. Coutinho was part of a "Working Group on Federal Banks", which was responsible for studying the privatization of public banks, both at the state and federal levels. In 1991, while in BNDES, as he reported in an interview, he "helped to pilot some privatizations such as Usiminas, and the CSN [*Companhia Siderúrgica Nacional*].

**Neide Teresinha Malard**

Malard graduated in law at UFMG in 1971, and in 1973 she went to Europe, where she obtained a specialization in international business law at the University of Stockholm. In 1989, after a period working as a legal advisor to Brossard, the Minister of Justice of Sarney, Malard went to the London School of Economics to pursue a master's degree, and attended several courses on competition law, motivated by the contact she had with the subject when the Ministry determined the transfer of CADE from Rio de Janeiro to Brasília. Malard developed her career in the public administration, as a public servant, and occupied several positions as a lawyer in organs of economic policy, and as a legal advisor during the ANC. During the Collor administration, she was the Attorney-General of the National Company of Supply, responsible for agricultural policies, and was later invited to join the advisory team of the Ministry of Justice's Secretary General, who was dealing with several projects related to the administrative reform. As revealed in an interview, she was invited to join CADE by the Minister of Justice. Malard later completed a PhD in economic law, retired from the public administration in 1998, and since then is a competition lawyer and a law professor in Brasília.

**Source:** elaborated by the author

As revealed in an interview, Coutinho's invitation to join CADE came directly from the President, in 1991, after the enactment of the law 8.158 who according to him affirmed the "need to resuscitate CADE" given the imminent "closing the organs of price regulation" and the start of "an aggressive process of privatization". As Coutinho reported, Collor wanted to substitute price control, something he had resorted to during the first two years of administration in the attempt to control inflation, by competition protection:

His expression: 'I want to substitute price control by competition protection'. I think the sentence is self-explanatory, although he mobilized mechanisms of price control in [stabilization plans] Collor I and Collor II. We are talking about 1991, Collor I and II had already passed, and none of them had worked. His vision was really not that one. He had a vision that was clearly of deregulation, of opening, of privatization, of insertion of Brazil, of globalizing Brazil.

In both extracts from Coutinho's interview, Collor's view on competition policy after the enactment of the law of 1991 is depicted as being connected to privatization and deregulation, and as part of the solution for the inefficacy of the stabilization plans he had authored.

The task of reactivating CADE however, was perceived as blocked by the recent transformations in competition law. The dissatisfaction with the changes implied by the Collor administration in antitrust policy was being born among the very commissioners appointed to CADE by the end of 1991. Coutinho, for instance, reported this shared feeling in an interview given to Dutra (2009, p. 29-30):

By the end of 1992, there was a consensus among commissioners that, given the new configuration of our economy, the moment to think about the revision of many aspects of the 1962 law, which was still valid, had arrived. [...] with Collor's government, the opening of markets had begun, and destatization gained impulse. Besides, CIP was extinct, and later SUNAB. In this context, competition protection was crucial, but the law in place revealed itself outdated. That's what we realized in CADE. We then thought about promoting its transformation.

As Malard revealed, even in its physical structure CADE was practically nullified in the administration. When the new commissioners went to the Ministry of Justice to check CADE's installations, they found out that they were gone. "They thought CADE was a council of consultation. The reform was so poorly carried out that they didn't realize it was a quasi-judicial organ", said Malard.

The existence of a consensus within CADE around the impression that the law had to be reformed was also expressed by her:

We realized that CADE couldn't depend on the SNDE. We depended on the SNDE for everything, including budget. So since the beginning we noticed that despite the fact that the law 8.158 was better than the law 4.137 [of 1962], it was more modern, incorporating principles that were already consolidating in Europe, the institutional aspect of this law was extremely weak.

It was thus in the course of the activities performed by the competition authorities that once again the reformist agenda found an opportunity to emerge. CADE's commissioners started a movement to articulate a new set of changes in competition policy. By that time, Collor had already been impeached, and Itamar Franco, until then vice-president, was the new President. The Minister of Justice was the lawyer Maurício Correa, of the PDT, who at the

ANC authored an amendment that I classified as part of the “radical” version of the progressive group, banning oligopolies and monopolies, and assuring an exemption to state-owned corporations. His position, at this point of history, was about to change.

The idea to reform the still recent law 8.158 was taken to Minister Correa, who forwarded the message to President Franco. Franco himself was sympathetic to the very idea of strengthening CADE. More than one interviewee attributed at least part of the President’s sensitivity to the idea of revising antitrust policy to more prosaic, personal reasons. In 1991, while he was still vice-president, Franco was the author of several representations to CADE, in which he denounced abusive prices charged by the pharmaceutical industry. By that time, Franco’s mother was facing health problems that demanded a variety of high cost medications.

On January 27<sup>th</sup> 1993, Ordinance number 28 of the Minister of Justice, determined the constitution of a commission to, “within 20 days”, “study and propose the enhancement and consolidation of the legislation on competition protection and abuse of economic power”<sup>208</sup>. Correa’s ordinance was opened by a sort of diagnosis about competition policy, in which he pointed to the “insufficiency of the legislation to repress [the abuses of economic power], and to the “citizenship’s claim of more effective instruments to repress the abuses of economic power”. Besides Coutinho (who also presided the commission), and Malard, the other members appointed to join the group assembled by Correa were: Antônio Gomes, by then Secretary of Economic Law; Ferraz Junior, who participated in the commission of 1990 and was at this point indicated by the Ministry of Finance<sup>209</sup>; Alexandre de Paula Dupeyrat Martins, a legal advisor at the Federal Senate, and according to Coutinho an advisor of President Franco; José Geraldo Brito Filomeno, a prosecutor of the state of São Paulo; Maria Aparecida Santos Pereira, who in the ordinance is defined as an “economist”, and according to Coutinho was also a direct advisor of President Franco; and Magalhães, who was appointed as the president of IBRAC<sup>210</sup>.

Although the official composition comprised 8 members, mostly lawyers, interviews revealed that a larger group of people participated in the drafting of what would become the 1994 Law, including economists, who had an unprecedented influence in the history of the reformist attempts. The other three members of CADE’s plenary – the lawyer Carlos Eduardo

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<sup>208</sup> The ordinance was published on the DOU of January 28<sup>th</sup> 1993, page 514.

<sup>209</sup> As Ferraz Junior stated in an interview, he didn’t have an active participation in the commission of 1993 as he ended his term at the Ministry of Finance, but nevertheless participated in the debates of the bill in Congress, in 1994.

<sup>210</sup> In interviews, I was also able to identify references to the “informal participation” of other corporate lawyers, in discussing the proposal of a new law with the commission, but especially in Congress.

Carvalho, and the economists Marcelo Monteiro Soares, and José Matias Pereira, both graduates of the UnB in the early 1970s, and public servants –, as well as CADE’s Attorney-General, Paulo Gustavo Gonet Branco, also took part in the commission.

Another group of participants was connected to the Ministry of Finance, and orbited the Ministry’s SPE, at that time occupied by Winston Fritsch. According to the interviews, there were two economists around Fritsch who worked in the commission to reform competition policy: Lucia Helena Salgado, and Eliane Lustosa Thômpson-Flores.

**Table 17.** Trajectories: Fritsch, Salgado, and Thômpson-Flores

<p><b>Winston Fritsch</b></p> <p>Fritsch graduated as an engineer from the UFRJ, possessed a degree in economics by the University of Cambridge, and had been a professor of economics at PUC-Rio. He joined a team of economists that, together with Fernando Henrique Cardoso, designed the stabilization plan enacted in 1994, the Plano Real. As defined by Nassif (2007, p. 154), Fritsch was “radically liberal”, opposed any involvement of the government in industrial policy, and developed a series of deregulatory measures while in the administration.</p> <p><b>Lucia Helena Salgado</b></p> <p>A graduate in economics from the UFRJ, Salgado held a master’s in political science by the IUPERJ, also in Rio. A public official since 1984, she worked in federal departments related to economic policy, such as SUNAB and CIP. In 1990, she joined the SPE, as an advisor to the Secretary, Antonio Kandir. It was during that period that she worked on the regulations of the 1991 competition law, together with Malard and others. In 1992, she was transferred to the Institute for Applied Economic Research (IPEA), a governmental think-tank, which by that time was subordinated to the SPE. As a researcher at IPEA, Salgado started studying competition policy, and published one of the first documents discussing contemporary theories about the topic, and issues of institutional design (Salgado 1992). In this study, Salgado analyzed the international experience of antitrust policy, especially the US and Europe, and highlighted aspects of institutional design and regulatory practice, such as the common trend among “industrialized countries” of determining the illegality of “excessive market concentrations” only in cases in which “no gain to society is proven” (Salgado 1992, p. 15). In that period, Salgado also authored a paper in which she criticized the creation of sectorial chambers by the Collor administration (Salgado 1993), as incompatible with a market economy. In 1993, she also helped the Secretary of Economic Law to create investigation offices in São Paulo, and worked in elaborating deregulation policies at the BNDES. Right after her master’s, Salgado began a doctorate in economics at UFRJ, which would be later complemented with a period as a visiting student at the University of California, at Berkeley (UCB), between 1994 and 1996. After a period abroad, she was appointed a commissioner to CADE in 1996.</p> <p><b>Eliane Lustosa Thômpson-Flores</b></p> <p>A Graduate in economics from the PUC-Rio (where Fritsch was a professor of economics), she also held a master’s in economics from the same institution. Between 1993 and 1995, Thômpson-Flores was the General-Coordinator of Industrial Matters of the SPE, at the Ministry of Finance.</p>
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**Source:** elaborated by the author

Although the members defined in the ordinance were officially appointed by the Minister of Justice, the commission’s composition was to a great extent articulated by CADE’s commissioners, especially its President. The composition avoided a purely governmental commission, so both professionals who were active in private practice, and in state institutions were invited.

The draft elaborated by this commission was submitted to the National Congress on April 24<sup>th</sup> 1993, through the Communication number 213/1993 of the Presidency of the Republic, and was converted into Bill number 3712/1993. The draft initially submitted was mostly focused on the repression of anticompetitive conduct, and on assuring CADE's institutional autonomy vis-à-vis the SNDE (which was to be transformed into the SDE) and the Ministry of Justice, becoming a proper regulatory agency. The only change in respect to merger reviews was the addition of a procedural norm to article 74 of the law of 1962. In other words, the draft didn't revoke the 1962 competition act, leaving to the law of 1991 the regulation of economic concentrations.

The bill went through the National Congress during the whole year of 1993, and was approved only on June 1994, under the number 8.884, in a version considerably different from that submitted by the Minister of Justice as the result of the commission's work. In addition to that proposal, the version passed by the Congress incorporated a whole new system of merger review, introduced changes in CADE's institutional design (for instance, increasing the number of commissioners to 6, while the draft proposed 4), and explicitly revoked the law of 1962. This version, eventually approved by the Legislature, was a substitute bill elaborated by representative Fábio Feldmann, and signed by João Carlos Aleluia, and Nelson Marquezelli, who were the rapporteurs of the Executive's draft at different congressional commissions.

In discussing the process of reform that resulted in the law of 1994 with several of my interviewees, they reported that many of those agents who were officially appointed to the commission of 1993, or who informally worked with that group, continued shaping the bill when it entered Congress, i.e. after the commission's draft was officially submitted to Congress. Coutinho, for instance, was revealed to have visited the National Congress to discuss the bill numerous times precisely between April 1993 and June 1994. Some of the interviewees also mentioned to have worked closely with representative Fábio Feldmann in the drafting of the substitute which would be approved<sup>211</sup>. According to one interview, the draft elaborated by the 1988 commission was eventually presented to Feldmann when the 1993 draft was in Congress, in order to supply him with references to the elaboration of the law. As Feldmann reported in the presentation of his substitute version, in July 1993 he, as the rapporteur of bill at the Commission of Consumer Protection, Environment and Minorities, started to study the Executive's project. In this document, he mentions the

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<sup>211</sup> Feldmann was a lawyer from São Paulo, specialized on environmental issues, and a former intern at Franceschini's law firm.

“support of the Legislative Advisors of the House of Representatives”, and to have gathered the “opinion of lawyers and economists experienced in the matter”, as well as to have conducted “several meetings with representatives of the Ministries of Justice and Finance”.

At the end of his report, Feldmann also acknowledges the collaboration of several people in the creation of the bill, including lawyers and organizations involved with consumer rights, and personalities already mentioned in the course of this reconstruction: Franceschini, Ferraz Junior, Grinberg, Fritsch, and Thômpson-Flores. This digression into the transit of the agenda of reform from the 1993 commission into Congress was a necessary step because the information provided by my interviewees about how this process occurred never distinguished between the work of the commission and that the continued after the draft’s presentation to the Legislative. That is, the process of reform that resulted in the 1994 law started with the formation of the 1993 commission, but evolved in Congress, counting on the participation of some of those who were officially appointed to draft an initial bill. The description of the reform process that follows below thus encompasses the whole transit of the reformist impulse, from the commission’s work to the legislative debates.

The development of the 1993/1994 reform was marked by divergences and, at some times, tensions, among the members of the 1993 commission, between the commission and the government, in Congress, and with groups outside the state. Within the commission, these tensions often paralleled a professional divide between lawyers and economists. Representative of such divergences were the discussions about the institutional design of CADE, and the extension of competition policy’s control over state-owned corporations. As reported in some interviews, the Ministry of Justice and the Ministry of Finance struggled to determine who should be responsible for competition regulation.

Coutinho explained the arguments of those who mobilized the idea of submitting competition policy to the Ministry of Finance:

*Economic* protection. ‘The name is right’, as the group [supporting the Ministry of Finance] said. [...] They thought that the Ministry already had instruments, already had the experts who could exercise [this control] more naturally than the Ministry of Justice.

Malard also reported the controversy, suggesting the struggle of expertise and the references to international models that underlying it:

The Ministry of Finance had great power, and they want at all costs to root CADE within its structure. Because in Europe, in some countries, the organ

of competition protection was connected to the Ministry of the Economy. I remember writing a note [...] to explain the reasons why CADE should remain with the Ministry of Justice. I showed the connection between consumer relations and competition relations. I showed the importance of the due process for convicting corporations, that the issues were more legal than economic, so much that in the US the process was judicialized. [...] They maintained that the control of mergers was more an economic issue than anything. And we showed that it was important to be a state organ, that it had independence from the Minister. And the Ministry of Justice had this profile to host a collegiate body that worked more with law than with economic theory.

The law of 1994 consolidated a compromise, transforming CADE into a regulatory agency connected to the Ministry of Justice (although “autonomous”, as mandates were assured to its commissioners), and giving accessory roles to SDE and SEAE (still SPE by that point) – these, in turn, hierarchically subject to the Ministries of Justice and Finance, respectively. As Malard revealed in an interview, however, the decision to create SEAE and define its competences in the SBDC was not part of the commission’s intentions, and occurred while the draft was already in Congress, directly expressed by the Ministry of Finance.

Although lawyers and economists seem to clash in the definition of the Ministry to which CADE would be submitted, there seemed to be no doubts about the necessity of guaranteeing the presence of economists in the institutional design of the agency. As in the previous projects, “notable legal or economic knowledge” was defined as a condition for appointment. As Coutinho explained in an interview, opening way for economists, or “technicians”, was perceived as a need of the time:

Lawyers and economists, we thought it very salutary, especially in a time of economic fears. We were in the worst scenario. We were coming out of the President’s impeachment. We were living a brutally high inflation, so we had to have a robust body of economists, not only as commissioners, but also as technicians in CADE. It was a matter of survival. If we were to constitute a council purely formed by lawyers, it would be complicated, mostly because we were creating merger reviews. So the economic aspects, econometric aspects, they had to be taken care of with attention.

Another point of divergence among those professionals who were gestating the reform of competition policy was reported by Salgado in her interview. This tension revived a debate of the ANC in which the two groups – progressive and conservative – often conflicted in defining the text to regulate competition: the extension of competition policy to state-owned corporations. As Salgado put it:



One tiny word made all the difference. It [the initial proposal] was like that: ‘State-owned corporations are not subjected to this law’. And I said: ‘State-owned corporations *are* subjected to this law’. I said: ‘It is not possible! Petrobras, Vale... They are half of the GDP!’.

The result of the debate was article 15 of the 1994 law, which explicitly applied the law to state-owned and private corporations, “even those that exercise an activity under the regime of legal monopoly”<sup>212</sup>. To Salgado, what motivated the position maintained an exception to state-owned corporations was a “cultural trace” of part of the elites, which understood in an erroneous way the boundaries between the state and the market:

This was a cultural trace, of thinking that one thing is the state, and the other thing is the market. Part of the elite still thought – but not today – of Petrobras as an arm of the state, not as an arm of the market. So it took a while, a few years longer. This is still very present.

As in the ANC, the victorious position was that extending the normative reach of competition policy to state-owned corporations.

Apart from these tensions, the collective work of those professionals involved in the draft of a new competition policy is said to have converged in several other topics. One of them was on the design of the merger review system, already included in the laws of 1962 and 1991, but which lacked an enforcement mechanism. The study of foreign experiences was especially relevant for defining the contours of this instrument. As Salgado reported, the initial idea of defining a threshold for submitting merger reviews of 40% of market share for a merger review to be mandatory was inspired by the international experience:

The idea of the 40%, we brought from the best international practices. We had doubts about, for instance, how to define the relevant market. Some people helped. For instance, a very important person, a commissioner at DG-IV [the European Commission’s competition authority]. The idea was to put at 40%, not 30%, or 20%. But 40%. Where did it come from? From the European jurisprudence. I remember talking on the phone with him [the commissioner at DG-4]. So we put 40%, a little based on this conversation, on this security he gave us, telling that it was a good benchmarking.

However, and despite the fact that none of the interviewees reported a divergence in this aspect, the proposal of 40% wasn’t reflected in the initial draft that the commission

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<sup>212</sup> Interestingly, in the draft initially submitted to Congress in 1993, the so-called “legal monopolies” of state-owned corporations were exempt from competition control (article 12, sole paragraph of the bill 3712/93).

submitted to the Minister of Justice. As the commission's proposal endorsed the articles of the law 8.158 of 1991 in respect to merger review, the threshold of the project was of 20%. Since the version eventually approved as the law of 1994 defined a threshold of 30%, it is likely that those professionals working close with Feldman, especially those orbiting the Ministry of Finance, such as Salgado, managed to increase the criterion. Nevertheless, on November 16<sup>th</sup> 2000, after more than 6 years under the law of 1994, through the Provisional Measure number 1.950-70, President Cardoso changed it to 20%, the number that prevailed.

The idea mentioned by Salgado, inspired in the European practice, reveals yet another dimension of the commission's work: the resort to the experience of foreign systems and agents. Although no direct pressure from foreign agents on the commission's work was reported<sup>213</sup>, the members of the commission themselves were in touch with international experiences and imported some of its instruments. Coutinho went to the US in 1993, during the commission's work, and visited the FTC, the DOJ, and several law firms. Malard had academic experience in the UK in competition law, and Salgado had previously studied both the American and European legislations. The contacts, as Salgado's previous example reveals, were mostly informal, with people working at the FTC and at the European Commission's antitrust authority.

Exemplary of the instruments imported was the "Term of Commitment to Performance" (*Termo de Compromisso de Desempenho – TCD*), a negotiated device institutionalized on article 58 of the law of 1994, and, as Salgado described in the interview, inspired by the European experience. This mechanism enables the antitrust authority to impose certain conditions for an operation to be approved. The objective, in Salgado's view, is to deal with potentially harmful concentrations without jeopardizing the operation's objective of "generating profit and more efficiency":

It was based on the idea that some operations may produce a negative effect on competition, due to the degree of concentration, but through some sort of intervention, be it behavioral, through a commitment, be it structural, such as selling part of the corporation, this operation can be suited to the legal design, and can thus proceed. That is, *that the central objective is that the*

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<sup>213</sup> On the contrary, as Malard's interview revealed, foreign agents didn't intervene at all in the reform of competition law, while on other legal reforms, such as intellectual property law, they were extremely involved: "They made no pressure on us. Do you know why I tell you that? Because at that time I was also coordinating the working group on intellectual property, and there was pressure all over the new patents law. From the Americans, above all. They just didn't leave the country. Everyday you had to talk to an American lawyer. But not in competition law. On the contrary, they weren't really interested". Coutinho also reported that there was no "explicit" pressure, but only suggestions that "Brazil was economically robust enough to have a competition law" in his visits to the US.

*operation can proceed with its objective of generating profit, more efficiency, and the economy can remain with its level of competition not harmed by the operation.* (my italics)

The importation of this European instrument also brought another novelty into the 1994 law, which was absent from the previous legislation: the notion of “employment” in competition policy. As Salgado explained, this was the result of the “tropicalization” of the European conception of “sharing the benefits” of competition policy:

We brought from the European tradition, the idea of sharing benefits. Sharing benefits is typically European. Sharing benefits with consumers. In Europe there is a great worry with small businesses, but we didn't put that in the law. The translation, almost a “tropicalization”, was the worry with social issues. And how did we put that? A concern with employment.

Salgado revealed that the inclusion of this issue in the law, “probably brought by a lawyer” and not by the economists at the commission, did not generate tensions, although employment issues “was not antitrust”. The preoccupation with employment, according to her, was part of “our tradition of a welfare state”:

This is unorthodox in terms of antitrust, but translates something about social preoccupations. The sharing of benefits is antitrust. But nobody questioned: ‘This can't be in the law’. Because that was part of our tradition of a welfare state. There must be a net of social protection. And it wouldn't be us who would eliminate that from the law, although it was not antitrust. Why not put it as a commitment? So if you want to fire people, it's OK. But before firing, reinsert them [in the labor market]. It's no bother. Reinsert, re-train. You want to profit, you can profit, but share a bit with your employees, who have benefited you before. It was a bit the idea of retribution.

The inclusion of employment in the law of 1994 occurred through the first paragraph of the article that created the TCD, establishing that in the definition of a commitment, “the exposition of the sector to international competition and the *alterations in the level of employment* will be taken into account”.

Another instrument that according to Salgado was brought from the international experience, in turn inspired by the US antitrust authorities, was a mechanism analogous to the Consent Decree, consolidated on article 53 of the law of 1994. As in the US, the Brazilian version, called *Termo de Cessação de Conduta* aimed at establishing a consensual instrument through which the antitrust authority and the investigated corporations agree on the conditions established to cease what was identified as harmful, anticompetitive practices.

Also within the arena of conducts, another importation was the concept of “dominant position”, already present in the early draft of 1988. As Salgado recalled, the choice was deliberate, and implied consciously turning down the US version of “monopoly power”, and adopting the European notion of “dominant position”:

*It [dominant position] is much more like us. Monopoly power only says that it is an abuse to elevate prices above the competitive price. But dominant position is much richer, because it talks about the capacity of imposing conditions to any agent of the market – on the distributor, on the supplier, etc. It enables observing closely the richness of actions a corporation may perform.*

The European concept was thought to be more suitable for the Brazilian reality than the American version. Nevertheless, article 25 of the commission’s draft, also incorporated what could be seen as the American version of “dominant position”, as it defined as an illegality the “abusive increase of prices”. This idea was later incorporated by article 21, XXIV of the law of 1994.

The international experience also served as a negative example. When questioned if the commission ever thought about defining the details of the economic analysis of merger cases in the law, Salgado said that they “sought not to commit the same mistake as Mexico”, who detailed parameters, “stifling the law” in respect of the advancements of economic theory:

*Mexico put in the law everything that should be actually regulated... These things change – how to analyze, what tests, the technique. These things must be very flexible, because the theory advances. It shouldn’t be in the law. This must be object of, at most, regulation, as it is in the US, or through guidelines, directives. Orientations for the market to know how it is being analyzed. [...] Defining intervals for concentration, the HHI [Herfindahl–Hirschman Index, used to assess the degree of concentration in a certain market], etc, these are things that shouldn’t be appropriate to define in the law.*

Together with the discussions and disputes among those directly involved in producing the draft for a reformed competition policy, movements related to reform were also happening outside the commission, and they helped shape the regulatory system inaugurated in 1994. One of them was propelled by central figures of the administration, which could better embody the idea of “government”: the President of the Republic and the Minister of Justice. In several meetings with the commission, as reported by some interviewees, Franco tried to insert price control mechanisms in the competition act that was being discussed. His

view, according to an interviewee, was “old fashioned for these things”, as he was still a supporter of price control mechanisms. As Coutinho maintained in an interview with Dutra (2009, p. 31), both the President and his Minister of Justice had an “extremely ideological view”, and “exercised a great pressure to include in the law these mechanisms”.

These “ideological views” cannot be separated from the worsening inflationary crisis that occurred at the time: by the end of 1992, when Franco substituted Collor, inflation reached 1.157%, and by the end of 1993, the year that the commission was working, reached a historical peak: 2.708%. As Magalhães maintained, the major expectation of Franco with the reform of the law was to create mechanisms to control the crisis, but those appointed took the opportunity to contradict these objectives and make “a good law”.

Malard, nevertheless, pointed to a relative success of Franco’s insistence on inserting price control mechanisms into the new law, although it has never been actually enforced:

He thought it was important that this mechanism was kept by the new law, although we tried to convince him of the contrary. We told him that there were other mechanism that could be used to repress this kind of conduct. But he conditioned sending the draft to Congress to the inclusion of a norm that could assure that CADE would take the measures in cases of excessive prices. So that’s how article 21, last item, came to existence. Ironically, CADE has never enforced that article.

Pressures also came from outside the state. Besides lawyers, economists, and academics, several other individuals and groups participated actively in the discussion of the draft, such as consumer protection NGOs, the Foundation of Protection and Consumer’s Protection (PROCON), consumer associations, FIESP, CNI, among others. The Brazilian industrial associations were generally suspicious of reform, and at times opposed it directly. Coutinho visited FIESP several times in order to convince its members about competition law’s importance as a modernizing step to substitute mechanisms of price control that many corporations actually enjoyed. According to one interviewee, FIESP’s president understood the idea of an antitrust authority as a “police control”, an “interference in the economy, right when it was opening itself with privatizations”. Similarly, as another interviewee maintained, “no one [in the market] wanted a project with those characteristics”. Salgado, for instance, explained that the inclusion, in the draft, of a norm that established punishments for corporations convicted for infractions to the economic order *independently of guilt* (consolidated on article 20 of the law of 1994) was “absolutely unpalatable for businessmen”. The model of price control and sectorial arrangement of prices, such as the CIP, that the

reform sought to substitute was not opposed by many groups of the Brazilian capitalist class, but, on the contrary, approved by them.

As some interviews revealed, the pressures coming from the market – be it explicit or veiled – managed to affect in a decisive form the design and practice of a reformed competition policy. This influence is reflected in what several interviews defined as “mistake”, or a “*jabuticaba*”<sup>214</sup>: the post-merger review system, existent only in Brazil (and Egypt and Pakistan, as Martinez [2011] explains). Like the draft of 1988, and the law of 1991, the commission of 1993 and the consequent law of 1994 kept a text that imposed a mandatory notification of mergers, but authorized their notification *after* the operation was undertaken. Interviews showed, however, that this design was neither a mere accident, nor a natural phenomenon. Rather, it was about politics. As an interviewee reported, the commission chose *not* to institute a pre-merger review system due to two reasons:

On the one hand, due to the relative lack of consciousness of the business class about the law. On the other, due to the perception that we didn't have qualified people to do the job. They were not specialized, they were still under formation, and they were just a few. So the commission consciously decided not to include this, also because of the fear of paralyzing the country. Because if it was to be taken strictly, there was the risk of paralyzing the country.

This “risk of paralyzing” the country was also what another interviewee emphasized in explaining the commission's decision of preserving a post-merger system. Such a risk was feared by the government, due to the economic context of the time and the pressures of market agents:

The pre-merger review system was at first discarded. We realized two things: it was not supposed to have pre-merger control, nor investigations. [...] Where was everybody? Preparing the Uruguay Round!<sup>215</sup> The country was about to open itself to foreign investments that were coming here. So maybe the government didn't want to lose political control over the competition protection organs. [...] And also because of the pressure of businessmen, especially in merger reviews. Brazil has always been very concentrationist.

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<sup>214</sup> The “*jabuticaba*” is a fruit of the Myrtaceae family native of Southeastern Brazil. Supposedly an exclusive species of the country (although it also grows in other South American countries), the *jabuticaba* provides a widely used metaphor that highlights, in a pejorative tone, the particularities of Brazil: “If it only exists in Brazil, but it is not *jabuticaba*, be suspicious!”.

<sup>215</sup> As Picciotto (2011, p. 78) explains, “liberalization reached its apogee with the successful conclusion of the decade-long Uruguay Round of trade negotiations, resulting in the establishment in 1995 of the WTO”. The final round of negotiations was held in December 1993, and the Final Act of the Uruguay Round was signed in April 1994 – precisely in the period of gestation of a new competition act in Brazil.

For another interviewee, however, it was never intended to constitute a post-merger system. Rather, they tried to concede an extended deadline for corporations to collect information *after* presenting the operation to CADE. The idea that Brazil institutionalized a post-merger system, according to her, was due to the work of lawyers representing market agents in subverting the law's interpretation:

We thought it was a pre-merger system, but it wasn't clear in the text. The market decided to understand that it was not pre-merger and imposed this understanding. The text was fragile. Lawyers, together with corporations, gave the legal discourse to what the market wanted to understand.

In any case – be it due to the lack of “consciousness” of businessmen, to the pressures of the government, to the imminence of foreign investments, to the direct opposition of corporations, or to a fragile text of which lawyers took advantage – article 54, paragraph 4 of the law 8.884 of 1994 was consolidated as a post-merger review system.

In Congress, the reformist agenda found natural support of the government's parliamentary basis, and faced criticisms from those who opposed the administration. The project entered Congress in 1993, but it was only in 1994, included as part of the governmental measures to establish the stabilization plan called *Plano Real*, that it started to move. Twenty individual amendments were presented, 16 of which were of the government's support group, that didn't touch on substantive aspects of the draft.

Another four amendments were from representatives of the PT and of PSTU, a radical left-wing party. The proposal signed by PSTU's representative, for instance, suggested that CADE's composition was to include representatives of consumer protection organs, business associations and labor unions. Another proposal was signed by Vladimir Palmeira, of the PT – the same who in the ANC was a member of Commission VI, and criticized the lack of explicit repression of oligopolies. He recast most of the 1988 draft, and determined the extinction of SDE, the institution of a system of merger review with a threshold of 20% without any explicit exception to allow concentration, and exempted state-owned corporations entitled to legal monopoly from competition control. In the voting session of June 7<sup>th</sup> 1994, the PT's leader in the House of Representatives expressed his criticism of Feldmann's substitute project, stating that although it represented “an advance in respect to the existing

legislation”, it was “insufficient”, because it didn’t “conceptualize in a clear way what are oligopolies and cartels”<sup>216</sup>.

Despite the divergences and criticisms, Feldmann’s project was approved with the support of all parties. In respect to the aspects highlighted in the reconstruction above, the law 8.884 of 1994 gave CADE the status of a regulatory agency, connected to the Ministry of Justice, but with an independent budget and legal duties, and formed of 6 commissioners and one president, lawyers or economists, with mandates guaranteed by law. It also explicitly submitted state-owned corporations that held legal monopoly to competition control, and imported several instruments and concepts from the international experience, notably from Europe and the US. The law instituted a post-merger review system with a threshold of 30% of market share, and several possibilities of allowing concentrations above this level, including the notion of efficiency<sup>217</sup>. Through the hands of a small group of lawyers and economists, the “modern” field of competition policy, tuned with the international standards, was thus being inaugurated in Brazil.

#### **4.4 Neoliberal roots of reform**

As discussed in Chapter 1, mainstream narratives tend to portray the process of legal reform as an evolutionary dynamic of modernization, a phenomenon of technological advancement and convergence, motivated by the necessities of adequacy to a new context, to solve problems generated by existing regulatory systems, or to fill eventual normative vacuums. Underlying these descriptions is a frequent idea that reform is an almost obvious, and spontaneous social process, propelled by the “government”. In more socialized perspectives, a nuanced view is presented: international organizations, and transnational or global actors are presented as the possessors of the know-how of the new technology to be implanted, and therefore as its mobilizers. In departing from these assumptions, the dominant perspectives that describe legal reforms of economic regulation construct a narrative that downplays the impact of local conditions, actors and struggles on reform, obfuscating the

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<sup>216</sup> Speech transcribed on page 8991 of the National Congress’ Diary (*Diário do Congresso Nacional*), House of Representatives, June 8th 1994, Section I – Report of the session of June 7th 1994.

<sup>217</sup> The possibility of allowing concentrations for reasons of the “national economy”, infused in the 1988 draft, was also incorporated in the 1994 law, as some acts could be declared legitimate “when necessary for reasons of the national economy and of the common good” (article 54, paragraph 2 of the law 8.884). As maintained in an interview, the appropriation of this idea in 1994 was nevertheless slightly different: “They added: ‘as long as it doesn’t affect consumers’. They put in something that didn’t exist, something that complicated the issue. This article has never been applied [after the 1994 law]. Never has CADE had the courage to talk about it, because it didn’t want to create a precedent”.



contending purposes underlying reform, and claiming that its ends are consensual. Reform is thus depoliticized.

The reconstruction of the agenda of competition policy reform in Brazil presented in this section, centered on the concrete agents who designed and disputed the institutional and legal contours of the regulatory system to be transformed, opens room for a different understanding of the process of reform, means, and goals. By connecting the institutional and legal choices fixated in the series of laws, regulations and drafts with the agents who articulated them, their trajectories, positions, and preferences, it is now possible to visualize the roots of the attempt to institute a modern regulatory framework of competition in neoliberalism.

Based on the description of reform constructed above, three main conclusions can be drawn. First, that the constitution of a modern field of competition policy in Brazil gained form most notably through the hands of corporate lawyers, and economists close to the economic mainstream in antitrust, and to the intellectual and policy nucleus of neoliberal reforms in other areas. Second, and differently from what mainstream narratives propose, far from a consensual process propelled by the government, there were several clashes around reform: among those professionals who directly designed the field, between them and market agents, and also with the “government”. Third, as struggles happened, some positions were defeated, and others were victorious. As I will argue, the rules and institutions designed for the field that resulted from these struggles were informed by the neoliberal tenets of transforming the state and the economy.

#### *4.4.1 The architects: corporate lawyers and mainstream economists*

In 1988, with the creation of a commission exclusively formed by lawyers to produce the draft of a new antitrust law, a trend that would permeate the subsequent episodes of competition policy reform was being inaugurated: the decisive role of agents close to the market – professionally and/or intellectually – as the prime architects of a system to regulate it. In 1988, all three members of the commission were corporate lawyers. Differently from the changes promoted in the mid-1980s, when minor shifts in competition policy were articulated by lawyers mostly coming from careers in the public sector, and or from academia, the commission formed by Venancio Filho, Magalhães, and Franceschini was joined by two lawyers experienced in antitrust, and another with a history of involvement with the importation of new legal instruments, theories and methods from the US.

In this group, Magalhães, a permanent presence in advancing the reformist agenda from 1988 until 1994, had a central role in defining the concepts that marked the difference between the field that was to be created, and the historically “ineffective” model of antitrust policy in Brazil, most notably the norms that regulated economic concentrations. This innovation consisted in the institution of a post-merger review system that included the notion of efficiency for the first time in Brazilian antitrust history, and submitted state-owned corporations to its control. These novelties translated into a specific regulatory device concerns already present at the ANC, between 1987 and 1988. There were basically two concerns that the conservative group often expressed when opposed the text frequently proposed by the progressive group in the production of the Constitution: the explicit reference to monopolies and oligopolies as forms of concentration to be restricted, or even more radically, *banned*; and the creation of exceptions for state monopolies from competition policy. Magalhães’ work solved these issues in favor of those who were victorious in the ANC, by not illegalizing economic concentrations, and not exempting state-owned corporations from competition control. These were principles tuned with the neoliberal economic tenets, and combined with policies of privatization and deregulation, could shape the Brazilian economy accordingly. The law of 1994 largely incorporated those definitions.

Although no economists were directly involved in the construction of the proposal elaborated by the 1988 commission, what by that time was already the mainstream of economics was being infused in the reform of competition policy in Brazil – and through the hands of lawyers. The argument expressed in Magalhães’ memorandum in the 1988 draft to justify the toleration of economic concentration in certain situations, which attributed to the European legislation the inspiration of the merger review system, is inseparable from what by that time was already a hegemonic position in the “modern antitrust legislations”.

The “unanimity” of foreign experiences referred by Magalhães was not the institution of merger reviews (already established, although in an embryonic form, in the 1962 law), but most importantly the conditional approach to the repression of economic concentrations, in which economic efficiency plays a great role. By 1988, when the commission was working on the draft, this understanding had already been consolidated in the sources from which Magalhães claimed to have taken the inspiration to produce the draft. In the U.S., two administrative guidelines of 1982 and 1984 issued by the DOJ crystallized the shift away from a long tradition of American antitrust, as embodied by the guidelines of 1968 (Eisner

1991, p. 195), which was starting to fall apart since the 1970s<sup>218</sup>. This was the period of Ronald Reagan's government, whose election in 1980 "was the catalyst for the most dramatic changes in the FTC and DOJ antitrust division" (Davies 2010, p. 77). Under Reagan's administration, US antitrust policy was re-established "upon the principles of Chicago industrial organization economics" (Davies 2010, p. 77).

The guidelines of 1982 "suggested a reorientation toward mergers, stressing their important and positive role in the economy" (Eisner 1991, p. 196), and were "the most prominent indication that antitrust had become dedicated exclusively to efficiency maximisation (Davies 2010, p. 77). As Eisner (1991, p. 196-197) explains, while the DOJ's 1968 guidelines were seen as an "antimerger policy", in the new understanding that sprouted in the 1980s, mergers "were presented as efficiency promoting, clearly in agreement with the tenets of the Chicago school of industrial organization"<sup>219</sup>. Like the draft of 1988, the DOJ's guidelines of 1982 enumerated the conditions (or "Defenses") in which a merger could be approved, among which was the notion of efficiency<sup>220</sup>. The 1984 guidelines went even further along this line, and "explicitly stated that efficiencies would be considered in the assessment of mergers that exceeded established thresholds" of economic concentration (Eisner 1991, p. 198).

Europe, to which Magalhães attributed the source of his inspiration, was by that time starting to align with the trend originated in the US. As Buch-Hansen and Wigger (2011, p. 81) maintain, since the mid-1980s European competition policy, notably that developed by the European Commission's Directorate General for Competition, "was subordinated to the sole purpose of establishing rigorous competition, thereby becoming a major regulatory

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<sup>218</sup> As Robert D. Willig, who was deputy assistant attorney general for economics of the DOJ Antitrust Division between 1989 and 1991, wrote in a somewhat praising tone about the novelties introduced by the 1982 and 1984 guidelines, they constituted "dramatic departures from the previous guidelines published in 1968", which "relied almost exclusively on measures of concentration and provided little precise guidance on how to define the relevant market, the universe over which concentration would be measured" (Willig 1991, p. 282).

<sup>219</sup> The new trend was explicit in the guidelines' first item, which was in several points similar to Magalhães' memorandum: "Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and *facilitate the efficient flow of investment capital and the redeployment of existing productive assets*. While challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral. In attempting to mediate between these dual concerns, however, the Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipency" (my italics).

<sup>220</sup> According to the "efficiency defense" established on the DOJ's 1982 guidelines (item V), "In the overwhelming majority of cases, *the Guidelines will allow firms to achieve available efficiencies through mergers without interference from the Department*. Except in extraordinary cases, the Department will not consider a claim of specific efficiencies as a mitigating factor for a merger that would otherwise be challenged. Plausible efficiencies are far easier to allege than to prove. Moreover, even if the existence of efficiencies were clear, their magnitudes would be extremely difficult to determine" (my italics).

instrument to warrant a genuinely free-market economy”. The combination of social policy goals with competition policy – often seen as typical of European antitrust – was gradually disappearing from the European Commission’s practice, and a new set of directives was targeting various forms of state aid and industrial policy in member-states (Buch-Hansen and Wigger 2011). At least since 1985, the Commission also “started to tackle state-monopolies by means of so-called privatization directives [...] a hitherto virtually unused provision” (Buch-Hansen and Wigger 2011, p. 80).

Already in 1988, thus, and through the work of a commission formed exclusively by lawyers, the economic mainstream was being incorporated into the reform of Brazilian competition policy. Lawyers were infusing modern economic theories into the law, even without economists. This finding speaks directly to the literature discussed in Chapter 2, sections 2.2 and 2.3. Dezalay and Garth (2002a) claim that the institutional reforms of the 1990s in Brazil were paralleled by the ascendancy of economists into the field of state power, in detriment of the historical roles performed by lawyers as statesmen and institution builders, and law as an expertise of government. In this view, lawyers would have a comeback only later in the implementation of neoliberal reforms.

In the case of competition policy, however, the phenomenon described indicates that already in the late 1980s lawyers were key agents in the introduction of reforms aligned with the neoliberal standards. Moreover, they were a particular kind of lawyer: corporate lawyers who were expert in the subject, and possessed connections and experience with foreign agents and practices, especially in the US and Europe. This observation also enables reassessing a specific evaluation about competition policy in Brazil, often present in mainstream narratives, but also in sociological studies such as Onto’s (2009). According to this author, it would be

only with the inclusion of economists in the antitrust organ (two years after the new law was approved) that the Brazilian competition policy started to adopt new procedures and organizational practices more similar to those adopted by the FTC. Antitrust policy became a space of calculability, in which decisions started to be taken according to economic criteria of efficiency (Onto 2009, p. 35-36).

As I will discuss in the next chapter, it was indeed only *after* the enactment of the 1994 law that an explicit and articulated set of procedures and practices highly reliant on economic science was implemented in CADE. However, the institutional roots of this system were already inspired by the US practice in the late 1980s, and would be consolidated in 1994. The legal possibility for incorporating what Onto called “procedures and organizational

practices” was thus to a great extent opened by the novelty that emerged in 1988 and was later replicated in other projects.

In the subsequent attempts to transform competition policy – in 1991 and 1993 – corporate lawyers were also present, including Magalhães. The novelty after 1988 was that economists started to actively participate in reform. Although the construction of the law 8.158 of 1991 was again articulated by corporate lawyers – two who had worked at FIESP and Magalhães –, the elaboration of the 1991 law’s regulations already involved the participation of an economist who would be active in the 1994 reform: Lucia Helena Salgado. It was only between 1993 and 1994, nevertheless, that economists achieved more possibilities to influence reform, and in different opportunities disputed it with lawyers.

Economists involved in the production of the 1994 law orbited the Secretariat of Economic Policy, then run by an exponent of the orthodox economic department of PUC-Rio, Winston Fritsch. According to the interviews conducted, they were not officially part of the commission appointed to elaborate the draft, but contributed to it in different respects, such as the definition of the market share threshold for merger reviews (demanding a number higher than that approved in Congress), the economic delimitation of the profit criterion for mandatory mergers submissions, and even in writing the explanatory memorandum of the substitutive project presented by Feldmann in Congress. These economists not only endorsed the heritage brought from the 1988 draft in respect to the approach to concentrations, but expanded it, contributing to the importation of regulatory instruments, such as the TCD.

They also seem to have contributed to the preservation of some intentions already present in 1988, but that were at risk of being lost in the 1993 commission. This was the case of the debate about submitting state-owned corporations to competition policy control, as depicted in the clash between Salgado and Coutinho. As Salgado described, her dispute with Coutinho was about overcoming a “cultural trace” still present in the elites, one that confused the “market” with the “state”. State-owned corporations, in her view, were to be equally submitted to competition control, as they were genuine, and purely market agents. Thus, the influence of economists in the 1994 reform doesn’t seem as “secondary” as suggested, for instance, by Onto (2009, p. 68). Again, they helped prepare the terrain for what would eventually be an even more decisive influence of economics. More importantly, these were already a specific kind of economists, radically different from those who, although marginally, were already involved with the field. Instead of being heterodox economists close to developmental economics and policies, the economists that arrived in 1993 were connected

to the nucleus of neoliberal reforms, in the Ministry of Finance, and part of what was already a consolidated mainstream, orthodox approach.

The decisive architects of reform were thus agents close to what mainstream narratives say they “regulated” or “controlled”: the market. They were their representatives (corporate lawyers), or believers in its superiority vis-à-vis the state and politics (mainstream economists). The role of these architects in shaping the institutional contours of a modern competition policy became clearer in the reconstruction presented through the mapping of the struggles that took place among them, and through the contrasting of their position-takings with other agents who tried to impact reform. Reform was a process marked by struggles and political compromises that, as I argue, constitute another indicator of the roots of reform in neoliberalism.

#### *4.4.2 The process: struggles and political compromises*

Although the architects of reform were a relatively cohesive group – many were acquaintances, worked together before or after reform, and had academic connections –, divergences were present in the process of transforming competition policy in Brazil. At this point, the “clashes of expertise” that Dezalay and Garth (2002a) talk about help understanding the nature and political consequences of these disputes.

Exemplary of these tensions captured in interviews was the battle between the Ministries of Justice and Finance around CADE. While until the late 1980s the Ministry of the Economy (later Ministry of Finance) was said to be an opponent of the idea of strengthening CADE, the change of government and the arrival of a new generation of economists in the field of state power underlay a shift in the Ministry’s relation with the subject. The Ministry of Finance not only became interested in competition policy, but attempted to absorb it within its hierarchical structure. Lawyers and the Ministry of Justice, on the other hand, reacted, affirming its necessary control over the organ. This dispute was expressed through appeals to expertise: lawyers highlighted the unavoidable legal aspects of competition regulation, while economists stressed the undeniable economic content of its object. What seems to underlie the position defended by economists was a fear that decisions would be inappropriate in economic terms, as CADE, historically an organ of legal features, wouldn’t have the technical capabilities to produce decisions qualified according to the standards of economics – i.e. according to the new economic model they were implementing in other areas (liberalization and privatization).

A political compromise was eventually constructed to resolve the dispute – establishing CADE as an autonomous regulatory agency, and conceding each Ministry a Secretariat to be involved in policy-making (SDE and SEAE). Even if it meant a defeat of the economists, it also implied the assurance that there would be a space of influence for them in the decision-making process, besides the direct appointment of economists to CADE. As I will discuss in the next chapter, this institutional design was fundamental to advance the reform of competition policy through the economicization of antitrust.

In the creation of a new space of practice and regulation, tensions occurred not only within and among the fields of law and economics, but also with the political and economic fields, as discussed in the framework sketched in section 2.1.2. Exemplary of a conflict with the political field was the tension between the professionals constructing reform and the agents that were the best representation of what mainstream narratives define as “the government”. In all the described attempts of reform, Presidents and Ministers, of different political parties, were often pointed to as sources of opposition to the agenda that was being pushed forward by those appointed to do so.

There were numerous references to the attempts of “the government” to “subvert” what would be a modern system of competition policy through the inclusion of price control mechanisms. In some interviews, the government was said to not “understand” what competition policy was about, so those agents articulating the transformations took the opportunity to advance a new institutional design and consolidated certain legal mechanisms beyond, or even against the interests expressed by Presidents and Ministers. The often oppositional stand taken by government evidences that the group of corporate lawyers and neoliberal economists who shaped reform worked as a sort of vanguard, and thus had an even more central role in actually adjusting the Brazilian competition regulation to the international standards.

A third example of conflict concerned the economic field, and was identified in the unsympathetic responses of market agents to the attempt to reform competition policy. Notably in respect to the control of concentrations, market agents were suspicious of the proposed system, and often thought of it as a measure that contrasted with the impulses of privatization, liberalization, and deregulation that were being promoted at the same time. The architects of reform worked extensively in talking to these agents and tranquilizing them. As reported by several interviewees, the institutional design embedded in the 1994 law, but already present in the 1988 draft, reflected the market’s expectations. Be it due to a deliberate choice or the result of lawyers exploiting a faulty legal text, the post-merger review system –

the mentioned “*jabuticaba*” – performed a sort of “social function” in respect to the market, by sending a signal that the reform that was being undertaken did not aim at jeopardizing the natural dynamics of the market.

Reform was thus far from consensual within the group propelling it, and between it, the higher ranks of government, and corporations. Evolutionary narratives, which depict reform as a consensual process toward a commonly shared objective are therefore misplaced. The Brazilian experience of competition policy reform was marked by clashes and political compromises to accommodate different and at times conflicting interests – often tending to pro-market positions. Moreover, it was clear from the struggles around reform that the importation of a modern technology of competition regulation was highly affected by the local context – be it due to the clashes of expertise between lawyers and economists, or to the dominant views of both “the government” and “the market”. As Twining (2005a, p. 24) suggested, “local conditions” affected the way a legal import is assimilated, adapted and rooted in a specific context.

#### 4.4.3 *Prospects for neoliberalism institutionalized*

The way it was articulated between the late 1980s and early 1990s, competition policy was an integral part of neoliberal policies of liberalization, deregulation and privatization that gained ground as an appropriate response to a decade long inflationary crisis. There is nothing unique in Brazil about that. As Saad-Filho (2005a, p. 225) maintains, it is a characteristic trace of neoliberal policies in Latin America to be “often disguised as ‘technical’ anti-inflationary measures”. The analysis of what competition policy reform institutionalized in Brazil enables, however, understanding on what grounds and with what purposes such linkage between neoliberal policies and inflation control is actually constructed.

Disguised or not, competition policy reform in Brazil was indeed articulated as the component of a series of anti-inflationary measures (not by chance, it was presented as one of the legal measures of the *Plano Real*), as at its core is the regulation of price formation. The way it was institutionalized through the hands of a vanguard of corporate lawyers and mainstream economists, and often against the will of the government, implied the constitution of mechanism for expanding and guaranteeing the market as the proper arena of price formation. The Brazilian state would have been historically interfering in this dynamic, be it through direct economic activity (state-owned corporations), or through mechanisms of price control, especially since the 1980s. With the creation of a modern field of competition policy,



and the parallel destruction of the interventionist institutions such as the CIP and SUNAB, the state's primary role in the definition of prices was taken away, and deposited into the market. This movement fits the neoliberal project of reforming the state and the economy. As discussed in section Chapter 2, section 2.4, at the center of neoliberal theory is the idea that the market, in place of the state, is the best setting to “process information” (Mirowski 2009a, p. 438) – and prices, in mainstream economic theory, are about information.

This is not to say that price formation was absolutely free under a modern competition policy. The 1994 law instituted several measures that explicitly mentioned prices – some of them even reputed by the architects of reform as being wrongfully inserted into the law due to the government's pressure. Nevertheless, the space for the market to determine prices was enhanced through reform, especially due to the institutional and legal imports that gave content to that regulatory arena: a system open to economic concentrations, that submitted state-owned corporations to its control, and respectful of economic efficiency as a central criterion of analysis. Price was now to be mediated by the market through competition – and not by previous forms such as price control and what interviewees and mainstream narratives called “arenas of negotiation” between the government and the market<sup>221</sup>. But a market that could, if justified for reasons of efficiency, be concentrated. Through a reformed competition policy, the impelling claim that the economic reality of the time is one of concentration, already ventilated in the ANC to oppose the explicit ban of oligopolies and monopolies, and endorsed in the specific reformist initiatives of the 1980s and 1990s, was thus matched to the allocation of price formation to the market. Two tenets of neoliberal theory were therefore consecrated through reform.

However, as both the theoretical framework from which I departed highlights, and the experience of those involved with competition policy since 1994 would reveal, the formal institution of a new regulatory system with the described traces was no guarantee of how it would be practised. The law contained *prospects* for the neoliberal orthodoxy to develop, but no *assurances*. A “politics of enforcement” was opened by this regulatory arena, and created a new set of challenges to be resolved. These new tasks evolved around determining who was entitled to produce competition policy in Brazil, and guiding the actual content and the priorities of the decision-making practice. These were matters beyond the text of the law. Reform was thus to be advanced in the practice of the recently created field.

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<sup>221</sup> As I will try to show in the next chapter, competition policy did not eliminate “arenas of negotiation” between the state and the market, but rather opened a new one, founded on a technocratic discourse and practice.

## CHAPTER 5

### The mode of production of competition regulation

As it was discussed in Chapter 2, to assess the hypothesis that the field of competition policy is rooted in and functional for neoliberalism, it is not enough to evidence its original connections to the agents that impacted reform, their positions and struggles. Although the modern contours of Brazilian competition policy started to be molded already in 1988, both at the ANC, and in the elaboration of a first comprehensive draft to transform antitrust, institutionalizing the prospects for neoliberalism to develop, there was no guarantee that the actual practice of the field would mirror the reformist intentions. The law of 1994 set the stage for the production of competition policy, opening way for a “politics of enforcement” to take place (Suchman and Edelman 1996). It is thus also necessary to understand how the field is structured after its constitution, that is, what are the objective relations that structure its practice.

To analyze the practice of the field of competition policy, I proposed a research question that is similar to that tackled through the data presented in the previous section: *Who are the agents of practice of competition policy in Brazil? What are their positions in the field, their capitals, and habitus?* By mapping the structure of relations among these agents, I believe it is possible to assess and explain what stances are institutionalized in the field after it was reformed, and thus to identify its linkages to the tenets of neoliberalism.

In this chapter, I seek to illustrate how the field was structured after its creation – i.e. the agents that hold the monopoly to determine the law, their positions and habitus – replicates the central trend identified in the reform of competition policy: the dominant presence of corporate lawyers and mainstream economists professionally and ideologically aligned with the neoliberal project. As I will discuss below, the recruitment of agents with these profiles was crucial in two senses. First, for guaranteeing that the means and contents of enforcement were compatible with the inspirations that guided the construction of the field. Second, for the advancement of reform into domains that weren’t tackled in the episodes that led to the creation of the field.

The sections that follow go into the details of the profiles and trajectories of those who possess the “notable legal or economic knowledge” to produce competition policy in Brazil: the commissioners and presidents appointed to CADE between the beginning of competition policy as a modern regulatory agency, in 1994, and 2012. I also applied such trajectory study to agents that occupied the SDE and SEAE and were seen by the field as important for its

development. Based on the methodological strategies described on Chapter 3, I identified what sorts of capital legitimize certain actors to achieve the position of regulator, to what stances on competition policy they are connected, and in what senses they helped to preserve and advance a neoliberal shape to the field of competition policy.

In section 5.1, I present a general overview of CADE's historical composition in the entire period in which competition policy was produced through the reformed law of 1994. In this section I also describe how the agents involved in the field perceive this composition. The narratives that emanate from those involved in the field's practice – both from agents that occupied positions in CADE, SDE or SEAE, and professionals who had never served any of these governmental organs – often erase or naturalize the dynamics behind the definition of who is entitled to produce competition law in Brazil. They provide definitions on what constitutes a “technical council”, and, in opposition, of who are seen as the “outliers” that achieved positions in CADE, and what is viewed as a “political” or “interventionist” Council. These are normative stances on how should competition policy be produced, and thus constitute useful parameters to understand what kind of expertise and competences became hegemonically valued and legitimate in CADE. In other words, it provides a reference to evaluate if the neoliberal tenets have been institutionalized as the appropriate (or “technical”) profile to produce competition policy.

Once CADE's different compositions (Figure 12) cannot be fixated in terms of years, to facilitate the analysis I divided the exposition of CADE's compositions in three broad periods, relatively circumscribed by CADE's presidencies. In section 5.2, I present the compositions from 1994 to 2000, a period marked by a serious institutional crisis of the field of competition policy and its solution. In section 5.3, the period from 2000 to 2008 is analyzed, one that, despite some changes in the balance between lawyers and economists in CADE, and in the political context, was one of relative stability and consolidation. Finally, in section 5.3, I assess the composition of the period from 2008 onwards, which was often reputed in interviews as that of “politicization” and growing “interventionism”. In the final section (5.4), I go back to the hypothesis that guided the inquiry into the agents that produce competition policy in Brazil, and discuss whether and how neoliberalism has been also institutionalized in the field's dynamics.

## 5.1 General overview and views of the producers of competition policy

The reform consolidated by the 1994 antitrust act inaugurated an institutional design in which CADE gained the contours of an administrative tribunal responsible for deciding the legality of corporate conducts and economic concentrations that fit the criteria established by reformers. This tribunal is formed by one president and six commissioners. Lawyers and economists are entitled of decision-making, once to become a commissioner the law established, besides an “immaculate reputation” and being over 30 years-old, the need to possess “notable legal or economic knowledge”. Formally, the President is in charge of appointing a commissioner, and the Federal Senate evaluates the nomination. If approved, the commissioner serves a two-years term, and may be reappointed for another term of equal duration.

In the first part of this section, I provide a general overview of CADE’s composition between 1994 and 2012<sup>222</sup>, which will serve as a reference for the detailed analysis presented in the forthcoming sections. In the second part, I describe what are the views of the very agents that integrate the field of competition policy about the “notables of law and economics” recruited to produce antitrust law in Brazil.

### 5.1.1 *Notables of law and economics*

Since the reform of the field, in 1994, until 2012, 46 individuals were appointed to CADE, comprising 6 presidents and 41 commissioners (1 of them occupied a seat as both commissioner and president). I classified these agents as “lawyers” and “economists” according to their academic trajectory (undergraduate and graduate studies). In cases in which the undergraduate and graduate studies were developed in distinct areas (for instance, undergraduate degree in law, and a PhD in economics), I also took into consideration the professional activities of the individual to determine where to classify her. These cases, a minority in the universe of the “notables”, will be identified in the next sections, and the classification adopted in these special cases will be made explicit.

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<sup>222</sup> I am here considering commissioners and presidents that produced competition law under the reformed law of 1994. Thus, the agents selected comprise those appointed in 1993, but who stayed in office until 1996, and those appointed in 2012 *before* the new competition act of 2011 (law number 12.529) came into force, in May 2012, revoking the 1994 antitrust act.

Among the 41 commissioners, 24 were law graduates, and were thus classified as “lawyers”. Other 17 agents came from different origins, such as economics, management, public administration and engineering, but were classified as economists, as it was their knowledge of economics (frequently reflected in their cultural capital, such as a PhD in economics) that legitimized their appointment to CADE. Among the 6 agents that occupied the chair of president, 4 were lawyers, and 2 were economists.

Under the 1994 law, commissioners and presidents were appointed under four different administrations: Franco (1992-1994) appointed one president and 6 commissioners<sup>223</sup>; Cardoso (1995-2002) appointed 19 commissioners, and 2 presidents; Lula (2003-2010) appointed 14 commissioners, and 2 presidents; and Rousseff (2010-2012) appointed 4 commissioners, and one president. The total sum of the appointments made by all presidents that were in office between 1994 and 2012 equals 49. This is because, as I will discuss in the next sections, 2 commissioners were appointed for their first mandate by one president, and for the second mandate by a different one.

The figure below summarizes CADE’s composition in the period of analysis. There are seven lines in the table, which stand for CADE’s president (the first line) and 6 commissioners (second to seventh lines). The boxes painted in black refer to the mandate of a lawyer, and those in orange, to the term of an economist. The spaces in gray comprise intervals in which a certain position wasn’t being occupied. The width of each box corresponds to the duration of the mandate, based on the dates of the first participation of a commissioner or president in CADE, and her last session. To identify the composition of CADE in a certain moment of time, it is necessary to pick the year and verify which “boxes” are touched by that straight line. For instance, right in the year 2001, the President was João Grandino Rodas, and the commissioners were Mércio Felsky, Celso Campilongo, Thompson Almeida Andrade, Afonso Arinos, João Bosco Fonseca, and Hebe Teixeira Romano. Between the years 2001 and 2002, to give another example, for a relatively long period of time 2 posts in CADE were vacant.

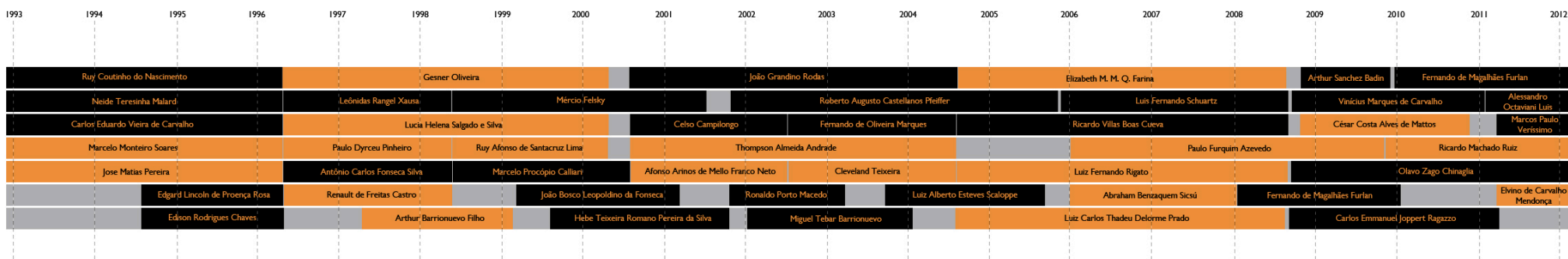
Although all mandates tended to begin together in the initial years (notably in 1994 and 1996), after a while they started to be intermittent. This is due to different reasons, such as the case of commissioners who didn’t have their mandates renewed, or those whose appointment was delayed in Senate. It is therefore not possible to talk about the council as fixated in terms of years, presidencies, or governments. For instance, under Gesner Oliveira’s

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<sup>223</sup> Five of the seven appointments made by Franco were previously nominated by Collor in 1991, under the law 8.158.

presidency, the council in 1998 was fairly different from that of 2000: 5 commissioners had been changed, and lawyers doubled their number.

**Figure 8.** CADE's composition under the law of 1994 (1994-2012)



Source: elaborated by the author

Nevertheless, some trends can be observed in the historical composition of CADE. For instance, the prevalence of lawyers vis-à-vis economists in certain historical periods (e.g. from 1994 to 1996, and from 2000 to the middle of 2004), and the dominance of economists in other moments (e.g. from 1996 to 1999, and from 2006 to 2008). Despite periods of notorious imbalance between the two professional groups, as a rule, since reform – and that was an important novelty in respect to the previous compositions of CADE – the council was never entirely composed solely by lawyers. Economists were always present, at least in the number of 2, and were also appointed as presidents of the Brazilian competition agency in two opportunities, governing the institution for a total of 8 years. This finding diverges with Onto's study (2009) about the economicization of antitrust policy in Brazil. In this author's view, this process would have begun with the appointment of economists to CADE, which in turn would have taken place only from 1996 onwards (Onto 2009, p. 86).

However, as depicted in the figure above, I identified two economists who were members of CADE since 1993. As described in section 4.1, even before the reform of antitrust, in the council assembled by the Minister of Justice Paulo Brossard, in 1986, an economist was already present as a commissioner. The numeric shift pointed by Onto is certainly worth understanding, as at a certain historical moment economists surpassed lawyers in an arena traditionally dominated by legal expertise. However, as I will discuss in this chapter, given that economists were already present in the history of competition policy in Brazil, more important than a quantitative increase, was a *qualitative* change in the profile of economists. The economists that outnumbered lawyers in CADE in the mid-1990s came from considerably different trajectories if compared to their predecessors, and brought with them distinct and innovative forms of capital to determine how should antitrust policy be practiced in Brazil. It is precisely the novel quality of these economists, as I will try to show, that helps understanding how and why CADE's composition pended to the side of mainstream economics and, thus, to neoliberalism.

Both the dominance of a certain professional group – notably that of economists from 1996 onwards –, and the attempt to institutionalize a minimum representativeness for lawyers and economists were not fortuitous. They resulted from disputes over the field of competition policy to assure its practice in a certain way, and through certain means. A “politics of composition” takes place in the history of the reformed field of competition policy in Brazil, and it constitutes a valuable entry point to assess its possible linkages to neoliberalism.



### 5.1.2 “Technical”, “outlier”, “political” and “interventionist”

*“Thank God we live in a time in which the question of ‘Are the commissioners today better than before?’ is not as relevant as in the past”.* This is how a lawyer responded a question that requested his/her evaluation of CADE’s compositions throughout history. The answer reveals two important elements that were replicated in many other interviews: first, that CADE’s composition has been “good” for some time, and second, that it was not the case in a certain moment of history.

This evaluation is frequently shared in the field of antitrust. Moreover, a “good” Council is said to be a “technical” one, and this is seen as a constant in CADE, despite some few exceptions. As a former commissioner maintained: “The anecdote tells that appointments have assumed an increasingly technical character, and less political, also because a critical mass of people working in this area started to be formed”.

A similar evaluation was offered by another former member of the SBDC: “Although I can identify different inclinations, different profiles, there is a certain technical worry. There has been a worry to compose CADE with people familiar with the area”. In the evaluation of yet another interviewee, the technical character does not imply, however, homogeneity:

Everyone in CADE has a CV that enables her to be there. Obviously, there is an influence, merely ideological. It is not an influence to decide something in the interest of who appointed them. But there are clear trends in how to face the economy.

In the view of different competition lawyers who have never served in governmental positions, CADE’s historical composition has been extremely technical, “recognized by the market”, even representing an exception within the state apparatuses, as the extracts below illustrate:

I would say CADE is an exception within public administration, because it has always have respected by the primacy of the technical pattern vis-à-vis a purely political appointment. Although it has happened, it is not the rule. The rule has been technical appointments, and this is very important for the formation of the organ’s culture.

In the responses provided in interviews, there are clues about what makes CADE such a “technical” agency. One is the opposition, or at least a hierarchy in respect to “political

influences”. As one interviewee maintained: “It’s been a place relatively isolated from political appointments”. In the view of another one,

The council has become more reliable, more predictable, increasingly independent, with less purely political appointments. All political appointments must at least have a minimum of technical appearance, otherwise they don’t succeed.

The technical character of the council is seen as a *barrier* to political interference, as yet another extract reveals:

The merit of having technical people is that they don’t have political compromises, and thus react badly to any attempt of interference. [...] The government itself, and the Legislative, started to see CADE as an organ that if you pressure too much, if you call to try and influence a decision, to ask for a favor, you don’t succeed.

The profile of those who compose the council was often appointed as one of the reasons that would explain CADE’s impermeability to political influences. An element that characterizes this profile and thus legitimizes a commissioner or president as a technical appointment are her academic credentials:

The profile of a commissioner is essentially a university professor, especially today. They’re almost all professors of law or economics. There are rare exceptions. It’s a profile of public universities professors, with the exception of the major private universities, such as PUC, and FGV.

There’s people with a solid academic background. Almost all of them went abroad to study, and most of them have a PhD, some even a post-doctorate. From the technical point of view, CADE is well equipped.

Professional expertise is also pointed to as an indicator of technicality, as these extracts illustrate:

Who are CADE’s commissioners? They are academics, people with expertise in the area. They are eventually people that worked in the sector. There is not many political interventions, such as putting someone that has no idea about competition defense, or that has no expertise. There is a worry with the academic expertise of commissioners. Today, they are normally PhDs in law or economics. A PhD in Political Science is not appointed to CADE, for example.

The “technical” character of CADE’s composition was also often established in comparison to other regulatory agencies in Brazil, which would be much more politicized than competition policy, as illustrated below the extract below:

Contrary to other organs, such as the regulatory agencies, CADE is not very much the object of political interest. Because of that, it is kept more protected from appointments that are not technical. CADE is usually integrated by people that really know the subject.

An explanation to the shielding of CADE from politics often offered by the interviewees is related to a perceived minor importance in terms of economic impacts, in comparison, for instance, to other regulatory agencies, and its precarious institutional and budgetary situation. As an interviewee maintained, “Because CADE has a really modest budget, maybe it hasn’t attracted the attention of political parties to make appointments”.

That would also explain what some interviewees perceive as an increasingly growing presence of young professionals among the appointments. As the salary to be a commissioner has been historically low, if compared to positions in private practice, CADE tends to attract young lawyers and economists:

CADE has become increasingly technical and young. They are still technical, but younger as the time passes. This is because the opportunity costs in Brazil raised. You’re not able to attract people to become a commissioner.

As a lawyer maintained, this institutional debility would be actually an “advantage” for competition policy: “If salaries were good, maybe there would be more [non-technical appointments]”.

Despite the changes that happened in the political scenario in Brazil since the reform of competition policy – most notably, the passage from FHC to Lula, members of the two major contestants in national politics –, the evaluation that depicts CADE as an exceptional technical arena is one of continuity. Several interviewees converge in this perception, some even expressing surprise: “There were much less [changes] than I thought we would have. In a certain way, there was a continuity of technical officers that were there before the government, especially in SDE and SEAE”.

Competition policy was compared, in this sense, to other governmental areas in which no ruptures would have happened, such as macroeconomic policy:

The government of Fernando Henrique Cardoso strengthened the Ministry of Finance, keeping [Pedro] Malan for 8 years. There was this stabilization in economic policy, there was coherence for 8 years in economic policy, with the same team, with the same leadership. There was the same process in the Ministry of Justice during Lula's government. We had only two Ministers, Márcio Thomaz Bastos, and Tarso Genro. It was the same agenda, an agenda of protecting and valuing institutions.

In the view of several interviewees, CADE's regulatory practice would be thus historically independent from the government:

Just as in the example of macroeconomic policy, competition policy in Brazil is consistent, independent of the government. This is one of the reasons that explain the good institutional performance of Brazil, this consistency in some fundamental policies. Macroeconomic policy even more. [...] There was the shift to Lula, but this was kept intact, even deepened. [...] And with competition policy is the same thing.

Besides the nearly consensual evaluation of the technical character of CADE's appointments, interviews also revealed another frequent shared perception about the composition of that council: that there are "outliers" in the general rule of technical agents. What defines an "outlier", in these narratives, is the absence of expertise in the subject, and a lack of proper understanding of "what is CADE" or competition policy, as an extract from the interview with a former commissioner illustrates:

There will always be a dissonant voice, a voice that doesn't understand what is CADE, or that goes there for a specific reason, that contrasts with the objective of competition policy defense. It will always happen, and it happens in any tribunal, at any time, anywhere in the world.

In a similar sense, the idea of a proper "language" of antitrust was raised by yet another former commissioner:

There were exceptions [to the technical rule], no doubt. People that parachuted there, that had no contact with the subject. [...] It was a little embarrassing sometimes. It's a grammar, a language that he/she doesn't speak and the others are speaking. This is a problem.

An example mentioned by several interviewees to illustrate the behavior of an "outlier" in CADE was a commissioner that conducted public hearings in certain cities to discuss cases with the local population. According to several interviewees, the potential "damages" and "distortions" caused by "outliers" have nevertheless been "corrected" by the

collegiate structure of CADE. As a lawyer referred, “once it is a council, I think this kind of ‘distortion’ is minimized by the capacity of the others”. As another interviewee highlighted, “There were commissioners that had no idea about what CADE or antitrust in Brazil. But as any bureaucracy – and CADE is a bureaucracy –, it seems that it walks by itself, and doesn’t produce much damage to society”.

Although CADE’s composition throughout time is said to be primarily technical, and “outliers” are seen as small minority with no real interference in the decision-making process, another convergence that emerged from some interviews pointed to a recent shift in the Council’s profile. These are perceptions maintaining that CADE has become more “politicized” and “interventionist” than before, and less independent from the “government”. Such shift is often identified with the arrival of certain agents in CADE, especially since 2010.

An extract from an interview with a former commissioner illustrates this idea:

In the past, once CADE was not well known, people were there for technical reasons. I even wonder if nobody actually wanted it! So Coutinho’s group was very technical, and Gesner [Oliveira] also brought technical people with him. But things evolved, and today it is much more politicized.

Another former commissioner qualified this “politicization”, suggesting that there is an alignment of the Council with what “the government thinks” and a consequent loss of “autonomy”, especially in respect to the support to certain industrial sectors (i.e. the formation of “national champions”):

CADE exercises too little its autonomy. I think it takes too much into consideration what seems to be the interest of the country, which is actually what the government thinks it’s important to the country. For example, certain corporations are important to the country, if they are national champions, if they are corporations that will represent shares and profits, if they are corporations that have national participation, if they are in significant sectors.

Although not talking in terms of “politicization”, other former commissioners highlight the emergence of a new decision-making style in the same period in which there would be such alignment with the governmental thinking. For a former commissioner, for instance, this shift would entail a more “interventionist”, “anti-capital” approach to antitrust, and that would be a perception shared by market agents: “From the ideological point of view,

I think there is a generalized perception in the market today, that CADE has become more interventionist. A mentality a little more anti-capital than before”.

In the view of yet another former member of the SBDC, the novelty is in the (problematic) *kind* of intervention promoted by CADE since a recent past:

Commissioners asking for a commitment to performance with technological development to approve a merger. Commissioners asking for commitments to investment to approve a merger. If you can't relate structural control of the market to performance in terms of prices, quantity, and quality, how come can you relate with variables like those?

As described above, there are three major trends embedded in how the field of competition policy interprets the historical composition of CADE: first, that the council has had a predominantly “technical” character throughout the years; second, that there have been some “outliers” recruited to CADE, who nevertheless haven't impacted decision-making significantly; third, that there is a recent move toward a more “political” and “interventionist” profile. More than mere opinions that emanate from these agents, these evaluations contain clues about the hierarchies and structures that operate in the field of competition policy in Brazil. The divide between a “technical” and a “political” council, as well as the contrast between “experts” and “outliers” provide parameters to investigate who is seen as legitimate to produce competition policy and why, and who is not. In other words, this is a means of identifying if the neoliberal tenets have been institutionalized as the appropriate (or “technical”) profile to produce competition policy. What is still to be done, thus, is identifying what sorts of agents fit each category.

## **5.2 Back to the future: the implementation of a “technical” agency**

The first composition of CADE to produce competition policy under the reformed law of 1994, in the transition between the government of Franco and his successor and former Minister of Finance, Cardoso, was mostly inherited from the Collor administration. Five commissioners appointed in 1991, under the law 8.158, were confirmed by Franco in March 1994 for another term, and were thus entitled of initiating the history of a modern field of competition policy in Brazil until April 1996. They were three lawyers – Ruy Coutinho do Nascimento, Neide Teresinha Malard, and Carlos Eduardo Vieira de Carvalho – and two economists – José Matias Pereira and Marcelo Monteiro Soares. In January 1995, following

the approval of the 1994 law, which determined a council with 6 commissioners and one president, other two lawyers were recruited to CADE: Edgard Lincoln de Proença Rosa and Edison Rodrigues Chaves.

As the table below illustrates, the group in charge of CADE in the early moments of the reformed field was quite homogeneous: they were all public servants, in an advanced stage of their careers (the age average was 50 years old), with master's degrees as their highest graduate title and no extensive dedication to academic work. They were also not specialists in the subject, with the exception of Malard, who held a master's degree in competition law at the London School of Economics. Working in the federal state apparatuses in Brasília for a long time, their academic formation was also mostly developed in the Federal Capital: three of them graduated at UnB, and other two that came from UFRJ obtained their master's at the University of Brasília.

**Table 18.** Trajectories: Coutinho, Malard, Carvalho, Pereira, Soares, Rosa, and Chaves

<p><b>Ruy Coutinho do Nascimento, 51 and Neide Teresinha Malard, 47</b> As described in the previous section, Coutinho and Malard were directly involved in the design of the 1994 law (trajectories on Table 16). They were both lawyers that came from careers in the state, and with a long involvement in political positions in an intermediate level of the administration.</p> <p><b>Carlos Eduardo Vieira de Carvalho, 54</b> Carvalho graduated in law at the Federal University of Rio de Janeiro (UFRJ) in 1962, and in 1991 completed a master's in administrative law at the University of Brasilia (UnB). Also a public servant, by the time of his first appointment to CADE in 1991, Carvalho had recently retired as an attorney of the National Council for Scientific and Technological Development (CNPq), an agency of the federal government responsible for funding educational and research institutions and projects. A former student of the CEPED initiative in 1969, Carvalho was also a law professor of administrative law at the UnB, and a member of the Commission on Constitutional Law of the Brazilian Bar Association (OAB) in Brasília.</p> <p><b>José Matias Pereira, 42</b> Pereira graduated in law and economics (at UnB, in 1974), and was registered in both professional orders, but is here classified as an economist because his professional career has developed mostly in the field of economics: he was a public official at IPEA close to retirement, and in the 1980s he was a professor of economics in different universities in Northern Brazil, teaching courses such as “rural economics”, “rural development”, and “economic formation of Brazil”. Besides serving in several political positions in the local administration of municipalities in the North of Brazil, had also worked at the SNDE in 1990.</p> <p><b>Marcelo Monteiro Soares, 45</b> Soares was an economist also graduated at the UnB (1972), and a public official subordinated to the Ministry of Industry and Commerce since the 1970s. While in the Ministry, he worked in different organs, such as the Secretariat of Planning, in and coordinating projects at the Council of Commercial Development. In 1990, he also served as the chief of staff of SNDE – precisely during the same period that Pereira was working in that Secretariat. As reported by Malard in the interview, the appointment of both Soares and Pereira to CADE in the first place was an initiative of Franco's Minister of Justice, Alexandre Dupeyrat, who was “their personal friend”.</p> <p><b>Edgard Lincoln de Proença Rosa</b> Rosa, 52, graduated in law at the UFRJ in 1967, and had a long career as a public servant. Between 1973 and 1991, he was a legal advisor of the Federal Senate, approved through public competition, and in 1993, by the time of his appointment to CADE, he had been approved to work as a lawyer in the National</p>
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Treasure's Attorney's Office (PGFN). Between the 1970s and 1980s, Rosa also worked as a law professor in different universities in Brasília, teaching courses such as tax law, legal philosophy, sociology of law, and legal epistemology. Rosa held a master's degree in tax law, obtained in 1985 at UnB.

**Edison Rodrigues Chaves, 64**

As his Council colleagues, Chaves also came from the public service. A lawyer graduated at the Faculdade de Direito Brás Cubas, in the state of São Paulo, he was a legal advisor of the House of Representatives in the late 1980s, and was later approved an Attorney of the Brazilian National Security Institute. In 1994, Chaves was requested to work as a legal advisor to the Ministry of Justice, when he was appointed to CADE. He obtained a master's degree in "right to information" at USP, and thought courses on law and media, law and journalism, and related subjects in two faculties of arts in São Paulo.

**Source:** elaborated by the author

The enforcement of competition policy by CADE's first composition was very strict. In the 9 Merger Reviews decided between 1994 and March 1996 (the period in which this composition worked) that I was able to identify<sup>224</sup>, *none* was approved without restrictions by the plenary led by Coutinho<sup>225</sup>. In 7 MR conditions were imposed for approval, and other 2 were entirely rejected. The conditions formulated by CADE at that time were mostly related to the increase of productive capacity, the quality of products and services, price reduction, and to the prohibition of certain conducts by the resulting concentrated corporate entity (Bello 2005, p. 141).

The number of cases approved with conditions corresponded to 77,77% of the decisions taken by CADE in that period – way above the average that would be consolidated for the whole practice of CADE under the 1994 law (between 1994 and 2012): 5,26% of decisions approved with restrictions. The 2 MR rejected in the period, in turn, correspond to one fourth of the all operations that were not approved by CADE in its history as a reformed competition agency<sup>226</sup>. In other words, in less than two years, 2 of the 8 rejections to ever be enacted by CADE happened. In symbolic terms, it was also impacting: the very first case decided by CADE under the 1994 law was rejected<sup>227</sup>.

Also in Administrative Proceedings the practice of CADE's first composition indicated an incisive decision-making. Out of the 7 AP decided between August 1994 and

<sup>224</sup> See Chapter 3, section 3.2.2 about the selection of cases.

<sup>225</sup> Salgado (2004, p. 367) describes a slightly different decision-making pattern, affirming that while in 1994 60% of MR were approved with restrictions, and 40% were rejected, in 1995 CADE approved 56,52% of MR without restrictions, 21,74% with restrictions, and no operation was rejected. Gheventer (2005, p. 149) also present data that evidence what he calls "an interventionist phase". According to his research, between June 1994 and May 1996, CADE would have decided 23 MR, and none would have been approved without restrictions. Although the numbers differ, probably due to the database considered by each author, it still converges with the idea that the Council was extremely interventionist in its two initial years of work under the 1994 law.

<sup>226</sup> These were the MR number 06/1994 (Brasilit/Eternit), and 01/1994 (Rockwell/Albarus).

<sup>227</sup> This was the case Brasilit/Eternit, decided on November 21<sup>st</sup> 1994.



March 1996 that I was able to identify, 3 received some sort of sanction. As in MR, the proportion is much higher than that consolidated in the historical practice of competition policy in Brazil. While from 1994 to 2012 the average of AP in which a conviction was made was of 20,89%, in the brief period of Coutinho's presidency, CADE convicted 42,85% of corporations subjected to an Administrative Procedure<sup>228</sup>. It looked like the fears of interventionism expressed by some market agents such as FIESP during the 1993 reform were being confirmed: the reinvigorated Brazilian competition policy was restricting economic concentrations, and imposing sanctions right when the country entered a new and more intense phase of liberalization and privatizations<sup>229</sup>.

According to Bello (2005, p. 129-161) the first MR decisions enacted by CADE in 1994 did not generate much public debate, despite of its restrictive trend. However, divergences between CADE and the Ministry of Finance, notably the SPE (which in 1995 would become SEAE), were already happening. As Malard reported in an interview to Dutra (2009, p. 46), the Ministry of Finance "didn't like" their decision in the case Rhodia/Sinasa (MR 12/1994), "because they enacted a technical opinion that was favorable to the operation".

In March 1995, nevertheless, the Council decided a case that would go beyond disagreements among the organs of the SBDC, and produce an institutional crisis. This was an MR in the steel sector through which the German corporation Korf GmbH, that in Brazil owned the *Companhia Siderúrgica Pains*, was acquired by a Uruguayan company called *Siderúrgica Laísa SA*, owned by the Brazilian conglomerate *Grupo Gerdau*. In what became known as the "Gerdau-Pains" case, CADE observed that the operation would result in a concentration of 46,2% of the long ordinary steel market in Brazil (Bello 2005, p. 137), and decided for the approval of the operation, but conditioned it to the cancellation of the acquisition of the *Pains* company by the *Gerdau* group. In practice, it meant a veto to the concentration.

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<sup>228</sup> As in MR cases, my data differs from Salgado (2004, p. 372-373) in respect to AP, but the general trend is also observed by her. According to that author, in 1994 40% of AP were convicted, and in 1995 33% received some sort of sanction. The numbers, therefore, are still well above the historical average, specially in 1994.

<sup>229</sup> Between 1990 and 1994, 33 state-owned companies were privatized, including the whole steel sector. In 1995, with the election of Cardoso, a new stage of privatizations begun: together with the privatization of other 19 corporations, the BNDES supported the destatization of corporations owned by the federate states, and the concession of public services (telecommunications, electricity, and transportation) was initiated. Also in 1995, two constitutional amendments affecting the economic activity were approved: amendment number 6 eliminated the distinction between national and foreign corporations established by the Constitution of 1988, and amendment number 9 enabled concessions for oil and gas extraction and refinement, which until then was monopoly of the state.

The case, whose rapporteur was the economist Pereira, was extremely controversial within CADE. The final score was 4 votes for the imposition of the mentioned restriction, and 3 for the approval without structural restrictions. The majority was composed by Pereira, Soares, Chaves, and Carvalho. Those defeated in the voting poll were Malard, Rosa, and Coutinho. Curiously, all those with economic training voted for the imposition of structural restrictions, including Carvalho, who I classified as a lawyer, but also possessed a degree in economics. Not only within CADE there was disagreement. While the SDE converged with the Council's majoritarian position, the Ministry of Finance, through the SPE, enacted a technical opinion in the case, which was very much in line with the position of those defeated in the poll: it approved the operation with conditions other than any structural remedies. At that time, the SPE hosted several economists who were involved in the 1993 reform, such as Eliane Lustosa Thompson-Flores, who signed the technical opinion enacted in the "*Gerdau-Pains*" case.

In face of the restriction, the corporations involved in the operation initiated a legal battle that would have significant outcomes to the field of competition policy. In May 1995, Gerdau's first attempt was to present new arguments to CADE, asking for a new judgment, but the rejection was maintained in October 1995 (Bello 2005, p. 139). In November 1995, Gerdau made an appeal to the Minister of Justice, by then Nelson Jobim, a lawyer from Rio Grande do Sul, who would later become a justice at the Brazilian Supreme Court (STF). Jobim accepted the appeal and determined the suspension of the effects of CADE's decision. The Minister defended the need of alignment between CADE and the government's policy, maintaining that it "didn't have full autonomy for decision-making" (Bello 2005, p. 144). He also sustained that Merger Reviews were legally dubious, as no conviction could be made based on the "presumption of harms" that could be caused by a concentration, which in turn would be necessary in a context of international competition (Bello 2005, p. 145). Jobim's decision was the catalyst of an institutional earthquake.

Several reactions sprouted in the media, both in favor of and against the Minister's decision. Journalists debated the correctness of CADE's intervention, and of the Ministry's attempt to revert it (Bello 2005, p. 151-154). Economists diverged among themselves. Mailson da Nóbrega, former Minister of Finance during Sarney's administration, criticized CADE for its "prejudice against private initiative", and Mário Henrique Simonsen, an economist identified with monetarism and orthodox economics, wrote an article titled "CADE

disturbs”<sup>230</sup>, in which he maintained that the Brazilian antitrust law “forgets that globalization demands concentration, at least in the national level”, and claimed for the “urgency of revising the law 8.884” – less than two years after its enactment. Similarly, Roberto Campos, another exponent of Brazilian economics, made harsh criticisms to CADE’s decisions in an article titled “The dangerous acronyms”<sup>231</sup>. Other economists such as Jorge Fagundes, who would later become one of the most frequently hired economic consultants by law firms in competition policy, and Mário Possas, a self-entitled Keynesian, publicly supported CADE’s decision (Bello 2005, p. 155-156).

Among lawyers, the reaction tended to converge around the defense of CADE’s behavior. As Bello describes (2005, p. 156-157), attorneys such as Carlos Francisco Magalhães, Onofre Sampaio, and José Del Chiaro criticized Jobim’s decision to overrule the antitrust authority. Both Magalhães and Del Chiaro were active agents in designing the reform of competition law in Brazil in the previous years, and as Sampaio, would be frequent lawyers representing corporations before the SBDC. In their view, the Minister’s revision of CADE’s decision would jeopardize its autonomy as a modern regulatory agency, and contradict an explicit norm of the 1994 law, which determined that CADE’s decisions could not be reviewed by the Executive<sup>232</sup>.

Nevertheless, the controversy was ignited by yet another lawyer who was actively involved in competition policy reform: Tércio Sampaio Ferraz Junior, the same that as the Executive-Secretary of the Ministry of Justice designed the series of Provisional Measures that resulted in the law of 1991, and who was a member of the 1993 commission formed to create a new competition law. Acting as the lawyer of Gerdau, he argued that once the rule determining the impossibility of revision by the Executive was confined to the title that specified the rules for Administrative Procedures, it didn’t apply to Merger Reviews.

Another expression of opposition to CADE’s restrictive decision coming from lawyers was made by the “Center of Legal Studies” of the Federation of Commerce of the State of São Paulo, who criticized CADE for “repressing – instead of supporting – mergers that enable the competitiveness and survival of corporations” (Bello 2005, p. 159). Within the political field, Jobim’s decision to revert CADE’s ruling was also attacked. Miguel Rossetto, a

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<sup>230</sup> The article “*O CADE atrapalha*” was published on February 2<sup>nd</sup> 1996, in the edition number 604 of the *Revista Exame*. Available at: <<http://exame.abril.com.br/revista-exame/edicoes/0604/noticias/o-cade-atrapalha-m0047502>>. Last accessed on June 14<sup>th</sup> 2013.

<sup>231</sup> The article “*As siglas perigosas*” was published in the newspaper *Folha de São Paulo* on March 17<sup>th</sup> 1996. Available at: <<http://www1.folha.uol.com.br/fsp/1996/3/17/brasil/3.html>>. Last accessed on June 14<sup>th</sup> 2013.

<sup>232</sup> Article 50 of the law 8.884 of 1994.

representative of the Worker's Party at the National Congress, elected by the state of Rio Grande do Sul – the same as Jobim's –, accused the Minister of acting in favor of Gerdau because the company was the major funder of the electoral campaign of Antonio Britto, of the PMDB, who was running for governor of that state, and was supported by Jobim (Bello 2005, p. 146).

The controversy also generated turmoil within the SBDC. In CADE, while Coutinho was on vacation, the substitute president, Chaves, who had voted for the restriction, asked the Republic's General Attorney's Office to execute the decision. Coutinho came back, and expressed his disagreement with what would be a "personal act" of Chaves while in the position of president (Bello 2005, p. 146). Another source of tension came from the Ministry of Finance. An economist that worked at the SPE in analyzing MR publicly proposed that the emphasis on concentration should be abandoned by CADE, and the focus redirected to repressing conducts, as that would be the modern international trend (Bello 2005, p. 149). This economist was Ruy Afonso de Santacruz Lima, who in 1998 would be appointed commissioner in CADE.

Motivated by the dissatisfaction with CADE's behavior, movements to change what was a recently reformed competition legislation were taking place. As publicized by the newspaper *Folha de São Paulo* on February 27<sup>th</sup> 1996, motivated by a request of FIESP, Jobim was about to "propose the suspension of CADE's deadlines until changes in the antitrust law are made"<sup>233</sup>. To promote such "changes", a Provisional Measure was being designed by an interministerial group, giving to the SDE the role of analyzing an MR and deciding whether CADE was supposed to judge it or not.

On March 6<sup>th</sup> 1996, *Folha de São Paulo* published what would be the integral text of a Provisional Measure altering CADE's competence<sup>234</sup>. Among other changes, the text proposed the replacement of article 54 of the 1994 law, determining that MR were to be submitted directly to the SDE, and that they should "obey the limits of participation in a relevant market, *fixated by the President of the Republic*" (my italics). In other words, CADE's role as an antitrust authority was being once again submitted to a ministerial secretariat, hierarchically subordinated to the Ministry, and the criteria for the analysis of an economic concentration were to be determined directly by the Executive's chief. As described by Bello (2005, p. 149), the "mentors" of this change were the Secretary of Economic Law, Aurélio Wander Bastos, and the Minister of Planning, José Serra. On March 16<sup>th</sup> 1996, *Folha*

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<sup>233</sup> Available at: < <http://www1.folha.uol.com.br/fsp/1996/2/27/dinheiro/31.html>>. Last access on July 15<sup>th</sup> 2013.

<sup>234</sup> Available at: < <http://www1.folha.uol.com.br/fsp/1996/3/06/dinheiro/17.html>>. Last access on July 15<sup>th</sup> 2013.

*de São Paulo* affirmed that the Ministry of Finance, and the Ministry of Industry and Commerce also endorsed the draft of the Provisional Measure<sup>235</sup>.

In the initial months of 1996 – less than two years after the enactment of law 8.884 of 1994 – the reform of competition policy, as articulated by its architects, was at risk from two sides. Institutionally, CADE was being jeopardized by new legal measures to revert its autonomy as a modern regulatory agency. In substantive terms, its decisions were perceived as not tuned with the imperatives of the economy (and economics), and changes were demanded from both within the government and the market. The task was therefore about bringing back the future of competition policy, as designed in the reformist initiatives between 1988 and 1994, i.e. guaranteeing CADE’s institutional autonomy, and enforcing the law accordingly to the precepts of a liberalizing economy. Who better to do that than those directly involved in the formulation of this future?

### 5.2.1 “Antitrust revolution”: neoliberal economics triumphs

The climax of the institutional crisis of 1995/1996 coincided with the imminent end of the terms of all commissioners that were in CADE since 1994. The whole composition was to be redone in 1996, and that constituted an opportunity for the government to replace those responsible for decision-making, and thus change decision-making itself, without jeopardizing the institutional design, something opposed by voices in the market and in the government (such as lawyers and economists).

On March 16<sup>th</sup> 1996, *Folha de São Paulo* gave a clue about the kind of compromise that would enable the preservation of the institutional design brought by the law of 1994: “The appointment of the economist Gesner de Oliveira by the Senate to occupy the presidency of CADE made Minister Nelson Jobim retreat from his idea of changing the antitrust law”<sup>236</sup>. It was the arrival of a new president – together with 6 other commissioners, being three lawyers and three economists – between 1996 and 1997 that sealed a solution to the crisis, one that combined both institutional preservation, and, as I will describe, a compromise with a decision-making compatible with the aspirations of the government and corporations. As Salgado, who was one of the economists appointed, maintained in an interview, the composition was a means to “comfort” those that weren’t “satisfied” with CADE’s “intervention”:

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<sup>235</sup> Available at: < <http://www1.folha.uol.com.br/fsp/1996/3/16/dinheiro/7.html>>. Last access on July 15<sup>th</sup> 2013.

<sup>236</sup> Available at: < <http://www1.folha.uol.com.br/fsp/1996/3/16/dinheiro/7.html>>. Last access on July 15<sup>th</sup> 2013.

it [CADE] started with a lot of intervention in the first years, 94 and 95, so the market was not nearly satisfied, not at all. [...] The solution they gave was: ‘Half economists, half lawyers, and the law stays the same’. Three economists and three lawyers, because that would comfort people [the market], that the Council would have more equilibrium.

Although the hopes were that with more economists the decision-making of CADE would be more compatible with the expectations of the market and the economic policy of the government, at least for Salgado, however, the shift of composition did not mean an automatic alignment, but rather the constitution of a truly “technical” council:

They thought that with more economists the council would have more reasonable decisions. A little mistaken, because they thought reasonable decisions meant decisions that let anything go. But on the contrary, people became very technical.

As Figure 12 illustrates, the arrival of these “very technical” people in CADE implied a radical shift in its composition: while the first group was dominated by lawyers (5 against 2 economists), the Council inaugurated after the crisis reversed the proportion: 5 economists against 2 lawyers. But this was not only a quantitative shift – and that’s where the narrative about the “technical” council that was allegedly emerging can be grasped. The economists that arrived in CADE as the solution to the conflict precipitated by the Gerdau/Pains case had considerably different trajectories from those of the previous formation. Moreover, these were also economists that were either involved in the reform of 1993, or who shared the ideals of those who were.

The new president appointed to CADE was the economist Gesner José de Oliveira Filho.

**Table 19.** Trajectory: Oliveira

**Gesner José de Oliveira Filho, 40<sup>237</sup>**

An economist graduated from USP, Oliveira held a master's degree in economics obtained at UNICAMP where he was supervised by José Serra – by then Minister of Planning of Cardoso. In 1989, he concluded a PhD in economics at the University of California, at Berkeley, with a thesis on liberalization policies, and the Brazilian experience with the IMF, supervised by Albert Fishlow. Prior to his recruitment to CADE, Oliveira's career combined academic duties, political appointments, and activities in private practice. Between 1980 and 1984, he was a professor of economics at PUC-SP, and since 1990 he taught at the FGV-SP. In 1990, he was a consultant at the BNDES on privatizations, and between 1991 and 1993 he worked in the private sector, as a consultant of the Swiss Development Cooperation, of a bank, and of a law firm. Back to government in 1993, he was appointed Deputy-Secretary of Economic Policy of Gustavo Franco, at the Ministry of Finance. When SPE was converted into SEAE in 1995, Oliveira became the Secretary for a few months. As a Secretary, it is likely that his appointment to CADE was articulated by the Minister of Finance, Pedro Malan, an economist and professor of economics at PUC-Rio, who also obtained his PhD in Berkeley, in 1973<sup>238</sup>.

**Source:** elaborated by the author

Five commissioners were appointed together with Oliveira in March 1996: the lawyers Leônidas Rangel Xausa, and Antônio Carlos Fonseca Silva, and the economists Lucia Helena Salgado, Paulo Dyrceu Pinheiro, and Renault Freitas Castro. In April 1997, CADE's composition was completed with the appointment of yet another economist: Arthur Barrionuevo Filho. A first indicator of a qualitative shift in respect to the previous council was the age average: while between 1994 and 1996 it reached 50 years old, commissioners in 1996/1997 had a total average of 46 years old. In the first group, commissioners were mostly in their late 40s and early 50s. In the council led by Oliveira, however, they were mostly in the early 40s, and there was Salgado, who was 35. If both lawyers and Pinheiro, who was an economist of formation but actually had a career as a diplomat, are not considered, the four economists that arrived to “tranquilize” CADE had an average of 39 years old, which evidences the emergence of a new generation of economists gaining space in the state apparatuses.

There was a generational shift not only in age, but also in the profile of their studies and careers as economists. The two economists in the 1994/1996 council were public

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<sup>237</sup> I was not able to locate Oliveira's exact birthdate, so I estimated his age based on the year of conclusion of his undergraduate course. Normally, a student starts the undergraduate course at the age of 18, and as it ends in 4 years, by the time of conclusion her age is around 22. Once Oliveira graduated in 1978, it is likely that he was born in 1956, and thus was around 40 years old in 1996. The same rationale was applied to estimate the age of Salgado, Castro, and Barrionuevo.

<sup>238</sup> Malan was one of the exponents of the PUC-Rio orthodox school of economics, and one of the idealizers of the Plano Real. As Loureiro (1997, p. 105) maintains, the Plano Real, as other programs of monetary stabilization performed in Latin America followed the neoliberal orientations of fiscal and financial adjustment, privatizations, and market liberalization. Illustrative of Malan's connections to the so-called “Washington Consensus” were his roles as the chief negotiator of Brazil's foreign debt between 1991 and 1993, and as an executive director of the World Bank in the periods 1986-1990, and 1992-1993.

officials, and only one of them possessed a graduate degree (a master's in urban and regional planning). The newcomers, however, had strong ties to academia, and combined it with extensive political involvement, notably in the Ministry of Finance, where all four had served or been close to. Three of them were PhD in economics, and two had experiences in the US in their graduate studies, at one of the centers of mainstream economics, the University of California at Berkeley. The areas of studies of these three economists in their PhDs were also tuned to the economic mainstream of the time: two of them developed researches on liberalization policies, and one specialized in competition policy. Both in political appointments, and academic work, Oliveira, Salgado and Barrionuevo were close among themselves, and as a consequence, to the exponents of the economics orthodoxy in Brazil, notably the group of PUC-Rio, who by 1995 occupied several positions in the Ministry of Finance.

**Table 20.** Trajectories: Xausa, Silva, Salgado, Pinheiro, Castro, and Barrionuevo

<p><b>Leônidas Rangel Xausa, 64</b></p> <p>Xausa was a lawyer who graduated from the Catholic University of Rio Grande do Sul (PUC-RS) in 1955. Besides law, he also held undergraduate degrees in Psychology and Philosophy, and MBAs in public law at Columbia University (US), and in corporate law at FGV-SP, obtained in 1961. A professor of constitutional law and legal history, Xausa combined active political involvement with a generalist knowledge in traditional areas of the law. Besides developing private practice in law firms, he was a member of PMDB, and a Senator in the early 1990s.</p>
<p><b>Antônio Carlos Fonseca Silva, 44</b></p> <p>Silva graduated in law at the Centro de Estudos Superiores de Maceió, in Northeast Brazil, also started an undergraduate degree in economics, but never completed it. Since 1980 he was a Prosecutor at the Prosecutor General of the Republic's office, and held a master's degree in tax law at UnB (1984), and a PhD in intellectual property at the University of London (UK, 1994).</p>
<p><b>Lucia Helena Salgado, 35</b></p> <p>Salgado's trajectory until 1993 has already been described on Chapter 4, Table 17. By 1996, Salgado had completed her PhD in economics at UFRJ, during which she was a visiting doctoral student at the University of California, at Berkeley. As she maintained in an interview, in her period abroad she filled a "gap" of her formation: "<i>There, I attended all courses on econometrics, mathematics and industrial organization</i>". Her doctoral thesis was an analysis of the incipient Brazilian antitrust regime, still under the law of 1991, focusing on Administrative Procedures. As Salgado reported in an interview, during her visit to UCB, she had classes with the exponents of new institutional economics, such as Oliver E. Williamson, Carl Shapiro, and Douglass North<sup>239</sup>. Besides these foreign professors, Salgado also mentioned other people that would have been influential in her PhD formation, such as Gustavo Franco, an economist of PUC-Rio and</p>

<sup>239</sup> Williamson and Shapiro were directly involved with antitrust policy (both had or would occupy positions in the DOJ), and antitrust economics. On an article "in tribute" of Williamson, Shapiro (2010, p. 138) gives a hint of the line of thinking proposed by his mentor: "Williamson was skeptical of the conventional wisdom of the [1960s], which presumed that the purpose and effect of many vertical practices was the enhancement of market power and the erection of entry barriers [...] Williamson could see rationales for various vertical practices that were based instead on economic efficiency". In this sense, one of Williamson's most renown contributions in economics would be precisely the formalization of the *trade-off* between concentration and efficiency that constitutes the backbone of the Chicago school of antitrust economics (Williamson 1968).



PhD by Harvard University who was the Secretary of Economic Policy of the Ministry of Finance between 1993 and 1999, and later became the President of the Brazilian Central Bank; Armando Castelar Pinheiro, also a PhD at Berkeley and supervised by Fishlow, professor of economics at PUC-Rio, and one of the pioneers of the “law and economics” approach in Brazil; and Regis Bonelli, PhD by Berkeley with several joint publications with Winston Fritsch and Gustavo Franco. After serving CADE, Salgado resumed her post at IPEA.

**Paulo Dyrceu Pinheiro, 57**

Although here defined as an economist due to an undergraduate degree in economics obtained from the State University of Rio de Janeiro (UERJ) in 1959, Pinheiro was a career diplomat since 1962. He served in several embassies and missions abroad, mostly focused on economic bilateral and multilateral negotiations, including at the UNCTAD and GATT.

**Renault Freitas Castro, 43**

An economist graduated from UnB in 1975, Castro held a master’s in agricultural economics at Oxford University (1981). Having worked in the private sector, since the early 1990s he was appointed to several positions in the federal government. Until 1990, he worked at the Ministry of Finance, and between that year and 1991 he was an advisor of the Ministries of Infrastructure (1990), and Planning (1991). From 1994 until the date of his appointment to CADE, Castro was an advisor to the Minister of Industry and Commerce, Dorothea Werneck, a PhD in economics at the Boston College (US). After serving CADE, Castro worked in the private sector as an economic consultant and executive director of an industrial association.

**Arthur Barrionuevo Filho, 40**

Barrionuevo was graduated in economics from the Federal University of Rio Grande do Sul (UFRGS), in 1979, and held a master’s in business at the FGV-SP, and a PhD in economics at USP, with a thesis focusing on liberalization policies. A professor of economics at FGV-SP, and specialist in microeconomics and industrial organization, he was also involved in consultancies related to regulation and competition policy. Prior to his arrival in CADE, Barrionuevo worked for an association of infrastructure industries, and produced technical opinions in MR in consultancies such as the multinational Arthur D. Little. Between 1987 and 1988, he worked at the Ministry of Finance, as an advisor of industrial policy to the Minister, Luiz Carlos Bresser-Pereira. A colleague of Gesner Oliveira at FGV-SP, he had previously been invited to teach in an internship program created by Oliveira in the first year of his term as president. After serving CADE, Barrionuevo resumed his activities as a professor of economics at FGV-SP, and as an economic consultant, acting in competition policy cases.

**Source:** elaborated by the author

As their trajectories indicate, commissioners appointed to CADE at this point were close among themselves, and to economists working in other areas of the government, where neoliberal policies of privatization and liberalization were being implemented. Oliveira was the first to be appointed to CADE, and it is very likely that the invitation came directly from the Minister of Finance, Pedro Malan, once he was a Secretary at that Ministry. Although in 1995 Salgado had already been communicated by Coutinho, CADE’s former president, about his intentions to appoint her to CADE, it was only in 1996 that it was actually confirmed, and through the hands of Oliveira. As she recalled in an interview, although she didn’t know him well, Oliveira communicated with her bringing bad news about the attempt to change the 1994 competition act, and asking her to help “impede” it.

Barrionuevo was also recruited by Oliveira, who was his colleague at FGV-SP, and recommended his name to Minister Malan. As revealed in an interview conceded to Dutra

(2009, p. 68), Castro, the fourth economist to enter CADE in 1996/1996 requested an indication to the Minister of Industry and Commerce, Dorothea Werneck, who then suggested his name to the Minister of Justice, Jobim. As Castro maintained, he “felt attracted by the transformation that was being operated in the economy by that time, from a closed economy, with controlled prices, to an economy that was more open and free” (Dutra 2009, p. 68).

The two lawyers appointed to CADE had significantly different profiles. While Xausa was a generalist in law, and an active politician, Silva was a Prosecutor, with a PhD in a “modern” area of the law. None of them, however, was a specialist in competition policy. Xausa’s appointment was probably arranged by the Minister of Justice, as they were both from the state of Rio Grande do Sul, and members of the same political party. I was not able to identify the origin of the appointment of both Silva and Pinheiro. In the case of the former, however, it is likely that it came from the Minister of Justice, as he was a lawyer with an established legal career. In the case of Pinheiro, once his trajectory didn’t indicate any connections to the Ministries of Justice or Finance, it is probable that his appointment came from the Ministry of Foreign Relations.

The sources of appointment of CADE’s president and its commissioners in 1996/1996 are indicative of an institutional dynamics that integrated the compromise to solve the crisis of the Gerdau/Pains case, and that would be a constant in the field’s future developments. This was what in many interviews was referred to as a “tacit agreement” between the Ministries of Justice and Finance, more specifically the SDE and SEAE, to share and manage the appointments to CADE. Between 1996/1997, this agreement was starting to be practiced: Oliveira, Salgado and Barrionuevo were appointments of SEAE, and Xausa, Castro, and Silva, of the SDE.

The arrival of this group in CADE, led by an economist, and dominated by professionals of the same field, shaped the practice of competition policy in distinct and decisive ways. Four aspects can be highlighted as illustrative of the changes brought in the first two years under Oliveira’s presidency: the institutional consolidation and autonomy affirmation of CADE (Bello 2005), the articulation with other economic policies, the internationalization of Brazilian competition policy, and the economicization of antitrust policy in Brazil (Onto 2009).

In the institutional level, Oliveira’s presidency focused on consolidating a modern institutional design, in giving visibility to CADE and to its decisions (Bello 2005), and in assuring its compatibility with a recently liberalized economy. For instance, CADE started to

produce annual reports of activities, and to publicize the complete report of judgment sessions, and approved its first internal regulations (*Regulamento Interno do CADE*<sup>240</sup>). In 1998, Oliveira celebrated a Cooperation Agreement between CADE and the Secretariat of State Reform to convert CADE into a “pilot-unit of the executive agencies project”, which aimed at the “strategic restructuring and modernization” of the competition agency<sup>241</sup>.

Measures of institutional consolidation were combined with several public appearances of Oliveira, in which he criticized the “excessive rigor” of CADE’s former composition, and assured the market about the inexistence of prejudices in CADE against economic concentration (Bello 2005, p. 164-165). As Bello (2005, p. 165) illustrates with a quote by Oliveira, his approach was one that accepted economic concentration as a natural and global process: “The market doesn’t have to keep up with CADE’s transformations. It is CADE that must keep up with the market, and sometimes interfere, giving guidance”. Another manifestation of Oliveira in 1997 is equally illustrative of the new attitude in CADE. As identified by Bello (2005, p. 185), in discussing the positive effects of the privatization of the mining company Companhia Vale do Rio Doce (CVRD) in a newspaper article, Oliveira stated that: “If society will have to bear the consequences of a loss of welfare caused by economic concentration, it will have, however, the benefits of economic development”.

The idea of “guidance” was emblematic of the attempt to not establish a conflictive relation with the market. Rather, since Oliveira’s appointment, CADE started a relationship of proximity, and developed the notion of “educating” and “raising the consciousness” of the market: the idea of “competition advocacy” gained space. This was articulated as a “civilizational function” (Onto 2009, p. 128) to, as the annual report of 1996 illustrates (CADE 1996, p. 25), “diffuse the culture of competition” in a context where “competition is still alien to economic relations and its agents” due to “the long period of state intervention and the closing of the country”. Concrete measures adopted to implement such “advocacy” role entailed hundreds of speeches and participations in conferences by commissioners, especially by Oliveira, throughout the country, the creation of an internship program in CADE (PinCADE) for undergraduate and graduate students, the elaboration of pamphlets on competition policy, and the creation of CADE’s website.

Other illustrative examples of CADE’s new attitude toward the market can be mentioned. In the end of 1996, for instance, CADE reanalyzed the Gerdau/Pains case,

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<sup>240</sup> Resolution number 10, of October 29<sup>th</sup> 1997.

<sup>241</sup> Agreement celebrated on September 2<sup>nd</sup> 1998, available at CADE’s institutional website, on the section “*Acordos e Convênios*”.

motivated by a proposition made by Oliveira. In a negotiated process, Oliveira presented three alternatives to the corporations for the acquisition to be approved, and one of them – precisely what Gerdau chose to do – did not entail a radical measure of total de-investment imposed by the previous composition (Bello 2005, p. 177; Gheventer 2005, p. 63). Another example was the institution, in August 28<sup>th</sup> 1996, through CADE’s Resolution number 5, of a fast track for “simplified procedures”. According to this regulation elaborated by CADE’s commissioners and president, in certain cases, depending on the “nature, specificities, and the degree of complexity of the act”, the presentation of a series of documents and information was not mandatory for the involved corporations. By the end of 1996, in the midst of all those measures, Jobim, who in the beginning of that same year was articulating a measure accused of “emptying” CADE’s competences, was making complements to the Council’s new decision-making practice (Bello 2005, p. 175).

Within the agency’s structure, Oliveira’s presidency also brought changes for CADE’s staff. Since 1996, courses in competition defense were organized by CADE in partnership with professional associations, universities, and other governmental organs with the objectives of, according to the Annual Report of 1996 (CADE 1996, p. 44) “training a specialized professional staff to serve public administration”, “preparing specialized directive personnel and training technical professionals for the private sector”, and “developing a common language and concepts between the public and private sectors, as well as between law, economics and connected areas”. The training program, definitely institutionalized in 1998 as *CADE’s Professional Training Program (PCPC)*, also started to emphasize the establishment of “closer relations between CADE and analogous agencies of different countries” (CADE 1998, p. 181).

Among the educational institutions with which CADE celebrated cooperation agreements in the first years of the initiative were FGV-RJ, FGV-SP, FGV-Brasília, PUC-SP, UFMG, and CEUB. Within the administration, CADE established agreements with BNDES, CNPq, IPEA, among others, and in the private sector institutions such as IBRAC, and the Institute Roberto Simonsen, of FIESP, were also cooperating with the antitrust agency (CADE 1996, p. 45). The proximity to market agents and educational institutions in which the modern technology of competition policy was being developed and advanced were yet another indication of CADE’s new cooperative attitude toward those it regulated.

Another strategy for consolidating CADE’s public image, again notably executed by Oliveira, was the articulation of antitrust policy with other areas of economic policy and

regulation. The underlying idea was to include CADE as an active part of the process of privatization that was being intensified in Brazil by that time. Already in 1996, Oliveira tried to insert CADE in the governmental arenas that elaborated the privatization process (Bello 2005, p. 181). The result, however, was that Oliveira was questioned by the government about the attempt to interfere in the privatization process, and CADE remained with his role of analyzing the operations related to privatization after they were concluded (Bello 2005, p. 185). Sectorial regulatory agencies entitled of regulating privatized sectors were also connected with CADE in the 1996-1998 period, with the objective of “providing CADE with technical support for the enforcement of its attributions, and supporting technical scientific, cultural and administrative exchange” (CADE 1998, p. 184). Besides agencies such as the ANP, ANEEL, and ANATEL, these agreements also included the Brazilian Central Bank. As Bello (2005, p. 237) maintains, these agreements in practice had the effect of “endorsing decisions taken by other state organs”.

Another agreement celebrated in the early moments of the new composition was with the Ministry of Labor. The objective was to “implement programs of professional requalification and replacement for workers in risk of dismissal due to MR” (Bello 2005, p. 180-181). As the only “social appeal” made in Oliveira’s presidency, the agreement, according to Bello (2005, p. 180), was a strategy in the “search for consolidating CADE’s power”. Opposed in the media, the interest in labor was never actually implemented, at least until 1998 (Bello 2005, p. 180).

As a group with in international academic and professional connections, CADE’s composition between 1996-1998 was also responsible for an unprecedented internationalization of the organ. In the Annual Reports of 1996, 1997 and 1998, CADE describes initiatives to “globalize competition policy” in which it took part, comprising several measures. One of them entailed visits from missionaries of foreign competition authorities and international organizations such as the World Bank and OECD to CADE, and from CADE’s commissioners, president and staff to antitrust agencies abroad.

Another venue of internationalization was occurring through cooperation agreements in competition policy, which by 1998 were celebrated with the Argentinean antitrust authority, and with the US government. An exchange program of staff from international agencies and organisms, such as the Organization of American States (OAS), the World Bank, and the Inter-American Development Bank (IDB) was also created. Since 1996, and especially through its president, CADE was an active agency in the negotiation of

“integration agreements”, notably the Mercosur and the Free Trade Area of the Americas (FTAA). In the regional level, the Annual Reports highlight the protagonist role played by CADE in diffusing and shaping competition policy in other countries. In 1996, at the negotiations of the competition policy chapter of Mercosur, CADE contributed in the formulation of the “Mercosur Protocol on Competition Policy”. Among several measures proposed, some of them very similar to the 1994 law text, the Protocol established the “wide adoption of the rule of reason, avoiding rigid criteria of the *per se* illicit” (i.e. not illegalizing economic concentrations, but only those identified as *unreasonable*), and the establishment of a “schedule for the implementation of a pre-merger review system in the [Mercosur] countries”, given that by that time only Brazil had such control (CADE 1996, p. 30).

At the FTAA negotiations, CADE contributed to the efforts of “harmonization of legal regimes of competition policy in the countries of the hemisphere”, which would be a “goal consistent with the interests of the Brazilian government and private sector” (CADE 1996, p. 31). To do so, measures such as technical cooperation, the “dissemination of best practices”, and the joint elaboration of “guidelines for analysis and technical texts” were discussed (CADE 1998, p. 147-148). At the World Trade Organization, in 1998 CADE participated in a working group to discuss the relations between international commerce and competition policy. According to the Annual Report of 1998 (CADE 1998, p. 153), CADE converged with the WTO’s diagnosis about the “desirability of defining general principles and pre-requisites that a national antitrust legislation must have in order to provide legal certainty to private agents”, and understood that WTO principles such as “national treatment” and “most-favored-nation”, were “of particular relevance for the construction of solid institutions for the defense of competition in developing countries” (CADE 1998, p. 153).

Under Oliveira’s presidency, CADE also began what would become a historical participation at the OECD. As described in the 1998 Annual Report (CADE 1998, p. 149-152), in 1998 CADE participated in a meeting of the Working Group of International Cooperation organized by OECD’s Competition Policy Committee focused on debating the regulation of transnational concentrations. In that meeting, the Working Group enacted a resolution establishing “a standard form for the submission of merger reviews oriented to serve as a model for member-states”, which “incorporated the best international practices” (CADE 1998, p. 150). In the same document, CADE highlighted being a “pioneer” in that sense, as it was the first antitrust authority in the world to adopt the model proposed by the OECD (CADE 1998, p. 150). Resolution number 15 of August 19<sup>th</sup> 1998 would have

“departed from the model proposed by the OECD, and adapted it to the Brazilian legislation” (CADE 1998, p. 150). In this document, several procedures for the analysis of MR, and key-concepts of a modern competition policy such as “relevant market”, and “efficiency” were defined.

This movement illustrates not only the internationalization of CADE, but yet another process that was being consolidated by the composition inaugurated in 1996: the economicization of competition policy. With the arrival of the group led by Oliveira, it is possible to observe in CADE’s jurisprudence, resolutions, and ordinances that economic concepts were being increasingly mobilized for decision-making (Onto 2009, p. 99). This process entailed what mainstream narratives often describe as a “revolution of antitrust in Brazil” (Mattos 2003, 2008).

Indicators of economicization in decision-making can be noticed in Lima’s (1998) highly critical study about the methodologies of analysis deployed in decisions made by CADE between 1994 and 1996 – precisely the period of transition between the first composition and the second<sup>242</sup>. As this author maintains, during most of this period, the analysis of MR was often based on “traditional” antitrust theory – that of Harvard school of structure-conduct-performance framework – and on a “legalistic view”, i.e. decisions to approve a merger tended to request the fulfillment of all conditions determined in article 54 of the 1994 law (Lima 1998, p. 128). Although *partially* based on the US Merger Guidelines of 1992, the decision-making by then dominant in CADE wouldn’t incorporate a sophisticated “mathematical analysis” into the judgment of MR (Lima 1998, p. 128). That would only have happened with the consolidation of a new composition in CADE.

To a former commissioner, during the 1994-1996 collegiate, decisions would lack proper [economic] “foundations”, deploying an approach in which “corporations had to prove its innocence”, and “concentration per se harms competition”. Such lack of foundation would be illustrated by the imposition of conditions that “had nothing to do with competition”, such as “re-training of employees dismissed, and obligations to export”. The new council formed in 1996 was the cause of a change, as according to an interviewee “people with a new mentality arrived”.

As Salgado (2003, p. 30) wrote about an emblematic case of which she was the rapporteur, the Kolynos/Colgate MR – the first to be analyzed by the council inaugurated in 1996 – “opened way to introduce in Brazilian antitrust the basic concepts of economic

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<sup>242</sup> Lima (Ruy Santacruz Lima) was the economist that worked in the SPE in 1996 and criticized CADE’s decisions in the 1994-1996 period. He was appointed commissioner in 1998.

analysis”. According to Onto (2009, p. 101) that case was based on the approach of the US antitrust agencies. From that moment on, concepts such as “relevant market”, “market structure”, “barriers to entry”, “potential competition”, and “product differentiation” (Onto 2009, p. 100), as well as market concentration indexes such as the Herfindahl-Hirschman Index (HHI), and the Ci would be present in CADE’s decision-making practice (Gama e Ruiz 2007)<sup>243</sup>.

As already mentioned, and in consonance to Onto (2009, p. 106), the economicization of Brazilian antitrust policy can also be noticed in two resolutions enacted in the first two years under Oliveira’s presidency. Resolution number 5, of August 28<sup>th</sup> 1996, detailed the procedures of MR analysis, and established the need of corporations to present a series of documents and information about the operation. As Onto (2009, 108) maintains, these were requirements of “information to define, ‘measure’ or calculate specific concepts of antitrust economic theory”. Resolution 15 of 1998 revoked that enacted in 1996, replicating several of its procedural rules, and document requirements, but innovated in making explicit a definition of different economic concepts for antitrust analysis<sup>244</sup>. As Salgado maintained in an interview, “That was when we started to institute all these definitions, such as relevant market. That was when we revolutionized. We established CADE’s original landmark”.

Another and no less important aspect of the changes imprinted by CADE’s new composition between 1996 and 1998 concerned the content of decisions. The major reason underlying the institutional crisis that affected competition policy by the end of 1995 were the restrictions imposed to economic concentrations, which faced a dramatic fall under Oliveira’s presidency. By the end of 1996 – 8 months after the new commissioners arrived – CADE had decided 16 MR, approving without restrictions 12 of them, and imposing conditions for the approval of the other 4 (25%)<sup>245</sup>. In 1997, of the 41 MR analyzed, 34 were approved without restrictions, and 7 with conditions (20,6%). Finally, in 1998, out of the 117 MR presented, only 4 (3,5%) suffered some kind of restriction for approval. In the whole period, no operation was entirely rejected.

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<sup>243</sup> However, if one takes the polemic Gerdau/Pains MR as an example – precisely a case reputed to be unsophisticated in terms of economic analysis – the votes of all commissioners already mobilized economic concepts such as “relevant market”, “barriers to entry”, and discussed the implications of the operation in terms of “efficiency”. The question thus seems to be around determining what is the *correct* or *legitimate* definition of these concepts, and how shall their *enforcement* occur.

<sup>244</sup> The major novelty brought by Oliveira’s presidency in its first two years through resolutions was not the establishment of procedures and document requirements for antitrust analysis, but the *definition* of these economic concepts. This is because already in 1995, and thus during CADE’s first composition, Resolution number 1 of July 7<sup>th</sup> 1995 detailed similar procedures and documents.

<sup>245</sup> The data here presented is based on the collection of decisions made by myself, as described on Chapter 3, section 3.2.1.



The overall average of cases restricted dropped from 77,77% in the period 1994-1996, to 8,6% in the period 1996-1998. Moreover, as Bello (2005, p. 225) maintains, in only 4 of the restricted cases a condition related to the assets of the involved corporation was imposed – which were nevertheless described by this author as “necessary to avoid that the organ was faced as merely ornamental” (Bello 2005, p. 176). In the two first years of CADE’s new composition, dominated by a new generation of economists, the institutional crisis of the beginning of 1996 seemed resolved. During the second mandate of Oliveira, between 1998 and 2000, new agents would be recruited, but the shaping of CADE as a truly “technical” organ achieved under his presidency would be consolidated.

### 5.2.2 *The consolidation of an economic creed*

In 1998, the mandates of CADE’s president and of 5 commissioners would expire (Barrionuevo was appointed in 1997, so his mandate was guaranteed until 1999). Only 2 members of the composition inaugurated in 1996 would complete a second mandate: Oliveira, the president, and Salgado. Xausa died in May 1998, and Barrionuevo was appointed Secretary of Technological Development at the Ministry of Science and Technology in 1999. The reasons for the other commissioners not having been re-appointed couldn’t be identified.

In June 1998, the recomposing of CADE started, with the appointment of two commissioners: the lawyer Marcelo Calliari, and the economist Ruy Afonso de Santacruz Lima. Three other commissioners – all lawyers – joined the Council between March and July 1999: João Bosco Leopoldino da Fonseca, Mércio Felsky, and Hebe Teixeira Romano.

**Table 21.** Trajectories: Calliari, Lima, Fonseca, Felsky, Romano

**Marcelo Calliari, 33**

Graduated in law from USP and in economics from PUCSP, both in 1989, Calliari held an LLM in trade law, obtained from Harvard University in 1996, and was a PhD candidate in international law at USP. Illustrative of his interdisciplinary background, his master thesis focused on the expansion of the WTO into areas such as investments, competition policy and environment through the approach of game theory, transaction costs and common goods. A columnist and writer of the newspaper *Folha de São Paulo* between 1989 and 1995, Calliari served as a correspondent in New York, where he was responsible for covering foreign debt negotiations, capital markets, among other themes. Between 1996 and 1997, he was a corporate lawyer at a law firm based in São Paulo. Since January 1998, he was a legal advisor of CADE’s plenary, and an advisor for international affairs of CADE’s president, Gesner Oliveira. After leaving CADE, in the year 2000, Calliari became a competition lawyer at one the largest Brazilian law firms: *Tozzini Freire Advogados*.

**Ruy Afonso de Santacruz Lima, 42**

Lima graduated in economics from UFF in 1982, and possessed both a master’s and a PhD degree in economics from the UFRJ (supervised by José Tavares de Araújo Junior, and Fábio Erber, respectively). His doctoral study, quoted in this dissertation (Lima 1998), focused on (and strongly criticized) the decision-making methodologies in merger reviews decided by CADE from 1994 to 1996. A professor of economics

since 1981, in the early 1980s Lima worked at one of the “Big Eight” accounting firms, Arthur Young & Co. An economist of the CVRD (a state-owned mining company) since 1985, in 1986 Lima joined the Ministry of Finance, where he would be until 1998. There he occupied positions in price controls organs, such as CIP, until he was appointed the coordinator of the Industrial Area of the Secretariat of Economic Policy (SPE), then ran by Winston Fristch, between 1993 and 1995. Lima kept the post when the SPE was transformed in SEAE. He was the coordinator of the industrial area of SEAE, and analyzed produced technical opinions on several Merger Reviews between 1991 and 1994. After serving CADE for one mandate, Lima became a professor of economics at UFF, and worked as an economic consultant in competition policy cases.

**João Bosco Leopoldino da Fonseca, 55**

Graduated in law from UFMG in 1967, philosophy and neo-latin literature at Faculdade Dom Bosco, Fonseca held a PhD in economic law obtained from UFMG in 1989. Between 1968 and 1973, he was an attorney specialized in civil and labor law, and from 1973 to 1985 he was a judge in labor and federal courts. In 1985, together with a career as a law professor at UFMG (teaching economic law, administrative law, constitutional law, logics, among others), he resumed his work in private practice.

**Mércio Felsky, 50**

Felsky graduated in law from the Regional University of Blumenau, in the Southern state of Santa Catarina, where he was a corporate lawyer, and long involved in local politics. He was appointed Attorney-General of the city of Blumenau, Secretary of Finances of the same municipality, and president of the State Bank of Santa Catarina between 1991 and 1994. Besides his legal career and political appointments, Felsky had also occupied several directive positions in different corporations.

**Hebe Teixeira Romano, 49**

Romano was a law graduate from UniCEUB, a private university in Brasília, in 1983, and after a short period in private practice, became a lawyer of the Federal Attorney General’s office, a law professor and occupied several political appointments in the Ministry of Justice since 1986, as an advisor to different secretariats. Between 1993 and 1997, she was the chief of staff of the Ministry’s Secretariat of Economic Law (SDE), and became substitute-Secretary between 1995 and 1997, elaborating SDE’s technical opinions in cases decided by CADE. In 1997, she was appointed chief of staff of the Ministry’s Executive Secretary (“vice-Minister”). After leaving CADE, she became the chief of staff of the Federal Attorney General.

**Source:** elaborated by the author

If compared to Oliveira’s first mandate, CADE’s composition got younger in 1998/1999: the age average dropped from 46 to 44 years old. The arrivals of Lima, who was of the same “generation” of economists as Oliveira and Salgado, and Calliari, who could be considered part of a subsequent generation, illustrate the continuation of the process of rejuvenescence of CADE. At first sight, lawyers gained more space if compared to the 1996/1998 period, as between 1990 and 2000 they were in the number of 4. However, as Calliari had both degrees, it is better to say that the council was professionally balanced – with the possibility of considering that the hegemony of economics was still in place, if he was considered an economist.

The qualitative shift performed by the 1996 composition was kept by the 1998/1999 formation. Although the only “pure” economist appointed in 1998 had no foreign degrees, he was also a PhD in economics, and had close connections to the Ministry of Finance, especially to the SPE and the group of PUC-Rio. An indicator of Lima’s alignment with the approach of those economists was already given in this dissertation: he was the member of

SEAE who publicly manifested his opinion against the control of concentrations in Brazil during the institutional crisis of 1996. In an interview during fieldwork, Lima maintained a similar position:

One possibility is to, maybe, let mergers occur at will. It looks like a liberal view. And then you see what you do with conducts. There are not theoretical supports to control market structures. Period! Unless in the old relationship, as Hovenkamp says (the first book I read about antitrust in 1994!): ‘there were four, and now there are three. It’s easier to raise prices.’

Calliari, the other economist (or “half-economist”) had legal training in the US, and managed modern economic approaches, such as the game theory he applied in his master’s dissertation. While he can be defined as a corporate lawyer in formation, the other three lawyers recruited in 1998/1999 had extremely different profiles. Fonseca was mostly a law professor, specialized in economic law, and coming from the UFMG circuit – the same from where two commissioners were appointed to CADE before reform, in 1986. All three of them were connected to Washington Peluzo Albino de Souza, who had been appointed member of the commission who produced the 1988 draft for an antitrust act. Romano and Felsky, however, had profiles closer to, respectively, public service and political positions than to private practice, or academia.

The sources of appointment of these new commissioners provide indicators of their connections and thus of how the “revolution” performed in the two preceding years was being consolidated. Two of these appointments were made by CADE’s president, Gesner Oliveira. Fonseca reported in an interview to Dutra (2009, p. 119) that Oliveira invited him to become a commissioner. Calliari’s appointment was also intermediated by CADE’s president, as he was Oliveira’s advisor since January 1998, and they had worked for the newspaper *Folha de São Paulo* in the late 1980s. Lima’s appointment came from what can be considered the same circuit, as Oliveira previously occupied a prominent position at the SPE, in the Ministry of Finance. Lima was serving SEAE by 1998 when the Secretary, Bolívar Moura Rocha read his doctoral thesis and presented it to the Minister, Pedro Malan, who then invited him to compose CADE.

Although it was not possible to precise how Romano’s appointment occurred, her name was probably supported by the Ministry of Justice, as she had been working for a while at the SDE. Felsky’s was the only appointment that escaped from the Ministerial influence, as it seems to be rooted in the political field. As reported by an interviewee who was active in

the SBDC by that time, Felsky was recommended to CADE by Espiridião Amin, a Senator by the state of Santa Catarina (the same where Felsky developed his political and legal career), and member of a party that supported the government. In talking about Felsky's appointment, the same interviewee recognized that while indications to CADE coming from Congress occurred – “although rare” – they had to “pass the test of academic formation and professional experience”. Mentioned only in this interview, Felsky's trajectory in corporate law, and his political appointments to economic institutions seems to have granted him legitimacy for a position in CADE. He was thus not considered to be an “outlier” of competition policy.

The initiatives that characterized the 1996-1998 period – institutional consolidation, articulation with other governmental agencies, internationalization, and economicization – intensified from 1998 to 2000. In the institutional level, CADE enacted several resolutions concerning, for instance, the “ethical behavior of staff”<sup>246</sup>, the procedures of consultation<sup>247</sup>, and the regulation of voluntary appeals of decisions enacted by the SDE<sup>248</sup>. The training program of CADE's staff, established in 1996, continued its activities, and in 1998 counted with the participation of a consultant of OECD as one of the professors. Oliveira also continued to publicly defend CADE's activities. On October 27<sup>th</sup> 1999, for instance, he repelled a newspaper article authored by Bello (whose work has been quoted several times in this dissertation), who “questioned the efficacy of CADE's decisions”, as it would approve without restrictions 95% of mergers. On that day's session, Oliveira explicitly contested the evaluation, stating that “the author is misinformed, because the international experience reveals that antitrust intervention reaches from 2% to 3% of mergers presented”<sup>249</sup>. In another example, dated of July 29<sup>th</sup> 2000, Oliveira publicly responded to an article authored by a journalist that was critical of CADE, stating that he “insisted in the myth of economic concentration, as if it was, by itself, necessarily harmful”<sup>250</sup>.

During this period, CADE also established several cooperation agreements with other governmental institutions, such as the National Sanitation Agency (ANVISA), ANP, and organizations outside the state, such as IBRAC and the consumer protection foundation PROCON. Within the scope of “competition advocacy”, agreements with educational

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<sup>246</sup> Resolution n. 16, of September 9<sup>th</sup> 1998.

<sup>247</sup> Resolution n. 18, of November 25<sup>th</sup> 1998.

<sup>248</sup> Resolution n. 19, of February 3<sup>rd</sup> 1999.

<sup>249</sup> Session Report n. 145, of October 27<sup>th</sup> 1999.

<sup>250</sup> Oliveira's article, titled “*Relembrando o caso AmBev*”, was published on *Folha de São Paulo* of July 29<sup>th</sup> 2000.

institutions were expanded, and probably not by chance included the universities to which two of the new commissioners were associated to: the Universidade Regional de Blumenau, where Felsky had graduated<sup>251</sup>, and the UFMG, where Fonseca was a law professor. Still in the educational area, in 1999 CADE formed a commission integrated by current and former commissioners, law professors (one of which would become a commissioner in the near future) and economists to propose the reform of undergraduate curricula in order to include subjects on competition policy. The proposal was to be submitted both to Congress and to the Minister of Education<sup>252</sup>.

Cooperation was also happening at the international level, as CADE was increasingly present in foreign arenas of debate, especially through the representation of Oliveira and Calliari. Several visits from staff of the antitrust authorities of Germany, the US, South Africa, Argentina, and consultants of the World Bank and OECD can be observed in the session reports of the period. Members of CADE also continued to participate in international fora to discuss and design competition policy, such as the Mercosur, the OECD, the FTAA, and the WTO. Oliveira also represented CADE in two meetings with the “law and economics” groups of Stanford University, and the University of California at Berkeley<sup>253</sup>.

The economicization of antitrust policy was also advanced between June 1998 and July 2000. Exemplary of such process was the enactment of Resolution number 20, of June 6<sup>th</sup> 1999. This was the equivalent of Resolution 15 of 1998, but focusing on Administrative Procedures. Through this document, CADE established economic concepts such as the HHI and the Ci indexes, the definitions of anticompetitive conducts, and presented formulas to be applied in the evaluation of conducts. A new frontier for antitrust economics was thus being opened in what was then considered a genuinely legal domain, close to traditional criminal investigations and based on juridical concepts and logics.

During Oliveira’s second mandate, CADE’s decision reached what he claimed to be the “international standards”. In 1998, out of the 89 MR decided after the composition was altered, 3 (3,4%) received some sort of restriction. In 1999, of a total of 219 cases, 3,2% (7) had their approval conditioned. In the last six months of Oliveira’s mandate in the year 2000,

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<sup>251</sup> Other two universities from the state of Santa Catarina, the homeland of Felsky, as well as the professional association of economists of that state signed agreements of cooperation with CADE while he was a commissioner. It is interesting that no institution from that state had previously signed an agreement with CADE.

<sup>252</sup> The information is available in the Session Report n. 130, of July 28th 1999. On May 10th 2000 (Session Report n. 167), president Oliveira informed that both the Minister of Education and the Commission of Education of the House of Representatives “recommended the inclusion of the discipline of economic law in the undergraduate courses of law, economics, management, engineering, and connected areas”.

<sup>253</sup> Session Report n. 145, of October 27th 1999.

129 MR were analyzed by CADE and 3,1% of them were restricted. As in the previous composition, no operation was rejected by CADE. The institutional crisis of 1996 seemed to be definitely resolved in both aspects that were at stake. On the side of CADE, the institution was being consolidated, internationalized and gaining an increasingly “technical” character through economicization. On the side of the market and the government, the restrictive behavior that motivated the crisis was part of the past. As Magalhães, one of the architects of competition policy reform in Brazil described in an interview, “Gesner de Oliveira lifted CADE to where it is today”.

Maybe not by chance, Felsky announced on the session of July 17<sup>th</sup> 2000 that the publication *Global Competition Review* suggested that CADE achieved a “position of international recognition”<sup>254</sup>. This celebration was taking place when yet another phase of the practice of the field of competition policy in Brazil was beginning. Changes were about to happen, but within a line of continuity with the “technical” and “modern” practice of competition policy.

### **5.3 Change within continuity, and continuity within change**

The period comprised between the middle of 2000 and the end of 2008 – equivalent to two presidential mandates in CADE – entailed a series of changes in its composition, and in the political context. The appointment of a new president to succeed Oliveira was accompanied by a shift in the professional balance inside the Council. Also, in 2003, the government changed, and new appointments were made, most intensely in 2004. However, while the former was a change occurring within the boundaries established in 1996, the latter expressed a line of continuity even in a broader context of political change.

#### *5.3.1 Juridification and economicization combined*

Between July 2000 and December 2001, CADE’s composition was completely reformulated. Four new commissioners were appointed in 2000 to substitute Oliveira and Salgado, who finished their second term, and Lima and Calliari, who served CADE for two years. In 2001, other two commissioners were appointed to replace Fonseca and Silva. The reasons why a high number of commissioners were replaced before a second mandate are

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<sup>254</sup> Session Report n. 171 of July 17<sup>th</sup> 2000.

hard to precise. It was probably related to CADE's decision in a polemic merger that attracted a lot of public attention and generated controversy: the so-called AmBev case<sup>255</sup>. According to an interviewee, the Minister of Justice appointed in 2000, José Gregori, didn't want to renovate the mandates of anyone who had decided that polemic case, despite of the correctness or not of the decision. CADE was to be institutionally preserved, and defining its composition was once again a crucial strategy to do so.

The profile of the new composition was considerably different from that which dominated CADE from 1996 to 2000. By the end of 2001, the proportion of lawyers and economists was reversed: 4 commissioners and CADE's president were lawyers, and there were only 2 economists. The prevalence of lawyers was tuned with the objective of preserving CADE's image. As reported in an interview, the Minister of Justice felt that it was necessary to give CADE the features of a true tribunal: “[The Minister said:] ‘CADE was too much exposed on the media. This is not good. CADE is a tribunal, CADE exercises a jurisdiction. I want someone in CADE with the profile of a judge’”.

CADE did become more like a tribunal due to the new composition installed in 2000. The substitute of Oliveira as CADE's president was the lawyer João Grandino Rodas, a retired federal judge who, as reported in an interview, “presided CADE's session with a gavel, like in the movies”. The other lawyers were Celso Fernandes Campilongo, Ronaldo Porto Macedo Júnior, Roberto Augusto Castellanos Pfeiffer, and Miguel Tebar Barrionuevo, and the economists appointed were Thompson Almeida Andrade, and Afonso Arinos de Mello Franco Neto. The age average in this period was of 46 years old, the same as between 1996 and 1998.

**Table 22.** Trajectories: Rodas, Campilongo, Porto Macedo, Pfeiffer, Andrade, Arinos, Tebar

<p><b>João Grandino Rodas, 55</b>  Graduated in law from USP in 1969, Rodas also held undergraduate degrees in music, literature and pedagogy, and possessed three master's degrees (two in law, by the University of Coimbra, Portugal, and by Harvard University, and one in diplomacy by The Fletcher School of Law and Diplomacy), and a PhD in law by USP. A professor of international law at USP since 1971, Rodas had previously worked as a corporate lawyer in the late 1970s, being the chief of Ford's legal department in Brazil. Between 1980 and 1993, he was a judge in lower and higher courts. In the 1990s, Rodas was the chief of the legal advisory body of the Brazilian Ministry of Foreign Relations between 1993 and 1998, and represented the country at several meetings of the United Nations Commission on International Trade Law (UNCITRAL). An arbitrator since</p>
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<sup>255</sup> This was the merger review number 08012.005846/99-12, approved with conditions by CADE on March 30th 2000, through which two Brazilian breweries merged to form AmBev. The market share resulting from the operation in the beer sector – around 72% - motivated an intense debate among CADE's commissioners and in the media. While the operation was sometimes opposed due to an excessively elevated concentration, it was also defended due to the “efficiencies” it produced, or celebrated as the constitution of a “national champion”.

the late 1990s, after his term as CADE's president between 2000 and 2004, he became the dean of USP, and started to produce legal opinions in international law and antitrust.

**Celso Fernandes Campilongo, 43**

Campilongo held two undergraduate degrees from USP, in law and philosophy, both obtained in 1980. He also obtained a master's degree and a PhD in legal philosophy from the same university, in 1987 and 1992, respectively. Working as a lawyer at a family law firm, he also conciliated a career as a law professor at USP since the early 1990s. Campilongo became one of the exponents of Brazilian sociology of law and legal theory. After leaving CADE, Campilongo became Executive-Secretary of the Ministry of Justice, as well as kept his career as a law professor and a lawyer – now incorporating more intensively a practice in competition law. At USP law school, he was involved with the “PET-CAPEs Sociology of Law”, a research group coordinated by his former PhD supervisor, José Eduardo Faria – an exponent of Brazilian sociology of law, law professor at USP and FGV-SP, and an executive of Itaú bank.

**Ronaldo Porto Macedo Júnior, 39**

Macedo held two undergraduate degrees, one in law and the other in social sciences, obtained in the mid-1980s, a master's degree in philosophy (1993), and a PhD in law (1997), all from USP. During his PhD research on contract law, he was a visiting doctoral student at Harvard University, where, as revealed in an interview, he “was in touch with the economic analysis of law bibliography”, and authors such as Oliver Williamson. Since 1992, he is a prosecutor in São Paulo, and after serving CADE went back to his career in the Prosecutor's Office. Prior to his term in CADE, and after it, Macedo was also a law professor, teaching courses on legal theory, sociology of law, contract law, and competition. Macedo was also involved with “PET-CAPEs Sociology of Law research group”, and his PhD supervisor was José Eduardo Faria.

**Roberto Augusto Castellanos Pfeiffer, 33**

Pfeiffer graduated in law from USP in 1991, and held a master's degree in civil procedure obtained at the same university in 1998. A prosecutor at the state of São Paulo since 1993, Pfeiffer had professional and academic activities related to consumer law. During his undergraduate course in law, he was also a member of “PET-CAPEs Sociology of Law” research group. In 1999, he served in the staff of a justice of the Brazilian Supreme Court, and as a legal advisor of the Ministry of Justice. After his terms in CADE, Pfeiffer resumed his career as a prosecutor, and in 2010 completed a PhD in law, focusing on competition policy, at USP.

**Thompson Almeida Andrade, 59**

When appointed to CADE, Andrade was a retired public official of IPEA, where he served between 1976 and 1995, and a professor of economics at UERJ. He graduated in economics from UFMG in 1964, held a master's in economic planning at Vanderbilt University, and a PhD in institutional economics obtained from the University of London in 1994. Among his areas of academic activity were regulation, regional and urban development, quantitative analysis, simulations, and econometric projections.

**Afonso Arinos de Mello Franco Neto, 40**

Member of a prominent Brazilian family of lawyers and politicians, Arinos obtained his undergraduate degree in engineering from PUC-Rio, in 1984. In 1988, he earned a master's degree in economics from FGV-Rio, with a dissertation focusing on macroeconomic computational models. In 1993 he concluded a PhD in industrial organization at the University of Chicago. As he reported in an interview conceded to Dutra (2009, p. 137) his master's course was organized by Mario Henrique Simonsen, and counted with several professors formed in the US with a “quantitative-analytical profile”. In Chicago, he attended the classes of Nobel Prizes such as Gary Becker (an exponent of law and economics), and Robert Lucas (one of the proponents of neoclassical macroeconomic theory of “endogenous growth” [Herrera 2006]). Having worked as an engineer in the early 1980s, since 1993 he was a professor of economics at FGV-Rio, teaching graduate courses on microeconomics, international trade, among others. After serving CADE, Arinos also worked in providing economic consultancy in antitrust cases.

**Miguel Tebar Barrionuevo, 57**

Tebar graduated in law from USP in 1967, and since then was a private practitioner. A member of the PSDB, he had occupied several political positions in public administration, such as Secretary of Administration and Modernization of the state of São Paulo (1991-1994), coordinator of PSDB's electoral campaign in that state (1994), and was a candidate for the National Congress by the same party in 1994.

**Source:** elaborated by the author



The profile of economists in CADE between July 2000 and July 2002 was similar to that of the former composition. Both Andrade and Arinos held PhD degrees in economics obtained in the US, were close to academic work, and familiar with quantitative approaches to economics, such as econometrics, microeconomics and the economic analysis of law. Arinos was what could be reputed as an “expert” for the field of competition policy, and held credentials that were highly praised by the view institutionalized in CADE with the hegemony of economists since 1996: his PhD, obtained at the University of Chicago, focused on industrial organization.

Lawyers, however, were not only in a higher number at this composition, but also started to have a different profile – a trend that would permeate the subsequent years of CADE’s composition. Although they did not form a homogeneous group in terms of careers, they came from the same circuit: all 5 graduated in USP law school, while prior to them only Calliari was from São Paulo. Moreover, 3 of these lawyers were connected to the “PET-CAPES Sociology of Law” research group at USP law school, coordinated by José Eduardo Faria.

The group of lawyers from USP held credentials that differed from those of the previous period – they were more academic, interdisciplinary, and familiarized with institutional and legal novelties such as antitrust policy. Macedo’s trajectory is emblematic: as he mentioned in an interview, as a visiting doctoral student in Harvard, he had the opportunity to get in touch with the law and economics tradition, and the works of economist Oliver Williamson. Also in the case of Rodas, who was not part of the “sociology of law” group, but yet a professor of international economic law at USP, these connections can be perceived: he attended Harvard in the 1970s, participated in several missions to UNCITRAL, and was an arbitrator.

These were therefore lawyers that tended to be more open to the dialogue with economics, and thus could represent an antidote to what those who “revolutionized” competition policy from 1996 onwards perceived as a problematic “legalistic vision” of the 1994-1996 period (Lima 1998, p. 124). The only exception to this profile was Tebar, whose career developed in the political field, rather than in law. Not by chance, he is one of the agents often reputed as an “outlier” in CADE, a “politician” that was not “technical” or “academic”.

The source of appointments of the president and the commissioners recruited to CADE between 2000 and 2001 was also maintained from the previous period: the Ministries

of Justice and Finance, especially in the level of secretariats, controlled indications. The appointments of the economists Arinos and Andrade were originated at SEAE, in the Ministry of Finance<sup>256</sup>. The Secretary at that time was Claudio Monteiro Considera, who knew Arinos from the FGV-RJ, where they were both researchers and professors, and Andrade from IPEA, where both of them retired. In the case of lawyers, the close links to SDE were decisive. Rodas revealed to be indicated by the Minister of Justice, José Gregori, who was a law graduate from USP (Dutra 2009, p. 134). The appointments of Campilongo, Macedo and Pfeiffer were articulated by Paulo de Tarso Ramos Ribeiro, who was the Secretary of Economic Law of the Ministry of Justice. Ribeiro obtained his PhD in law from USP, in 1995, under the supervision of Tércio Sampaio Ferraz Junior, and was also a member of the “PET-CAPEs” group. According to Campilongo, he was recommended to the SDE by Faria, who was a close friend of the Minister of Justice, José Carlos Dias, also a law graduate of USP<sup>257</sup>. Tebar’s indication once again differs from the trends identified: according to some interviews, he was appointed by Aloysio Nunes, Minister of Justice between November 2001 and April 2002, former classmate of Tebar at USP law school, and member of the same party, the PSDB.

In July 2002, with the end of Campilongo’s and Arino’s first term, two other commissioners were appointed to CADE<sup>258</sup>. They were Fernando de Oliveira Marques – a lawyer –, and the economist Cleveland Teixeira.

**Table 23.** Trajectories: Marques, and Teixeira

<p><b>Fernando de Oliveira Marques, 39</b>  Marques held degrees in economics and law obtained from PUC-SP in the mid-1980s. A competition lawyer and law professor teaching courses on antitrust, he celebrated one of the first cooperation agreements between CADE and an educational institution, in 1997, when Gesner Oliveira was the president of the Council.</p> <p><b>Cleveland Teixeira, 36</b>  After graduating in economics from USP, in 1981, Teixeira pursued a master’s degree at FGV-SP, with a dissertation focusing on the control of mergers reviews in Brazil, supervised by Gesner Oliveira, by then CADE’s president. Between 1990 and 1998, he was a consultant in economics, and in 1999 he became</p>
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<sup>256</sup> Besides the reference to SEAE, Arinos also identifies another possible source of support for his appointment in the Brazilian Central Bank’s president, Armínio Fraga (Dutra 2009, p. 138). Fraga was an economist graduated from PUC-Rio, with a master’s in economics at the same university, and a PhD in economics obtained from Princeton University.

<sup>257</sup> During Ribeiro’s period at the SDE, other law graduates of USP were working at that Secretariat: José Reinaldo Lima Lopes, who held a PhD in law supervised by Faria, and was in charge of the Department of Consumer Protection, and Caio Mário da Silva Pereira Neto, PhD from Yale, who was the director of the Department of Economic Protection and Defence of SDE.

<sup>258</sup> Campilongo’s term wasn’t renovated because he became Executive-Secretary of the Ministry of Justice. The Minister, by that time, was Paulo de Tarso Ribeiro.

the economic advisor of the National Confederation of Commerce's president. In the same year, he joined SEAE, through the indication of his former PhD supervisor. By 2001, Teixeira was Deputy-Secretary of SEAE. After leaving CADE, Teixeira created an economic consultancy that, among other areas, works in antitrust cases. His partner at the firm is Luis Fernando Rigato, an economist that would be appointed commissioner to CADE in 2004.

**Source:** elaborated by the author

With the arrival of these two commissioners, the age average once again dropped, reaching to 40 years old, but the general profile of the council was practically intact: the recruitment of agents who combined academic involvement and professional practice. As both a lawyer and economist, and with a long career as a professor of economic law and a private practitioner of competition policy, Marques can be considered an expert in the subject. Moreover, although I classified him as a lawyer due to a professional career as a law professor, and being partner of a law firm, Marques' appointment also indicates a mitigation in the professional balance in the Council: at this point, there were 3 commissioners with training in economics.

Similarly, although Teixeira didn't have an academic career equivalent to Arinos, he was working at SEAE, and had experience in antitrust policy. Both appointments came from the Ministry of Finance. While Marques mentioned that his appointment was suggested by Malan, the Minister of Finance, to Miguel Reale Junior (a lawyer and law professor of USP), by then Ministry of Justice, Teixeira's name was first suggested by his boss at SEAE – Claudio Monteiro Considera. Teixeira's arrival at SEAE in the first place was articulated by Gesner Oliveira, who had been his supervisor at the master's he completed at FGV-SP in 1998.

The dominance of lawyers in the council had effects beyond the anecdotal "gavel" of president Rodas. Several measures related to institutional design, and procedures were taken between 2000 and 2001. In August 2000, for instance, an inter-ministerial working group formed by CADE, SEAE, SDE, the Ministries of Planning, and of Industry and Commerce, as well as the Presidency was in charge of proposing a new institutional design for the SBDC<sup>259</sup>. In the same year, a typical legal institute of US law was imported to Brazil: the "leniency agreement". CADE's Annual Reports of the period also illustrate the possible influence toward a legal approach that its composition was exercising. In the year 2000 (CADE 2000, p.

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<sup>259</sup> The proposal was presented to the Presidency of the Republic on November 2002. The document preserved the substantive concepts of the law of 1994, redesigning the institutional competences of CADE, SDE, and SEAE into a single regulatory agency. These were the first discussions of a long process that would result in the new competition act of 2011 (law number 12.529/11), which replaced the law of 1994 and started to be enforced in May 2012.

140-177), for the first time an item of the Annual Report was integrally dedicated to the supervision of the judicialization of CADE’s decisions, being replicated in other reports from that moment on. The same report announced the “implantation of a jurisprudential, legislative, and doctrinal database about competition defense” in CADE (2000, p. 192). In 2002, infralegal instruments to deal with the “problem” generated by the “post-merger review” system adopted in Brazil were also created: these were the Precautionary Order and the Agreement to Preserve Reversibility of Transaction (APRO)<sup>260</sup>. Through these measures, CADE determines that an MR in which it visualizes potential anticompetitive effects cannot be consummated until the Council enacts its final decision.

Nevertheless, initiatives of the preceding compositions were being replicated, notably the conduction of seminars with foreign specialists, lawyers and economists (now including members of the former composition), of cooperation agreements with governmental institutions, universities and market associations, and the participation on conferences abroad. The majority of lawyers was not an impediment for yet another continuity from the previous period: the deepening of the economicization of competition policy. On August 1<sup>st</sup> 2001, a joint ordinance signed by the Secretary of Economic Monitoring, Claudio Considera Correa, and the Secretary of Economic Law, Paulo de Tarso Ribeiro, enacted the “Guidelines for the analysis of horizontal mergers”<sup>261</sup>. One year later, on December 12<sup>th</sup> 2002, through an ordinance signed by Considera, SEAE published the “Guidelines for the economic analysis of predatory pricing”<sup>262</sup>. Two economists had an active role in designing the guidelines: the Secretary Considera, and SEAE’s Deputy-Secretary for regulation, competition policy and trade-related matters, Paulo Correa, appointed by Considera in 1999.

**Table 24.** Trajectories: Considera and Correa

<p><b>Claudio Monteiro Considera</b></p> <p>Considera held an undergraduate degree in economics from UFF, a master’s degree in economics from UnB, and a PhD in economics from the University of Oxford. He was a public official at IPEA, and later served at the Brazilian Institute of Geography and Statistics (IBGE). He was invited to become the Secretary of SEAE by his former colleague at IPEA, the Minister of Finance, Pedro Malan. Considera is currently a professor of economics at UFF, and a researcher at FGV-Rio.</p>
<p><b>Paulo Correa</b></p>

<sup>260</sup> *Resolução* n. 28, of June 24<sup>th</sup> 2002, which instituted the *Medidas Cautelares*, and the *Acordos de Preservação da Reversibilidade da Operação*.

<sup>261</sup> *Portaria Conjunta SEAE/SDE* n. 50, of August 1st 2001. A first version of the guidelines had already been published through an ordinance signed only by SEAE in 1999, through the *Portaria SEAE n. 39*, of June 29th 1999.

<sup>262</sup> *Portaria SEAE n. 70*, of December 12<sup>th</sup> 2002.

Correa held an undergraduate degree in economics from the UFRJ (1993), and a master's in economics from the University of Western Ontario (1997). Prior to joining SEAE, he was a professor of economics, a researcher in the Brazil's National Development Bank (1994-1996) and in Brazil's International Trade Foundation (1992-1994). He also served as an advisor of the Panamanian government in competition and trade policies (1997-1999), helping to design Panama's merger guidelines. He was invited to SEAE by Considera through the indication of José Tavares de Araujo Junior, who would replace Considera as Secretary with the change of government in 2003. Correa and Tavares knew each other from UFRJ. In 2002, Correa joined the World Bank in Washington, as a Senior Economist in the Infrastructure, Private Sector and Finance Department in the Latin American and Caribbean region.

**Source:** elaborated by the author

As Considera explained in an interview, the idea to design the guidelines stemmed from the “astonishment” that SEAE enacted different opinions on similar situations, and was based on foreign experiences, notably the US and Europe:

There was no clear rule on competition defense, so together with Paulo Correa we decided to implement something similar to what more advanced countries in this area have: a merger guideline. Based on the American guideline, on the Panamenian guideline, and some European guidelines, we constructed our own.

With the objective of providing “an instrument for the enforcement of the rule of reason”, the guidelines to merger reviews presented a detailed definition of several economic concepts, established a step-by-step procedure for the analysis of MR, and defined parameters of concentration based on indexes such as the HHI and Ci. Similarly, the guidelines for predatory pricing defined several antitrust concepts based on economic theories, and established economic parameters for the detection of anticompetitive practices.

Considera was also responsible for implementing other changes that affected competition policy. In the institutional level of SEAE, one change was recomposing almost entirely the secretariat with a new staff. What motivated the radical shift was the fact that “people were all addicted to the idea of price control”. A new generation of economists was brought in to replace them, people that, according to Considera, “were recently coming out of academia, and that went there without any addictions”. The measure would have inspired Paulo de Tarso Ribeiro, who conducted a similar transformation at SDE, which until his appointment was directed by Ruy Coutinho do Nascimento – CADE's president in the criticized 1994-1996 period. Both SEAE and SDE were thus being also economicized, or at least being aligned to a different economic creed<sup>263</sup>.

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<sup>263</sup> It is interesting to note that Considera's predecessor at SEAE was a lawyer, Bolívar Moura Rocha. Rocha graduated in law from USP, and obtained a PhD degree from the University of Geneve, in Switzerland, in political science, during which he was a visiting student at Georgetown University. Prior to joining the

During his term as Secretary, Considera also performed another transformation in respect to the procedures to analyze MR at SEAE. As he maintained, “something that has always caught our attention was that most part of merger reviews were irrelevant”. The solution found by the Secretary was inspired by the American antitrust experience: the creation of a “fast track” for cases “with no relevance”. The US antitrust authorities not only served as an example, but were also called by Considera to train his staff in subjects other than MR. He reported a training course conducted by the DOJ and the FBI to SEAE’s staff and public prosecutors about how to conduct investigations in cartel cases.

In the period between July 2000 and December 2002, several measures within CADE, but also in SEAE and SDE, thus gave continuity to the trends initiated in 1996, even if through a different composition in terms of professional balance. Decisions taken by CADE even suggest that the regulatory standards consolidated in the preceding years were furthered. Out of the 1375 MR decided in the period, 98,2% were integrally cleared by CADE, and only 1.6% were approved with some sort of restriction. Other 2 MR, which in practice comprised a single operation, were not approved by the Council, thus meaning the first rejections since the 1994-1996 period. However, as I will discuss in Chapter 6, these rejections were entirely consistent with the neoliberal creed that was being consolidated in the field’s practice.

### *5.3.2 The confirmation of “autonomy” despite of political change*

In 2003, with the change of government (the 8 years of Cardoso’s administration were concluded, and Lula took office for his first mandate in January), CADE’s composition was once again to be remade. Macedo didn’t complete his first term, due to a judicial battle between him and the Prosecutor’s Office where he worked, around the compatibility of the appointment with his career as a prosecutor. In the beginning of 2004, Tebar finished his first term, and was not appointed for a second mandate. Also in 2004, Rodas and Andrade concluded their second and last term, and Marques and Teixeira did not have their terms renovating. Teixeira explained in an interview that the new Minister of Justice of Lula – Márcio Thomaz Bastos – and his Secretary of Economic Law, Daniel Goldberg, both lawyers from USP, wanted to renovate his term. However, due to a delay of 6 months in the processing of this appointment in the Federal Senate, he decided not to wait, and left CADE.

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government, he served as a legal assistant of the International Monetary Fund (IMF). He was called by the Minister of Finance, Pedro Malan, to work on the coordination of foreign debt negotiations, and was later appointed Secretary at SEAE.

The new composition made by Lula started in the end of 2003, when the lawyer Luiz Alberto Esteves Scaloppe was appointed. Together with Scaloppe, Pfeiffer, who had been appointed in 2001, had his term renovated for another two years. In the middle of 2004, a new president and three other commissioners were appointed. The president was the economist Elizabeth Mercier Querido Farina, and commissioners were the lawyer Ricardo Villas Boas Cueva, and the economists Luiz Fernando Rigato and Luiz Carlos Thadeu Delorme Prado. From the end of 2004 until the end of 2005, CADE was thus composed by three lawyers and three economists.

**Table 25.** Trajectories: Scaloppe, Farina, Cueva, Rigato, Prado

**Luiz Alberto Esteves Scaloppe, 51**

Scaloppe graduated in law from a small private university in the state of São Paulo in 1975, and had also undergraduate degrees in business and public administration obtained in the end of the 1970s. Besides having attended several specialization courses on traditional areas of the law, such as administrative law, criminal procedure, and labor law, Scaloppe held a master's degree in sociology from PUCSP, and a master's degree in public education, obtained from the Federal University of Mato Grosso (UFMT). Since 1997, he was a PhD candidate in legal philosophy at the University of Barcelona (Spain), but by the time of his appointment he hadn't concluded the course. A professor of law at UFMT, he was a public prosecutor in the same state. Long involved in politics, Scaloppe ran for the City Council of Cuiabá, and for governor of the state of Mato Grosso by the PT in the late 1980s and early 1990s. He had also been the president of Mato Grosso's labor union of teachers between 1986 and 1989.

**Elizabeth Mercier Querido Farina, 51**

An economist graduated from USP in 1976, with a PhD in industrial organization obtained from the same university in 1983, Farina is often reputed as one of the "pioneers" of antitrust economics in Brazil. She was a professor of microeconomics and industrial organization, and dean of the department of economics of USP by the time of her appointment, and had experience working as an economic consultant in antitrust cases presented before CADE, and in publishing academic pieces about competition policy. As a professor of economics, she was involved in a joint project with the Liberal Institute (*Instituto Liberal*), in which her students of microeconomics were taken to visit multinational corporations and "see the real world" (Farina in Dutra 2009, p. 220). As Farina informed in an interview to Dutra (2009, p. 220), the creation of the Liberal Institute was motivated by the fear multinational corporations had of the treatment distinction between national and foreign capital instituted by the Constitution of 1988. After serving as CADE's president until 2008, in 2012 Farina retired as a professor, and became the president of the Sugar Cane Industry Union in Brazil (UNICA), the largest industrial association of the sectors of sugar and bioethanol production. In 2013, she was appointed a member of FIESP's Council of Agrobusiness.

**Ricardo Villas Boas Cueva, 42**

Cueva concluded his law degree in USP in 1984, and later obtained a master's in environmental tax law from Harvard University (1990), and a PhD in the same subject from the University of Frankfurt at Main, in 2001. During his undergraduate degree in law, he was a researcher of "PET-CAPEs Sociology of Law" group, and had his final graduation work supervised by Tércio Sampaio Ferraz Junior. A prosecutor between 1985 and 1987, and lawyer between 1987 and 1988, in 1987 he was approved to be an attorney at PGFN. Between 1991 and 1994, he was appointed deputy-Attorney-General of his former law professor, Ferraz Junior. When appointed to CADE, Cueva represented the PGFN at a collegiate organ within the Ministry of Finance that regulated the capital market. After serving CADE until 2008, he worked as legal consultant in competition law, and in 2011 was appointed a justice at the Brazilian Superior Court of Justice (STJ).

**Luiz Fernando Rigato, 34**

Rigato graduated in economics from USP in 1993, and obtained a master's degree in corporate economics from FGV-SP in 1999, during which he was a classmate of Cleveland Teixeira (commissioner

2002-2004). By the time of his appointment, he was a PhD candidate in economics at FGV-SP, supervised by Arthur Barrionuevo Filho (commissioner 1997-1999). In the year 2000, by Teixeira's indication, he was appointed Coordinator-General of SDE, a position equivalent of a "chief-economist", where he stayed until the end of Cardoso's government. After working for a short period as a consultant at a law firm, in 2003 he was invited to join SEAE, where he served until 2004, when he was appointed to CADE. After leaving CADE, he concluded his PhD thesis in 2005, on competition policy, became a researcher at FGV-SP, and a partner of an economic consultancy with Cleveland Teixeira.

**Luiz Carlos Thadeu Delorme Prado, 52**

After finishing law school at UFRJ in 1975, Prado graduated in economics from Universidade Cândido Mendes, in Rio, in 1977. Here classified as an economist, he has never practiced the law. His graduate studies were a master's in production engineering from UFRJ, obtained in 1982, and a PhD in economic history from the University of London, in 1991. A professor of economics at UFRJ since 1994, Prado had several publications on economic history, and political economy. As illustrated by his academic publications, such as an article titled "Lessons from an old master: John Kenneth Galbraith", Prado was close to Keynesian approaches, as well as to Latin American structuralism. In 2004, he was appointed to coordinate the Industrial Directorate of BNDES by Carlos Lessa, nominated president of the bank by Lula. Lessa, a PhD in economics by UNICAMP and a disciple of Celso Furtado's developmentalist economics, served as professor of ECLAC in the 1960s, and founded UNICAMP's Institute of Economics, reputed as a center of heterodox economics in Brazil. After leaving CADE, Prado resumed his activities as a professor of economics, and has worked as an economic consultant in antitrust cases.

**Source:** elaborated by the author

The composition formed under Farina's presidency brought new agents into CADE, and once again was about to shift the balance between lawyers and economists, but the overall tendencies identified since 1996 were being preserved. The group was highly titled: there were 3 PhDs, and 2 PhD candidates. Among economists, two of them – Farina and Rigato – had similar profiles to those of the previous period. Rigato was already part of the SBDC since the year 2000, when he served at the SDE, and Farina was a specialist in industrial economics. Prado was a novelty in the council, if compared to the trajectories of other economists in CADE. While the prior compositions, and even his colleagues appointed in 2003/2004 were specialized in industrial economics, microeconomics, and had often academic connections to the US economic mainstream, Prado's work was more focused on developmental economics, and political economy, and his theoretical influences were rather Keynesian authors, and Latin American structuralism.

The two lawyers appointed did not contrast to the observed pattern. Cueva was a law graduate from USP, connected to the "PET-CAPES" group that dominated the 2000-2004 composition, with academic experiences in the US, and a professional career combined with political appointments since 1991. Scaloppe's appointment, on the other hand, was an equivalent to that of Tebar in 2002. They were both non-experts in economic or competition law, and had their careers strongly associated to politics. An important difference among them was perhaps that Scaloppe had also developed a legal career, as a public prosecutor. Just as



Tebar was reputed as an “outlier” in the previous period, Scaloppe was seen as “not vocationed” for antitrust policy. Nevertheless, once the council was dominated by “technical” commissioners, his lack of vocation did not affect CADE.

The dynamics of appointments was also mostly preserved, as the Ministries of Justice and Finance closely controlled the reformulation of the Council. Rigato’s appointment was articulated within SEAE, by Secretary José Tavares de Araújo Junior. Farina and Cueva were invited by SDE’s Secretary, Daniel Goldberg. As Farina recalled in an interview conceded to Dutra (2009, p. 221), Goldberg argued in his invitation that “it was important that [the name] came from academia, to be a neutral name at that moment”. In the same interview, Farina mentioned that her name had been ventilated to compose CADE in 1998 (Dutra 2009, p. 221), so it is likely that the perception that she was “neutral” came from before, also under Cardoso’s administration, and probably from within the Ministry of Finance. The sources of the appointments of Prado and Scaloppe contrasted to this general trend. As informed by an interviewee, Prado’s indication was probably originated at the BNDES, and Scaloppe’s appointment, again similarly to Tebar’s trajectory, came from the political field. His name would have been articulated by José Dirceu, who was the President’s Chief of Staff by that time.

At first sight, the practice of competition policy in the period 2004-2005, as reflected by the result of its decisions, was slightly different from the previous compositions. From January 2004 to December 2005, out of the 1002 MR analyzed, 8,08% received some sort of restriction, and 1 operation was rejected<sup>264</sup>. The number of restrictions imposed is lower, however, if it is considered that only five operations that received restrictions entailed 53 MR presented separately. Thus, if the number of operations restricted was, in practice, of 28, it corresponds to 2,9% of restrictions imposed in the period – close to the average in the preceding years.

Between the end of 2005 and the beginning of 2006, three new commissioners were appointed to CADE, replacing Pfeiffer and Andrade, who finished their second term, and Scaloppe, whose mandate was not renovat<sup>265</sup>. Two economists and a lawyer were brought

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<sup>264</sup> This was the MR number 08012.001697/2002-89, decided on February 2004, through which the multinational *Nestlé* bought the Brazilian chocolate and candy industry *Garoto*. The operation generated a concentration of up to 65% in certain markets.

<sup>265</sup> In April 2005, Lula appointed the lawyer Denise Maria Ayres Abreu to CADE, but withdrew the nomination in July. Similarly to Scaloppe, Abreu was also said to be connected to José Dirceu. She was his classmate at PUC-SP law school, and by 2005 occupied the position of deputy secretary for legal affairs at the Presidential Chief of Staff’s office. The cancellation of the appointment was related to the fact that, according to the

into CADE, again consolidating the logics of composition that was hegemonizing the field since 1996, and shifting the professional balance between lawyers and economists (2 against 5) to the level observed between 1997 and 1998. The economists appointed were Paulo Furquim Azevedo, and Abraham Benzaquem Sicsú, and the lawyer was Luis Fernando Schuartz.

**Table 26.** Trajectories: Furquim, Sicsú, and Schuartz

<p style="text-align: center;"><b>Paulo Furquim Azevedo, 41</b></p> <p>Furquim graduated in business management from FGV-SP in 1986, and held a master's and a PhD degree in industrial organization and competition policy obtained from USP, in 1992 and 1996, respectively. During his PhD, which was supervised by Elizabeth Farina, he was a visiting doctoral student at the University of California, at Berkeley, where he was co-supervised by Oliver Williamson. Since the early 1990s, Furquim was a professor of economics, teaching disciplines such as industrial organization and agricultural economics. Two years prior to his appointment to CADE, he joined the FGV-SP as a professor. After serving CADE, he resumed his activity as a professor of economics, was appointed a member of FIESP's Council of Agribusiness, and obtained a post-doctoral degree in economics from the MIT. Academically involved with competition policy and economic analysis of the law, he has also worked as an economic consultant in antitrust cases.</p> <p style="text-align: center;"><b>Abraham Benzaquem Sicsú, 53</b></p> <p>Sicsú graduated in production engineering from USP, in 1976, obtained a master's degree in economics from the Federal University of Pernambuco (UFPE), in 1980, and a PhD in economics from UNICAMP, in 1985, supervised by Luis Gonzaga Belluzo. A professor of economics at UFPE since the late 1980s, he has thought courses on industrial economics, industrial organization, economic history, among others, and specialized on economic development and technological innovation. Sicsú is also a member of the Celso Furtado International Center for Development Policies.</p> <p style="text-align: center;"><b>Luis Fernando Schuartz, 39</b></p> <p>A graduate in law from PUCSP, and mathematics from USP, in 1989, Schuartz held a master's in constitutional law from the University of Frankfurt at Main, where he presented a dissertation on the independence of the German Central Bank in 1992. He also obtained his PhD degree from Frankfurt, in the area of legal philosophy, in 1999. In his academic career, Schuartz conducted courses and published articles and books on topics such as legal philosophy, competition law, economic analysis of law, game theory, and rational choice theory. Among his publications, there is one quoted in this dissertation (Schuartz 2009), in which Schuartz, relying on Richard Posner, analyzes the Brazilian competition policy experience, and attributes the "satisfactory quality of enforcement" observed since 1994, among other factors, to the expressive influence of economists, and to the impermeability of competition law to "substantive constitutional arguments". In 1992, he worked as a lawyer with Tercio Sampaio Ferraz Junior. By the time of his appointment, he was a professor of law at FGV-RJ, and a lawyer at a large law firm in São Paulo, having acted before CADE in several occasions.</p>
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**Source:** elaborated by the author

Although I was not able to identify how Sicsú was taken to CADE<sup>266</sup>, the appointments of Furquim and Schuartz obeyed the general dynamic observed in the previous periods: their names emerged from within the SBDC. Furquim was supervised in his PhD

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newspaper *Valor Econômico* of June 29<sup>th</sup> 2005 (p. A4), the new Presidential Chief of Staff – Dilma Rousseff, who would become President in 2010 – required Abreu to stay at her position.

<sup>266</sup> As an economist trained at UNICAMP, it is likely that his appointment was articulated through this network, which was the same as Prado's.

thesis by Farina, who by then was CADE’s president, and had worked with her in economic consultancies in antitrust cases. It is said that Schuartz, in turn, was first recommended by Cueva, who was a commissioner since 2004. They knew each other from the University of Frankfurt at Main, where they both did their PhDs in the 1990s. As Schuartz mentioned in an interview with Dutra (2009, p. 265), at first he feared that the appointment would compromise his academic career, but was convinced to accept the offer by “three friends: Afonso Arinos, Ronaldo Porto Macedo Junior, and Celso Campilongo” – all three appointed commissioners to CADE between 2000 and 2001.

The profiles of these three commissioners reveal, on the one hand, a tendency that could already be observed in CADE’s historical composition, and on the other, the beginning of a possible shift. Furquim and Schuartz had trajectories that were consistent with the profiles of economists and lawyers appointed to CADE since 1996. Sicsú, however, being an economist closer to structuralist economics and the UNICAMP school, was the second exemplary of a commissioner with a profile that until then was exceptional. By 2008, nevertheless, the Council was still dominated by economists that replicated the dominant profile in CADE since 1996.

The continuity noticed in the composition of CADE despite its parallel reformulation to the change of government was not restricted to CADE. Also in SDE and SEAE the agents appointed in the initial years of Lula’s administration were connected to those who previously ran the secretariats. In the case of SEAE the continuity reverberated the broader composition of the Ministry of Finance. As Novelli (2010) explains, during Lula’s first mandate, when Antonio Palocci was appointed Minister of Finance, the exchange, monetary and fiscal policies practiced by Cardoso were to a large extent reproduced. This can be explained by the fact that the “nucleus of macroeconomic policy, of the orthodoxy represented, above all, by PUC-Rio economists”, and/or economists connected to the international and national financial markets, and with training in the US was maintained (Novelli 2010, p. 235).

In SEAE, between 2003 and 2006, two economists occupied the position of Secretary: José Tavares de Araújo Júnior, and Hércio Tokeshi. In SDE, a young lawyer became Secretary in 2003, and stayed in office until 2006: Daniel Goldberg.

**Table 27.** Trajectories: Tavares, Tokeshi, and Goldberg

<p><b>José Tavares de Araújo Júnior</b>          PhD in economics from the University of London, and a retired professor of economics at UFRJ, Tavares had been long involved in political positions when appointed to SEAE. In the late 1980s, during</p>
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Sarney's administration, he was the executive secretary of the Commission of Customs Policy, and implemented a series of deregulatory measures of tariffs to "modernize" the "protectionist system" in place in Brazil (Castelan 2010, p. 584). During Cardoso's government, Tavares was appointed executive secretary of the Foreign Trade Chamber. A specialist in international trade, competition policy, and industrial organization, he has worked as a consultant for several international organisms, such as the World Bank, OAS, and ECLAC. Since he left SEAE, he coordinates an economic think tank, and is a partner of an economic consultancy, together with Régis Bonelli, and Armando Castelar Pinheiro (already mentioned in the trajectory summary of Lucia Helena Salgado – Table 18). Tavares served at SEAE between March 2003 and July 2004.

**Hélcio Tokeshi, 40**

Tokeshi held an undergraduate degree in economics from USP (1985), a master's in economics from UNICAMP (1988), and a PhD in economics from the University of California, at Berkeley (1996), where, as reported in an interview, he attended several courses taught by Oliver Williamson. Between 1983 and 1987, he was a junior researcher at the think tank Brazilian Center for Analysis and Planning (CEBRAP), in a group formed by José Serra (who would become Cardoso's Minister of Planning), and integrated by, among others, Gesner Oliveira. After working as an economist in a Brazilian corporation, in 1990 Tokeshi was appointed to a position at the Secretariat of Economic Policy of the Ministry of Finance, during Collor de Mello's administration, where he was in charge of negotiating with the IMF and foreign private banks, as well as of developing simulation models to forecast inflation and set monetary policy targets. Between 1997 and 1999, he served the World Bank as an economist, and later was hired as a consultant at McKinsey & Co (one of the "Big Three" in management consulting services), at the offices in São Paulo and New York. After a 2 year period in SEAE, between 2004 and 2008 Tokeshi went back to McKinsey & Co, then as an associate principal. Since 2009, he is the managing director of *Estruturadora Brasileira de Projetos (EBP)*, a company acting as a bid advisor for infrastructure projects. Tokeshi served at SEAE between July 2004 and May 2006.

**Daniel Krepel Goldberg, 27**

Graduated in law from USP, Goldberg held a master's degree obtained from a joint program between USP law school and the Harvard University School of Government, and a PhD in competition law from USP. During the period at Harvard, he specialized in tax law, and attended courses on microeconomics required by the School of Government. As an undergraduate student, he was involved with a research group on theories of justice, coordinated by José Reinaldo de Lima Lopes, a professor of law and PhD from USP (supervised by Faria) who occupied a directive position at SDE in the year 2000. Prior to joining the government, he was a lawyer at *Lilla, Huck & Malheiros Advogados*, a prestigious law firm in São Paulo. Between 2001 and 2002, he was a corporate lawyer at Wilmer, Cutler and Pickering, in Washington D.C. After leaving SDE in 2006, he joined the investment bank Morgan Stanley, in New York City, was appointed the head of mergers and acquisitions, and later president of the bank in Brazil. In 2011, he created a hedge fund which acts in partnership with the multinational investment firm Farallon Capital Management, based in the US.

**Source:** elaborated by the author

As it is possible to observe from their trajectories, both Tavares and Tokeshi were connected to economists who produced economic policy at the Ministry of Finance during Cardoso's government. Moreover, they had themselves worked in governmental organs prior to the change in the administration, and in positions where some of the characteristic neoliberal adjustments (for instance, tariff deregulation and foreign debt negotiation with the IMF). Their academic trajectories was also very similar to many of the economists appointed to produce competition policy in Brazil: PhD degrees, connections and experience in the field of economics in the US, works in the World Bank, and as economic consultants in the market.

The were both also close to one of the Brazilian exponents of “law and economics”, Armando Castelar Pinheiro, who obtained a PhD in economics from Berkeley, during the same period as Gesner Oliveira, and with the same supervisor: Albert Fishlow. Tavares was Pinheiro’s partner at an economic consultancy created in 1997, and Tokeshi mentioned in an interview to have met Pinheiro, as well as Lucia Helena Salgado while in Berkeley. Besides integrating the same research group as Gesner Oliveira in CEBRAP, Tokeshi also mentioned in an interview that Oliveira, who had concluded his PhD in Berkeley by 1989, wrote him a recommendation letter to support his application to that university.

Similarly, at the SDE Golderg combined a highly qualified academic profile, with a professional career as a corporate lawyer, even working at a law firm abroad, and later becoming the president of Morgan Stanley in Brazil. As some of the lawyers that started to emerge in the field of competition policy in the previous years, he had some training in economics, which he acquired through an experience in the US. He was also connected to those who produced competition policy in the previous administration: his supervisor during the undergraduate degree at USP was José Reinaldo de Lima Lopes, who held a PhD in law supervised by José Eduardo Faria, and was in charge of the Department of Consumer Protection of the SDE in the period 1999-2002.

Although I was not able to identify the source of Tavares’ appointment to SEAE, the cases of Tokeshi and Goldberg fit the general dynamic of recruitment observed until 2003. Their arrival in government was directly connected to professional contacts. In the case of Tokeshi, the invitation came from Bernard Appy, an economist who was his classmate at the undergraduate degree in economics at USP, possessed a master’s degree in economics obtained from UNICAMP, and was appointed Executive-Secretary of the Ministry of Finance by Antonio Palocci. In the 1980s, Appy was a member of the same research group Tokeshi participated, coordinated by José Serra, and integrated by Gesner Oliveira in CEBRAP.

Both Appy and Tokeshi were also in contact when the latter was working at the Secretariat of Economic Policy during Collor’s government, and the former was an economic advisor of the Worker’s Party in the National Congress<sup>267</sup>. Similarly, Goldberg’s appointment was mediated by a professional contact: the Minister of Justice, Márcio Thomaz Bastos.

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<sup>267</sup> As Novelli (2010, p. 236) maintains, although Appy didn’t have the same academic or professional trajectory of the orthodox economists that hegemonized the Ministry of Finance during Cardoso’s government (when Pedro Malan was the Minister), and which were preserved in the Ministry by Antonio Palocci, “he was tuned with the [orthodox] conduction of macroeconomic policy”. Another evidence of Appy’s alignment with the economists appointed during Cardoso’s government can be found precisely in his connection with Tokeshi, and as a consequence, with José Serra and Gesner Oliveira in the early years of his career, at CEBRAP.

The arrival of these agents into key-positions of SEAE and SDE deepened the consolidation of competition policy in the form it was being shaped since the solution of the 1996 crisis. Tavares, for instance, understood competition policy in similar terms as those articulated by Gesner Oliveira in the mid-1990s, and by his predecessor at SEAE. Illustrative of this convergence is how Tavares expressed his view of the role of competition policy, and of the merger guidelines enacted by Considera in 2002, in a paper dated of 2006:

The major role of the guidelines is to remember that antitrust law does not aim at restricting the size of corporations, or at promoting industrial de-concentration, but at impeding that market power is exercised in detriment of public interest (Araújo Junior 2006, p. 2).

He not only endorsed the role of the guidelines in establishing the “rule of reason” and thus a regulation compatible to an economic context where concentration must not be illegal per se, or it is seen as necessary for corporate “survival”, but criticized its supposed connections to the Harvard school of industrial organization:

However, despite its merits, the guidelines are not exempt of limitations, most of which are derived from its analytical framework: the Structure-Conduct-Performance (SCP) of industrial organization theory. [...] Some criteria of that manual [...] have been applied with excessive rigor, increasing even more the unrealistic nature of the SCP model, and sometimes leading to the decisions that are contrary to the objectives of antitrust law (Araújo Junior 2006, p. 2).

Tokeshi’s view of the practice of competition policy in Brazil was also one that praised the preceding achievements of SEAE. As he maintained in an interview, a “positive aspect” of his term was that the staff composed by Considera between 1999 and 2002 in SEAE was largely preserved by Tavares:

This is one of the good things that happens in some places, but which in the Ministry of Finance is very much consolidated. When Malan was the minister, the Secretary was Claudio Considera, and he assembled a highly qualified team in SEAE. When Tavares arrived, he changed only a few people. When I arrived, I kept the same deputy secretary, Marcelo Santi, which later became the secretary of SEAE.

The idea of continuity despite the change in government was also mentioned by yet another interviewee, who was in the SBDC in that period. As he maintained,

The new secretary appointed by Lula's government [Tavares] didn't come dismissing all coordinators. On the contrary, he kept all coordinators in their positions. By keeping the technical staff, it was a clear sign of 'No, we are keeping competition policy the same'. If he wanted to change the way of thinking of competition policy, which has this neoliberal approach, he would have changed all coordinators, but he did the opposite.<sup>268</sup>

Another indicator of continuity concerns the internationalization of Brazilian competition policy. As highlighted by Tokeshi, the OECD had an important role in the institutional consolidation of antitrust policy in Brazil. Initiated in 1996, when Gesner Oliveira was CADE's president, the "transfer of knowledge", as Tokeshi defined, between CADE and the OECD was intense in his period as secretary – and in both directions: "From a certain moment on, or at least when I was in SEAE, we also had what to teach, what to exchange, to talk about the experiments we were making, which were relevant to other countries".

Goldberg's period in front of SDE was also marked by the consolidation of some trends that came from the preceding years of the field's practice. As he described, it was a "golden period, in which several reforms were done". Reputed in several interviews as the Secretary responsible for implementing important "enhancements" in Brazilian competition policy, Goldberg significantly modified the institutional dynamics of the system. As he maintained in an interview, the measures adopted by him departed from a "technocratic" diagnosis of the field:

My approach for the Secretary of Economic Law at the time was, in a good sense, a technocratic approach. [We said:] 'What are the public policy objectives, independently of prescriptive judgments about these objectives?' 'Competition must work in Brazil under these rules? These are the rules of the game? Why are these tools completely ineffective?'

The diagnosis produced through these questions pointed to several institutional and policy bottlenecks. For instance, as Goldberg maintained, given that "the country lived decades in a system of regulated prices in which the government dictated, through sectorial chambers, what should be the price for each sector", it was "reasonable to imagine that the level of cartelization in the economy was way above what should be expected from a

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<sup>268</sup> The explicit reference to a "neoliberal approach" in Brazilian competition policy – quite exceptional in all interviews I conducted – is nevertheless interestingly naturalized by this agent. When asked about how he identifies himself in terms of economic lines of thinking, he replied that "Competition defense has much to do with a liberal policy, a policy in which we must make the market work. We have to impede that artificial barriers are created to the good functioning of the market. I go through this line. But from the academic point of view, I don't. From the academic point of view I don't follow the liberal line. I have an approach that is more socially oriented".

competitive economy”. But, as he added, although “with a lake full of fish”, competition policy in Brazil had been ineffective in penalizing conducts.

The explanation for such ineffectiveness, as he maintained, lied on the Secretariat’s infrastructure, which was both precarious, and “inefficient”. As he put it, “it is hard to make public policy when the system that protects market efficiency is in itself one of the most inefficient organs of the Republic”. Different interconnected measures were taken by Goldberg to revert this institutional “inefficiency”, without implying an expressive growth in SDE’s structure. As he defined it, “to use a financial jargon, we raised the operational leverage of SDE”.

These measures entailed, for instance, the unification of MR analysis by SDE and SEAE, which until then gave separate technical opinions on each MR and AP case presented to CADE, “eliminating redundancy”<sup>269</sup>. Goldberg implemented a division of labor, in which SEAE would focus on analyzing MR, leaving SDE free to concentrate on Administrative Procedures (conduct cases). It didn’t imply that SDE didn’t have to manifest itself on MR cases anymore, something that was imposed by the law of 1994 and, as Goldberg maintained, “lawyers would oppose”. In practice, however, SEAE would perform the analysis and the economists at SDE, if they agreed, would endorse SEAE’s opinion. The inclusion of economists in SDE was precisely another measure taken by Goldberg to increase “the system’s efficiency”. He created a “Center for Quantitative Studies”, bringing economists from IPEA into the SDE, which had the role to produce economic analysis in both MR and AP cases. This Center would have been important, for instance, to assist CADE in conducting econometric studies in MR decisions.

Both the decision to focus on AP, and the inclusion of economists to conduct econometric studies in SDE were, according to Goldberg, based on the objective of emphasizing “practices that were more obviously harmful to welfare”, and didn’t go into the “academic discussion between Chicago or post-Chicago, because there were so many cartels to catch”. As he put it,

This is something much more academic. [...] It is funny: “post-Chicago, Chicago, neoliberal, ordoliberal...” A lot of ink spent in this discussion. But our approach was much more econometric. It was literally a quantitative approach.

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<sup>269</sup> This measure was consolidated through a joint ordinance between SEAE and SDE, the *Portaria Conjunta SEAE/SDE n. 001*, of February 18<sup>th</sup> 2003.



According to him, the “econometric approach” is not determined by any economic line of thinking. Rather, what is demanded of an econometric study is what frames the analysis in terms of antitrust theory – and the framing adopted by him of focusing on cartels, was, however, “consciously” influenced by the Chicago school:

The framing does not occur in the view taken by your econometrist. The framing occurs in how many cases of each type arrives to your econometrist. This is subtle. And we, in fact, did the framing. Maybe a sociologist of law would say that it was a Chicagoan framing, as we started with cartels. It was not due to an unshakable belief I had, that the market solves everything, those silliness people discuss with so much passion and emphasis. But due to the fact that despite the market solving everything or not, the fact was that nobody discussed the most serious infractions: cartels. So that’s where we started. So, in fact, we adopted a framing somewhat Chicagoan, consciously.

During Goldberg’s term in SDE, the economicization of Brazilian antitrust policy was thus both extended into new domains, with the inclusion of economists into the SDE, and deepened, due to a new division of labor that left more space for SEAE to become, in practice, the sole analyst of MR. The view that cartels constituted the “most serious infractions”, and its corollary emphasis on conducts – a consciously adopted “Chicagoan framing” – was also a complement to the trends observed since 1996. The shift of approach is noticeable in the decisions made by CADE during Goldberg’s term. While between 1994 and 2002 549 AP were decided by the Council, and penalties were imposed to 17% of them (93 cases), in the four years of Goldberg’s appointment, 166 cases were decided, and 38% (63) received some sort of penalty.

The successors of Tokeshi and Goldberg also illustrate the continuity of competition policy in the secretariats. Marcelo Barbosa Saintive, who was deputy-secretary of both Tavares and Tokeshi, became secretary of SEAE between June 2006 and April 2007. Saintive graduated in economics, and held a master’s in the same area from UFRJ. After serving SEAE, he became a director at the same company presided by Tokeshi. Goldberg’s successor also came from his close circle at SDE. His first deputy-secretary was Barbara Rosenberg, who also accumulated the position of director of the Department of Economic Protection and Defence of SDE between February 2003 and December 2005. When Rosenberg left SDE, in 2006, Mariana Tavares de Araújo, who since 2003 worked in SDE in the area of National Consumer Defence Policy, was appointed her substitute.

Mariana Tavares was the daughter of José Tavares de Araújo Junior – the Secretary of SEAE between 2003 and 2004. Prior to joining SDE in 2003 through an invitation of

Goldberg, Mariana Tavares had also served SEAE in the period between 2001 and 2002, i.e. during Cardoso's government and prior to her father's appointment as Secretary. Her role at SEAE was of an advisor to Secretary Claudio Considera in the area of international affairs. As informed in an interview, she met Considera in Washington D.C. while doing an LLM at Georgetown on merger reviews. Considera was visiting Washington together with Paulo Correa due to a meeting of the World Bank, and was introduced to Mariana Tavares by her father. He later made an invitation for her to join SEAE when back to Brazil.

In February 2007, when Goldberg left SDE, Mariana Tavares became Secretary, and served until November 2010. In 2007, Mariana Tavares appointed the Ana Paula Martinez to the position of director of the Department of Economic Protection and Defence of SDE – occupied by Rosenberg when Goldberg was the Secretary. Martinez, a competition lawyer that went back to Brazil after working in an American law firm in Brussels (and which has been quoted several times throughout this dissertation), was Goldberg's wife.

**Table 28.** Trajectories: Rosenberg, Mariana Tavares, Martinez

**Barbara Rosenberg**

Rosenberg graduated in law from USP in 1997, and held a LLM from the University of California, at Berkeley (2001), and a PhD in economic law from USP (2004). While an undergraduate student, Rosenberg was a member of the "PET-CAPES Sociology of Law" research group. Her PhD supervisor was Hermes Marcelo Huck, a law professor and partner of the law firm in which Goldberg worked before joining SDE. She was a foreign associate at Cleary, Gottlieb, Steen & Hamilton (New York, 2001-2002), and attorney for the Secretariat of the WTO (2001). After leaving SDE, she became a partner and competition lawyer at *Barbosa Müssnich & Aragão*, a member of IBRAC, and of the international task force of the antitrust section of the American Bar Association (ITF-AA). She has also been a member of the leniency working group of the International Bar Association, and of the ICN. She was twice nominated among the "40 under 40" worldwide competition lawyers (2009 and 2012), and the "Best Lawyer Under 40" by the Global Competition Review. She has also worked as a lecturer in competition, international trade, and intellectual property at FGV-SP.

**Mariana Tavares de Araújo**

A law graduate from PUC-Rio, Mariana Tavares obtained an LLM in competition law from Georgetown University in 2001. She was appointed an advisor to the Secretary of SEAE between 2001 and 2002, and in 2003 she joined the SDE, where she stayed until 2010. Between 2007 and 2010, Tavares was the Secretary of SDE. After leaving the government, in 2011 she became a partner and competition lawyer at *Levy & Salomão Advogados* – the same firm in which Bolívar Moura Rocha, Secretary at SEAE between 1996 and 1998, is also a partner.

**Ana Paula Martinez**

A law graduate from USP (2003), Martinez held a master's degree in international law from the same university (2008), and an LLM obtained from Harvard University (2006), both focusing on competition law. Her undergraduate and master's dissertations were supervised by CADE's president between 2000-2004, João Grandino Rodas. A member of the New York State Bar, and a consultant of the ICN, Martinez was an associate in competition law of Cleary, Gottlieb, Steen & Hamilton LLP in Brussels (the same law firm in which Rosenberg worked), between 2006 and 2007. She has also worked as a consultant for UNCTAD, World Bank, and the government of Colombia in competition policy, and was included among the "Top Women in Antitrust" by the Global Competition Review, and is considered one of the 500 top competition lawyers of the world by the Who's Who Legal. Since 2011, she is a partner and competition lawyer at *Levy & Salomão Advogados*.

**Source:** elaborated by the author

Until 2010, even after Goldberg left SDE, the Secretary was ran by highly internationalized corporate lawyers, with both academic and professional experiences in the US, and socially close to him. As these lawyers were involved in the gestation of the series of measures Goldberg implemented while Secretary, their appointment can be seen as the continuation of the period. In 2008, nevertheless, CADE's composition was almost entirely changed, and a phase of competition policy under a new president started, combining both elements of continuity, but also bringing signs of change.

## **5.4 Contradictory movements**

The period between 2008 and 2012 was marked by changes in CADE and in government. Within the competition authority, two different presidents were in charge of running the institution. Also, in 2010, Dilma Rousseff, of Lula's party, was elected President of the Republic, and started a new administration in 2011. Within this context, a set of contradictory movements can be noticed in the agents recruited to produce competition policy. On the one hand, indications of continuity of the previous years could be noticed, such as the appointment of a president to CADE that was directly connected to Goldberg. On the other, agents with a profile more aligned with those who until then were marginal in the field, such as Prado and Sicsú, gained more space. Not by chance, it is in reference to this period that the narratives of "politicization" and "interventionism" are often mobilized.

### *5.4.1 Indications of continuity*

Between January and November 2008, 6 of the 7 seats in CADE were changed. Farina, Cueva, Rigato and Prado, all appointed in 2004, finished their second mandates in the middle of 2008. Schuartz and Sicsú served for only one term, and left CADE in 2007. Only the economist Paulo Furquim, initially appointed in 2004, remained in council, and finished his second mandate in December 2008. With the end of most mandates of the council presided by Farina and dominated by economists, once again the pendulum swung to the side of lawyers. In 2008, 5 lawyers and 1 economist were appointed to CADE, forming the council that would enforce competition policy practically until the end of 2009.

The lawyers were Arthur Sanchez Badin, appointed president, Fernando Magalhães Furlan, Vinicius Marques de Carvalho, Carlos Emmanuel Joppert Ragazzo, and Olavo Zago Chinaglia. The economist was César Costa Alves de Mattos. For the most part, a line of

continuity can still be traced from these appointments to the previous formations of CADE. However, as I will describe, agents with a different profile gradually arrived in CADE from 2008 to 2011, in parallel to what several interviewees referred as a “politicization” of the council, or its more “interventionist” attitude.

**Table 29.** Trajectories: Badin, Furlan, Carvalho, Ragazzo, Chinaglia, Mattos

**Arthur Sanchez Badin, 32**

Graduated in law from USP in 1998, Badin was connected to the “PET-CAPES Sociology of Law” research group. After graduation, he became a partner at *Lilla, Huck & Malheiros Advogados* between 1999 and 2002, together with Daniel Goldberg. He obtained an MBA in corporate law from PUC-SP in 2001, and one in competition defence and regulation from FGV-SP in 2005 (supervised by Arthur Barrionuevo Filho, who served as a commissioner in CADE between 1996 and 1999). In 2003, Badin became the Chief of Staff of Goldberg at SDE. While in SDE, he participated in the agenda of microeconomic reform advanced by the Secretariat of Economic Policy of the Ministry of Finance. In 2005, he served as Executive-Secretary of the Brazilian Reinsurance Institute, a by then state-owned reinsurance company. According to Badin, he “stayed there 6 months contributing to the sanitation of the company, preparing it for privatization, for breaking the monopoly”. Also in 2005, he was appointed Attorney-General of CADE, and occupied this position until 2008, when he became CADE’s president. After leaving CADE in 2010, he obtained a master’s degree in economic law from USP, supervised by Hermes Marcelo Huck, a partner of the firm where he worked in the late 1990s, became the chief of the legal division of the *Camargo Corrêa* (2011), a multinational Brazilian corporation, an arbitrator at FIESP’s *Center of Conciliation, Mediation, and Arbitration*, and a lecturer of economic and regulatory law at FGV-RJ.

**Fernando Magalhães Furlan, 39**

Furlan held two undergraduate degrees by the time of his appointment: in law, obtained from UnB in 1993, and in management, obtained from the State University of Santa Catarina (UDESC), in 1990. Besides having a master’s degree in International Relations, and a PhD in Political Science, both obtained from the University of Paris I – Panthéon Sorbonne, between 2000 and 2006, Furlan had also attended a program on management of governmental performance, organized by Harvard University School of Government and School of Business (2005), and a program on international economic diplomacy at Georgetown University (2004). A professor of law in Brasília between 1995 and 1998, since the early 1990s Furlan occupied positions in government. Between 1991 and 1993, he was a legal advisor at the National Congress, first of his father’s office, a representative elected by the PPB, and later in the office of Inocêncio Oliveira, of the PFL. In 1994, he became a public official at the Brazilian Supreme Court (STF), and served until 1995. He also worked as an executive of foreign relations at the Brazilian food conglomerate *Sadia SA* (1995-2001), and as a foreign associate of McDermott, Will & Emery, in Chicago and Washington (1996), and of O’Connor and Company (1997) in Brussels, in the areas of international trade and World Trade Organization (WTO). In 2001, after participating in the internship program PinCADE, Furlan was appointed Attorney-General of the council, and served until 2003. From 2003 to 2007, he was the Chief of Staff of the Ministry of Development, Industry, Commerce and the Director of the Department of Economic Defence. The Minister between 2003 and 2007 was Luiz Fernando Furlan, who until then was the CEO of *Sadia SA* and Furlan’s cousin. After serving as a commissioner for two years, Furlan was CADE’s president between 2010 and 2012. Since 2013, he owns a consultancy firm on competition policy, international trade, and regulation.

**Vinicius Marques de Carvalho, 30**

A law graduate from USP law school (2001), Carvalho held a joint PhD degree obtained from USP and University of Paris I – Panthéon Sorbonne in commercial law, supervised by Calixto Salomão Filho, a competition lawyer and law professor, and Eros Roberto Grau, an exponent of Brazilian economic law, and justice of STF. While an undergraduate student, Carvalho was a member of the “PET-CAPES Sociology of Law” group at USP, supervised by José Eduardo Faria, and was Faria’s teaching assistant in 2002. Between 2001 and 2006, Carvalho served in different political appointments connected to the Worker’s Party: at the city council of São Paulo, in the House of Representatives of the state of São Paulo, and as a legal advisor in the Federal Senate. In 2006, he became a federal public official in the career of “Specialist in Public Policies and Governmental Management”. Between 2006 and 2007, he was an advisor of CADE’s president, Farina, and between 2007 and 2008 he was the Chief of Staff of the Special Secretariat for Human Rights, an organ

connected to the Presidency of the Republic. After serving as a commissioner between 2008 and 2010, Carvalho was appointed Secretary of SDE, and in 2012 he became CADE's president.

**Carlos Emmanuel Joppert Ragazzo, 31**

Graduated in law from PUC-Rio (1999), Ragazzo obtained an LLM in Competition and Regulation Policy from the New York University in 2002, a master's degree in law from UERJ, in 2005, and a PhD degree in law from UERJ in 2008. When appointed to CADE, Ragazzo was the Coordinator-General for Competition Defence of SEAE, to which he was appointed in 2003. A public official in the career of "Specialist in Public Policies and Governmental Management" since 2005, between 1997 and 2001 he was a corporate lawyer at *Pinheiro Neto Advogados*. In 2002, he was a legal intern at the Federal Trade Commission, in the US, and was admitted to the New York State Bar. By the end of 2002, he also participated in the internship program of CADE – PinCADE. After serving for almost two mandates as a commissioner, Ragazzo was appointed to a new position created in CADE by the recent law of 2011: general superintendent.

**Olavo Zago Chinaglia, 33**

Graduated in law from USP in 1996, Chinaglia obtained an MBA in corporate law in 2003, and a PhD in corporate law from USP in 2008. A professor of business law since 2002, Chinaglia was a corporate and competition lawyer since graduation, working as an associate at *L. O. Baptista Advogados* (1997-1999), *Tozzini, Freire, Teixeira e Silva Advogados* (1999-2000), and later as a partner at *Advocacia Del Chiaro* (2000-2006 – founded by José Del Chiaro, former SDE between 1989 and 1991), and *Velloso, Pugliese e Guidoni Advogados* (2006-2008). Chinaglia was the son of Arlindo Chinaglia, a congressman of the Worker's Party (PT) and president of the House of Representatives by the time of Olavo's appointment to CADE. After leaving CADE in 2012, since 2013 Chinaglia is a partner and coordinator of the competition law area of *Veirano Advogados*, and a consultant of the International Competition Network (ICN).

**César Costa Alves de Mattos, 43**

Mattos graduated in economics from UnB in 1986, obtained a master's degree in economics, with a dissertation of stabilization policies, from PUC-Rio in 1991, supervised by Gustavo Franco, and a PhD in economics from UnB in 2001, with a thesis on regulatory reform of the telecommunications sector. During his PhD, he was a visiting student at Oxford University. In 2005, he was a visiting scholar at the Haas School of Business of the University of California, at Berkeley. The author of several publications on antitrust economics, Mattos edited two books about economic analysis of competition policy and the "antitrust revolution in Brazil", both quoted in this dissertation (Mattos 2003, 2008). At least one of his publications was co-authored with Gesner Oliveira, CADE's president between 1996-2000. As a professor of economics, Mattos taught several courses on "economic analysis of law and regulation", microeconomics and competition policy. In 1995, Mattos was approved a public official in the position of financial analyst at the Ministry's of Finance National Treasury. In 2002, he became an economic advisor of the National Congress. Also active in political positions, between 1993 and 1994 he was an advisor to the World Bank's mission in Brasília, in 1994, Mattos was part of the technical staff of Fernando Henrique Cardoso's campaign, and later became the advisor of José Serra and of PSDB's office in Congress. Between 1996 and 1999, he was an assistant to CADE's president, Gesner Oliveira (with whom he had worked previously at the Secretariat of Economic Policy), and in 2002 he was appointed deputy secretary of international affairs at the Ministry of Finance, where he stayed until May 2003, despite the change of government. Between 1999 and 2001, he was hired as an economic consultant at the multinational law firm *Baker & McKenzie*. After leaving CADE in 2010, Mattos resumed his career as a public official in the National Congress.

**Source:** elaborated by the author

The profiles of the agents appointed in 2008 for the most part obeyed the logics institutionalized in the field since 1996. Besides Badin, the other 5 agents appointed were all PhDs, and four of them had experiences abroad, notably in the US. Among law graduates, 4 of them were corporate lawyers before joining the government, practicing competition law before CADE in major law firms. As many other lawyers recruited in the early 2000s, both Badin and Carvalho were also former members of the "PET-CAPEs" group at USP. The

profile of the only economist appointed in 2008 – Mattos – was also similar to that observed in the preceding years: an expert on microeconomics, with experience in the US (at the University of California, at Berkeley, as several other economists), and prior passages in the Ministry of Finance. The trend of rejuvenescence was also intensified in this period, as the average of the Council reached its lowest level in history: 35 years old.

Similarly, the predominant mechanism of recruitment in 2008 was that identified in other compositions: a combination of social capital (for instance, friendship ties), and professional capital, such as having been previously connected to competition policy in other governmental agencies. Badin, for instance, was the Chief of Staff of Goldberg in SDE, and later became his “best man” when the former Secretary married Ana Paula Martinez, who was appointed director of one of SDE’s areas in 2007. Badin was also a partner of the same law firm where Goldberg worked prior to joining SDE in 2003. His appointment as CADE’s Attorney-General in 2005 was supported by Goldberg. Furlan had also worked in CADE before being appointed commissioner. In 2001, by the indication of CADE’s president, João Grandino Rodas, with whom he had contact during his internship in CADE, and due to his research on international trade law, he became CADE’s Attorney-General. As he revealed in an interview, in 2005 he had already been invited to become a commissioner by Goldberg. He didn’t accept the invitation because he had recently taken a position at the Ministry of Industry and Commerce, as requested by his cousin, the Minister.

Ragazzo’s appointment to CADE was equally related to his previous participation in the SBDC. In 2002, he was recruited to SEAE after the suggestion of the economist Cleveland Teixeira, who worked in the Secretariat between 1999 and 2001, and became a commissioner in CADE between 2002 and 2004. When in SEAE, Ragazzo’s appointment was recommended by the Secretary. Similarly, Carvalho had a previous experience in CADE, as an advisor of the president Elizabeth Farina, between 2006 and 2007. His arrival in CADE by that time was probably related to his approval as a public official, as CADE requested that several of these “specialists” were to be located in the Council. In 2008, his appointment as a commissioner was probably mobilized by the Presidency of the Republic, as Carvalho was long involved with the Worker’s Party, and worked at the Secretariat of Human Rights, subordinated to the President.

Mattos also had previous experiences in the SBDC, both in CADE (as an advisor of Gesner Oliveira) and in the Ministry of Finance. Although he had connections to the previous administration, senator Eduardo Suplicy, of the Worker’s Party, redacted an opinion that,

after reconstructing Mattos' trajectory, including his political appointments during Cardoso's administration, concluded that "the candidate has an academic formation and a professional practice that give him credentials to the performance of the position to which he was indicated by the President"<sup>270</sup>. On October 2008, Mattos, an economist of an orthodox strand, was approved a commissioner in CADE.

Interestingly, the appointment of Mattos, gestated at SEAE, occurred after an important change of the profile of key-agents in the Ministry of Finance. In March 2006, the Minister of Finance Palocci was substituted by the economist Guido Mantega, who was the president of BNDES, held a PhD in sociology and is often reputed as part of the non-orthodox, developmentalist line of thinking. Mantega changed most of Palocci's team, which was still reminiscent of Malan's staff or ideologically aligned to them, appointing several heterodox economists.

For instance, the Secretary appointed to SEAE in May 2006 was Nelson Henrique Barbosa Filho, an economist graduated from UFRJ and with a PhD in economics obtained from the New School for Social Research. Mantega had also appointed the substitute of Barbosa Filho – Pinheiro Silveira – to the Ministry of Finance. Thus, although there was a potential shift of profile in the Ministry, an orthodox economist such as Mattos was appointed to CADE by SEAE, corroborating Novelli's (2010, p. 236) idea that despite the changes brought by Mantega, "there was no significant alteration in the orientation of macroeconomic policy".

In respect to the last commissioner appointed in the period – the lawyer Chinaglia – although it was not possible to directly identify the source of his appointment to CADE, he had similar connections to those appointed with him in 2008, or before: a high social and political capital – as his father was the president of the National Congress in 2008, and a member of the government's party – and a long career as a competition lawyer in major law firms in São Paulo, where several former commissioners and presidents also worked. Another indicator of Chinaglia's connection to the field is the fact that he had been a student of Elizabeth Farina's (CADE's president between 2004-2008) in a specialization course, as declared by Farina in an interview to the newspaper *Folha de São Paulo*, in which she evaluated the commissioners appointed to succeed her<sup>271</sup>.

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<sup>270</sup> Opinion (*Parecer*) number 1.028 of 2008, enacted on October 7<sup>th</sup> 2008 by senator Eduardo Suplicy (PT) in the evaluation of the Message to the Federal Senate (*Mensagem ao Senado Federal*) number 172 of 2008, p. 4.

<sup>271</sup> *Folha de São Paulo*, July 21<sup>st</sup> 2008.

Given both the profiles and the dynamics of appointment of the president and 5 commissioners appointed in 2008, the rules of the field, as instituted in 1996, were being preserved: “technical” appointments of highly educated corporate lawyers, especially with experience in the US, and/or previously connected to the field of competition policy, and an economist close to mainstream economic theory and methods. An exception that confirms the rule was the aborted appointment of the Marxist economist Enéas Costa de Souza in November 2007. Graduated in economics and philosophy from the Federal University of Rio Grande do Sul, former president of the Regional Development Bank of the Extreme South (BRDE), and professor of economic history, Souza was confirmed by the Senate, but in August 2008 declined the appointment<sup>272</sup>.

#### 5.4.2 “Politics” and “interventionism” return

After Badin’s first term as president, by the end of 2010 a new set of changes in CADE’s composition started to take place. Badin was not appointed to a second term, according to the news of the time, due to his degraded relationship inside CADE, and to conflicts with the Ministry of Finance<sup>273</sup>. Furquim also finished his second term in the end of 2009, and Vinicius Carvalho was appointed Secretary of Economic Law in March 2010. Also in 2010, Mattos finished his term, and wasn’t appointed for another one.

Thus, in 2010, Fernando Furlan was appointed CADE’s president, and a considerable part of his mandate would be conducted within a different council. Between the end of 2009 and the beginning of 2011, four new commissioners were appointed to CADE. They were the lawyers Alessandro Octaviani Luís, and Marcos Paulo Verissimo – both appointed in 2011 –, and the economists Ricardo Machado Ruiz, and Elvino de Carvalho Mendonça – appointed in 2009 and 2011, respectively.

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<sup>272</sup> The newspaper *Folha de São Paulo* (02/08/08, “*Economista renuncia a vaga no Cade*”) speculated that although Costa claimed health and professional reasons to decline the appointment, his retreat would a “strategy of the government” to open a new spot in CADE to place Badin, who was being appointed for president, but faced the opposition of some corporations due to his work in persecuting cartels at SDE.

<sup>273</sup> According to the news website *GI* (22/05/2010), SEAE wouldn’t support Badin’s appointment for a second term because CADE’s president would have criticized the government (and by extension the by then less orthodox Ministry of Finance) in respect to the strategy of using public banks to induce interest rates decrease in Brazil. As Badin declared to *Folha de São Paulo* on August 10<sup>th</sup> 2010, converging with the Brazilian Central Bank’s president, Henrique Meirelles, “The time when it was believed that it is possible to reduce prices through decrees is gone” – a similar discourse to that found in the reformist initiatives of the early 1990s, and endorsed by the orthodox economists in the administration, such as Meirelles.



**Table 30.** Trajectories: Octaviani, Verissimo, Ruiz, Mendonça

**Alessandro Octaviani Luís, 36**

A law graduate from USP (1999), Octaviani held a master's degree in political science (2005), with a dissertation titled "Hegemony and the Law: a reconstruction of Gramsci's concept". He also obtained a PhD degree in economic law (2008) from the same university, supervised by Gilberto Bercovici, with a thesis titled "Genetic resources and development: the Furtadian and Gramscian challenges". Octaviani was a partner at *Ernesto Tzirulnik Advocacia* between 1998 and 2004, a law firm specialized in insurance law, where he had experience with competition law, although not directly in merger reviews. Between 2004 and 2010, he had his own law firm: *Octaviani & Massonetto Advocacia*, specialized in economic law and technological innovation law. Since 2008, he is a professor of economic law at three law schools in São Paulo: USP, FGV-SP, and Mackenzie. Between 2003 and 2007, he was a guest professor at "PET-CAPES Sociology of Law" group, teaching courses on Karl Marx, Max Weber, Antonio Gramsci, and political economy. Since 2008, he coordinates a research group at USP law school named "Law and underdevelopment: the Furtadian challenge", which discusses the theory of underdevelopment of Celso Furtado, an exponent of Latin American structuralism, and topics such as technological innovation, international finances, "agencies of orthodox macroeconomics", and the restructuring of the developmental state. Octaviani participated of CADE's internship program, PinCADE, in the late 1990s, as an undergraduate student. In the year 2010, Octaviani signed a petition organized by professors of public universities in support of Dilma Rousseff's candidacy.

**Marcos Paulo Verissimo, 37**

Verissimo graduated in law from USP in 1997, and obtained a master's degree (2002) and a PhD (2006) in law from the same university, with researches focusing on the judicial review of regulatory agencies, and the judicialization of public policies in Brazil, respectively. In 2005, he was a visiting scholar at Yale law school. Between 1999 and 2003, he was an associate lawyer at *Machado, Meyer, Sendacz e Ópice Advogados*, a large law firm in São Paulo, and between 2003 and 2007 he was a partner at a law firm founded by him. From 2007 to 2009, he was a full time professor at FGV-SP, and coordinated a specialization course on economic competition law in partnership with CADE. Since 2010, he is a law professor at USP, teaching undergraduate courses such as "Public freedoms", and "Political and electoral systems". By the time he was appointed to CADE, in 2011, he was serving as Chief of Staff of BNDES' president for two years.

**Ricardo Machado Ruiz, 45**

Ruiz obtained an undergraduate degree in economics from UNICAMP, in 1988, and a master's degree in economics from the same university (1994), with a dissertation on industrial restructuring in Brazil in the 1980s and 1990s, supervised by Luciano Coutinho, an exponent of Brazilian heterodox economics, and who since May 2007 is the President of BNDES. Ruiz obtained his PhD degree in economics from the New School for Social Research, in 2003, with a thesis that discussed Paul Krugman's Computable General Equilibrium Model. A full time professor of economics at UFMG since 1995, Ruiz has taught undergraduate and graduate courses on theories of regional and urban development, microeconomics, industrial organization, antitrust and regulation economics, among others.

**Elvino de Carvalho Mendonça, 42**

Mendonça obtained an undergraduate degree in business management from PUC-Rio in 1994, a master's in economics from UFF (1999), and a PhD in economics from UnB (2003). Since 1997, he is a part time professor of economics, teaching courses on macroeconomic and microeconomic theory, and industrial organization. Mendonça's core career is as a public official. Initially appointed Analyst of Finances and Control at the Secretariat of the National Treasury of the Ministry of Finance in 2003, he joined SEAE in 2006, as a member of the staff responsible for analyzing merger reviews. After serving CADE until 2013, Mendonça joined the Ministry of Mines and Energy, as a director of the area of Mineral Policy Management.

**Source:** elaborated by the author

The trajectories of most of the lawyers and economists recruited between 2009 and 2011 – the last appointments under the law 8.884 of 1994 – indicate a shift in respect to the dominant profile of the preceding compositions. In the case of lawyers, instead of corporate

lawyers with a considerable private practice in antitrust, and academic or professional experience in the US, the two lawyers appointed were mostly academic jurists. Moreover, their training and expertise, although in economic law, followed contrasting theoretical traditions in respect to those of lawyers that dominated the field of competition policy until then. Octaviani, for instance, as revealed by his academic agenda, combined theoretical insights of Latin American structuralism (Celso Furtado) with Gramscian theory to study Brazilian underdevelopment and its connections to the law. Illustrative of how Octaviani's profile and approach differs from that of lawyers historically dominant in CADE is how he connects competition policy to Constitutional objectives:

My political trajectory is one of reflection, militancy, and vote on the left of the political spectrum, and some people asked me if it wouldn't contradict with being here [in CADE]. But this is pacific for me. What I came to do here is on the Constitution, and my trajectory is attached to the Constitution. [...] I am the son of Constitution of 1988, articles 219 and 3<sup>rd</sup> of the Constitution<sup>274</sup>.

Although Verissimo's socio-legal approach to the judicialization of public policies and regulation, as well as his relatively long career in private practice are not distinctive in respect to the several sociologists of law that occupied positions in CADE notably from 2000 onwards, since 2007 he was a full time professor. Moreover, he was the Chief of Staff of BNDES' president by the time of his appointment – a governmental institution renown to be the center of neo-developmental policies and heterodox economic thinking since Lula's administration.

The cases of the two economists appointed in 2011, however, indicate both a continuity and a rupture in respect to the historical trends of the field. As Octaviani, Ruiz can be situated within the "structuralist" economic thinking. He obtained a master's in economics from UNICAMP, a historical center of heterodox economics in Brazil, under the supervision of Luciano Coutinho – who was BNDES president, with whom Verissimo worked –, and a PhD from the equally heterodox department of economics of the New School for Social Research. In locating himself among different economic lines of thinking, Ruiz defined where he is placed in antitrust economics: "In public policy and in antitrust I am a structuralist. [...]"

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<sup>274</sup> Article 3<sup>rd</sup> of the Brazilian Constitution of 1988 establishes the "fundamental objectives" of the Republic: to build a fair, free, and solidary society; to guarantee national development; to eradicate poverty and marginalization, and to reduce regional and social inequalities; and to promote general welfare, without prejudices of origin, race, sex, color, or age. Article 219, in turn, defines that the "market integrates the national patrimony and will be encouraged in a way to enable cultural and socio-economic development, the welfare of the population, and the technological autonomy of the country".

So I tend to place a behavioral solution [to economic concentrations] as the less interesting for a competition problem. I always prefer a structural intervention”. Also differently from most economists previously appointed to CADE, Ruiz had no professional or academic connections to SEAE.

Mendonça, on the other hand, somewhat replicated the trend found in the trajectories of most economists that served CADE previously. A public official at SEAE, although Mendonça pursued his graduate degrees in institutions hardly associated with the economic mainstream, he obtained an undergraduate degree from PUC-Rio, which in the 1980s and 1990s was the center of orthodox economic thinking in Brazil. Additionally, his intellectual affiliation, as he defined in an interview, was that of a “classic liberal”:

I am not a neoclassical economist, I’m not an economist of the School of Chicago. I’m a classical economist. I’m of Adam Smith’s school, David Ricardo’s school, not of Robert Lucas’ school. I’m not Chicago school, I don’t believe in efficiencies.

Together with the trajectories of these lawyers and economists, the source of appointments was also not identical to the tendencies of the previous compositions, at least in two cases. Octaviani’s appointment can be traced to SDE. As he mentioned in the interview, the invitation came from the Minister of Justice, José Eduardo Cardozo, and was intermediated by his former partner at the law firm in which he worked with insurance law. It is likely, however, that as in the preceding years, the Secretary of Economic Law – by then the former commissioner and future president of CADE, Vinicius Carvalho – contributed to his choice. Carvalho was Octaviani’s contemporary at USP law school, and close to the same academic circle (e.g. Carvalho’s chief of staff when he became CADE’s president in 2012 held a master’s degree supervised by Octaviani’s supervisor, Gilberto Bercovici).

Mendonça’s appointment was linked to SEAE. Although Secretary Nelson Barbosa articulated his appointment, the invitation was officially made by Antonio Henrique Pinheiro Silveira (the same Secretary that appointed Mattos in 2008). The appointments of Verissimo and Ruiz, however, probably represent a novelty. Although I was not able to interview Verissimo, and Ruiz mentioned not to know where the invitation came from, they both had connections to BNDES president, Luciano Coutinho. Coutinho was Verissimo’s boss, and had supervised Ruiz in his master’s dissertation at UNICAMP.

It was precisely in parallel to the arrival of agents with a distinct profile if compared to the previous compositions, and through different sources of appointment, that the perceptions

of “politicization” and “interventionism” sprout. These ideas, often present to describe the 1994-1996 period, but hibernating since the solution of the 1996 institutional crisis, are frequently mobilized to characterize CADE especially from 2011 onwards, although two structuralist economists such as Prado and Sicsú had already been in CADE before.

The “politicization” of the field would have occurred, in the view of some interviewees, due to the alignment of CADE with governmental objectives of industrial policy, notably conducted by the BNDES. As a former member of the SBDC maintained in an interview, a “1950s theory” of privileging “national champions” is an “ideological” perspective that would have been present, although “subliminally”, in a recent decision. The extract of another interview illustrates a similar perception: “It’s very subtle, you can’t get that from the decision, but you get that from the discussion, from the council’s composition. There are people more connected to this kind of reasoning”.

Another interviewee referred to the emphasis given by this recent composition on the *policy* dimension of the field: “I heard it for the first time: “Competition defence *policy*”<sup>275</sup>. There is no *policy* to me. There is only theory”. A similar understanding that a proper application of antitrust theory would be lacking in a recent period was offered by yet another interviewee through an example of a decision taken by CADE in a merger in the educational sector:

There was a speech on the phenomenon of the “financialization of educational relations”. Whatever that means! CADE started to worry about the financialization of Brazilian education. Something like: “capitalism is dominating education”. And what is the problem for antitrust? There is no problem!

The shift of the profile of CADE’s composition has also been perceived as implying more “interventionism”, and being more “left-wing”, or even “socialist”. As the extract from an interview with a former member of the SBDC illustrates, CADE would have recently become more “interventionist”, with an “anti-capital mentality”:

I perceive a more left-wing council. [...] From the ideological point of view, I think that there is a generalized perception today in the market that CADE nowadays has something more interventionist, a little more anti-capital mentality than before.

The critical tone embedded in the diagnosis of CADE’s increasing reliance on “industrial policy” objectives, and most notably its growing “interventionism” thus indicate a

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<sup>275</sup> In Portuguese, the translation of *policy* is *política*, which also means *politics*.

perceived return to the 1994-1996 period. Similarly to the initial years of the reformed field, the profile of the agents in charge of producing competition policy was different from that consolidated since 1996 and throughout the years as a “technical” landmark. However, what the ascendancy of these new agents indicate is not necessarily a retreat of the economicization of antitrust policy, or a lack of technical character (what indeed several other interviewees recognize), but a potentially qualitatively different economicization, referenced by economic and legal theories other than those that became hegemonic since 1996.

## **5.5 The monopoly of competition**

In the beginning of the chapter, I announced the objective of mapping the hierarchies that operate in the field of competition policy in Brazil, and argued that such exercise enables grasping the field’s structure: its rules of functioning, the dominant habitus, and its disputed purposes – and thus its potential connections to neoliberalism. I departed from what in fieldwork revealed to be often shared perceptions about the historical composition of CADE: the definitions of what constitute a “technical” council – which would be the historical rule for CADE –, the deviant cases of “outliers”, and the recent trends of “politicization” and “interventionism”.

As Bourdieu advises (2004, p. 17), in order not to incur in the “fetishism of the text”, these discourses are not to be taken for granted as a means to assess the social phenomenon studied. In the case of this research, the very discussion about the linkages between the field of competition policy and the political and intellectual tenets of neoliberalism would be embargoed by the very characterization of CADE as “technical”. There would be no politics in a purely “technical” environment, and thus inquiring the relations with a political phenomenon such as neoliberalism simply wouldn’t make sense. However, these narratives, as those reviewed in Chapter 1, provide interesting clues about the rules operating in the field. They can be useful for the investigation of the field as long as they are confronted with the field’s objective structure, its agents, positions, and practices.

This is precisely what I sought to perform in this chapter. I reconstructed the composition of CADE and key-positions of the field of competition policy in Brazil in chronological order, from the first composition to enforce the reformed law of 1994, until the last council formed to apply it. My strategy was to describe the trajectories of the agents that occupied these positions, and relate them to both the political and economic context of the time, and to the actual practice observed in each moment. Taken together, these elements

evidenced the centrality of agents with a certain profile to assure that the “politics of enforcement” (Suchman and Edelman 1996) of competition policy would mirror the objectives advanced by reformist initiatives of the early 1990s.

As discussed in the end of Chapter 4, the establishment of a new regulatory arena was no assurance that the practice of competition policy would respond accordingly to the expectations that motivated reform. Right in the first two years under the law of 1994, an institutional crisis provoked by a series of interventions performed by CADE almost led to a new set of legislative and institutional changes. The reformed field was only a newborn, and was already at risk. The solution found to assure a “correct”, or “technical” enforcement, tuned to the international trends in antitrust policy and to the broader impulses of liberalization, without however jeopardizing the recent reform, relied on CADE’s composition.

Economists gained more space, but most importantly, a shift of profile of both lawyers and economists was observed when the new council initiated its term in 1996. Some of the reformists were called to perform the task of resuscitating the rationale behind the creation of the field. Their recruitment, to a great extent articulated by a small group of professionals that was directly involved with the creation of the field, sought to preserve what was supposed to be an “autonomous” sphere of regulation, thus guaranteeing that it remained independent from “politics”, or “government”. On the other hand, it also aimed at institutionalizing an enforcement that was not incompatible with the imperatives of market liberalization.

As it is possible to observe from the mapping of the producers of competition policy conducted above, since the solution to the crisis of 1996 was implemented, agents aligned with this view dominated the field. The long period inaugurated after the crisis is precisely what interviewees frequently characterized as a “technical” practice, despite the eventual presence of “outliers”. A monopoly of competition policy in Brazil was thus established in 1996, and remained nearly untouched at least until the end of 2004, when agents with a different profile started to emerge in the field, but most notably in 2010.

After having presented the trajectory study of the agents of the field of competition policy, it is thus necessary interpreting what sorts of capital authorizes some lawyers and economists to hold this monopoly, (and thus what makes them “technical”), who is seen as not belonging to it (i.e. what makes an “outliers”), and who is perceived as, to use other antitrust jargons, the agents that somehow ruptured the field’s “barriers to entry” and started to “contest” such power and habitus (those responsible for “politicization” and

“interventionism”). Moreover, it is now necessary to assess if and how these profiles connect to what in Chapter 2 I affirmed to be the roles of lawyers and economists in performing neoliberal reforms.

### *5.5.1 Corporate lawyers meet sociologists of law*

As in the process of competition policy reform, lawyers recruited to the transformed field were often academically and/or professionally close to the market that they sought to regulate. This pattern, however, took time to be consolidated. In the initial years after reform, with the exception of Ruy Coutinho and Neide Malard, lawyers in CADE were mostly public officials with peripheral involvement in political positions, and were far from being experts in the modern technologies of regulation and antitrust. Even Coutinho and Malard, despite being involved in liberalizing measures conducted by Collor de Mello, were already in an advanced stage of their careers, and still resembled a more the traditional profile of a lawyer.

Even during the presidency of Gesner Oliveira, lawyers still tended to have the characteristic trajectory of what Dezalay and Garth (2002a) defined as the “politicians of the law”, i.e. jurists combining political involvement with a practice in traditional areas of the law. The appointments of Antonio Carlos Fonseca, who although being a public official had a PhD in the UK – which was still was an unusual center for a lawyer to pursue graduate education, if compared to Continental Europe –, and Marcelo Calliari were the harbingers of a shift. It was thus only some time after the solution of the institutional crisis of 1996, symbolized by the ascendancy of Oliviera as CADE’s president, that a more modern profile of lawyer started to emerge.

In the year 2000, when lawyers became the majority of the council, a generational and intellectual shift was being completed. Lawyers in CADE got younger, and closer to private practice than to public service. This was also a geographical shift. Between 1994 and 1999 the 11 lawyers appointed came from 9 different universities, and 7 different states, including the Northeast and South regions, which wouldn’t be present in the forthcoming years. From the year 2000 onwards, however, out of the 16 lawyers appointed to CADE, 14 graduated in the state of São Paulo, and most interestingly, 11 held degrees from USP.

If compared to lawyers recruited in the first 5 years of the reformed field’s existence, these lawyers were professionally and academically distinct. Several of them came from private practice in their own firms, or in large Brazilian and foreign corporate law firms,

acting as competition lawyers prior to their appointment, and even being members of bar associations in the US. After serving CADE, they also often became competition lawyers, achieving new prominent positions in corporations, or in large law firms. When lawyers recruited to CADE weren't experts in competition policy (be it professionally or academically), they gained such status, and frequently became legal consultants for corporations or their very attorneys.

Such trend was not restricted to CADE. Also SDE was from a certain point on dominated by corporate lawyers from USP, with close ties among themselves. Paulo de Tarso Ribeiro, who had been supervised in his PhD by Tércio Sampaio, recruited José Reinaldo Lima Lopes to SDE in 1999, through the indication of José Eduardo Faria (who would also have suggested the names of Campilongo, and Ronaldo Porto Macedo for CADE). Lima Lopes was Daniel Goldberg's supervisor at USP, who became SDE in 2003, and while there, recruited Barbara Rosenberg, Arthur Badin and Mariana Tavares. Finally, Tavares later recruited Goldberg's wife, Ana Paula Martinez, to SDE. With the exception of Tavares, who was nevertheless also a corporate lawyer, they were all from USP. In this small group that controlled SDE between 1999 and 2010, all lawyers were at some point associated with some of the largest Brazilian law firms, and three of them had experience as corporate lawyers in the US or Europe.

Even when not professionally distinguishable from the previous group of lawyers (e.g. when they were public officials, prosecutors, etc), those who hegemonized the field since 2000 held considerably different academic credentials. Formal studies in the United States, or at least familiarity with the American legal tradition, and with economics were constants among those who produced competition policy. There were even lawyers who had undergraduate degrees in economics recruited to CADE. Experiences with US law were very often focused on areas close to economics, such as, for instance, Ronaldo Porto Macedo's contact with Oliver Williamson's work when he was in Harvard, or Carlos Ragazzo's LLM in regulation and antitrust at NYU. Another example, although outside CADE, was Daniel Goldberg, Secretary at SDE. As he maintained in an interview, it was during his joint LLM between USP and Harvard that he attended courses on microeconomics. Not by chance, the measures he undertook while in SDE, as well as the very vocabulary he used in interview to narrate them, are very much influenced by a mainstream microeconomic approach to both public management and antitrust policy. Similarly, Badin, who was part of Goldberg's team



at SDE, and later became CADE's Attorney-General and president, described his participation in several "microeconomic reforms" together with the Ministry of Finance.

A curious finding in the academic trajectory of these lawyers was the repeated connection with areas such as the sociology of law, and legal philosophy, especially in the cases of those coming from USP. The numerous linkages of lawyers from USP with the "PET-CAPES Sociology of Law" group are illustrative of that. The intriguing frequency of sociologists of law formed by USP interested in practicing antitrust regulation was explained by the commissioner (and sociologist of law) Campilongo in an interview as the product of two factors<sup>276</sup>. First, because São Paulo is a financial and industrial center, the department of legal philosophy of USP law school would integrate professors working close to economic issues: "so there will be a professor who is an advisor in a bank, another who is Minister of Foreign Relations, and another who works at FIESP"<sup>277</sup>.

Second, for Campilongo, the "interdisciplinary nature of antitrust policy" would be an incentive for the participation of academics of the area of sociology of law, which have "versatility for empirical research, and openness for the dialogue between law and social sciences, political science, and philosophy – half the way for the dialogue with economics". A third factor could be added to Campilongo's explanation: sociology of law can be seen as an academic field more permeable to foreign references outside the Continental Europe axis, which has historically been particularly influential in traditional areas of the law. Due to their academic practice, sociologists of the law are often interested in "legal novelties", and in the last two decades of the twentieth century antitrust policy was anything but traditional or old-fashioned in Brazil.

Still in the academic arena, several of these lawyers were previously connected to, or eventually became involved with educational institutions such as FGV-SP and FGV-RJ, in which "corporate law expertise" has been historically reproduced in Brazil (Dezalay and Garth 2002a, p. 207). Many of these lawyers thought courses on regulation and antitrust in undergraduate, and MBA courses promoted by those institutions for the training of new competition lawyers.

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<sup>276</sup> Doing a research within the domain of sociology of law in which the agents of the studied field are themselves sociologists of law generated interesting situations (and additional difficulties in interviews). For instance, in the interview with Campilongo, he explicitly pointed to the common trajectories of several commissioners recruited to CADE, and provided an explanation for the relation between this area of research and the production of antitrust policy. In other words, Campilongo spontaneously offered a reconstruction of the field.

<sup>277</sup> The "advisor in a bank" mentioned by Campilongo was precisely José Eduardo Faria, who worked in Itaú, and the one who "works at FIESP" was Tércio Sampaio Ferraz Junior – mentioned several times in the reconstruction of the reform of competition law in Brazil, and who was Faria's PhD supervisor.

Once lawyers with this profile have dominated the field for a long time, and are part of what interviewees often refer to as a “technical” policy-making, it is easy to identify the “outliers” and to explain why fears of “politicization” and “interventionism” arise. On the one hand, those often referred to as “outliers” of the field were all lawyers with precisely the traditional profile of the “politician of the law”. They were not as formally educated as those who started to hegemonize the field since 2000, and even when possessed graduate studies, these were often obtained in traditional areas of the law, and in Brazil. Their professional careers were also closer to political groups and positions, and not in modern corporate law firms, or regulatory arenas. Also, their sources of appointment were not endogenous to the field, that is, they were introduced to the field by agents of the political field, such as senators and ministers, and thus distant from the “technical” world.

On the other hand, the recent suspicion of “politicization” and “interventionism”, present between 1994 and 1996, was revived when equally young lawyers, but with different credentials started to be appointed. Even when highly educated and internationalized (for instance, Vinicius Carvalho held a PhD obtained in France), these lawyers did not come majoritarily from long careers in corporate law, had no formal or intellectual connections to the US legal tradition, and were not adepts of an economicized legal expertise. Additionally, while two of them had more evident links with the government’s political party and followed a line of economic law that directly links economic regulation to constitutional objectives such as “national development” and “poverty eradication” (alien concepts in a mainstream view of competition policy), the third was a high rank assistant of BNDES – a symbol of developmentalist policies in Brazil.

Once the praise of competition policy as a “technical” arena vis-à-vis the eventual appearance of “outliers”, and the recent expressions of “interventionism” or “politicization” is parallel to the dominance of a certain profile of lawyers, it is possible to visualize a hierarchy that structures the field. The “correct” practice of the field depends on the presence of lawyers who are familiar with the imperatives of a liberalized market and with the proper doctrines and methods to regulate it, be it due to their professional experience as the representatives of corporations, or due to their academic openness to the dialogue with economic science, most notably microeconomics. In several of the cases described above, these “abilities” were combined. The success of the Brazilian antitrust field in becoming a “technical” arena, however, could hardly be achieved if together with corporate lawyers and the sociologists of

law, a group of economists equally reliant on the modern technologies of economic regulation developed in the US weren't recruited to share the monopoly of competition policy.

### 5.5.2 *Berkeley boys (and girls) and their disciples*

As described in the beginning of the chapter, the arrival of economists in CADE – or better said, the arrival of a certain *type* of economists in CADE – was decisive for the solution of the institutional crisis precipitated in 1996. Moreover, those called to put out the fire in the mid 1990s were eventually followed by other economists with similar trajectories and views on competition policy. If compared to the two economists in CADE during the extensively criticized period of 1994-1996, those recruited from 1996 onwards had considerably different professional and academic trajectories. Similarly to lawyers, while the first members of CADE were public officials with no title higher than a master's degree obtained at a Brazilian university, economists since Oliveira's presidency – and including him – were mostly from academia, acted as consultants for corporations and international organizations such as the World Bank, and were highly educated, notably abroad. The period following the crisis also brought a generational and geographic turn: since the field became “technical”, economists in CADE were often trained in the mid to late 1980s, and although USP alone formed 5 of them, other 6 had at least one passage through a university based in Rio de Janeiro.

Although the professional origins of these economists indicate some degree of convergence, it is their academic background that evidences the formation of a nearly homogenous group. Be it through direct and explicit connections, or due to second degree relationships, no less than 8 economists were linked to the so-called “New Institutional Economics” (NIE)<sup>278</sup>. The hegemony of economists affiliated to NIE was established early in the development of the field, notably with the council presided by Gesner Oliveira, from 1996 to 2000. Similar to the agents of the legal field, the hegemony exercised by economists of this strand was permanently in place throughout time, and started to be contested only in a recent past.

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<sup>278</sup> As Craig and Porter define (2006, p. 102), “broadly, NIE argues that efficient transactions (and, as we will see, ‘accountabilities’) depend on three ingredients: first, information, in the sense of both expertise and knowledge that can make better informed choices (in markets), second, laws, contracts and their efficient enforcement (supporting markets), and third, contest, in the sense of having competition (e.g. to contract to provide services) between multiple different players (that is, market competition). In short form, these three precepts of NIE could be rendered as ‘Inform, Enforce, Compete’”.

The links of economists recruited to produce competition policy to NIE were identified in different ways. Four of them, appointed in different moments of history (and in different governments) obtained their PhDs, or were at least visiting students, at the University of California, at Berkeley, where exponents of this economic tradition were teaching, such as Oliver Williamson, Douglass North, Carl Shapiro, and Albert Fishlow. These American economists were connected to the trajectories of several economists as influential references, or even more directly, as supervisors of their graduate researches. Other economists, although not formally connected to Berkeley or prominent new institutional economists, can be situated within this tradition based on their academic activities. This is the case, for instance, of Elizabeth Farina, who although did not obtain her graduate degree at Berkeley, was the supervisor of Furquim when he was a visiting student at that university, and also participated in meetings of the International Society for New Institutional Economics since 1998 (including a conference at UCB). These economists were largely responsible for the recruitment of yet another group of professionals that was not formally connected to NIE. For instance, Oliveira, who had been supervised by Fishlow, indicated the names of Arthur Barrionuevo and Cleveland Teixeira to integrate CADE, who in turn later articulated the entrance of Rigato in the field.

Although NIE has placed itself as a specific stream of economic theory through the criticism of what it saw as unrealistic assumptions of neoclassical economics – as the works of Ronald Coase, Williamson, and North illustrate – it “shares some basic attributes of the dominant neoclassical approach”, such as the “emphasis on self-seeking and rational behavior, and the neglect of the role of power in shaping the evolution of institutions” (Burlamarqui et al 2000, p. x). As Chang (2002, p. 547) maintains, a key common premise to NIE and neoclassical economics is the “market primacy assumption”, which understands “state intervention and the other non-market, non-state institutions (e.g., the firm) as man-made substitutes for the ‘natural’ institution called the market”<sup>279</sup>. The famous adage coined by Williamson (1975, p. 21) – “in the beginning there were markets” – is illustrative of such assumption<sup>280</sup>. Similarly, Erber (2011, p. 44) identifies that what underlies the “institutionalist convention” is the belief of the “efficacy and legitimacy of the market as the main institution entitled of organizing and conducting the economy and society through the efficient distribution in the use of resources”. Implicit in this belief, he argues, is the “neoliberal thesis

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<sup>279</sup> Similarly to what I have been sustaining in this section, Chang (2002, p. 554; 557) also argues that “NIE models” are part of “neoliberal theories”, or constitute a “branch of neoliberal economics”.

<sup>280</sup> As Ankarloo and Palermo (2004, p. 414) argue in a highly critical article, such assumption characterizes NIE as a theoretical approach that holds an “idealized vision of capitalist economic relations”.

that, even if the market is not in line with the competition ideal, failures introduced in the process of efficiently allocating resources through other institutions, notably the state, are even higher” (Erber 2011, p. 45).

Not only a positive program describing “reality”, this assumption also encompasses a normative content in respect to the “role of the state” (Chang 2002, p. 549): if the market is “natural”, it is preferable as an arena for economic relations, vis-à-vis the state, and non-market mechanisms of “intervention” are secondary. A second defining feature of NIE as part of “neoliberal economics” that can be grasped from Chang’s (2002, p. 549) characterization is the proposal of yet another hierarchy: that politics “distorts” the “rationality” of the market system. The corollary of this assumption is the “depoliticization” of the economy by, for instance, “strengthening the rules on bureaucratic conduct or by setting up ‘politically independent’ policy agencies bound by rigid rules (e.g., independent central bank, independent regulatory agencies)”.

As part of the theoretical endeavor of neoliberal economics, NIE became a complementary policy program to the objectives previously pursued through structural adjustments, privatizations, and liberalization: the production of efficient markets. Illustrative of such role was the conversion of NIE into the theoretical basis of the “institutional turn” taken by the Washington Consensus in the late 1990s and early 2000s (e.g. as reflected in the World Bank’s famous document “*Building institutions for markets*”, of 2002)<sup>281</sup>. Market efficiency, as in the initial years of neoliberal reforms, was still at the center of both theoretical efforts and policy translations of NIE. As Craig and Porter (2006, p. 17) maintain, similarly to orthodox economic thinking, NIE was equally “premised on a mentality of governance that required the prior and effective disaggregation of government”, as it would often constitute “an ‘obstacle’ to the free flow of information and adequate competition”. The primacy of the market was only to be guaranteed by the appropriate institutions.

Despite its “constructive” tone (Craig and Porter 2006, p. 17) in respect to institutions, NIE has been thus focused on engendering specific types of institutional and legal arrangements: market-efficient institutions. In the policy domain, far from being incompatible with the “first phase” of neoliberal reforms of structural adjustments for promoting market

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<sup>281</sup> As Cameron (2004) shows, the World Bank incorporated the NIE framework at least since 1997, but most intensely in 2002, when a series of “second-generation reforms” were systematized into a single agenda. These reforms “built upon the earlier neoliberal reforms” and allegedly sought to “to strengthen judicial systems, banking regulations, and capital markets, combat government corruption, make bureaucracies efficient and responsive to client needs, and decentralized administrative, fiscal, and political power from central to subnational levels of government” (Cameron 2004, p. 97).

shocks and liberalization (Santos 2006, p. 267-268), NIE therefore brings in a complementary agenda. While the macroeconomic tenets of neoliberal fiscal and monetary policies, as well as privatizations opened way for the construction of “free markets”, it was quite logical that an institutional apparatus appropriate to keep these measures effects’ in place would be necessary. NIE entails, in this sense, a set of theoretical foundations and policy recipes to consolidate the outcomes of neoliberal macroeconomic reforms. As Craig and Porter (2006, p. 103) maintain, the “doctrines” of NIE “fitted tidily within the liberal market paradigm, while portending a clear role for the state in facilitating efficient, almost spontaneous governance”.

The compatibility, or better said, the *complementarity* of both “phases” of economic reforms as integral parts of the same project can be identified in the very trajectories of economists recruited to produce competition policy in Brazil. Several of them had been academically or professionally involved with economists that performed the “first generation” reforms in Brazil. I am here referring to the PUC-Rio nucleus that hegemonized macroeconomic policy-making in the Ministry of Finance and in the Central Bank, especially during Cardoso’s government, but as Novelli (2010) and my data indicates, still under Lula’s administration. The names of economists such as Winston Fritsch, Pedro Malan, Armínio Fraga, and Gustavo Franco can be identified in the trajectories of many of those appointed commissioners, presidents, and secretaries in the SBDC. Moreover, some of the new institutional economists recruited to produce competition policy had even worked in the design and implementation of structural adjustments prior to joining the field.

Given their ages – economists who became commissioners and CADE’s presidents were around 40 years old or younger since the mid 1990s – they were members of a generation of economists that succeeded those who imported the Washington Consensus into Brazil between the late 1980s and early 1990s. While the first neoliberal reforms were conducted by agents closer to what in Chile has been often identified as the “Chicago boys” (Dezalay and Garth 2002a, Montecinos 2009), the step further, not by chance, was to be performed by agents holding the expertise of market-efficient institutions. As this expertise started to consolidate in the field of economics precisely in the 1980s (notably at the University of California, at Berkeley), economists that were being trained by that time got in touch with what was an emerging mainstream approach<sup>282</sup>.

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<sup>282</sup> A rudimental yet illustrative indicator of consolidation of NIE as a mainstream approach in the 1980s is the Nobel Prize in economics. In the 1970s and 1980s Nobel laureates of the Chicagoan and neoclassical strand such as Kenneth Arrow (1972), Friedrich Hayek (1974), Milton Friedman (1976), George Stigler (1982), and Harry Markowitz (1989) were dominant. New Institutional Economists started to arise in some early later, especially in the 1990s: Ronald Coase was the laureate in 1991, and Douglass North in 1993. In the 1990s, Chicagoan

As professors, academics and policy makers, throughout the 1990s they would become propagators of this expertise, recruiting yet another generation of economists. Among the economists that were part of the SBDC since 1996 until the late 2000s, a “genealogical tree” of NIE can be noticed. The trajectory of Gesner Oliveira, reputed as a key character for the consolidation of antitrust in Brazil, is illustrative in this respect. Trained in Berkeley during the 1980s, he became a professor at FGV-SP, where he was the supervisor of Cleveland Teixeira and a colleague of Arthur Barrionuevo. Another student of Oliveira’s, and Teixeira’s graduate classmate by that time was Luiz Fernando Rigato, who was supervised by Barrionuevo. If taken as part of a same group, these agents form a network that was present in CADE almost uninterruptedly from 1996 to 2008. Similarly, president Elizabeth Farina, a member of the NIE academic association, supervised Furquim, who was a visiting doctoral student of Oliver Williamson at Berkeley. With Farina and Furquim, another branch of representatives of the NIE school was in CADE between 2004 and 2010.

Another indicator of the linkage of NIE to neoliberalism can be noticed in the several connections of economists recruited to CADE with the “Law and Economics” movement in Brazil – the “ideology of business law” (Engelmann 2011, p. 29- 30) that “provide[s] a set of prescriptions to deregulate through law” (Dezalay and Garth 2002a, p. 170). In the trajectories of economists recruited in different periods, such as Lucia Helena Salgado (1996-2000), José Tavares Araújo (2004-2006), Elizabeth Farina (2004-2008), and Paulo Furquim Azevedo (2006-2010), the influences of or professional relations with L&E scholars were identified. An illustrative example of the proximate relations between Brazilian disciples of NIE and L&E is a book edited by Decio Zylberstajn and Rachel Sztajn (2005) in which the preface was signed by Elizabeth Farina (while she was CADE’s president), and there are articles authored by Oliver Williamson, Paulo Furquim, and exponents of Brazilian L&E such as Armando Castelar Pinheiro, Pérsio Arida, besides the editors. These L&E scholars have been academically and professionally close to agents of the PUC-Rio nucleus that performed the liberalization and privatization reforms in the early 1990s, such as Winston Fritsch and Gustavo Franco, and with economists that acted in the SBDC under different governments.

Considering the 17 economists appointed commissioners and presidents, besides 7 somehow connected to New Institutional Economics, other 4 economists could also be placed within the adjacencies of NIE as part of the economic mainstream. For instance, Afonso Arinos, who was trained in Chicago and a disciple of Robert Lucas and Gary Becker. Other

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economists such as Gary Becker (1992) and Robert Lucas (1995) were still the vogue, and Oliver Williamson would receive the prize only in 2009.

examples were Ruy Santacruz, Thompson Andrade, and César Mattos, all connected to the governmental exponents of the PUC-Rio group. Close to the liberal paradigm, albeit critical of the Chicagoan approach was also Elvino Mendonça, who defined himself as a “Sherman Act” economist.

The dominance of economists with the described profile was stable during most of the period between 1996 and 2012. Since 2004, however, economists with a heterodox background started to emerge among the appointments to CADE. They were Abraham Sicsú, Luiz Delorme Prado, and Ricardo Ruiz – all connected to UNICAMP, a center of heterodox, Keynesian and structuralist economics in Brazil, and/or professors and policy-makers of the Brazilian developmental bank (BNDES) that are exponents of that school, such as Carlos Lessa and Luciano Coutinho. As with lawyers appointed in the recent period, it is precisely in the context where these economists started to gain space that the narratives of “interventionism” and CADE’s “politicization” in respect to the government’s industrial policy goals emerge. The “technical” council, characterized by the sovereignty of NIE and orthodox economists, was thus been challenged – but never actually lost the majority of the council.

### *5.5.3 The neoliberal mode of production of competition regulation*

As the reconstruction of competition policy field historical composition reveals, the arrival of agents possessing a specific set of capitals was parallel to a movement allegedly directed to both protect the institutional design of an autonomous regulatory agency devised in the early 1990s, and to assure a “technical” regulatory practice. Such description was present not only in the discourses of the agents directly involved in the institutional crisis precipitated in 1996, but also in how Onto (2009) and Bello (2005), for instance, explain the shift of CADE’s composition. According to Onto (2009, p. 83), the extensive inclusion of economists in CADE was motivated by an attempt of “rationalizing” antitrust policy, and “reducing of political conflicts”. Similarly, Bello (2005, p. 92) argues that a consensus was established around appointing “experts”, motivated by the government’s worry that new political conflicts would arise.

However, as described in this chapter, and beyond the impressions or explanations offered by the very agents involved in those episodes, assuring the monopoly of competition policy to a certain profile of policy-makers was a matter of *winning* a political conflict, not



only of *reducing* or *avoiding* new ones. What was at stake in 1996 was the compatibility of a recently reformed field with broader transformations of the state and the economy, notably the neoliberal measures of deregulation and privatization. CADE had to be tuned with the new context.

The “government” itself was a source of opposition to antitrust policy, or at least to *the* antitrust policy that was being produced between 1994 and 1996. Professionals previously involved in the reformist initiatives of the early 1990s had a crucial role in composing a political compromise that enabled both the protection of the institutional design, and offered an insurance of a new practice, one that wouldn’t clash with the impulses of a liberalizing economy. In concrete terms, the crisis to be solved was not only about the alleged “irrationality” of decisions during the 1994-1996 period, but most importantly concerned the very content of these decisions, which were considered excessively interventionist for a modern practice. Not by chance, the arrival of mainstream economists after 1996 was paralleled by the decrease in the number of restrictions, what was often celebrated by the agents involved in the field as the adequacy of Brazil to international standards.

The compromise to “solve” the conflict initially implied the hegemony of mainstream liberal economists, mostly of the NIE and Chicagoan traditions, in the field of competition policy. The consolidation of the field as a “technical” arena was later deepened by the maintenance of this profile of economists, and also through the inclusion of corporate lawyers and sociologists of law. Together, these lawyers and economists were the agents seen as legitimized by an expertise fit to the regulatory agency paradigm, and understanding of the “needs” implied by other neoliberal reforms. Most lawyers came from the world of corporate law, and were familiar with and/or enthusiasts of the modern dialogue between law and economics. The majority of economists recruited to produce competition policy, in a similar sense, were trained in a line of thinking that combined the tenets of neoliberal economics with an attention to the institutional aspects of the economy. Eventual outliers, albeit pointed to in several interviews and easily identifiable in the trajectory study, didn’t have any possibilities to affect the field, as they were isolated cases, and never nearly composed a majority in a single council.

The phenomenon of the institutional crisis of 1996, and the criticisms to the first two years of the field’s practice under a reformed law fit, in this sense, the explanation offered by Dezalay and Garth (2002a) about the neoliberal transformation of the state and the economy. As these authors suggested in respect to the broad changes in the state in Brazil (Dezalay and

Garth 2002a, p. 102), also in the case of competition policy the movement toward a “modern” arena of practice was largely operated by economists of a new generation coming from São Paulo and Rio de Janeiro, with graduate degrees in the US, who discredited both developmental economics, and the generalist knowledge of lawyers. The way Lima (1998, p. 124), who became a commissioner in 1998, and was previously in SEAE, described the 1994-1996 period as having a “legalistic view without economic foundations” is illustrative of such clash. As economists were already in CADE in that period, the criticism can be also seen as directed to them, who were public officials long imbricated in the apparatuses of the developmental state. The neoliberal roots of the reformed field of competition policy thus lie on the profile of the agents that integrated it.

As I described in the chapter, it is possible to visualize how the positions occupied by those agents, and thus their capitals and normative stances, are reflected in the concrete shaping of the field, i.e. in their position-takings. Lawyers recruited to CADE, SDE, and SEAE, for instance, deployed legal expertise in a similar way to that historically present in Brazil. They were “institution builders” of competition policy, and acted as “statesmen” managing a governmental apparatus. An example of this role can be identified beyond the very activity of producing regulation within the state. Lawyers were central for the creation of legal “solutions” for “institutional problems” within the Brazilian System of Competition Defence, such as the “duplicate” system of analysis by SDE and SEAE, or in establishing a “fast track” procedure for “simple cases”. The implementation of a leniency system in Brazilian competition policy was also to a great extent articulated by lawyers that integrated the SBDC. They negotiated and disputed the incorporation of this legal instrument imported from the US experience, as it generated potential tensions with Brazilian criminal law and the expectations of more “traditional” lawyers of the Prosecutor’s Office.

As in the past, lawyers also provided their usual “rhetoric of universality and neutrality” to the field of competition policy (Dezalay and Madsen 2012, p. 438). Illustrative of such contribution was the very arrival of a large contingent of lawyers in the year 2000, after two mandates of a council dominated by economists. As by that time CADE was being exposed to public opinion, the appointment of a majority of lawyers sought to confer a “jurisdictional” character to CADE, turning it into a proper tribunal, and thus protecting it from political clashes.

However, due to their professional and academic trajectories, the *content* of the legal expertise infused by these agents in the field of competition policy was considerably different

from the traditional legal “forma mentis” (Venancio Filho 2004, p. 294). Lawyers helped advancing the economicization of antitrust policy accordingly to the international standards informed by mainstream economics. Illustrations of these contributions can be noted especially in SDE, such as the change of focus to conducts, leaving SEAE with the priority of analyzing merger reviews, the creation of a Department of Quantitative Studies which hired econometrists within an organ of the Ministry of Justice (which also assisted CADE in several cases), and the joint-ordinances with SEAE to establish modern guidelines for decision-making. The fact that these measures initiated in the late 1990s and early 2000s occurred in parallel to the arrival of lawyers with a “dollarized” expertise and professional practice is thus not a mere coincidence. Lawyers frequently coming from corporate law, and holding international credentials in the US, were essential to institutionalize formal means and substantive contents in the field of competition policy.

Similarly, economists mostly connected to the NIE strand of neoliberal economics were since early responsible for aligning CADE with the broader transformations of the state and the economy in the awake of neoliberalism. This was achieved through different strategies. One of them was the increasing economicization of antitrust policy, as crystallized by the ordinances enacting guidelines for the analysis of mergers and conduct cases. The economic methods and parameters established in these guidelines reflected, on the one had, what Fourcade (2009b, p. 90) identifies as the dominant “market-oriented” knowledge and “professional culture” of economists, which relies on scientific and extremely quantified methods as a means to freed decision-making from politics.

Another strategy frequently mobilized by economists, and most notably in the initial years after the institutional crisis of 1996, was the internationalization of Brazilian antitrust policy. CADE was included in transnational networks of experts in competition policy, such as the ICN and the OECD, venues where the diffusion of standards and “best practices” among professionals and worldwide antitrust authorities occurred. Also, members of the SBDC actively tried to articulate antitrust policy with other arenas of economic transformation which were characteristic of the global neoliberal project of liberalizing markets. Exemplary of such attempts was the involvement of CADE, notably pushed by economists, in the discussions of competition regulation in the (eventually failed) creation of the FTAA, and of the WTO<sup>283</sup>.

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<sup>283</sup> I herein subscribe to Chorev and Babb’s (2009, p. 460) understanding of the WTO’s “global system of market-liberalizing economic rules” as a “key institution of neoliberal governance”. However, as these authors maintain in a comparison of the “systems of rules” of the WTO and the IMF, the former “provides some political

Through this set of measures advanced by lawyers and economists in the practice of the field, Brazilian competition policy was being aligned with the broader political and economic impulses that characterized the neoliberal transformation of the economy and the state. In substantive terms, although the law of 1994 already consolidated the tenets of neoliberal antitrust policy developed in the US in the 1980s, as the agents of the field saw it, the law was being poorly enforced. It was thus through the hands of corporate lawyers and mainstream economists that the modern standard for antitrust policy gained specific methodologies and parameters to be applied – and moreover, that it was *effectively* and, according to those standards, *correctly* applied.

Illustrative of such shift is what Lima (1998, p. 124) characterized as a “sensitive modification” of the “legalistic view” of competition policy that dominated CADE until 1996. For this author, such perspective, which would also include a “lack of attention to the trade-off between efficiency and market power”, was changed by the new composition that arrived in CADE in 1996 – precisely the one that inaugurated the monopoly of competition policy by mainstream economists, and later opened way for corporate lawyers. Economic efficiency, the motto of neoliberal economics – and most notably its “trade-off” with market power, as Lima defines – gained space only when agents that possessed an expertise oriented for its achievement managed to occupy positions in CADE, SDE and SEAE.

Such roles performed by corporate lawyers and mainstream economists in shaping the field of competition policy in its very practice enable delineating yet another conclusion, now about regulatory reforms in general. As described in Chapter 1, mainstream narratives tend to adopt a synchronic approach to depict the *process* of reform. However, as illustrated by the struggles to redefine legal enforcement and to institutionalize a certain model of practice, be it through decisions, or through infra-legal instruments such as the guidelines, reform did not cease with the enactment of the law of 1994. The transformation of this arena of economic regulation into a “modern” field continued in time, and was conditioned by disputes around imposing the purposes to be pursued by competition policy, and the means to do so. Thus, as Twining (2005a, p. 34) suggests, the diffusion of a legal technology such as that embedded in the reform of competition policy in Brazil involved a “long drawn out process, which, even if

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leverage to developing countries, which is completely absent under the IMF procedures”, and thus constitutes “a much less ideologically coherent and consistently ‘neoliberal’ organization than the IMF” (Chorev and Babb 2009, p. 463). Similarly, Phillips (2003, p. 329) characterizes the FTAA as an integral part of the “strategies of economic liberalization and neoliberal restructuring that took root across the region over the course of the 1990s”.

there were some critical moments [e.g. the enactment of the law], cannot be understood without reference to events prior and subsequent to such moments”.

The diachronic nature of the reform process is connected to another dimension in which a contrast between the data presented and the discourses of mainstream narratives can be noticed: the relation between the import of an institutional framework such as competition policy and the local conditions of the importing context. As discussed in Chapter 2, local conditions affect the way in which a legal technology is imported, and the form it takes in practice. A central component of the “indigenous” factors that may impact a reform process is what Twining (2005a, p. 35) calls “pre-existing law” – which, as I understand it, is more useful if understood in a broader sense, as the local legal field, and in the case of competition policy, also the field of economics.

The 1996 crisis is illustrative in this sense. Although the law of 1994 was already in place, those entitled of initially enforcing it occupied positions in their respective professional fields that revealed to be incompatible to the expectations of other agents. These were the agents holding the sorts of capitals which, at that point of time, enabled them to achieve prominent positions in the field, and who assimilated the new technology and translated it into concrete decisions through their expertise. In the case of lawyers in CADE from 1994 to 1996, this was not a highly economicized expertise, and in the case of economists, it was not tuned with neoclassical economics and its later developments. In the initial years of the field’s practice after the enactment of the law, competition policy was therefore still rooted very much in the traditional hierarchies of the fields of law and economics, which were specific configurations of the Brazilian context, and which albeit fast, would only change after the new law. Therefore, besides having developed diachronically, reform did not fill a vacuum, as there was still a legal and economic inheritance in place. The very agents responsible for operating a recently created or reformed field constituted an element of “path dependence” (Dezalay and Garth 2002a, p. 13).

Also, for the most part, the advancement of reform in the practice of the field of competition policy indicates that rather than a permanent clash between law and economics as distinct forms of “expertise of government” (Dezalay and Garth 2002a), lawyers and economists were allies in a joint endeavor. Given that the criticism of the “legalistic view” was directed to lawyers with a traditional profile, such alliance was likely possible due to the economicization of lawyers themselves. The result of such generally cooperative relationship was a powerful shielding of the field from politics, as it combined the expertise held by the

“men of science” (Schneider 1998, p. 79) symbolized by economists, and lawyers possessing a “tool for ordering politics without necessarily doing politics” (Dezalay and Madsen 2012, p. 438)<sup>284</sup>.

As the trajectory study presented above revealed, besides the “modern” legal framework established in 1994, and the posterior measures to institutionalize the parameters for a proper enforcement of competition policy and advance reform, the “success” of the field as a “technical” arena was highly dependent on a social mechanism: the politics of composition. Since 1996, when mainstream economists started to hegemonize the field, and later on 2000, when corporate lawyers and sociologists of law joined them, positions in CADE, SDE and SEAE were predominantly occupied by a nearly homogeneous group. As the several connections among the agents that composed the field indicate, recruitments were mostly endogenous, and relied on social capital originated in professional, academic and even personal and familial relationships. The field itself created a device to reproduce agents accordingly to its practice. Examples of such attempts were the internship program PinCADE, in which three commissioners had previously participated, and the series of cooperation agreements with universities. Such mechanism contributed to giving stability to the enforcement pattern inaugurated in 1996, and provided a means to a perennial practice notwithstanding changes in government – or in the field’s jargon, despite of “politics”.

The strength of such internalized social control over the access to the field can be observed in at least two senses. First, agents that were politically connected to the government of Fernando Henrique Cardoso managed to stay in the field of competition policy during Lula’s administration, by jumping from one position to another, by having their terms renovated by a different government, or by being appointed by one political party despite of explicit connections to its main adversary. Second, those agents whose background and trajectory were most distinct from the majority of corporate lawyers, or mainstream economists were recruited through channels other than CADE, SDE and SEAE. Not by chance, the adjectives of “outlier”, “political”, and “interventionist” often match the operation of an instrument of recruitment that was exogenous to the field.

Such self-feeding mechanism had yet another potential of stabilizing the hegemonic habitus of the field due to the fact that the agents appointed to CADE, as well as to the ministerial secretariats, after serving their terms, often worked in private practice, as attorneys

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<sup>284</sup> An exception that confirms the rule was identified in Neide Malard’s interview, in which she criticizes the “currently exaggerated” use of economic analysis that “copies American textbooks”. Malard was a commissioner in the period of 1994-1996, criticized precisely by its “lack” of “economic foundations” (Lima 1998).

for corporations, and economic consultants. As Badin stated in an interview, “in the theater of antitrust, [he] had exercised all roles: that of a defender, as a lawyer; that of an accuser, as the chief of staff of SDE; that of *custus legis*, as the Attorney-General; and that of president”. Playing different roles in the “theater of antitrust” was a rule for almost all corporate lawyers, and mainstream economists that worked in the SBDC – before and/or after their appointment. The effects of the “revolving doors” of CADE to the field’s practice are hard to precise empirically, but can nevertheless be potentially assessed.

For instance, the combination of commissioners’ increasingly low age average with the typical dynamics of “changing sides” touches the issue of jurisprudence formation. As young commissioners today will still have a long career as the representatives of the market tomorrow – if a subversion of the “rational actor” perspective of orthodox economics is here allowed – the field’s structure produces *incentives* for a moderate regulatory behavior. Otherwise, an “interventionist” decision-making by one agent may become the precedent that hinders her defense of a corporation in a (not so distant) future. Also, the achievement of certain positions in the market may be later jeopardized<sup>285</sup>.

Another example of the roles exercised by social ties in the field’s practice came up in by an interviewee when discussing the strategy for hiring economic consultants for cases presented before CADE. According to the interviewee, the choice is not only “technical”, but depends on “CADE’s composition”:

Who do we feel that is more influential there today? If the rapporteur [of the case] is commissioner X, who is he most friends with? Commissioner X was consultant’s Y student. Y was X’s PhD supervisor. So if I present an opinion by Y, X will probably say: ‘So Professor Y wrote this, let me read’. On the other hand, if there is an intellectual dispute, there is no point presenting the opinion of a certain consultant. It doesn’t matter if I like consultant Z. If the rapporteur doesn’t, you must dismiss it. It is not based only on professional qualification. It is based on to whom are you sending the opinion.

Beyond the speculative exercise about the potential effects of such social ties that operate in the field of competition policy, it is nevertheless possible to affirm that due to the agents mobility between the “state” and the “market”, the links between the “regulators”, symbolized by CADE, SDE, and SEAE, and those “regulated” are generally extremely close.

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<sup>285</sup> On this issue, the interview of Malard is once again extremely critical of the development of the field since the mid-1990s. According to her, the young age of commissioners appointed to CADE and SDE may be related to the “tolerance with big business”, once after serving the council regulators often become “big lawyers of big corporations”. It is interesting to notice that during her term, CADE had the highest age average of the period 1994-2012, as all commissioners were public officials already retired, or in the end of their careers.

The field of competition policy is thus hegemonized by an expertise that is not only “cognitively and professionally” “market-oriented” (Fourcade 2009b, p. 8-9), but also socially close to it. This is because the recruitment to the field has predominantly both demanded and offered experiences of socialization with the market.

The fact that corporate lawyers, sociologists of law and mainstream economists with similar profiles dominated the field since 1996 does not mean a universally consensual decision-making practice. Divergences occurred among commissioners, as reflected in the non-unanimous decisions taken by CADE<sup>286</sup>, within the SBDC (for instance, in the different opinions enacted by SDE and SEAE), and between the regulatory authorities and the agents it regulated. Since the field became controlled by the described agents, however, these conflicts have been largely restricted to what Bourdieu (2004, p. 29) defined as “struggles in reality”, a process “fueled by interest, dedication, belief, etc in the issues at stake” (Dezalay and Madsen 2012, p. 441). These clashes took place within the boundaries established cooperatively between NIE economists and corporate lawyers. Regulators and regulated corporations struggled on the basis of an agreement about the “technical” competition policy.

The very structure of the field – its rules of functioning and dominant visions – has therefore been relatively stable. Struggles in the field’s “representation” were solved for a long period of time since 1996, when the battle to define “the field’s logic and taken for granted limits” and “its consecration mechanisms” (Dezalay and Madsen 2012, p. 441) was won by lawyers and economists defending the primacy of the market, and the need to adequate competition policy to the impulses of a liberalizing economy. The series of measures that advanced the reform of the field comprised the strategies mobilized by a certain group of agents to achieve such objective.

It was only recently, based on the references of the field’s agents to the recent trends of “politicization” and “interventionism”, that more fundamental struggles over the field’s structure (re)emerged. These are battles that contest the boundaries of the field, its hierarchy, and rules of functioning. Agents, capitals and stances that were outside the frontiers previously established received the adjectives of “outlier”, “political”, and “interventionist”. However, these battles to achieve the monopoly of competition policy are still too recent to have its effects noticed. As I will try to show in the next Chapter, the broad consensus over the field’s structure and practice, forged out of a clash, and based on political compromises,

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<sup>286</sup> The number of divergences in CADE’s decision-making is however largely minoritarian. In the universe of decisions I reconstructed for the present study (described in Chapter 3), 5958 decisions in MR were made by CADE between 1996 and 2010. Out of these, more than 95% were unanimous.



and strategies mobilized by corporate lawyers and mainstream economists, implied concrete effects that are in accordance to its agents' positions and stances. In other words, the ideals of the 1990s reform, expanded and deepened especially since 1996, managed to produce outcomes to the economy and society that are functional to the neoliberal political and economic project.

## **CHAPTER 6**

### **The products of competition policy in the economy and society**

As discussed in Chapter 2, the proposal of assessing the linkages of competition policy reform with neoliberalism is built upon two pillars. One comprises the identification of the roots of the field of competition policy within the neoliberal economic and political tenets through the analysis of the agents that created a modern field and who occupied it after reform. As discussed in Chapters 4 and 5, this dimension entailed, respectively, the reconstruction of the historical episodes that culminated in the creation of the 1994 competition act, and the description of the field's dynamics from its creation until 2011. The second pillar encompasses the evaluation of if and how the outcomes produced by the field on the economy and society fit into the characteristic features of neoliberalism. This is the task to be addressed in this Chapter.

In Chapter 1, I reviewed how mainstream narratives in legal and economic scholarships, as well as in diffusion studies, portray these outcomes. They often depart from the assumption that competition law is explicit and authoritative, and therefore it does what it says. The corollary of this premise is that competition policy in Brazil, as it announces its aims to “promote competition” and “protect consumers”, performs the roles of controlling the market, moderating capitalism, and generating general benefits for society and economic agents. By employing vague notions of “success” and “failure” in the evaluation of these roles, and often through claims based on impressionistic empirical sources, mainstream narratives tend to endorse a formalistic view of competition policy's responses to economic phenomena, functionalizing its outcomes within the very endogenous narrative of the legal text, and thus depoliticizing the effects of economic regulation. In such descriptions, since the outcomes of competition policy enforcement are a matter of compliance with a clear-cut legal framework, neoliberalism is ignored or even neglected as a political and economic phenomenon.

What I propose as an alternative narrative about the connections of the practice of competition policy with neoliberalism combines conceptual tools to develop an empirical study of outcomes with a substantive theory about the defining elements of the neoliberal economic and political project. As described in Chapter 2, I deploy a “law in action” approach to grasp competition policy's facilitative-regulatory and constitutive roles in the economy and society, and confront it with what a critical political economy of neoliberalism identifies as its characteristic features: the global concentration and expansion of capital into liberalized

markets, the hegemony and autonomization of financial capital, and the constitution of a “consumer citizenship”.

As described in Chapter 3, I adopted different methodological strategies to pursue the analysis of each of these three features. These constitute the actual structure of the present chapter. In sections 6.1 and 6.2, I present the results of the first strategy: a quantitative study of CADE’s decision-making in Merger Reviews (MRs) and Administrative Procedures (APs), respectively. The goal, in these sections, is to identify what kind of economy the field of competition policy facilitates/regulates, and how. In section 6.3, to evaluate how Brazilian competition policy deals with the pressures for the hegemony of financial capital, I describe how CADE has historically regulated financial capital, and how the very jurisdiction of competition policy over this sector has been contested within and outside the field. In section 6.4, I tackle the last dimension highlighted in Chapter 2: the constitutive “conceptual dichotomies” produced by competition policy in respect to “consumers” and “workers”. By identifying how the field incorporates or repels these categories I analyze what societal model it helps to constitute. In the Chapter’s closing section, in light of the empirical material presented, I go back to hypotheses stated in Chapter 3 to discuss the linkages between the outcomes of competition policy in Brazil and the structuring of neoliberalism.

### **6.1 The regulation of economic concentrations**

As described in Chapter 3, the largest part of the regulation produced by the Brazilian competition policy field has historically been focused on economic concentrations. Through the so-called Merger Reviews (MR), CADE has decided on the legality of corporate concentrations that occur, for instance, in the form of mergers, acquisitions and joint-ventures. In this section, I present the results of the quantitative study based on a sample of 871 MR decided by CADE between 1994 and 2010. This sample provides a comprehensive and representative view of the phenomena that demanded the field’s operation during practically the whole period under the reformed law of 1994. Moreover, the study developed on the basis of this sample enables constructing a profile of economic concentrations that “entered” CADE and, at the same time, of the field’s responses to them. In section 6.1.1, I describe the profile of the operations submitted to CADE according to the variables described in Chapter 3. In section 6.1.2, I analyze how CADE regulated these operations, i.e. how certain economic concentrations were treated, and what regulatory responses the agents that operate the field gave them. At the end of this section, I summarize the findings and complete

the picture of how CADE regulates economic concentrations by briefly describing the profiles of cases entirely rejected by the antitrust authority.

#### 6.1.1 *The economy that concentrates*

From a general overview of operations it is possible to visualize a first pattern in the economy regulated by competition policy in Brazil. Although economic concentrations decided by CADE occurred in 29 different economic sectors, almost 70% of all operations presented before the Brazilian competition authority occurred in only 10 economic sectors, most of which where there had been significant privatizations and deregulation in the 1990s. The so-called “Essential and Infrastructure Services” sector, which comprises activities of production and distribution of electricity, gas, water, sanitation, and telecommunications, had the highest incidence. Traditionally monopolized by the state, these activities were largely liberalized for private activity in the early 1990s, especially through the privatization of state-owned enterprises. In the electricity sector, for instance, no less than 16 state-owned corporations were privatized, such as CEEE Centro-Oeste, CEEE Norte-Nordeste, SAELPA, and Eletropaulo. In the gas sector, corporations such as Riogás, Gás Noroeste and Gás Sul were also privatized.

The second sector in the ranking was also one in which the market was largely liberalized: the chemical and petrochemical industry. It comprises activities related to the exploration and refinement of oil, the production of petrochemical elements, synthetic and artificial fibers, lubricants, asphalt, industrial gases, paints, fertilizers, among others. I also included in this sector the activity of fuel distribution developed by gas stations. Similarly to the infrastructure sector, the petrochemical and chemical industry was largely opened for private agents in parallel to the constitution of the field of competition policy. In the oil sector, for instance, the Constitutional Amendment 09 of 1995 broke the state monopoly over this natural resource, opening the way for foreign corporations to explore for oil in Brazil. Also, at least 22 industries controlled by the state were privatized in this sector in the 1990s, notably in the fertilizers sectors, as in the case of Ultrafertil, Arafertil, and Fosfertil, or was opened to outside investors, such as in the case of Petrobras.

**Table 31.** MRs – Economic Sectors

Economic Sectors	%	Cumulative %
Essential and Infrastructure Services	12.1	12.1
Chemical and Petrochemical Industry	9	21.1
Informatics and Telecommunication Industry	7.7	28.8
General Services	6.5	35.3
Automotive Industry and Transports	6.2	41.5
Pharmaceutical and Hygiene Industry	5.7	47.2
Metal Industry	5.7	52.9
Mechanical Industry	5.4	58.3
Communication and Entertainment	4.2	62.5
Food Industry	4.2	66.7
Transportation and Storage Services	3.5	70.2
Mineral Extraction	3.4	73.6
Electro-electronic Industry	3.3	77
Retail Sector	3.2	80.1
Financial Services	2.4	82.5
Plastic and Rubber Industry	2.3	84.8
Non-Metallic Mineral Products Industry	2	86.8
Agriculture	1.9	88.7
Civil Construction	1.7	90.4
Beverage Industry	1.5	91.9
Insurances and Pension	1.5	93.4
Pulp and Paper Industry	1.3	94.7
Textile Industry and Leather Products	1.3	96
Wholesale Trade	1.1	97.1
Soft Mechanical Industry	1	98.1
Tobacco Industry	0.7	98.8
Livestock farming	0.5	99.3
Furniture Industry	0.5	99.7
Wood Industry	0.3	100
Total	100	

**Source:** elaborated by the author

The incidence of concentrations was noticeable in two other sectors, which were also largely opened to private agents through measures of deregulation or privatization. The “General Services” sector, fourth in the rank, comprises a variety of activities, such as hospitals and medical services and security. Sixth in the rank, the “Metal Industry” was extensively privatized in the 1990s. Exemplary of this process were the privatizations of nine state-owned corporations, such as CSN, CST, Usiminas, Forjas Acesita SA, COSIPA, and COSINOR.

A second pattern that may be added to the sectors of economic activity in which

economic concentrations occurred is that of the means through which they occur. Almost 82% of operations were acquisitions, followed by 7.3% joint-ventures. Mergers comprised less than 4% of concentrations regulated by the Brazilian antitrust authority. Operations of concession of public services corresponded to only 1.6% of operations, and a series of other forms that I classified under the label “Others”, comprising the increase of capital of a corporation that was subscribed by investors without, however, altering the control of the business, and distribution contracts among corporations.

**Table 32.** MRs – Type of operation

Type of operation	%
Acquisitions	81.7
Joint-Ventures	7.3
Other	5.8
Mergers	3.6
Concessions	1.6

**Source:** elaborated by the author

Most operations presented to CADE were of national scope, that is, restricted to the Brazilian market. A considerable proportion of almost 43%, however, was of global scope, which means operations of a scope larger than the Brazilian market, including it or not. Frequent examples of this type of operation in the database were those in which foreign corporations, even if one of them was not active in Brazil, were involved in concentrations elsewhere, through global mergers or acquisitions, and notified the Brazilian antitrust authority.

**Table 33.** MRs – Scope of operations

Scope	%
National	57.1
Global	42.9

**Source:** elaborated by the author

Although occurring in sectors largely affected by destatization, and mostly comprising acquisitions and operations of national scope, specific operations of privatization compose only a minority of cases decided by CADE between 1994 and 2010: 2.4%.

Together with this general profile of the sectors and types of operations decided by CADE, the analysis of what sorts of capital mobilize the field is also extremely relevant to understand its roles properly. The table below describes in descending order of incidence the different movements of capital embedded in economic concentrations. I considered the origin of the controlling capital of each corporation involved in an operation to construct the

classification. The symbol “>” indicates a movement of inclusion by the enterprise on the left side of the symbol of one on the right side. The symbol “–”, in turn, depicts relations that are not of inclusion, such as join-ventures.

**Table 34.** MRs – Capital movement

Capital movement	%
Foreign > Foreign	44
Foreign > Brazilian	19
Brazilian > Brazilian	12.7
Brazilian – Foreign	7.5
Foreign – Foreign	7.3
Brazilian > Foreign	6.2
Brazilian – Brazilian	3.2
<b>Total</b>	<b>100</b>

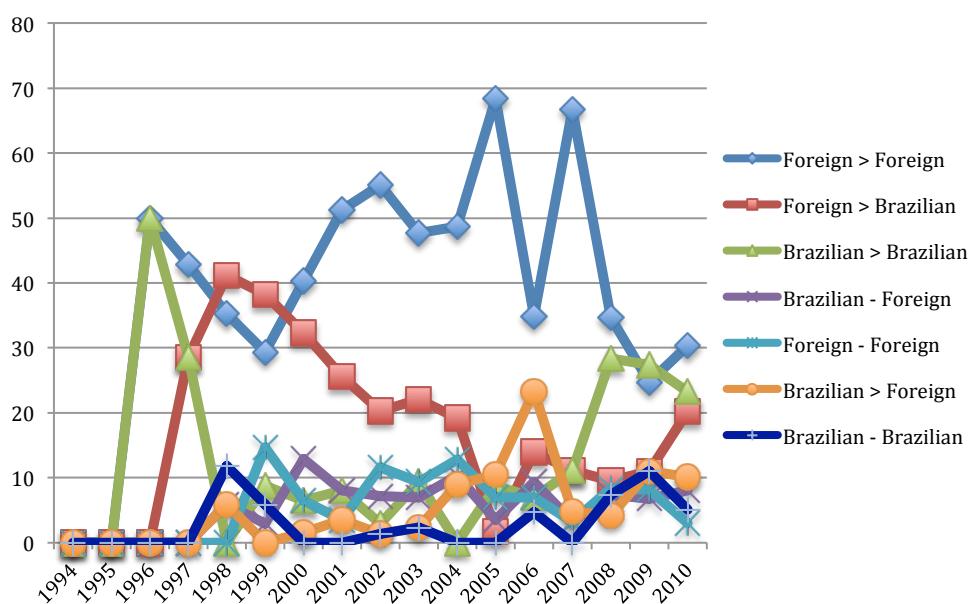
**Source:** elaborated by the author

The first information that emerges from the table is that 63% of economic concentrations entailed the acquisition of new assets by a foreign firm, be it by the acquisition of another foreign corporation, or of Brazilian businesses. The proportion of concentrations favoring foreign firms is higher, however, if movements of cooperation among foreign firms, or between them and Brazilian enterprises are added to this number. In doing so, it is possible to observe that 77,8% of cases regulated by the Brazilian competition authority involved some sort of concentration benefiting foreign firms. Concentrations solely in favor of Brazilian corporations, in turn, comprised 22,1%, and were mostly focused on the acquisition of another national enterprise.

Unraveling the movement of capital in a time series provides yet another set of information, as the figure below indicates. According to the aggregated data, in most of the 17-year period analyzed, acquisitions of foreign corporations dominated CADE’s decisions portfolio<sup>287</sup>. However, as it is possible to notice, there are some historical trends in the directions taken by economic concentrations. Although acquisitions among Brazilian firms were highly present in the initial years of the period, already in 1997 a trend that would permeate CADE’s decision-making until 2004 can be observed: most concentrations benefited foreign corporations, be it in the form of acquisitions, or joint-ventures with Brazilian companies or other foreign firms.

<sup>287</sup> The lines of the chart begin only in 1996 because cases in 1994 and 1995 are of a small number in the sample, and are thus ignored when annual frequencies were generated. This is due to the weighting of cases. In other graphs I present below, the same phenomenon can be observed. In the sample, there is one case decided in 1994, and another decided in 1995. Both of them were acquisitions of a Brazilian corporation by a foreign company. It is likely that the observed dominance of foreign acquisitions was already in place since the first year of the reformed field’s activity.

**Figure 9.** MRs – Capital movement in time (1994-2010)



Source: elaborated by the author

Moreover, given that the year CADE usually made a decision a while after the operation was submitted, the “boom” of concentrations generated by foreign firms coincides with the series of deregulation, liberalization and privatization measures in Brazil.

In the mid 2000s, however, this trend started to shift. In 2005, although acquisitions involving only foreign firms reached a historical peak (68.4% of MR decided by CADE), two novelties can be observed. On the one hand, other forms of concentration pushed by foreign companies became less relevant, as acquisitions of Brazilian firms by foreigners dropped from 19.4% in 2004 to virtually zero in 2005, and joint-ventures between Brazilian and foreign firms decreased from 10.3% to 3.5% in the same period. On the other, Brazilian companies started to be more numerous on the acquiring pole of concentrations, a movement that began already in 2003. Most notably, acquisitions of foreign firms by Brazilian corporations, which were largely marginal, gained space in 2003, and in 2006, when 23.3% of concentrations were of this type, it became the second highest form of operation. In parallel to this shift, acquisitions among Brazilian firms almost continuously grew from 2004 onwards, even surpassing concentrations among foreign companies in 2009. This is precisely the period when, as discussed in Chapter 2, “developmentalist” measures would have heated the Brazilian market, and incentives for national corporations were given through instruments of “industrial policy”. This shift also coincides with the aftermath of the global financial crisis, in which global mergers and acquisitions decelerated.

Another pattern concerning the profile of the capital that mobilizes the Brazilian



antitrust field emerges if the countries of origin of corporations involved are considered. Within concentrations in which assets were permanently transferred (acquisitions and mergers), companies controlled by capital identified with 37 different countries figured in the acquiring pole of the operation. However, almost 80% of operations benefited companies from only 6 countries. While Brazilian firms acquired assets in 25% of these operations, companies based in the United States accounted for 35.7% of acquisitions, followed by Germany (5.9%), the United Kingdom (4.6%), France (4.5%), and the Netherlands (3.2%).

**Table 35.** MRs – Origin of capital acquirers

Country	%	Cumulative %
United States	35.7	35.7
Brazil	25.7	61.4
Germany	5.9	67.3
United Kingdom	4.6	71.9
France	4.5	76.4
Netherlands	3.2	79.6
Spain	3.1	82.7
Canada	2.5	85.3
Italy	2	87.3
Switzerland	1.6	88.9
Japan	1.1	90
Others	10	100

**Source:** elaborated by the author

Among the “others” are mostly European corporations of 8 different nationalities, Latin American companies of 6 countries, and Asian corporations from Singapore, China, and India, in this order. Most interestingly, in 1.6% of operations the acquiring companies were based in countries often reputed as tax havens, such as the Cayman Islands, Jersey, Bermuda, the Netherlands Antilles, and Panama. Together they account for the same proportion of operations as countries such as Switzerland, which is ranked within the top-10 acquiring countries. It is likely, however, that the actual control of corporations of those origins is based elsewhere, although it was not possible to confirm this from the available sources.

On the side of the “acquired” capital, 39 countries appear in CADE’s decisions. Although more diverse, the distribution is also highly concentrated: corporations based in 10 countries were those acquired in 90% of cases. The positions, however, are slightly different. Brazilian corporations are naturally at the top, comprising almost 40% of acquired capital, followed by the United States, with 25,5%.

**Table 36.** MRs – Origin of capital acquired

Country	%	Cumulative %
Brazil	38.3	38.3
United States	25.5	63.8
Germany	6.9	70.7
United Kingdom	5	75.8
France	4.9	80.6
Netherlands	3.1	83.7
Switzerland	2.3	86
Italy	2.1	88.1
Japan	1.4	89.5
Canada	1.1	90.6
Others	9.4	100

**Source:** elaborated by the author

Countries that appeared repeatedly as “incorporators” were also frequently on the passive pole of the operation. Interestingly, with the exception of the US, among the top 5 countries that can be observed on both sides of economic concentrations, they were all more frequently acquired than acquirers of capital. Also in this dimension corporations based on tax havens appear in a relatively considerable amount, if compared to individual countries. Companies with declared origin in Bermuda, Cayman Islands, Virgin Islands, and the Bahamas comprised 1,5% of acquired capital.

Among concentrations involving Brazilian corporations, in 7,5% of them state-owned capital was present. State capital was observed in different ways: as participation held by governmental bodies, especially the BNDES (most notably its holding that invests in private companies, BNDESPar), pension funds, and state-owned corporations. Businesses directly controlled by the government were also the acquirers in 3,1% of concentrations.

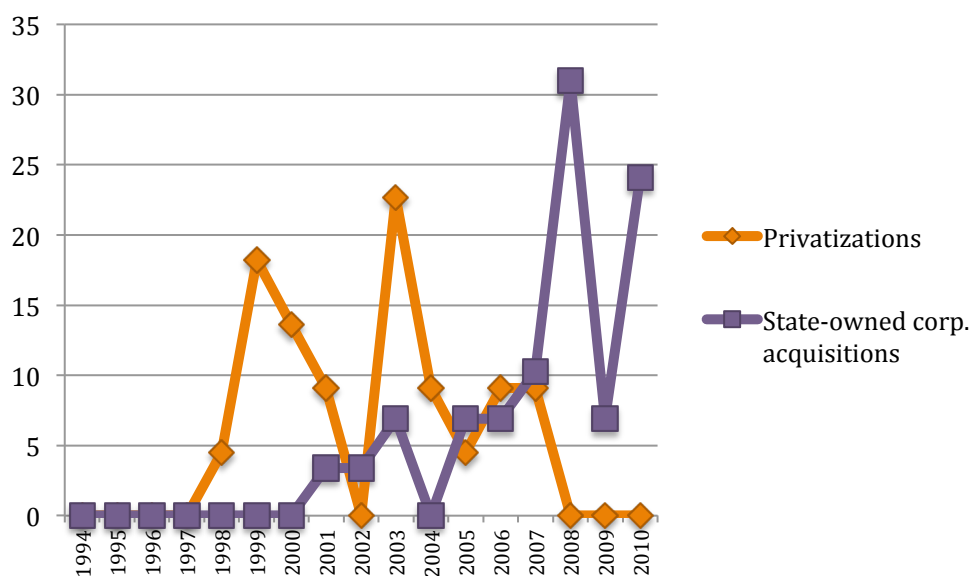
**Table 37.** MRs – State-owned capital

State-owned capital	%
Overall	7.5
Acquiring pole	3.1

**Source:** elaborated by the author

As with capital movement, the distribution of acquisitions by state-owned capital in time provides another glimpse into the profile of the economy regulated by competition policy, especially if compared to situations in which state-owned capital was acquired, i.e. privatizations. In the graph below, I depict the distribution of privatizations and acquisitions by state-owned corporations in the analyzed period. The annual percentage corresponds to the total amount of operations of each type present in the sample.

**Figure 10.** MRs – Privatizations and state-owned capital in time (1994-2010)



**Source:** elaborated by the author

In line with the trends identified in the capital movement variable, the selling of state-owned assets parallels the period dominated by foreign acquisitions. Similarly, while in this period acquisitions by Brazilian corporations were a minority, the buying of other firms by state-owned corporations started only in the early 2000s. Most interestingly, it grew and peaked during the so-called “developmentalist” period, when acquisitions by Brazilian firms in general also grew. This growth was also highly concentrated in the petrochemical sector, as among the acquisitions involving state-owned capital, 55.8% were mobilized by Petrobras – the Brazilian state-owned oil company.

The third element that composes the picture of the economy regulated by CADE concerns the characteristics of economic concentrations that demanded the field’s attention in the period. Among the operations analyzed by CADE in the period, in 40% of them the antitrust authority recognized the existence of some kind of concentration. More than one third of operations (34.8%) implied horizontal integration, and in 5.6%, although horizontal concentration was not identified, vertical integration was observed.

**Table 38.** MRs – Type of integration

Type of integration	%
Vertical	5.6
Horizontal (including vertical or not)	34.8

**Source:** elaborated by the author

The relatively limited proportion of cases in which some sort of integration was observed may be related to a recurrent argument often referred to in mainstream narratives, as well as in interviews, that most cases analyzed by CADE were not “important”, or had no “real competition concerns”. According to these views, due to what would be excessively encompassing legal definitions of the 1994 law, especially the threshold for MR mandatory submission, several cases with no possibility of generating anti-competitive effects were obliged to enter CADE<sup>288</sup>.

On average, horizontal integrations resulted in a concentration of the structure of supply of 24.89%, with a standard deviation of 22.40%, which indicates an important variance within the sample. In other words, the degrees of integration implied by MR were highly varied. This variance can be observed when the resulting levels of concentration are grouped in strata. Since horizontal integration was observed by CADE in 34,8% of cases, in 65.2% of them the level of concentration assigned was zero. Most operations that implied some sort of concentration of this type (19.2%) were circumscribed to the legal limit established by the 1994 law: up to 20% of the relevant market. In 15.7% of cases, horizontal integration was above this standard.

**Table 39.** MRs – Level of concentration

Level of concentration	%
0	65.2
0.1-20%	19.2
21-40%	8.7
41-60%	4.7
61-80%	1.1
81-100%	1.2
Total	100

**Source:** elaborated by the author

The percentage of market share incorporated in operations where horizontal concentration was observed (what I call “ $\Delta$  concentration”) ranged from close to zero to 97.60%. The average of “ $\Delta$  concentrations” was of 7.4%, with a standard deviation of 10,8%, which reflects the mentioned variance. As the table below illustrates, most horizontal concentrations entailed a maximum accumulation of market share by the acquiring agent of

<sup>288</sup> One of the frequently proposed explanations states that since the law 1994 stipulated that any operation involving at least one corporation with an annual revenue of 200 million Reais must be submitted to CADE, several small acquisitions by large groups ended up demanding regulatory approval. Although I am here describing the general trends of CADE’s decision-making, the focus on operations that actually generated some sort of concentration enables overcoming eventual problems implied by this massive presence of so-called “irrelevant cases”.

10%, which encompasses the overall average. More than 90% of horizontal integrations implied, in this sense, less than 20% of concentration.

**Table 40.** MRs – Market share  $\Delta$

Market share $\Delta$	%
0-10%	77.9
10.1-20%	12.9
20.1-30%	3.7
30.1-40%	3.4
40.1-50%	0.7
50.1-60%	1
60.1-70%	0.1
70.1-80%	0.1
80.1-90%	0.1
90.1-100%	0.2
Total	100

**Source:** elaborated by the author

The table below crosses the level of concentration with the market share  $\Delta$  observed in each level. Concentrations of up to 20% obviously had a maximum  $\Delta$  of the same amount, but as the table illustrates, they were mostly around 10%. The incorporation of  $\Delta$  higher than 60%, although they were observed in the sample, became proportionally irrelevant in running the representations in terms of percentages. This is due to the small number of cases at these higher levels. For instance, for  $\Delta$  between 60.1-70%, only one case was identified; between 70.1-80%, two cases; between 80.1-90%, one case; and between 90,1-100%, two cases.

**Table 41.** MRs – Market share  $\Delta$  / Level of concentration

Level of concentration	Market share $\Delta$					
	0-10%	10.1-20%	20.1-30%	30.1-40%	40.1-50%	50.1-60%
0.1-20%	93.4	6.6	0	0	0	0
21-40%	70.7	24	4	1.3	0	0
41-60%	53.7	14.6	12.2	12.2	2.4	4.9
61-80%	55.6	33.3	11.1	0	0	0
81-100%	10	10	20	40	10	10

**Source:** elaborated by the author

When concentrations implied a level higher than that of the legal limit of 20%, a higher  $\Delta$  can be observed. What is interesting to notice is that between concentration levels of 41-60% and 61-80%, most  $\Delta$  were of a maximum of 20%, what means that economic agents

who already held a market share of at least 20% were increasing their proportion of market control<sup>289</sup>.

In cases in which the level of concentration was close to monopolist positions (levels between 81 and 100%), market share  $\Delta$  was better distributed, although small  $\Delta$  were a minority. This means that these positions were achieved through a considerable incorporation of market share, most notably of shares between 30.1 and 40%. Even in those situations, however, and similarly to the previous cases, companies that achieved at least 80.1% of market share already held a considerable amount of the market: at least 40% when  $\Delta$  was between 30.1 and 40%. The economic phenomena regulated by the field of competition policy that implied the highest levels of concentration were therefore largely composed by increases of the shares held by agents that already controlled a considerable amount of the markets.

Like operations in general, horizontal integration was also concentrated in certain economic sectors. Among the 27 areas of economic activity regulated by CADE, 10 of them comprised 70% of horizontal concentrations.

**Table 42.** MRs – Economic sectors of horizontal concentrations

Economic Sector	%
Essential and Infrastructure Services	11.6
Informatics and Telecommunication Industry	11.2
Chemical and Petrochemical Industry	9.2
Food Industry	6.9
Electro-electronic Industry	5.9
General Services	5.9
Pharmaceutical and Hygiene Industry	5.6
Metal Industry	5.6
Automotive Industry and Transports	4.3
Mechanical Industry	4
Others	29.89

**Source:** elaborated by the author

The proportion in each sector is more or less consistent with the overall distribution of sectors in CADE's regulatory practice. Hence, liberalized and privatized economic areas counted for most effective concentrations decided by CADE. The levels of concentration generated in the analyzed cases varied, however, among these sectors. Although those that

<sup>289</sup> Although the table indicates that 0% of operations resulting in levels of concentration between 61% and 80% had market share  $\Delta$  higher than 30%, 5 cases with such profile were identified in the sample. Their absence in the table is due to the different weights each case received in the stratified sample.

congregate the largest amount of concentrations generally figure in all levels, other sectors that were less represented in the sample, or even in the distribution of cases with horizontal integration are frequent in certain strata. Nevertheless, the highest level of concentration was dominated by sectors in which several privatizations and deregulation measures happened, such as the “Chemical and Petrochemical Industry”, the “Informatics and Telecommunication Industry”, and the sector of “General Services”, which together account for 75% of the highest concentrations decided by CADE, even though they represent 23.2% of the sample.

**Table 43.** MRs – Economic sectors in each level of concentration

Level of concentration	Economic sector	%
0.1-20%	Essential and Infrastructure Services	15.50%
	Informatics and Telecommunication Industry	
	Chemical and Petrochemical Industry	8.90%
	Electro-electronic Industry	
	Mechanical Industry	6.50%
20.1-40%	Informatics and Telecommunication Industry	17.30%
	Pharmaceutical and Hygiene Industry	10.70%
	Chemical and Petrochemical Industry	8.00%
	Metal Industry	
	Essential and Infrastructure Services	6.70%
Food Industry		
40.1-60%	Retail Sector	14.60%
	Mineral Extraction	9.80%
	Chemical and Petrochemical Industry	7.30%
	Pharmaceutical and Hygiene Industry	
	Metal Industry	
	Essential and Infrastructure Services	7.30%
	General Services	
Food Industry		
60.1-80%	Retail Sector	20.00%
	Beverage Industry	
	Metal Industry	
	Chemical and Petrochemical Industry	10.00%
	Electro-electronic Industry	
	Automotive Industry and Transports	
	Transportation and Storage Services	
80.1-100%	Chemical and Petrochemical Industry	25.00%
	Informatics and Telecommunication Industry	
	General Services	

Pharmaceutical and Hygiene Industry	12.50%
Retail Sector	

Source: elaborated by the author

With respect to the movement of capital observed in operations regulated by CADE, concentrations involving Brazilian firms implied horizontal integrations more often than those in which a foreign company participated. As the table below illustrates, the highest proportion of concentrations in each kind of capital movement was of acquisitions among Brazilian firms, followed by the acquisition of a foreign company by a Brazilian corporation. Those operations in which foreign capital expanded, in turn, generated horizontal concentrations in a lower amount.

**Table 44.** MRs – Horizontal concentration according to capital movement

Capital movement	Horizontal Concentration
Brazilian > Brazilian	48.60%
Brazilian > Foreign	40.00%
Foreign > Brazilian	32.10%
Foreign > Foreign	32.00%
Brazilian - Brazilian	46.40%
Brazilian - Foreign	23.10%
Foreign - Foreign	37.50%

Source: elaborated by the author

That acquisitions among Brazilian firms implied a higher amount of horizontal concentrations is quite logical, since they were operations involving firms that already acted in the Brazilian market. The lower presence of horizontal concentrations when foreign firms were in the active pole of the relation may be explained by two reasons. First, among those solely involving foreign companies (Foreign > Foreign, and Foreign – Foreign) many were global operations in which one or even all companies had no direct activity in Brazil, and horizontal concentration was thus not observed. Second, in those situations in which foreign firms acquired or cooperated with Brazilian companies, the lower degree of horizontal integration suggests that in many cases they entered the Brazilian market for the first time, i.e. there was no juxtaposition of activities. In other words, these were operations of expansion of foreign capital into Brazil, which didn't necessarily imply horizontal integration.

For instance, in 25 of the MRs captured in the sample in which a foreign firm acquired assets of a Brazilian corporation, CADE considered the operation a simple “restructuring of shares”, as a new share-holder entered the company, or explicitly acknowledged the



“substitution of economic agent” and the “entering” of a foreign competitor into Brazil. In 22 of these cases, no horizontal integration was observed by CADE. Examples of such cases are the MR numbers 11/1994, 08012.005226/1998-57 and 188/1997, in which foreign companies bought Brazilian firms, and that implied levels of concentration of 65%, 50% and 38%, respectively, and not variations of market shares.

Although less prone to generate horizontal integrations, when they did, operations involving foreign firms generally resulted in higher levels of concentration. The table below illustrates the frequency of each level of concentration according to the capital movement. Only operations that resulted in horizontal concentrations are considered. As it illustrates, the most frequent level of concentration generated by operations only involving Brazilian firms was between 0-20%.

**Table 45.** MRs – Level of concentration according to capital movement

Capital movement	Level of concentration				
	0-20%	21-40%	41-60%	61-80%	81-100%
Brazilian > Brazilian	57.4	18.5	14.8	5.6	3.7
Brazilian > Foreign	57.1	28.6	14.3	0	0
Foreign > Brazilian	41.5	26.4	20.8	5.7	5.7
Foreign > Foreign	55.3	27.6	14.6	1.6	0.8
Brazilian X Brazilian	84.6	15.4	0	0	0
Brazilian X Foreign	56.2	31.2	6.2	0	6.2
Foreign X Foreign	62.5	20.8	4.2	0	12.5

**Source:** elaborated by the author

When it comes to the expansion of foreign capital into the country, however, the frequency of higher levels of concentration increased. In the movement “Foreign > Brazilian”, for instance, 58.5% of operations generated horizontal concentrations higher than the legal limit. In 32.2% of these operations, the resulting level of concentration was even higher than 40%. The relationship between levels of concentration and capital movement thus reveals that MRs decided by CADE not only reflect the entrance of foreign firms into the country, but also the consolidation of their participation in the Brazilian market.

The proportion of market share incorporated in operations that implied horizontal integration ( $\Delta$ ) also reveals that foreign companies achieved higher proportions of the market if compared to Brazilian firms. While more than 80% of acquisitions by Brazilian firms implied a market share  $\Delta$  of a maximum of 10%, the acquisition of capital by foreign corporations at this level was 77.7% in the case of another foreign company being acquired, and 66% when a Brazilian company was bought. Although to a lower degree, as the table

below reveals, similar trends can be observed in other capital movements that benefited foreign companies. This means that operations through which foreign companies consolidated their position in the Brazilian economy not only generally implied higher levels of concentration, but also a more intense process of concentration.

**Table 46.** MRs – Market share  $\Delta$  according to capital movement

Capital movement	Market share $\Delta$					
	0-10%	10.1-20%	20.1-30%	30.1-40%	40.1-50%	50.1-60%
Brazilian > Brazilian	86.8%	5.7%	1.9%	3.8%	0.0%	1.9%
Brazilian > Foreign	81.8%	13.6%	4.5%	0.0%	0.0%	0.0%
Foreign > Brazilian	66.0%	15.1%	9.4%	3.8%	1.9%	3.8%
Foreign > Foreign	77.7%	16.5%	3.3%	1.7%	0.8%	0.0%
Brazilian - Brazilian	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Brazilian - Foreign	78.6%	21.4%	0.0%	0.0%	0.0%	0.0%
Foreign - Foreign	79.2%	8.3%	0.0%	12.5%	0.0%	0.0%

**Source:** elaborated by the author

Finally, in respect to operations related to privatizations, 45% of them implied horizontal concentrations, which is a higher proportion if compared to the overall average of 34.8% horizontal integrations in the sample. In these cases, the level of concentration implied by operations was also slightly different from that of general cases implying horizontal concentrations. MRs of privatizations contained higher levels of concentration in certain strata. For instance, while the general distribution in the level 0-20% was of 19.2% of cases, privatizations were of 25%.

**Table 47.** MRs – Level of concentration in privatizations

	Level of concentration (%)				
	0-20%	21-40%	41-60%	61-80%	81-100%
Privatization	25	15	5	0	0

**Source:** elaborated by the author

Privatizations also implied more concentrations between the level of 21-40% than the general sample. Since the market share  $\Delta$  of these operations are also confined to the intervals of 0-10% (77.8%) and 10.1-20% (22.2%), it is possible to assume that privatizations that compose the sample were mostly acquisitions by companies that until then didn't hold large proportions of the sector. An illustration of this profile can be seen in two MRs that concerned privatizations in which CADE did not detect horizontal concentrations: 11/1994 and 53500.002120/1998. Both of them were acquisitions of state-owned corporations by foreign companies, and were considered by CADE as a mere substitution of economic agent, as they

entailed the transfer of assets to companies that didn't previously hold market shares in the same market. In such a context, the transfer of state control over an economic sector to a private agent (in one of them of 65% of the market) was seen as a “pro-competitive operation”, as no “modification in the level of concentration” was detected<sup>290</sup>.

### 6.1.2 *Regulatory responses to economic concentrations*

Having described the profile of the economy regulated by the field of competition policy in Brazil, I now portray how these economic phenomena were regulated by CADE. In other words, in this section I empirically assess how the field facilitates and regulates the operations described above. This description entails two dimensions: first, the depiction of the profile of economic concentrations that suffered some kind of restriction by CADE; second, the identification of the types of restrictions imposed.

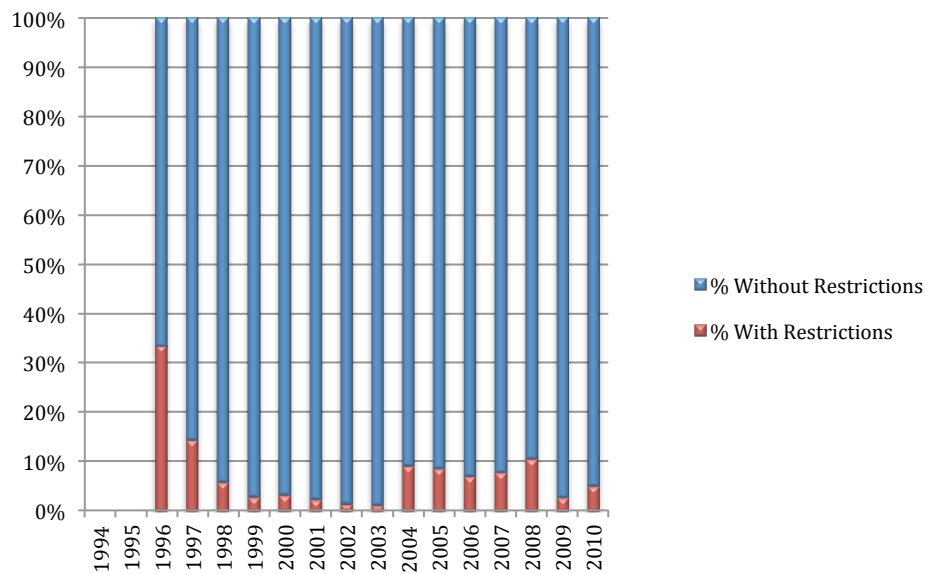
As described in Chapter 3, in the universe of decisions made by CADE between 1994 and 2010, the proportion of cases that suffered some sort of restriction was 4.9%. In the sample here analyzed, a similar number was found: 5.3%. As the graph below evidences, the proportion of restrictions in the initial years grasped in the sample was higher than the overall average in the initial years of the analyzed period, dropping since 1997 and stabilizing by 2003. The years of 1994 and 1995 are not depicted in the graph due to the small number of decisions of those years in the sample. However, as discussed in the previous chapter, from 1994 to mid 1996, CADE imposed restrictions in 77.77% of MRs – the reason for the institutional crisis precipitated in 1996. With the arrival of new commissioners in 1996, the number of restrictions dropped dramatically: 25% of the 16 MRs decided by this group in 1996 were approved with restrictions, 20% of 41 MRs in 1997, and finally 3,5% of the universe of 117 MRs in 1998.

Although the graph cannot be taken as a perfect representation to these initial years, since decisions from the period are of a small number, it does evidence the fall of restrictions implied by a new profile of commissioner that dominated the Council. It also illustrates how the decision-making pattern initiated in the middle of 1996 was relatively stable over time – which may also be related to the dominance of the field by agents of the same circle.

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<sup>290</sup> Extracts from the rapporteur's opinion enacted in the MR number 53500.002120/1998, p.4.

**Figure 11.** MRs – Types of decision in time (1994-2010)



**Source:** elaborated by the author

Both in the universe of decisions and in the sample, some oscillations can be observed. The graph indicates that in 2004 occurred a raise in the level of restrictions, which can also be noticed in the universe of decisions. From this moment to 2008, the annual average of restrictions in the sample was of 8,6%, never below 7%, and even reaching 10,6%. However, also due to the small number of cases restricted, it is not possible to infer that in this period CADE became more restrictive. Since the number of restricted cases in the universe is very low, a single case corresponds to a high percentage of the total of cases restricted. Thus, the addition of one case may increase substantially the proportion of cases restricted in one year.

Moreover, the increase in the proportion of restrictions may be related to yet another reason: several of the MRs restricted between 2004 and 2008 were connected to a single economic phenomenon. For instance, the analyzed sample comprises 74 cases decided in 2004, of which 30 were approved with restrictions. Out of these 30, however, 14 MRs were concentrations mobilized by a single corporation that produces elevators and provides maintenance services – *Elevadores do Brasil Ltda*, controlled by the firm *Elevadores Otis Ltda*, which in turn belonged to the US group *United Technologies CO* –, which acquired service contracts of several smaller Brazilian firms.

**Table 48.** MRs – Cases with restriction (2004-2008)

Year	Total of cases	Cases with restriction	Cases connected
2004	74	30	1 operation connected to 14 MRs
2005	54	21	2 operations connected to 3 MRs each
2006	39	14	1 operation connected to 2 MRs
2007	57	20	2 operations connected to 2 MRs each
2008	96	41	1 operation connected to 6 MRs + 1 operation connected to 5 MRs + 2 operations connected to 2 MRs each

**Source:** elaborated by the author

Almost half of restrictions imposed in this year that were captured in the sample were thus linked to, in practice, a single movement of concentration. As the table above indicates, similar phenomena were also noticed in the subsequent years. If a restriction was imposed to one of these MRs, it was likely extended to the others. Thus, since the number of restricted cases is small both in the universe and in the sample, this multiplication of restrictions in what was actually a single movement of concentration led to an important proportional addition of restrictions, as a single case counts for an important percentage within the group of restricted cases. It is therefore not possible to conclude that CADE’s behavior in these years was more restrictive, but rather that the imposition of restrictions was largely stable over time – which is consistent with the finding described in the last chapter, that the field was historically dominated by a relatively homogeneous group of decision-makers<sup>291</sup>.

As with MRs in general, restrictions were concentrated in certain economic sectors. Ten sectors congregate 77% of all restrictions imposed by CADE. Surprisingly, however, not in the same proportion of cases presented in each of those sectors. As the table below illustrates, sectors that by far account for most restrictions imposed by the Brazilian antitrust authority were those of “General Services” and “Chemical and Petrochemical Industry”, followed by the “Food Industry”.

**Table 49.** MRs – % of restrictions in economic sectors

Economic Sector	% of Restrictions
General Services	18.20%
Chemical and Petrochemical Industry	15.90%
Food Industry	9.10%
Retail Sector	6.80%
Pharmaceutical and Hygiene Industry	4.50%
Non-Metallic Mineral Products Industry	4.50%

<sup>291</sup> Indicative of the stability of CADE’s decision making in time is the result of the Likelihood Ratio for the association between type of decision and year of decision: 0,134 – way above the level of significance of 0,05.

Mineral Extraction	4.50%
Metal Industry	4.50%
Essential and Infrastructure Services	4.50%
Beverage Industry	4.50%
Others	33.00%

**Source:** elaborated by the author

Out of the 10 sectors most frequently present in CADE’s decisions, only 6 figure among those in which restrictions were more intensely imposed. This is an indication that the sectors in which more concentrations happened received less restrictions, most notably the areas of “Essential and Infrastructure Services” and “Informatics and Telecommunications Industry”, which together comprised almost 20% of all operations analyzed by CADE. Exceptions to this trend are the “Chemical and Petrochemical Industry” and the “General Services” sector, which entailed more than 15% of operations and respond for 34% of restrictions. Moreover, with the exception of the “Non-Metallic Mineral Products Industry”, they all figure among those that generated higher levels of concentration, even though they were not frequent areas of economic activity in the overall sample.

A finding that supports this idea is the proportion of restrictions within each sector. As the table below illustrates, sectors that were frequent among those which generated higher levels of concentration, such as the “Beverage Industry”, “General Services”, and “Non-Metallic Mineral Products Industry” appear as those that were proportionally more restricted by CADE. In these areas of economic activity, as well as in sectors such as the “Retail Sector” and others, the percentage of restrictions is from two to three times higher than the overall average of restrictions observed in the sample.

**Table 50.** MRs – % of restrictions within economic sectors

Economic Sector	% of Restrictions within Sector
Beverage Industry	15.4
General Services	14.0
Non-Metallic Mineral Products Industry	11.8
Wholesale Trade	11.1
Retail Sector	11.1
Food Industry	11.1
Textile Industry and Leather Products	9.1
Chemical and Petrochemical Industry	9.0
Pulp and Paper Industry	8.3
Insurances and Pension	7.7
Mineral Extraction	6.9
Agriculture	6.2

**Source:** elaborated by the author

In respect to the scope of operations, the types of decisions enacted by CADE also tended to be concentrated. While operations of national scope counted for 57.1% of cases, and of global scope corresponded to 42.9% of MRs presented, the proportions of restrictions in each category were much more unbalanced. Out of all restrictions imposed by CADE, almost 85% tackled operations of national scope. This means that while MRs of national scope were restricted 7.8% of the time (higher than the overall average), global operations received restrictions in only 1.9%.

**Table 51.** MRs – Restrictions and scope of operations

Scope	% With Restrictions	% of Restrictions
National	7.8	84.8
Global	1.9	15.2

**Source:** elaborated by the author

Although there is an association between the scope of the operation and the type of decision taken by CADE, the difference likely reflects the lower incidence of effects to the Brazilian market encompassed by global operations<sup>292</sup>. While operations of national scope by definition were connected to the Brazilian market, several of those of global dimension entailed at least one corporation that did not perform any activities in Brazil.

In respect to capital movement, the types of decision tended to be associated with three forms of operations. As the table below indicates, five types of movement were above the overall average of restrictions, and only the movements involving exclusively foreign corporations were below it.

**Table 52.** MRs – Restrictions and capital movement

Capital movement	% with restriction
Brazilian - Foreign	12.3
Brazilian > Brazilian	10.8
Foreign > Brazilian	7.9
Brazilian - Brazilian	6.9
Brazilian > Foreign	5.6
Foreign > Foreign	1.8
Foreign - Foreign	1.6

**Source:** elaborated by the author

<sup>292</sup> The Pearson Chi-Square test for the association between scope and type of decision resulted in .000, thus indicating a statistically significant association.

The highest incidences of restrictions were located, respectively, in the movements “Brazilian – Foreign” and “Brazilian > Brazilian”. As the tests of association ran in the analysis indicate, in both cases there was a statistically significant association, which means that these forms of capital movement do tended to be more restricted than the overall sample<sup>293</sup>. A third type of capital movement in which an association with restrictive decisions was detected was that of “Foreign > Foreign”<sup>294</sup>. In this case, as the percentage of restrictions is almost three times below the average, the result suggests that acquisitions among foreign firms tend to be less restricted than other forms of capital movement. In the other four species movements, although they indicate a level of restrictions above the average of 5,3% observed in the sample, or in the case of “Foreign – Foreign” way below it, no statistical association was noticed<sup>295</sup>.

These results cannot be interpreted automatically as institutional “preferences” in respect to the movements of capital. In the case of the movement “Brazilian – Foreign”, in which the highest amount of restrictions was observed, the association with restrictive decisions must be specially nuanced. This is due to the same cause that explains the “inflation” of restrictions in the year of 2004. Out of the 35 cases of the type “Brazilian – Foreign” with restrictions that compose the sample, 16 were connected to the mentioned corporation that produces elevators. Decided between 2004 and 2006, these cases correspond to 45% of the “Brazilian – Foreign” movement that was restricted in the sample. Thus, if these cases were taken as part of a single economic phenomenon, restrictions in this type of movement would be much lower.

The statistical association between the high amount of restrictions and the movement “Brazilian > Brazilian”, as well as the low incidence of conditions imposed for operations of the form “Foreign > Foreign”, must also be taken cautiously. The different responses given to each type of movement cannot be separated from the fact that while operations of the form “Brazilian > Brazilian” virtually always implied effects on the Brazilian market, those of “Foreign > Foreign”, as already mentioned, encompassed several operations of global scope without any effects on Brazil. Thus, it is understandable why operations that almost always imply effects to the market regulated by CADE were more restricted, while those that often didn’t were less restricted.

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<sup>293</sup> The Pearson Chi-Square test for the association of the movements “Brazilian > Brazilian” and “Brazilian-Foreign” with the decision type resulted in, respectively, 0,005 and 0,008.

<sup>294</sup> The Pearson Chi-Square test for this movement was 0,000, suggesting a strong association.

<sup>295</sup> The Pearson Chi-Square for these movements were the following: 0,098 in “Foreign > Brazilian”; 0,692 in “Brazilian – Brazilian”; 0,928 in “Brazilian > Foreign”; and 0,173 in “Foreign – Foreign”.



However, these findings are specially relevant in the case of the movement “Foreign > Brazilian”, the second most frequent type of movement in the overall sample. Although higher than the average, the percentage of restrictions imposed in this case was not statistically significant. Since they entailed the acquisition of Brazilian corporations, these operations can be compared to the “Brazilian > Brazilian” movement. Curiously, thus, while the latter received restrictions above the average, the former were not so in a statistically significant amount. Moreover, as presented in the previous section, the movement “Foreign > Brazilian” more often implied higher levels of concentration and the incorporation of larger amounts of market share if compared to the movement “Brazilian > Brazilian”. It is thus possible to assume that the entrance of foreign capital in Brazil through the acquisition of foreign corporations tended to be less restricted than the concentration among Brazilian firms.

The incidence of restrictions in cases involving privatizations was also higher than the overall average: 9.5% of cases involving privatization were restricted. However, given that these cases are largely a minority in the analyzed sample, the tests of association indicate no statistical significance to these averages<sup>296</sup>. Therefore, even if higher at first sight, restrictions in privatizations do not deviate from the overall tendency observed in the regulatory practice.

In respect to the types of integration observed in the sample, as the table below indicates, the percentage of restrictions is higher than the average for both vertical and horizontal concentrations.

**Table 53.** MRs – Restrictions in types of integration

Type of integration	% of restrictions
Vertical	8.3
Horizontal (including vertical or not)	10.2

**Source:** elaborated by the author

However, a statistically significant association was identified only in cases that implied at least some horizontal concentration<sup>297</sup>. This means that, as it could be expected, the imposition of restrictions tends to be associated with the existence of horizontal integration.

<sup>296</sup> In the Pearson Chi-Square test of association between privatizations and decision type, the result was 0,379, and in the case of acquisitions by state-owned corporations, it was of 0,169.

<sup>297</sup> In the case of vertical integration, since the sample does not provide enough cases for running a Pearson Chi-Square test, I relied on Fisher’s Exact Test, whose result was 0,313. In cases implying horizontal concentrations, in turn, Pearson Chi-Square test could be used, and resulted in 0,000, indicating a strong association with the imposition of restrictions.

As the table below indicates, the proportion of restrictions imposed also tended to increase accordingly to the level of concentration. In other words, the higher level of concentration implied by operations, the more restricted they were<sup>298</sup>.

**Table 54.** MRs – Restrictions in levels of concentration

Level of concentration	% with restriction
0-20%	4.2
21-40%	11.8
41-60%	15.0
61-80%	22.2
81-100%	60.0

**Source:** elaborated by the author

In dismembering the analysis of association between the type of decision with each level, however, it was possible to observe that the association is statistically significant in only three extracts: those between 21-40%, 41-60%, and 81-100%<sup>299</sup>. This means that, on the one hand, it is not possible to assume a relation between the lower proportion of restrictions imposed in the level 0-20% if compared to the average, and on the other, the higher percentage of restrictions in the level 61-80%.

In any case, the crossing of these variables indicate that although restrictions were imposed above the average in certain levels, in four of them the majority of operations was not restricted, even if they surpassed the legal limit of a 20% market share. Between 21-40% concentration levels, almost 88% of operations were approved without restrictions, and between 41-60%, 78% of operations were not contested by CADE. Thus, in practice, the vast majority of cases generating levels of concentrations of up to 80% were majoritarily approved.

In respect to the market share  $\Delta$  implied in operations regulated by CADE, the association between the degree of incorporation and the imposition of restrictions was also observed. As the table below illustrates, the higher the percentage of market share embedded in operations, the larger the proportion of cases restricted<sup>300</sup>. Market shares higher than 50%

<sup>298</sup> The Likelihood Ratio for this association was of 0,000, indicating a strong connection between the imposition of restrictions and the level of concentration.

<sup>299</sup> The Fisher's Exact Test for these levels were of, respectively, 0,014, 0,015, and 0,000. In the other two extracts (0-20% and 61-80%), the results did not indicate a statistically significant association, resulting in, respectively, a Pearson Chi-Square of 0,484, and a Fisher's Exact Test of 0,078.

<sup>300</sup> The Likelihood Ration for the association between the market share  $\Delta$  and the type of decision resulted in 0,001, indicating a connection between the variables.

are not displayed in the table due to the small number of cases present in the sample, which do not generate a relevant percentage in running the aggregate data.

**Table 55.** MRs – Restrictions and in market share  $\Delta$

Market share $\Delta$	% with restriction
0-10%	7.2
10.1-20%	15.4
20.1-30%	36.4
30.1-40%	10.0
40.1-50%	50.0

**Source:** elaborated by the author

In evaluating the association in each level of market share separately, in only two cases the association was statistically confirmed: those between 10.1-20%, and 20.1-30%. In the other levels, the association was not statistically relevant (notably due to the decreasing amount of cases in the sample when  $\Delta$  increases). However, as the increase from the second to the third levels were statistically relevant, it is likely that as  $\Delta$  increases, so does the proportion of restrictions.

A more comprehensive understanding of how the Brazilian field of competition policy regulates economic concentrations demands not only an overview of what sorts of cases are restricted, but also *what kinds of restrictions* are imposed and *when*. Within the analyzed sample, among the 5.3% of MRs that suffered some form of restriction by CADE, and in the vast majority of them behavioral conditions were imposed for the approval of the operation.

**Table 56.** MRs – Types of restriction

Type of restriction	%
Behavioral	88.5
Structural	11.2

**Source:** elaborated by the author

As the table above indicates, in only 11.2% of cases restricted, a structural condition was imposed, i.e. in only a minority of cases the actual market concentration was tackled through the imposition of measures to de-concentrate the market. In the overall sample, this means that while 94.7% of economic concentrations were approved without conditions, 4.7% received only behavioral restrictions, and 0.6% of them were structurally limited in a certain way. Among cases that received a structural restriction, quite logically, all of them implied horizontal integrations.

Within behavioral restrictions, a relevant pattern emerged from the sample: 68.3% of these restrictions focused only on so-called “non-compete clauses”. These are contractual clauses often signed between the agents involved in an economic concentration determining that during a certain period of time and/or in a determinate geographical region the acquired agent will abstain for developing the same economic activity that is being transferred. In CADE’s decision-making, thus almost 70% of behavioral restrictions only stipulated changes in this clause, often imposing the reduction of the “non-compete clause” duration from 10 to 5 years, and its delimitation to the relevant market of the operation, which frequently meant the adoption of a local or regional geographical area, rather than national. This type of restriction correspond to 3.2% of the whole sample, and thus if it was excluded from the analysis, more substantive forms of behavioral restrictions actually entailed only 1.5% of cases.

Given the small number of cases restricted with a structural condition (22 out of 204 with restrictions that integrate the sample of 870 MRs), the possible association of the type of restriction with variables that entailed a series of different values – such as the year of decision and the economic sectors involved – was not statistically significant. This means that the imposition of structural restrictions is very likely unrelated to those aspects. Similarly, in the case of the scope of the operations restricted, although those of national dimension received structural conditions in a higher proportion than those of global scope (12,1% against 6,7%), there was no significant statistical association between the variables analyzed<sup>301</sup>.

Relations with the types of restriction can be nevertheless identified when the profile of the capitals involved in operations, as well as its impacts in terms of market shares are analyzed thoroughly. In the crossing the different types of capital movement with the imposition of structural restrictions among cases that received some sort of restriction (n = 204), it is possible to notice that most of these conditions affected acquisitions of Brazilian firms by foreign corporations, followed by acquisitions by Brazilian companies (be it of national or foreign capital).

**Table 57.** MRs – Types of restriction and capital movement

Capital movement	% with behavioral restrictions	% with structural restrictions
Brazilian > Brazilian	90.4	9.6
Brazilian > Foreign	53.8	46.2
Foreign > Brazilian	87.7	12.3

<sup>301</sup> For this relation, the Fisher’s Exact Test resulted in 0,540.

Foreign > Foreign	96.9	3.1
Brazilian – Brazilian	71.4	28.6
Brazilian – Foreign	97.1	2.9
Foreign – Foreign	100	0.0

**Source:** elaborated by the author

However, as the table also illustrates, the proportion of structural restrictions imposed to each capital movement differs. Those capital movements in which the proportion of structural restrictions were highest involved the accumulation of capital by Brazilian firms: “Brazilian > Foreign”, in which almost half of operations restricted received a structural condition, and “Brazilian – Brazilian”. In testing the association between these variables, however, the only capital movement in which a statistically relevant connection was identified was that of “Brazilian > Foreign”<sup>302</sup>. Nevertheless, as in other situations mentioned above, this result must be nuanced, since different MRs connected to a single economic operation compose the sample. In the case “Brazilian > Foreign”, out of the 6 MRs in which a structural condition was imposed, 4 were linked to 2 operations in which the same corporation acquired assets from the same source<sup>303</sup>. Thus, if instead of 6 cases this variable is seen as comprising 4 MRs, the association with the capital movement “Brazilian > Foreign” likely disappears. In this case, the type of restriction imposed cannot therefore be associated with the capital movement entailed by operations regulated by CADE.

The higher incidence of structural restrictions in integrations benefiting Brazilian corporations is rather likely connected to the levels of concentration they generate. As already stated, these were the capital movements that more often entailed high degrees of concentration. The table above illustrates the proportion of each type of restriction imposed according to the level of concentration implied by the economic concentration<sup>304</sup>.

<sup>302</sup> Fisher’s Exact Test for the association between “Brazilian > Foreign” and the type of restriction resulted in 0,001.

<sup>303</sup> These cases were the following: MR numbers 08012.005226/2000-88 and 08012.005250/2000-17, through which the formerly state-owned mining company *Companhia Vale do Rio Doce* acquired foreign capital detained by the same group, and MR numbers 08012.011047/2004-11 and 08012.009419/2004-31, through which corporations of the cement sector owned by the Brazilian group *Votorantim* acquired assets of the same subsidiary of a Swiss conglomerate.

<sup>304</sup> The Likelihood Test for these variables resulted in 0,001, thus indicating a statistically relevant association.

**Table 58.** MRs – Types of restriction and level of concentration

Level of concentration	% with behavioral restrictions	% with behavioral restrictions excluding “non-compete clause”	% with structural restrictions
0-20%	4.2	0.0	0.0
21-40%	11.8	2.6	0.0
41-60%	12.5	2.7	2.5
61-80%	11.1	11.1	11.1
81-100%	30.0	20.0	30.0

**Source:** elaborated by the author

In respect to behavioral restrictions, it is possible to identify that in most levels the imposition of this type of condition is above the overall average only after an operation implied more than 20% of concentration. Although the proportion does not increase in a relevant amount until the 61-80% level, in the highest stratum of concentration almost a third of operations received some sort of behavioral restrictions.

However, if the majority of restrictions related to the “non-compete clause” are excluded from the analysis to evaluate the imposition of more substantive behavioral conditions, it is possible to formulate two conclusions. First, that within the legal limit of 20% no substantive behavioral restrictions were imposed, and between 21% and 60% they comprise a large minority of conditions. Second, only in the two highest levels substantive behavioral restrictions were frequent: in the level 61-80%, all restrictions were of this kind, and in the level 81-100%, two thirds of behavioral conditions were substantive. Thus, substantive behavioral restrictions tend to grow according to the increase in the level of concentration – but nevertheless comprise a vast minority in the sample.

Similarly, in respect to structural conditions, the proportion of restrictions rises in each stratum. Interestingly, however, no structural restrictions were identified when operations generated up to 40% of concentration. In other words, operations in the sample resulting in up to 40% of concentration had never faced a challenge by CADE in respect to the very control of market share. Moreover, only in a minority of these cases substantive behavioral conditions were imposed. Additionally, from this point to 80%, no less than 89% of MRs were approved without structural conditions. As with behavioral restrictions, it is only in the highest level that the proportion becomes more relevant, reaching a third of cases – which can nevertheless be interpreted as an indication that in operations that result in close to monopolistic positions, two thirds are not structurally challenged.

In respect to the market share  $\Delta$  implied by restricted operations that involved horizontal integration, conclusions must be drawn cautiously. Since the presence of restricted cases in the universe and by extension in the sample was extremely low, so was the number of restricted cases in many  $\Delta$  strata, and thus the value of a single case may significantly influence the whole proportion analyzed. I was able to identify an association with the types of restriction in the first 5 extracts created for the analysis<sup>305</sup>. As the table below illustrates, behavioral restrictions were higher than structural conditions in  $\Delta$  up to 30%. Structural restrictions, on the other hand, proportionally increased as the level of concentration raised, reaching a third of operations restricted that implied a market share acquisition of 40.1% to 50%.

**Table 59.** MRs – Types of restriction and market share  $\Delta$

Market share $\Delta$	% with behavioral restrictions	% with behavioral restrictions excluding “non-compete clause”	% with structural restrictions
0-10%	7.2	5.5	0.4
10.1-20%	10.3	7.5	5.1
20.1-30%	27.3	16.7	9.1
30.1-40%	9.1	9.1	9.1
40.1-50%	33.3	0.0	33.3

**Source:** elaborated by the author

The finding that  $\Delta$  up to 30% led to more behavioral than structural restrictions is specially relevant if it is taken into account that, as shown in Table 41, most operations that resulted in level of concentrations of 41-60% and 61-80% were achieved through this amount of market share acquisition. The market share  $\Delta$  of a maximum of 30% was observed in 80.5% of operations that resulted in concentrations between 41-60%, and in 100% of operations that implied a level of integration of 61-80%. Therefore, not only level of concentrations of up to 40% did not receive structural restrictions, but these were also lower than behavioral conditions in most concentrations that resulted in levels between 41% and 80%.

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The trends mapped in the sample in respect to the types of economic phenomena regulated by competition policy, and the way it regulates it can also be noticed in the 8 cases ever entirely rejected by CADE out of the 5959 MRs decided between 1994 and 2010, which

<sup>305</sup> The Likelihood Ratio for this association in the first 5 extracts resulted in 0,000, but indicated no statistical significance when  $\Delta$  was above 50%. This may be related to the small number of cases that fit into that category, which does not enable to extract any conclusions.

were excluded for the sample to be analyzed separately. Corresponding to 0.13% of economic concentrations that entered the field of competition policy in Brazil, these MRs are no exception to what was described. As the table below indicates, they fit, for instance, the profile of cases that received structural restrictions (in this case, the very de-constitution of the operation), as they all implied levels of concentration above 60%, being 5 in the highest level constructed for analysis: between 80% and 100%.

**Table 60. MRs – Rejected cases**

Year of decision	Economic Sector	Capital movement	Level of concentration	Market share $\Delta$
1994	Non-Metallic Mineral Products Industry	Brazilian – Brazilian	68.0	?
1994	Automotive Industry and Transports	Foreign > Foreign	95.5%	83.0
2000	Agriculture	Brazilian – Brazilian	85.0	?
2000	Agriculture	Brazilian – Brazilian	70.0	?
2004	Food Industry	Foreign > Brazilian	100.0	28.0
2008	Non-Metallic Mineral Products Industry	Foreign X Foreign	98.0	27.0
2009	General Services	Brazilian – Brazilian	100.0	24.9
2010	Non-Metallic Mineral Products Industry	Brazilian > Brazilian	71.0	13.0

**Source:** elaborated by the author

Although in three of these cases I was unable to identify the market share  $\Delta$  implied by the operation, in other 4 it was possible to observe that, as in the sample, most concentrations resulting in the highest levels of horizontal integration entailed shares of up to 30%. This means that corporations that already held a considerable amount of the market frequently mobilized the rejected operations, as most of those structurally restricted.

The actual extension of rejections, which is already minimal if compared to the universe of decisions, can nevertheless be even more nuanced if some specificities involved in at least 6 operations are taken into account. For instance, two of the rejected MRs were decided in the first year of competition policy enforcement in Brazil under the reformed law of 1994<sup>306</sup>. One of them was precisely the very first MRs presented to CADE. As discussed in Chapter 5, this was the period in which CADE, by then with a composition formed by more traditional lawyers and economists, was extensively criticized by its “excessive” interventionism. Thus, if only cases that happened after the “revolution” of economics in

<sup>306</sup> The first was the acquisition among two Brazilian firms in the roof tiles sector (*Eternit* and *Brasilit*), and the second was an international operation through which *Álbarus S.A. Indústria e Comércio* acquired *Rockwell do Brasil S.A.*, both subsidiaries of two US conglomerates.



1996 are considered (a total of 5953 in the universe of MRs that I mapped), the proportion of restrictions drops slightly from 0,13% to 0,10%.

Already under the period inaugurated by the “revolutionary” council of 1996 two other MRs rejected also had special contours. These were the operations involving several producers of alcohol fuel extracted from sugar cane. One of them, presented on March 1999, proposed the creation of a joint-venture named “*Brasil-Álcool S.A.*”, which would be responsible for coordinating the export of sugar and alcohol of 84 Brazilian corporations, and implied a concentration of 70% of the national market<sup>307</sup>. The other operation, presented to CADE on May 1999, entailed an “agreement” subscribed by 181 Brazilian corporations of the sector to submit the commercialization of alcohol fuel exclusively to a company that was being created with that purpose, the “*Bolsa Brasileira do Álcool*”, and implied a concentration of 85% of the national market<sup>308</sup>.

Both operations were a strategy of the Brazilian alcohol industry – landowners and sugar cane producers – to face the effects of the deregulation and liberalization policies that were being implemented since the early 1990s, but most intensely by the end of that decade. The sugar cane and alcohol sectors in Brazil historically counted with extensive participation of the state. In 1975, following the oil crisis of 1973, the Brazilian state started to subsidize the development of alcohol fuel as an alternative to the supply of oil derivatives, notably gas. Prices were administered, and exports of sugar and alcohol, for instance, controlled by a governmental organ named “*Institute of Sugar and Alcohol*” (IAA). In 1990, among the several measures taken by Collor de Mello to abolish price control mechanisms, the extinction of the IAA was determined<sup>309</sup>. With the enactment of the law 8.178 of 1991, through which several formerly administered prices were liberalized, the sugar cane sector was deregulated. Only in 1998, however the movement would be completed: through the ordinance number 275 of the Ministry of Finance, it was determined that the prices of sugar, sugar cane and alcohol were to be fully liberalized on February 1<sup>st</sup> 1999<sup>310</sup>.

As the lawyer who represented those firms in the mentioned MRs – Magalhães, the same that worked in the reform of the field – affirmed in an interview, those measures nearly “broke” the sector:

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<sup>307</sup> MR number 08012.002315/1999-50.

<sup>308</sup> MR number 08012.004117/1999-67.

<sup>309</sup> Decree 99.240 of May 7<sup>th</sup> 1990.

<sup>310</sup> Attempts were to implement this measure were happening since 1996, but were eventually postponed until 1999.

The government put the alcohol sector, which was always administered, into the market. Price was administered, production was administered, everything. All of a sudden, it was gone. [...] The sector was broken. The administered price was 35 cents, and became 12 cents.

The idea behind both MRs was thus to “survive” these measures. The first MRs comprised the creation of an “official cartel”, to be legalized by CADE. As Magalhães explained, this operation aimed at “blocking 20% of the national stocks of alcohol within the industries, to decrease the supply and raise the prices”. According to him, the reception at SEAE was far from supportive, as he was told that “That was an industry protected by the government, with governmental money, and it should be let to break, since the efficient industries must survive, as the American model dictates”.

The second MRs, which congregated most producers in the country, also aimed to institute some sort of price administration – this time by market agents themselves. Instituted in 1999, the corporation created for such end was since the begging and intentionally of limited duration: to exist until April 2000 (the deadline could be extended until April 2001). At this point is where the nuance of these cases becomes clear: both MRs were rejected by CADE only on November 2000, thus after more than a year and a half each of them was presented. In the meantime, the “official cartel” was in effect, achieving its goals of administering production and recovering prices hammered by deregulation.

Although these MR figure as “rejected” cases in CADE’s decisions portfolio, in practice they can be seen as cases that produced its effects and were not actually challenged by regulation. Moreover, these cases reveal how 2 of the only 8 rejections imposed by CADE were absolutely aligned with the broader impulses of deregulation and liberalization. Thus, if these cases are not considered as proper rejections, the proportion of cases integrally prohibited by CADE after it became “technical” drops once again, as only 4 cases subsist: from 0.10% to 0.06%.

In 2004 and 2009, two other cases rejected by CADE contained idiosyncrasies that are worth mentioning. The first was the acquisition by the Swiss company *Nestlé* of Brazilian chocolate industry *Garoto*<sup>311</sup>. Presented in 2002, the MR was rejected by CADE in 2004, giving start to a judicial battle that is still unresolved. In practice, until now the 2004 decision has not been enforced<sup>312</sup>. The other case, of 2009, dealt with the transfer of health insurance

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<sup>311</sup> MR number 08012.001697/2002-89.

<sup>312</sup> Unsatisfied with CADE’s decision, *Nestlé* asked for the judicial review of the MR rejection, sustaining that CADE would have violated the deadline for evaluating the concentration, and its decision would be thus null. The latest news about the case suggest that the Judiciary has decided to determine CADE to cast a new decision,

clients and rent contracts of a hospital located in a countryside city of the state of Rio Grande do Sul to a local medical cooperative<sup>313</sup>. What is interesting about this case is that the 100% of market concentration CADE observed to impose the rejection concerned the market of a single municipality of less than 300 thousand inhabitants. This was thus a case of extremely localized dimension, not an integration of broader scope or higher economic impacts.

## 6.2 The regulation of corporate conduct

While the regulation of economic concentrations stands for what mainstream narratives define as the “preventive” role of CADE, the control of the so-called “anticompetitive conduct” and “restrictive practices” of corporations comprises what is seen as a second key-pillar of the Brazilian antitrust authority’s activities: its “repressive” function. This role is performed through Administrative Procedures (APs) in which CADE decides if a certain conduct such as the formation of a cartel infringes the competition act, and if so stipulates measures to revert the conduct and monetary fines. Differently than MRs, and quite logically, APs are not initiated by the corporations that are the actual subjects tackled by CADE. Rather, they may begin through the representation of different agents: individuals, corporations that accuse other companies of anticompetitive conduct, governmental organs such as the Public Prosecutor’s Office, secretariats of the Executive power, and the Legislative power in its distinct federative levels (from municipalities’ councils to the National Congress), non-governmental organizations such as consumer defense institutions, and the SBDC organs itself – be it CADE, SDE, or SEAE.

As described in Chapters 1 and 5, the regulation of anticompetitive conduct through AP is often seen as historically precarious by mainstream narratives and the agents involved in the field of competition policy. Given the extensive demand produced by the more than 6 thousand MRs decided by CADE between 1994 and 2010, during most of this period APs would have not achieved a prominent position among the authority’s priorities. Only in 2003, these narratives almost unanimously suggest, with the arrival of a new group of professionals in SDE, APs gained a new impulse. The so called “shift of focus” from MR to AP promoted since then would in turn represent a modernizing turning point in the field’s history, as the

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but an appeal to the Brazilian Supreme Court would still be opened to the antitrust authority. See for instance, the article published in *Valor Econômico* of March 5<sup>th</sup> 2012, titled “*Presidente do CADE se diz impedido de analisar caso Nestlé-Garoto*”.

<sup>313</sup> MR number 08012.008853/2008-28.

regulation of conduct is often seen by the mainstream antitrust thinking as the priority to be pursued in regulation, instead of economic concentrations.

In this section, I thus present the results of the quantitative study based on a sample of 483 AP decided by CADE between 1994 and 2010. As with MR, this sample provides a representative view of the phenomena that demanded the field's operation during practically the whole period under the reformed law of 1994. Moreover, the study developed with this sample enables constructing a profile of "conduct" that "entered" CADE and, at the same time, of the field's responses to them. It thus complements the empirical description of what economy is regulated by competition policy in Brazil and how it's regulated. In section 6.2.1, I describe the profile of the economic phenomena regulated by CADE through AP accordingly to the variables described in Chapter 3. In section 6.2.2, I analyze how CADE regulated these phenomena.

### *6.2.1 The economy that is disciplined*

Given that CADE was already entitled to decide APs before the 1994 reform (as discussed in Chapter 4, one of the main novelties of reform was precisely the inclusion of a mandatory merger review system), and that this type of procedure has traditionally taken a lot of time from the moment it is initiated until the final decision by CADE<sup>314</sup>, most APs that compose the sample were not initiated in the year they were decided. Some of them began even before the 1994 reform. The cases that compose the sample can be thus divided in three groups according to the historical period they begun: prior to the 1994 reform, after the 1994 reform until 2003, and from 2003 onwards. The division within the period under the 1994 competition act is based on what mainstream narratives and the reconstruction of the field conducted in Chapter 5 indicate as the "shift" toward AP in 2003. By highlighting this period, although it entails only a few cases, it will be possible to compare it to the moments prior to such so-called turning point.

In the analyzed sample, 85% were initiated already under the 1994 competition act, but a considerable amount (15%) had begun prior to reform. Among the former, as the table below illustrates, 79.4% started between 1994 and 2003, and only 5.6% after 2003. Given the

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<sup>314</sup> For instance, according to CADE's annual reports, the annual average for the SBDC to decide an AP in 1996 was of 840 days and in 1998, 1748 days. Although faster in the 2000s, the length of trials was still considerable: in 2005, the average was of 461 days; in 2006, of 414; in 2007, of 503; in 2008, of 268; in 2009, of 361; and in 2010, of 567.

large length average of the transit of an AP within the SBDC, the latest procedures that compose the sample date of 2007.

**Table 61.** APs in time

Period	%
Pre-1994	15
1994-2002	79.4
2003 onwards	5.6

**Source:** elaborated by the author

If compared to the economic sectors that generated MRs, the economy regulated by AP is less varied. Instead of 29 sectors in which economic concentrations were observed, the regulation of corporate conduct comprised 26 areas of economic activity. Moreover, APs were much more concentrated in a few sectors in comparison to MRs. As the table below indicates, 8 economic sectors comprised more than 90% of APs decided by CADE between 1994 and 2010. Only three sectors entailed almost three quarters of decisions, and a single area of economic activity – that of “General Services” – accounted for more than half of APs in the sample.

**Table 62.** APs – Economic sectors of conduct

Economic sector	%	Cumulative %
General Services	52.6	52.6
Pharmaceutical and Hygiene Industry	12.5	65
Non-Metallic Mineral Products Industry	7.8	72.9
Chemical and Petrochemical Industry	6.4	79.3
Transportation and Storage Services	4.2	83.4
Food Industry	2.6	86
Retail Sector	2.1	88.2
Beverage Industry	2.1	90.2
Essential and Infrastructure Services	2	92.3
Communication and Entertainment	1.2	93.5
Agriculture	0.8	94.3
Civil Construction	0.7	95
Wholesale Trade	0.7	95.7
Financial Services	0.6	96.3
Mineral Extraction	0.5	96.8
Automotive Industry and Transports	0.5	97.4
Textile Industry and Leather Products	0.4	97.8
Plastic and Rubber Industry	0.4	98.2
Informatics and Telecommunication Industry	0.3	98.5

Electro-electronic Industry	0.3	98.8
Insurances and Pension	0.3	99
Wood Industry	0.3	99.3
Metal Industry	0.2	99.5
Mechanical Industry	0.2	99.7
Tobacco Industry	0.2	99.9
Livestock farming	0.1	100

**Source:** elaborated by the author

The difference with respect to MR is not only related to the lower variety and the higher concentration in certain sectors, but also to what sectors were most frequently tackled in AP. Among the top 5 sectors regulated through Administrative Procedures, only 2 were also present in the five most frequent areas in which economic concentrations happened (“General Services”, which was fourth, and the “Chemical and Petrochemical Industry”, which was placed second). Sectors such as the “Pharmaceutical and Hygiene Industry” (6<sup>th</sup> in MR), the Non-Metallic Mineral Products Industry” (17<sup>th</sup> in MR), and “Transportation and Storage Services” (11<sup>th</sup> in MR), appear among the 5 areas most frequently regulated in AP.

The dominance of the “General Services” sector in the sample can be explained by the presence of multiple processes in only two sub-sectors that together accounted for more than 90% of APs in this area: health insurance and medical services, and private education. The former comprised 32.7% of all cases classified as “General Services”, which means a presence of 17.2% in the overall sample. As I will detail later on this section, these were mostly cases in which health insurance companies structured in the form of cooperatives of doctors – notably *Unimed*<sup>315</sup> –, unions of professionals of the health sector, and hospital associations were charged with price fixing, and anticompetitive conduct implied by exclusivity agreements, which impeded professionals from serving other health insurance companies or hospitals. As maintained by a former commissioner of the period 1994-1996, the multiple APs involving *Unimed* were initiated by the pressure of “large health insurance companies that wanted to reach cities in the countryside”.

APs connected to the private education sector corresponded, in turn, to 57.9% of procedures classified in the “General Services” sector, corresponding to 30.4% of the whole sample. In the sample, there were more than a hundred APs initiated in 1997 and 1998

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<sup>315</sup> According to its official institutional history (available at [www.unimed.coop.br](http://www.unimed.coop.br)), *Unimed* was created in 1967, and is the largest cooperative of doctors in the world. Present in 83% of the Brazilian territory, it is composed by 360 local and regional cooperatives that provide health insurance services to 19 million clients (approximately 32% of the health insurance market in the country). With a membership of more than 110 thousand doctors, *Unimed* owns 116 hospitals and a variety of equipment and other facilities for health services.

targeting private schools in a single region – the Federal District of Brazil – for abusive and concerted increase of tuition fees. As Figure 4 in Chapter 3 illustrates, the abnormal number of APs in the year of 1997 is directly connected to these procedures. This is because although the conduct investigated by CADE were common to several schools, each institution was the object of a separate procedure. Thus, what in the sample was around 30% of all APs decided by the field, are all related to a single economic phenomenon.

The fourth most frequent sector regulated through APs – “Chemical and Petrochemical Industry” – also deserves clarification at this point. This is because I classified within this sector not only the production of petrochemical supplies, but also its distribution. Within the 5.5% of APs that fell in this sector, 33.3% of them involved corporations and associations that distributed gasoline and gas – most notably gas stations, and its local and regional associations. Thus, a third of corporations tackled by APs in this sector were not the large producing corporations, but the distribution concessionaries, often owned by Brazilian medium-sized companies.

The distribution of APs in the three periods mentioned above according to economic sectors reveal some trends. As the table below illustrates, APs initiated before the 1994 reform were mostly concentrated around two sectors: “Non-Metallic Mineral Products Industry”, and “Pharmaceutical and Hygiene Industry”. The first comprised a series of investigations initiated in 1992 targeting cement producers, who were accused of combining the sale of the product with its transportation. These APs were mostly decided between 1998 and 2001. The considerable presence of the “Pharmaceutical and Hygiene Industry”, in turn, is due to a set of APs also initiated in 1992 against several foreign pharmaceutical companies, in which it was alleged that they arbitrarily increased prices. This is precisely the set of procedures referred in Chapter 4 to which former president Itamar Franco was related, as he took a position against several of those corporations. These procedures were decided between 1996 and 1998.

**Table 63.** APs – Economic sectors in time

Pre-1994	1994-2002	2003 onwards
Non-Metallic Mineral Products Industry (42.30%)	General Services (60.70%)	General Services (43.30%)
Pharmaceutical and Hygiene Industry (21.10%)	Pharmaceutical and Hygiene Industry (11.70%)	Essential and Infrastructure Services (13.30%)
General Services (11.30%)	Chemical and Petrochemical Industry (6.80%)	Non-Metallic Mineral Products Industry (6.70%)

Retail Sector (5.60%)	Transportation and Storage Services (4.70%)	Beverage Industry (6.70%)
Food Industry (5.60%)	Food Industry (2.30%)	Mineral Extraction (6.70%)
Beverage Industry (5.60%)	Beverage Industry (1.60%)	Chemical and Petrochemical Industry (6.70%)

**Source:** elaborated by the author

The period beginning in 1994 indicates a change in the profile of the economy regulated by APs. The “Pharmaceutical and Hygiene Industry” was still the second sector of highest incidence, and followed the same profile as the preceding period. However, the sector in which most operations occurred was that of “General Services”. As already mentioned, the large proportion of cases in this sector is due to the fact that one single economic phenomenon related to the increase of tuition fees by private schools in the Federal District. All cases connected to that matter were initiated between 1994 and 1995, and although they were mostly decided in 1997, they were also analyzed in 1998 and 1999. Health insurance and medical cooperatives also gained space in this period, although they already appeared in 1992. Among all cases initiated between 1994 and 2002 in the sample, 18.3% investigated agents of that type. This number corresponds to 84.3% of all cases focused on health insurance and medical cooperatives tackled by CADE in the whole period studied.

The period after the turning point of 2003 must be interpreted cautiously, as only 30 cases out of 483 that compose the sample were initiated since that moment. Nevertheless, it is possible to observe the continuity of a trend initiated after 1994: the “General Services” sector was that of highest incidence of APs from 2003 onwards. Within this sector, most cases were still related to health insurance companies and medical cooperatives (37% of all APs decided initiated form 2003 onwards). Also as in the previous period, cases in the sector of “Non-Metallic Mineral Products” focused on the already practices involving cement producers. The novelty of this period was the relevant presence of the “Essential and Infrastructure Services” sector, with 13.3%.

Another considerable difference of APs in comparison to MR can be noticed in respect to the scope of the economic phenomena regulated. While around 43% of economic concentrations regulated by the field of competition policy were of global scope, these comprised only 0.3% of conduct investigated by CADE. It means that 99.7% of the economic phenomena tackled in this dimension were circumscribed to the Brazilian market. There are two other indicators that reinforce the prominent presence of phenomena restricted to Brazil among APs decided by CADE. One is the proportion of cases that concerned local or regional markets, as opposed



to economic activities of national or global scope: in the sample of APs analyzed, 64% of them were at best regional, not reaching the entire national territory.

The other is the origin of the corporations involved in conduct investigated by the Brazilian competition authority. As the table below indicates, the vast majority of APs targeted only Brazilian corporations. Again differently from MRs, in which 84% of economic concentrations involved foreign companies (and 51.3% involved *only* foreign firms), foreign capital was subjected to conduct regulation in only 18.4% of cases, being 16% in an exclusive form.

**Table 64.** APs – Origin of capital investigated

Capital investigated	%
Brazilian	81.6
Foreign	16.1
Brazilian and Foreign	2.3

**Source:** elaborated by the author

Putting the different types of capital regulated through APs in time, a shift can be noticed. In all three periods targeting Brazilian corporations was a constant. However, while a higher proportion of the APs initiated in the period prior to the 1994 reform tackled foreign companies (be it together with Brazilian firms or in an exclusive form), after reform the focus on national agents was largely dominant.

**Table 65.** APs – Origin of capital investigated in time

Capital involved	Pre-1994	1994-2002	2003 onwards
Brazilian	68.1	84.1	85.2
Brazilian and Foreign	4.2	1.6	7.4
Foreign	27.8	14.4	7.4

**Source:** elaborated by the author

As the table above illustrates, around a third of APs started before 1994 challenged foreign firms, and after that this number was never above 16%. The higher incidence of foreign corporations prior to 1994 is connected to the economic sectors challenged in that period. The “Pharmaceutical and Hygiene Industry” corresponded to almost 21% of APs initiated before 1994, and 70% of cases in this sector involved foreign firms (66.7% *only* foreign companies, and 3.3% foreign and Brazilian companies). In turn, almost all companies investigated in the “General Services” sector were Brazilian: 97.2%. Thus, when the focus shifted to this sector, the presence of Brazilian firms became more relevant.

While in the overall sample around 84% of APs targeted Brazilian firms (exclusively or not), as in MR foreign corporations investigated in APs were concentrated in a few countries: Germany, France, the UK, and most notably the US. These were the same foreign countries that were most frequently involved in economic concentrations.

**Table 66.** APs – Countries of origin of corporations investigated

Country	%
Brazil	83.8
United States	10.7
Germany	3.9
France	1.9
United Kingdom	1.4
Spain	1.0
Other	< 1.0

**Source:** elaborated by the author

In a relevant proportion of APs, CADE investigated corporate associations and unions of professionals. As the table below illustrates, 17.4% of APs targeted corporate associations, and in another 12.9% of cases at least one of the investigated agents was an association of professionals, such as unions or cooperatives.

**Table 67.** APs – Corporate associations and professional unions

	%
Corporate associations	17.4
Professional unions	12.9

**Source:** elaborated by the author

The high incidence of cases involving professional unions is mostly related to the several cases targeting *Unimed*, which, as mentioned, is a cooperative of doctors. Among the APs that investigated conduct in the health services sector, 96.4% of them had a corporate association or union of professionals in the passive role. As the table below illustrates, cases involving corporate associations were most frequent in sectors such as “Civil Construction”, “Mineral Extraction”, the “Food Industry”, “Financial Services”, “Communication and Entertainment”, and “Chemical and Petrochemical Industry”. In the sector of “Chemical and Petrochemical Industry”, the high percentage of unions in the passive pole is motivated by APs that investigated associations of gasoline and gas distributors.

**Table 68.** APs – Economic sectors of conduct

Economic sector	% Corporate association
Civil Construction	66.7
Mineral Extraction	66.7
Food Industry	38.5
Financial Services	33.3
Communication and Entertainment	33.3
Chemical and Petrochemical Industry	32.3

**Source:** elaborated by the author

The relevant presence of associations and unions is yet another indicator of the often regional scope of conduct regulated through APs. In the case of corporate associations, 89.3% of them were of regional scope, mostly comprising companies that acted in a single federate state. In APs in which professional unions were investigated, 96.8% of them were of regional, and most of the time local scope, encompassing a single city.

APs decided by CADE were initiated by 16 different actors. Most procedures, as the table below evidences, began due to the mobilization of the organs that compose the SBDC, as APs initiated by SDE, the Ministry of Finance and CADE comprise around 45.7% of the sample. The SDE alone counts for 34.5% of APs, which is quite logical, as this was the organ whose main priority was to undertake investigations. However, the proportion of cases attributed to this Secretariat is probably overstated, as in the initial years covered by the sample it was not possible to identify with certainty that all procedures in which the author is said to be SDE were not connected to a representation by another author. This is because several procedures only indicated SDE as the author, but it is likely that some of them started elsewhere. For instance, in collecting data, several of the APs targeting the “Pharmaceutical and Hygiene Industry” were said to be initiated by SDE, but as presented in Chapter 4, many of them were mobilized by former president Itamar Franco.

**Table 69.** APs – Authors

Author	%
SDE	34.5
Professional/Sectoral Associations	13.7
Brazilian corporation	12.7
Ministry of Finance	10.1
National Congress	8.3
MP	6.2
PROCON	4.6
Individuals	3.8

Foreign corporation	1.8
State-owned corporation	1.2
CADE	1.1
State governments	0.5
Local/Regional Legislatives	0.4
Regulatory agencies	0.4
Presidency	0.3
NGO	0.3

**Source:** elaborated by the author

If other public institutions such as the National Congress, the Prosecutor’s Office, and Regulatory agencies are included with those that composed the SBDC, it is possible to identify that 66.4% of APs were initiated by organs connected to the government. This group also includes PROCONs (*Programa de Proteção e Defesa do Consumidor*), public institutions connected to the National System of Consumer Defence established in the state and municipal levels in charge of protecting consumer rights.

Thus, APs explicitly initiated outside governmental organs were identified in 33.6% of cases – a third of conduct investigated by CADE. These entail, on the one hand, representations made by individuals and Non-Governmental Organizations (NGO), which was observed in only one case. Several of the “Individuals” identified as the initiators of APs, however, were not “consumers” affected by a potential anticompetitive conduct, but professionals that worked in the sector where the violations would have occurred. Thus, for instance, 42.1% of APs mobilized by “Individuals” were in the health services sector and concerned cases of exclusivity agreements imposed by medical cooperatives to doctors. These individuals were likely doctors that did not agree with such practice.

Despite the dominance of APs initiated within government, corporate agents directly mobilized a relevant amount of cases: a total of 29.4%, if representations by a single Brazilian, foreign or state-owned companies, and professional and sectoral associations and merged together. Moreover, corporate agents alone were the second and third most frequent authors of APs initiated. Almost a third of APs was thus related to intra-capital disputes. Among these, foreign corporations were present in only a minority of cases, which is yet another indicator of the predominantly national character of the economy regulated through APs.

As the table below indicates, the types of capital tackled by APs often differed accordingly to the authors of the representation, here divided into four groups. In procedures initiated within the SBDC, the vast majority targeted Brazilian corporations, and only 5.5%

focused solely on foreign firms. The higher proportion of APs initiated by governmental organs that investigated foreign companies is connected to the fact that the National Congress started several APs to investigate multinational firms of the “Pharmaceutical and Hygiene Industry” (about 54,2% of APs in this sector were initiated by the National Congress). This was due to a Congressional Investigation Committee (CPI) installed in Congress to investigate the pharmaceutical sector in Brazil between 1999 and 2000. The Committee concluded for the existence of cartels in drugs production, and its findings were sent to SDE in order for APs to be initiated.

**Table 70.** APs – Investigated corporations according to authors

Authors	% Brazilian	% Brazilian and Foreign	% Foreign
SBDC	93.2	1.4	5.5
Governmental organs	70.0	2.0	28.0
Corporate agents	70.4	4.2	25.4
Individuals/NGO	94.7	0.0	5.3

**Source:** elaborated by the author

More interestingly, proportionally much more APs initiated by corporate agents tackled foreign firms than those started by the organs of entitled of enforcing competition policy in Brazil: SDE, CADE or the Ministry of Finance. This is related to two phenomena. One, all APs motivated by a representation of a foreign firm tackled another foreign company, thus indicating disputes among foreign capital. These happened in only three sectors: “Transportation and Storage Services” (in a case involving the alleged abusive imposition of tariffs in harbors), “Essential and Infrastructure Services” (in cases among telecom corporations), and in “Financial Services”. Not by chance, the three sectors were related to areas directly connected to the expansion of foreign capital into Brazil. The other phenomenon is that 30.6% of APs initiated by Brazilian corporations required the investigation of practices of a foreign firm. Thus, about a third of procedures begun by Brazilian companies entailed a dispute with foreign capital.

Another interesting feature among the profile of APs mobilized by these different authors that is connected to the origins of capital involved concerns the proportion of cases focusing on conduct restricted to a regional scope.

**Table 71.** APs – Regional cases according to authors

Author	% regional cases
SBDC	70.5
Governmental organs	57.0
Corporate agents	57.7
Individuals/NGO	73.7

**Source:** elaborated by the author

While the majority of APs initiated by the SBDC, governmental organs, or individuals and NGOs tackled conduct of local or regional dimension, those mobilized by corporate agents were more focused on cases of national scope or higher. The difference is especially relevant if cases begun by corporate agents are compared to those initiated by CADE and SDE: while only 29.5% of the latter were of national or larger scope, 42.3% of the former involved cases larger than a regional dimension. This is related to the fact that APs initiated by corporations more often investigated conduct of foreign corporations, which were frequently involved in economic sectors and markets of a national dimension.

The presence of these different authors in time has also been relatively stable. As the table below illustrates, only from 2003 onwards a more substantive difference emerged: corporate agents became the main authors of APs initiated since that year. Also, the participation of the SBDC as the author of representations decreased, which may reflect the consolidation of the field of competition policy as an arena of regulation before other, non-governmental agents. However, as already discussed, given the small number of cases in the sample from this last period, any inferences suggesting that the regulation of corporate conduct became more significant must be taken cautiously.

**Table 72.** APs – Authors in time

Author	Pre-1994	1994-2002	2003 onwards
SBDC	58.9%	44.4%	25.9%
Governmental organs	11.0%	23.0%	18.5%
Corporate agents	28.8%	28.5%	48.1%
Individuals/NGO	1.4%	4.2%	7.4%

**Source:** elaborated by the author

The final and no less important aspect that enables understanding what kind of economy is regulated through APs concerns the actual types of conduct that are investigated. These were classified in 13 categories, listed below according to their proportion in the sample. Grouping cases according to the type of economic phenomena they were related to

was a hard task, as some of them entailed a variety of types of conduct. Classifying them according to the legal norm they supposedly violated was considered, but revealed itself to be a difficult task, as there could be multiple articles referred in a single case, or even no legal reference in cases that the investigated corporation was not convicted. Rather than a strict legal definition, I thus decided to define groups according to the general theme of the conduct attributed to the corporation or corporations investigated. Some categories do coincide with legal norms, such as “Abusive price increase” or “Cartel” formation, or were classified by a legal norm because it was not possible to identify a broader theme – this was the case of APs classified in the type “Creating difficulties to the constitution, performance or development of competitor”.

Other classifications, however, are not specific legal norms, such as “Disputes among concessionaires and resellers”<sup>316</sup>, “Supply shortages / Supply refusal”<sup>317</sup>, “Exclusivity agreements”<sup>318</sup>, “Combined sales”<sup>319</sup>, “Price / Buyer Discrimination”<sup>320</sup>, “Contractual relations”<sup>321</sup>, and “Tax exemptions”<sup>322</sup>. I chose to adopt this form of categorization since it better reveals the economic nature of conduct, and thus avoids the homogenization promoted by legal categories. Finally, types of conduct that appeared only once in the sample were grouped in the type “Others”<sup>323</sup>.

**Table 73.** APs – Types of conduct

Type of conduct	%
Abusive price / Abusive price increase	42.5
Price fixing	15.9
Exclusivity agreements	12.2
Cartel	10.3

<sup>316</sup> Under this category I placed all APs in which the alleged anticompetitive conduct was related to commercial relationships between corporations and their concessionaires or resellers.

<sup>317</sup> This category entailed cases in which the anticompetitive conduct investigated was related to the refusal or shortages of supply from one company to another.

<sup>318</sup> This category comprised conduct connected to the exclusivity imposed on a certain corporation or individuals in relation to another company. Examples of this kind were the several APs in the health services sector in which exclusivity clauses prevented doctors from serving outside the cooperative to which they belonged.

<sup>319</sup> Cases in which the accused conduct comprised the combined commercialization of one service or product to another.

<sup>320</sup> Cases in which a corporation was accused of discriminating among its buyers in the price of products or in the access to them.

<sup>321</sup> This category comprised cases in which the anticompetitive conduct investigated was related to contractual clauses or agreements between corporations, such as one-sided clauses, or the breach of a contract.

<sup>322</sup> Under this category I placed cases in which the existence of tax exemptions for certain corporations were accused of being anticompetitive factors.

<sup>323</sup> There are only 4 cases in this category. One entailed a conduct of “falsifying products”, another was an AP initiated to investigate a corporation that did not present an MR to CADE, the third an AP discussed the anticompetitive effects of a strike of workers, and the last was the accusation of an illegal concentration due to the formation of a joint-venture.

Combined sales	5.7
Disputes among concessionaires and resellers	4.4
Price / Buyer Discrimination	2.7
Supply shortages / Supply refusal	2.3
Create difficulties to the constitution, performance or development of competitor	1.8
Underselling	0.8
Contractual relations	0.6
Tax exemptions	0.4
Market dominance	0.4
Others	1.1

**Source:** elaborated by the author

As the table above illustrates, the vast majority of APs dealt with conduct related to the manipulation of prices – be it the abusive establishment or increase of prices, or the fixation of prices among different agents. Another 24,8% of APs encompassed conduct that concerned relations among competitors. This portion is comprised by conduct such as “Exclusivity”, “Disputes among concessionaires and resellers”, “Supply shortages / Supply refusal”, “Price / Buyer Discrimination”, “Create difficulties to the constitution, performance or development of competitor”, “Contractual relations”, “Tax exemptions”, and “Market dominance”.

The conduct tackled by APs varied in the three periods constructed for analysis. The table below depicts the most frequent types of conduct investigated in each period. The only two types of conduct that together comprised 50% of procedures prior to the reform of 1994 were not those of more relevance in the subsequent periods.

**Table 74.** APs – Most frequent types of conduct in time

Period	Types of conduct (% within period)
Pre-1994	Combined Sales (30.6%) / Disputes among concessionaires and resellers (20.8%) / Abusive Price / Abusive Price Increase (15.3%)
1994-2002	Abusive price / Abusive price increase (50.4%) / Price Fixing (17.0%) / Exclusivity (12.0%)
2003 onwards	Exclusivity (40.7%) / Cartel (18.5%) / Price / Buyer Discrimination (14.8%)

**Source:** elaborated by the author

After reform until 2002, procedures investigating the abusiveness of prices, their increase, or fixation entailed more than 60% of procedures. Since 2003, “Exclusivity” became the type of conduct with highest incidence. This variance is likely connected to the different economic sectors emphasized in each period. As the table below illustrates, types of conduct are generally associated with the economic sector tackled by Administrative Procedures. In at



least 7 of the 10 most frequent sectors in APs, certain types of conduct were much more frequent than others:

**Table 75.** APs – Most frequent types of conduct according to economic sector

Economic sector	Type of conduct (% within sector)
General Services	Abusive price / Abusive price increase (52.8%) / Price Fixing (20.5%) / Exclusivity (18.5%)
Pharmaceutical and Hygiene Industry	Abusive price / Abusive price increase (81.0%) / Price Fixing (3.4%)
Non-Metallic Mineral Products Industry	Combined sales (59.5%) / Cartel (18.9%) / Disputes among concessionaires and resellers (18.9%)
Beverage Industry	Price Fixing (36.4%) / Supply Shortages / Supply Refusal (27.3%)
Retail Sector	Disputes among concessionaires and resellers (40.0%) / Exclusivity (20.0%)
Essential and Infrastructure Services	Price / Buyer Discrimination (46.4%) and Abusive price / Abusive price increase (27.3%)
Communication and Entertainment	Create difficulties to the constitution, performance or development of competitor (33.3%) / Abusive price / Abusive price increase (16.7%) / Price Fixing (16.7%)

**Source:** elaborated by the author

Thus, as described on Table 63, since the “Non-Metallic Mineral Products Industry” and the “Retail Sector” were those which most procedures before 1994 investigated, and given that they largely focused on the mentioned types of conduct, the high presence of “Combined sales” and “Disputes among concessionaires and resellers” can be explained by the sector regulated. The same phenomenon can be observed in the period 1994-2002 – the largest in the period and largely related to “Abusive prices”, and after 2003, in which “Exclusivity” was present in several procedures of the “General Services” sector, notably health insurance cooperatives.

Also, as the economic sectors investigated were also often associated with different authors of representations that initiated APs, types of conduct also differed according to who began the procedure. APs initiated by the SBDC were mostly related to “Abusive pricing and Abusive price increases” (63.2%). The same thing with procedures mobilized by “Governmental institutions”, although to a lesser extent (47%). In the case of APs mobilized by “Corporate agents”, the distribution was much more varied: conduct related to “Exclusivity” comprised 28.9% of APs, “Price Fixing” entailed 17.6%, and those investigating “Abusive price”, and “Disputes among concessionaires and resellers” 9.9% and 8.5% respectively. This finding converges with the idea already mentioned that different authors often tackled different sectors, and thus distinct types of conduct. As the data illustrates, and quite logically, “Corporate agents” were more frequently mobilizers of APs

that investigated allegations of anticompetitive conduct occurring in an intra-capitalist dimension, i.e. among corporations.

Another indicator of the connection between the types of conduct regulated and the economic sectors tackled by APs can be noticed if the reach of these types of conduct are considered. Conduct associated with sectors in which most APs were of regional character, were also naturally mostly regional. For instance, 86.4% of APs focusing on “Exclusivity”, 69.8% of APs investigating “Abusive Price / Abusive increase of price”, and 63.3% of investigations of cartels were local or regional. In opposition, 89.3% of “Combined sales” allegations, 90.5% of APs dealing with “Disputes among concessionaires and resellers”, and 72.7% of “Supply shortages / Supply refusal” accusations were of a broader scope. Types of conduct were thus also associated with the scope of conduct regulate through APs.

### 6.2.2 Regulatory responses to corporate conduct

As the table below indicates, the proportion of APs that suffered convictions in the sample is exactly the same as the universe of CADE’s decisions: 22.4%. This means that almost 80% of conduct cases analyzed by CADE were dismissed without any sort of penalty.

**Table 76.** APs – Types of decision

Type of decision	%
Dismissed	79.6
Convicted	20.4
Total	100

**Source:** elaborated by the author

Although 26 sectors were identified in the sample of APs regulated by CADE, convictions were present in precisely half of these areas of economic activity. Moreover, a single sector, that of “General Services”, accounted for almost three quarters of all convictions enacted by the Brazilian antitrust authority. Within this sector, most convictions were related to health services. APs connected to this area actually entailed 67.7% of all convictions enacted by CADE. As the table below indicates, besides that sector, decisions that imposed penalties on the investigated corporation were dispersed among 12 other areas.

**Table 77.** APs – Convictions in economic sectors

Economic sector	% of convictions	% with convictions
General Services	72.0	28.3
Chemical and Petrochemical Industry	8.0	25.8
Transportation and Storage Services	6.0	30.0
Communication and Entertainment	3.0	50.0
Pharmaceutical and Hygiene Industry	2.0	3.3
Retail Sector	2.0	20.0
Mineral Extraction	1.0	33.3
Agriculture	1.0	25.0
Informatics and Telecommunication Industry	1.0	50.0
Automotive Industry and Transports	1.0	33.3
Essential and Infrastructure Services	1.0	11.1
Livestock farming	1.0	100.0
Beverage Industry	1.0	10.0

**Source:** elaborated by the author

Some of these sectors were not the most frequent within the sample, and that is why in at least three of them the percentage of cases with convictions (second column of the table above) is 50% or even 100%. This means that half or all of the small number of cases in those sectors were convicted. Given the restricted number of cases in these sectors, it is hard to infer that they tended to be more convicted than others.

In sectors such as “General Services”, the “Chemical and Petrochemical Industry”, and the “Pharmaceutical and Hygiene Industry”, however, since they were among the 5 most frequently present in CADE the percentage of cases with convictions above the average can be seen as indicative of a relevant incidence of penalties<sup>324</sup>. Another finding that supports this idea is that the “Non-Metallic Mineral Products Industry”, which was the third sector with more cases in the overall sample (7.8%), does not account for a single conviction.

As described in the previous section, economic sectors regulated by APs were often associated with corporations of different origins, and markets of distinct scopes. Hence, convictions were also concentrated in respect to other variables. For instance, nearly 95% of convictions affected *only* Brazilian corporations. If APs tackling both Brazilian and foreign companies are considered, national firms penalized by CADE were present in 96% of cases. As the table below illustrates, the different types of capital involved in APs were convicted in

<sup>324</sup> The Likelihood Ratio test for the association between the type of decision (to convict or not) and the economic sectors of corporations regulated through AP resulted in 0,000, thus indicating a statistically relevant association.

notably distinct proportions<sup>325</sup>. Moreover, the presence of foreign companies was associated with less convictions, being almost 5 times lower if compared to APs concerning only Brazilian firms.

**Table 78.** APs – Convictions according to capital investigated

Capital investigated	% of convictions	% with convictions
Brazilian	94.9	23.6
Brazilian and Foreign	1	9.1
Foreign	4.1	5.2

**Source:** elaborated by the author

Since APs that solely concerned Brazilian firms were often focused on regional markets, convictions were also more frequent in this scope<sup>326</sup>. While 6,4% of procedures involving markets of national or higher scope were convicted, those of local or regional dimension were more than 4 times more frequently convicted: 28.2%.

Given that regional markets counted for an important amount of convictions and, as described in the previous section, that these markets often involved agents that represented some sort of corporate or professional associations, convictions also tended to be higher in those cases. As the table below illustrates, almost 80% of all convictions observed in the sample were related to corporate associations and unions of professionals<sup>327</sup>.

**Table 79.** APs – Convictions of corporate associations and unions

	% of convictions	% with convictions
Corporate associations	26.5	31
Professional unions	53.1	83.9

**Source:** elaborated by the author

More interestingly, as the table above illustrates, penalties imposed to unions of professionals – notably those of doctors, as already discussed – comprised more than half convictions that compose the sample.

As depicted on Table 65, since the presence of Brazilian corporations in the passive pole of APs, and by extension the regulation of sectors in which they were more frequent rose

<sup>325</sup> The Likelihood Ratio test for the relation between the types of capital and types of decision was of 0,000, what indicates a statistically relevant association between those variables.

<sup>326</sup> The Pearson Chi-Square test for the relation between the regional character of AP and the type of decision was 0,000, which reveals a statistically relevant association.

<sup>327</sup> In the case of corporate associations, the Pearson Chi-Square test resulted in 0,008, and in the case of unions of professionals, in 0,000. In both cases, thus, there is a statistically significant association with the type of decision.

in each of the three periods in which APs were initiated, and given that convictions are associated with these sectors, they also became more frequent in time<sup>328</sup>. As the table below illustrates, while APs that began prior to reform were convicted in 5,6% of cases, this proportion more than tripled after reform, reaching almost 50% of cases initiated after 2003.

**Table 80.** APs – Convictions in time

Period	% of convictions	% with convictions
Pre-1994	4.1	5.6
1994-2002	82.7	21.2
2003 onwards	13.3	48.1

**Source:** elaborated by the author

The higher number of convictions in cases initiated after 2003 is an indication of what mainstream narratives suggest to be a “turning point” in CADE’s “repressive roles”. However, as described, this increase was also the consolidation of a shift of focus initiated in the mid 1990s toward cases involving Brazilian firms, most notably in regional markets, and in sectors such as health insurance, thus encompassing several unions of professionals.

Convictions were also more frequent in APs initiated by certain authors – notably those outside the state. As the table below evidences, 62.3% of convictions occurred in cases mobilized by corporate agents, individuals or NGOs. The higher incidence of convictions in APs initiated by these authors is connected to the sectors in which they more frequently denounced anticompetitive conduct, precisely those more often penalized.

**Table 81.** APs – Convictions according to authors

Author	% of convictions	% with convictions
SBDC	23.5	10.4
Governmental organs	14.3	14
Corporate agents	54.1	37.3
Individuals/NGO	8.2	42.1

**Source:** elaborated by the author

Not only these authors counted for a larger amount of cases convicted, but the proportion of cases initiated by them that were penalized was also much higher than APs initiated by the SBDC or other governmental organs. Moreover, while the percentage of convictions in cases initiated within the field of competition policy, or by other agents of the

<sup>328</sup> The Likelihood Ratio for the association between the period in which AP were initiated and the type of decision resulted in 0,000, thus suggesting an association.

state were considerably below the overall average of 20.4%, those mobilized outside the field were around two times more penalized<sup>329</sup>.

As discussed in the previous section, there are important associations among the sectors regulated by APs, the dimension of markets, the types of capital investigated, the period in which procedures were initiated and the agents that mobilized them. Thus, since the types of conduct were also connected to these variables, so was the type of decision for the distinct kinds of conduct regulated through APs. In this sense, as the table below reveals, although I grouped conduct in 14 categories, convictions were imposed in only 9. No AP tackling conduct such as “Disputes among concessionaires and resellers”, “Underselling”, “Contractual relations”, “Tax exemptions”, and “Others” was penalized. This is an indication that most of the types of conduct more clearly related to divergences among corporations were not seen as faulty by CADE, even though most convictions occurred in APs mobilized by corporate agents.

**Table 82.** APs – Convictions in types of conduct

Type of conduct	% of convictions	% with convictions
Exclusivity	42.9	72.4
Price fixing	34.7	45.2
Cartel	13.3	26.5
Abusive price / Abusive price increase	4.1	2.0
Create difficulties to the constitution, performance or development of competitor	2.0	25.0
Market dominance	1.0	50.0
Price / Buyer Discrimination	1.0	10.0
Supply shortages / Supply refusal	1.0	9.1
Combined Sales	1.0	3.6

**Source:** elaborated by the author

Also, nearly 43% of convicted APs concerned disputes around exclusivity clauses. As already presented, these were mostly found in the health services sector, in which medical cooperatives imposed the condition of exclusivity for associated doctors, and which counted for more than 67% of all convictions made by CADE. Another theme in which a high incidence of convictions was observed concerned conduct related to price manipulation. As depicted in the table, almost 40% of convictions entailed “Price fixing” conduct, and

<sup>329</sup> The Likelihood Ratio test for the association between the authors of AP and the type of decision resulted in 0,000, thus indicating a strong association.

“Abusive price / Abusive price increase”<sup>330</sup>. Thus, in the exercise of its “repressive” role, an important portion of conduct penalized was precisely related to practices that, as described in Chapter 4, were to be tackled through reform, such as the manipulation of prices.

### **6.3 The regulation of financial capital**

As discussed in Chapter 2, one of the characteristic features of neoliberalism is the hegemony of financial capital, materialized in its free expansion into new domains of economic activity and increasing concentration. In describing the methodological strategies to address the connection of what I called the process of “financialization” embedded in the neoliberal economic project, however, I anticipated that such link cannot be properly grasped in the field of competition policy through the quantitative analysis of decisions produced by CADE because the financial sector comprises only a limited number of cases. Moreover, as I referred, the actual pertinence of antitrust regulation of the financial sector motivates a heated debate among the agents of the field. The jurisdiction of the field in respect to financial capital comprises a struggle among the agents of the field and others outside it.

I thus suggested that the analysis of the actual dispute to determine whether and how the field of antitrust policy should regulate the financial sector is a useful entry-point to evaluate its connections to neoliberalism in this dimension. In this section, I thus describe in detail how antitrust expertise is positioned in respect to financial capital and the judicial review of CADE’s decision-making. In the first part (6.3.1), the focus is on presenting what sorts of financial phenomena are regulated by CADE, and how they are regulated. In the second part (6.3.2), I turn to the active construction of financial exceptionalism to the field’s jurisdiction. From these descriptions, I understand it will be possible to visualize how the field has built a nuanced approach to financial capital in respect to other economic sectors, notably based on appeals to a specific form of expertise.

#### *6.3.1 Concentrations and conducts in the financial sector*

As described in the two previous sections, MR and AP decided by CADE concerning the financial sector comprise a small proportion of cases. Within economic concentrations, those classified as happening in the area of “Financial Services” entailed 2.4% of MRs (17

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<sup>330</sup> The Likelihood Ratio for the relation between types of conduct and types of decision resulted in 0,000, thus suggesting a statistically significant association.

cases in the sample of 871), and within conduct they constituted 0.6% of APs (3 cases in the sample of 483). Although 2 of those MRs suffered some kind of restriction by CADE (both behavioral), given their weight in the sample, these conditions are virtually inexistent. Similarly, in APs none of the three cases were convicted by CADE.

The extension of the financial sector’s presence in the two samples, as well as the fact that they entailed minor or practically none intervention by CADE is in itself interesting information. In both “preventive” and “repressive” roles of the field, if compared to other sectors, concentrations involving financial institutions were far less present. They were also intact after being submitted to regulation, fitting the overall profile of decision-making, i.e. of majoritarily not tackling concentrations structurally, and of imposing penalties to a small fraction of conduct.

However, a detailed analysis of these cases’ profiles, especially of MRs in the financial sector, reveals other valuable trends for a point of view interested in understanding the connections of competition policy to neoliberalism. Among the 17 MRs classified by CADE as occurring in the financial sector, 16 were acquisitions and 1 fit into the category of “Other” types of operations, as it didn’t comprise the acquisition of assets, as I will detail later. Out of these, 11 were of national scope, and 6 reflected global operations. As in the overall sample, most operations entailed the accumulation of capital by foreign companies.

**Table 83.** Financial sector in MRs

Scope	Capital movement
11 National	8 = Foreign > Foreign
6 Global	4 = Foreign > Brazilian
	3 = Brazilian > Brazilian
	1 = Brazilian > Foreign
	1 = Brazilian - Brazilian

**Source:** elaborated by the author

Only three of these operations implied some sort of horizontal integration. Among them, 2 led to levels within the legal limit of 20% (2.0% and 7.1%), and another one surpassed 40%. In all of them, the market share  $\Delta$  was within the first stratum of analysis, i.e. much inferior to 10%. In only one of these cases, however, the concentration was properly among financial institutions. As the table below reveals, most of the operations classified as happening in the “Financial Sector” in the analyzed sample comprised financial institutions acquiring assets of firms in productive sectors, what I call the “financialization of productive sectors”. These entailed, for instance, acquisitions of shares of companies in the “Chemical



and Petrochemical Industry”, “Electro-electronic Industry”, and in the “Plastic and Rubber Industry” by banks such as the *Lehman Brothers* and *ABN AMRO*, or financial institutions such as *Allianz*<sup>331</sup>. Other cases of this type were the acquisition of a company in the “Agriculture” sector by an investment corporation held by a corporation of the “Non-Metallic Mineral Products Industry”, and the acquisition of assets of a firm of educational services by a hedge fund<sup>332</sup>.

**Table 84.** Types of concentration in the financial sector

Financialization of productive sectors	Financial institutions	Financial management / services
6	6	5

**Source:** elaborated by the author

In all those cases, the approval of CADE without restrictions was based on the argument that since the acquirer does not develop activities in the same sector of the company whose assets were acquired, there is no horizontal concentration or vertical integration. Rather, these operations are said to constitute a mere “transfer of shares”.

Other 5 MRs selected in the sample were acquisitions involving companies that provide services of support to properly financial institutions, such as financial analysis and information, credit protection, and informational technologies. All of them were mobilized by foreign firms, who acquired other foreign firms in two cases, and Brazilian companies in the other three. In none of them CADE observed horizontal concentrations, as they involved companies that were not active in Brazil and were thus entering the market through the operation. In one of these MRs, a restriction was imposed, in line with the trends observed in section 6.1: the modification of the geographical and temporal amplitude of the “Non-Compete clause”.

Cases involving properly financial institutions besides those in which an acquisition of assets of productive sectors were observed were identified in 6 other cases. One of them was

<sup>331</sup> In the MR numbers 08012.003344/1999-93 (*Páteo Participações e Consultoria de Comércio Exterior, Banco Sul América S/A, Banco Bba Creditanstalt e Nevada Woods S/A*) and 08012.004066/2000-50 (*Pharmacia Corporation, Lehman Brothers Merchant Banking Partners II L.P., Hercules Incorporated e WSP Inc*), assets of companies in the “Chemical and Petrochemical Industry” were acquired. In MR numbers 08012.004265/2000-68 (*Allianz Capital Partners GMBH e E.ON Aktiengesellschaft*) and 08012.001941/2008-07 (*ABN AMRO Participaties Fund IV B.V. e Eurochannels Holding B.V.*), respectively, assets of firms in the sectors “Plastic and Rubber Industry” and “Electro-Electronic Industry” were acquired.

<sup>332</sup> These were, respectively, the MR numbers 08012.006865/2008-18 (*RVBE – Empreendimentos Ltda. e Agrisa Agro Industrial São João S.A.*) and 08012.005387/2009-18 (*Fundo de Investimento em Participações - Brasil Gestão e Administração, Kroton Educacional S.A.*).

not an acquisition of shares, and was thus classified as of the type “Others”. It entailed, in turn, the acquisition, by two commercial banks, of information about the clients of two airlines<sup>333</sup>. Hence, only 5 of the 17 MRs that compose the sample in the “Financial Sector” entailed concentrations of financial institutions. While 4 of them involved banks, one comprised an acquisition between two foreign hedge funds focused on investments on developing countries<sup>334</sup>. Two other operations were acquisitions in the insurance sector by banks, one of which implied a level of 7.1% of concentration due to the incorporation of 1.1% by the acquiring firm<sup>335</sup>.

The other 2 MRs, in turn, concerned concentrations in the banking sector. In one of them, CADE decided that it was a mere “restructuring”, as the major shareholder was mobilizing the acquisition<sup>336</sup>. The other, however, motivated the second restriction observed in the sector in MR. This was the acquisition of a bank owned by the state of São Paulo by *Banco do Brasil*, a bank owned by the Federal government<sup>337</sup>. Implying more than 40% of concentration in certain relevant markets of various municipalities, the MR had its approval conditioned to the creation of a call-center to inform and enable the portability of accounts held by customers of the acquired bank.

While MR in the “Financial Sector” replicated the overall trends observed in the regulation of economic concentrations, the investigation of conduct in this area of economic activity was distinct in respect to the general profile of APs traced in section 6.2. As described, most APs focused on Brazilian corporations and markets of regional dimension. However, in the financial sector, types of conduct were of national dimension and foreign companies were present in all three APs.

One similarity in respect to the overall sample was the prevalence of APs mobilized by corporate agents: in the “Financial Sector”, all 3 APs entailed intra-corporate disputes. Two of them concerned credit card corporations. In one of them, *American Express* denounced *Visa* for the abuse of dominant position due to the imposition of difficulties in entering certain markets<sup>338</sup>. In the other, the union of retailers of the Federal District (*Sindicato do Comércio Varejista do Distrito Federal*) represented against *Visa*, *American*

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<sup>333</sup> MR number 08012.005476/2009-56 (*Banco Bradesco S.A., Banco do Brasil S.A., VRG Linhas Aéreas S.A.*).

<sup>334</sup> MR number 08012.008378/2008-90 (*DEG - Deutsche Investitions - Und Entwicklungsgesellschaft mbH, Tolstoi Investimentos S.A.*)

<sup>335</sup> MR numbers 08012.009114/2003-49 (*Unibanco Aig Seguros S/A e Phenix Seguradora S/A.*) and 08012.004833/2009-69 (*Banco Bradesco S.A.; Morelia S.A.; Cortines S.A.*).

<sup>336</sup> MR number 08012.003307/2003-96 (*Dresdner Bank Brasil S/A – Banco Múltiplo e Dresdner Bank Brasil S/A Corretora de Câmbio, Títulos e Valores Imobiliários*).

<sup>337</sup> This was MR number 08012.011736/2008-41 (*Banco do Brasil S.A., Banco Nossa Caixa S.A.*).

<sup>338</sup> AP number 08000.022500/1996-66.

*Express, Visa, Redecard* and the *Brazilian Association of Credit Card Services* reclaiming the abusive increase of credit card administration taxes by those corporations<sup>339</sup>. The third APs identified, also mobilized by a Brazilian corporation against a foreign company, comprised a claim of underselling in the sector of automobile consortium<sup>340</sup>. As already mentioned, in none of them did CADE recognize the existence of anticompetitive conduct.

As described, the practice of competition policy in respect to the financial sector follows the general trends identified in the broader economic phenomena regulated in MR and AP. However, the most telling element in the field's practice about the relation between competition policy and the financial sector concerns its diminished presence as an object of regulation – which, as described in the next section, has been actively constructed.

### 6.3.2 *Clashes of expertise in the regulation of finance*

The actual submission of economic concentrations occurring in the financial sector to the regulation of the Brazilian competition authority has been a topic of heated doctrinal debate. These disputes concern the reach of the field's jurisdiction over the financial sector, i.e. around determining if CADE is entitled of regulating concentrations involving financial institutions, if this task is exclusive of the Brazilian Central Bank (BACEN), or if competences are shared. Legal battles around this issue sprouted in the Brazilian field of competition policy at least since the early 2000s, and can be noticed in legal doctrine<sup>341</sup>, in judicial disputes, and in legislative struggles.

The controversy involving the financial sector translates the dispute of competences between CADE and the Central Bank into a conflict of norms. On one side of the dispute there is the law 4.599 of 1964, which created the Brazilian Central Bank as a modern monetary agency, and established the “exclusive competence” of BACEN to authorize the “transformation, merger and incorporation” of financial institutions<sup>342</sup>. In 1997, the law 9.447 reinforced this competence, stating that in certain cases BACEN can determine “corporate reorganization, including incorporations, mergers and splits”<sup>343</sup>. On the other side, there is the reformed competition act of 1994, which established in a general form CADE's jurisdiction

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<sup>339</sup> AP number 08012.006242/1997-68.

<sup>340</sup> AP number 08012.003578/2000-18 (*Rodobens Administração e Participação Ltda. and DAIMLE RCHRYSLER Administradora de Consórcios S/C LTDA*).

<sup>341</sup> See, for instance, the books edited by Campilongo et al (2002), Goldberg (2008), and Maranhão and César (2012), which gather articles authored by lawyers and economists defending different positions on the topic.

<sup>342</sup> Article 10, X, item “c” of the law 4595/64.

<sup>343</sup> Article, III, of the law 9447/97.

over economic concentrations, without mentioning any kind of exception in terms of economic sector.

The competence to regulate economic concentrations in the financial sector thus seems to be granted by both BACEN and CADE, each by a different norm. The legal dispute involving these norms is whether the law of 1964 is hierarchically superior to the 1994 competition act, or on the contrary, if the reformed antitrust norm, enacted after the law creating BACEN and specific to competition, revoked the Central Bank's competence, entitling CADE to regulate the sector, or even if both competences coexist and are complementary (Maranhão and Osmo 2012, p. 7). In more substantive terms, the struggle is around defining if and in what circumstances should financial concentrations be subjected to competition regulation, as in some cases involving "systemic risk" they would be necessary to "preserve" the financial system's "health" and "stability", independently of its potential anticompetitive effects.

The first episodes of the controversy date from the initial years of the reformed field. In 1995, the Brazilian Securities Exchange Commission (CVM) informed SDE about an acquisition involving two banks, and asked that Secretariat about the need to inform the SBDC of concentrations in the financial sector (Arcanjo Neto 2006, p. 10). Although it affirmed that the competence was exclusively that of BACEN, SDE sent the inquiry to CADE. In August 1996, CADE's commissioner responsible for analyzing it, still a member of the Council's first formation under the 1994 law, overruled SDE's opinion on the issue, sustaining that it had no legal competence to make such a statement, and asked the agency's Attorney General's Office (ProCADE) to issue an opinion (Arcanjo Neto 2006, p. 12). ProCADE then issued a "dubious and cautious" opinion, recognizing BACEN's jurisdiction over concentrations in the financial sector, but also the need to "contemplate CADE's participation, given its technical expertise" (Arcanjo Neto 2006, p. 12-13). In November 1996, this opinion was sent to BACEN in order to initiate an inter-institutional dialogue. In March 1997, however, the Central Bank's Attorney's Office issued an opinion stating that BACEN is solely entitled to regulate the sector (Arcanjo Neto 2006, p. 13). As an interviewee revealed, by the time that the friction between the two authorities was starting – which coincided with the major concentrations in the sector in Brazil<sup>344</sup> –, the Central Bank would

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<sup>344</sup> Between 1995 and 1996, the federal government instituted two programs of restructuring of the Brazilian financial sector which comprised measures to concentrate the banking sector: the Stimulus Program to the Restructuring and Strengthening of the Financial System (PROER), focused on private banks, and the Incentives Program to the Reduction of Public State Banks (PROES), which supported the privatization of banks owned by state governments. Later on this section, I detail the effects of these programs in terms of concentration.

not only have responded to CADE, but directly instructed financial institutions not to submit concentrations to the antitrust agency: “The Central Bank called the banks and said, explicitly – ‘You don’t go to CADE. The first to go to CADE will have to deal with me. You are all prohibited to go to CADE’”.

In the view of the same interviewee, CADE was not “strong enough” in responding to BACEN, behaving differently than it did in respect to other economic sectors, most notably the industry. Although it claimed to be competent, in practice it didn’t reclaim the presentation of Merger Reviews as in other sectors:

All concentrations in the banking sector during the late 1990s and early 2000s were published on the papers, everyone knew about them. And in industrial concentrations I received many letters from CADE saying: ‘I read in the papers that you merged, but I didn’t receive your MR’. By the late 1990s there was this magazine of an American group that they gave for free in the airport. In the end of it, there were four pages saying who bought whom. If your operation was in that magazine, you could expect that you would receive a notification from CADE in the next week. I got many of those. But why didn’t they notify banks? I’m not stupid enough to raise the issue...

In 1997, when CADE was already under the presidency of Gesner Oliveira and with a considerably different composition, as mentioned in Chapter 5, a series of cooperation agreements started to be concluded by the competition authority with other governmental agencies: among them, the Central Bank. In May 1997, for instance, CADE and BACEN concluded a “Technical Cooperation Agreement” to exchange information, and perform joint activities with their personnel. However, in June of the same year, BACEN endorsed its Attorney Office’s opinion enacted in March, affirming its exclusive competence over the financial sector (Arcanjo Neto 2006, p. 14).

The Central Bank’s insistence on controlling concentrations in the financial sector cannot be separated from the context of the time. As described in Chapter 5, by 1997 there was still a suspicion about competition policy by market agents, as the 1994-1996 Council was seen as extremely interventionist. For instance, in the same month of 1997 that BACEN reaffirmed its jurisdiction, the economist Gustavo Franco, who was connected to the PUC-Rio circle, and was by then a Central Bank director and in the following month became BACEN’s President, articulated the same fears and criticisms that were coming from the market and other governmental spheres. In a speech he gave in CADE, Franco argued that the organ adopted a “more liberal view on economic power concentration, focusing on the control of

conduct, especially of state-owned companies”, and criticized the “nonsense of price control mechanisms that the competition law maintained” (Bello 2005, p. 211).

As described by lawyers and economists involved with the field of competition policy at that time, BACEN’s radical position was to a great extent constructed not by its President, but by the bureaucrats who occupied directive positions in the Bank. As one of the interviewees reported,

Discussions with Gustavo Franco and Armínio Fraga [BACEN’s president between 1999 and 2002] were peaceful. The big problem was with the Central Bank’s technical body. When a director sat down to discuss, there was no discussion. They didn’t even look at you, barely greeted you, because they thought they were of a different cast, a different lineage.

In 1998, through Resolution number 15, CADE reacted to BACEN’s latest move, and re-stated its competence to regulate the financial sector by including it among the areas of economic activity to be regulated through merger reviews. Despite this move, the inter-institutional relations between CADE and BACEN seemed stable, as in February 2000 a joint ordinance between the two agencies was signed, creating an “Interinstitutional Group of Technical Cooperation”, which among other attributions was entitled to elaborate a proposal for solving the controversy over the competence to regulate the financial sector<sup>345</sup>.

After this ordinance, however, CADE examined two MRs that entailed concentrations involving financial institutions<sup>346</sup>. According to Arcanjo Neto (2006, p. 14) and the information provided by some interviewees, CADE’s decision to act in these concentrations motivated BACEN to “change its posture”, triggering a reaction that would result in a landmark of the controversy. BACEN’s response was articulated by its Attorney General’s Office, which made an official inquiry to the Attorney-General of the Union (AGU), by then Gilmar Mendes, later appointed justice of the Brazilian Supreme Court by President Cardoso, asking for a legal opinion to settle the controversy. The “conflict of competences” was established (Arcanjo Neto 2006, p. 17). Interestingly, this was the period when CADE’s composition was shifting. In the year 2000, a Council composed mostly by lawyers substituted that consisting of a majority of economists since 1996 – and as a lawyer reported

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<sup>345</sup> *Portaria Conjunta n. 1*, of February 9<sup>th</sup> 2000.

<sup>346</sup> One was the acquisition of *Consórcio Rodobens* by *Daimler-Chrysler*, decided on February 6<sup>th</sup> 2000, and the other was the capital increase of *BNY International Financing Corporation* in *Banco Credibanco*, decided on October 4<sup>th</sup> 2000 (Arcanjo Neto 2006, p. 14). In a quote of CADE’s Attorney General manifestation about the controversy, approved by the Council’s plenary, these MR are said to be exemplaries of concentrations “presented by some financial institutions *ad cautelam*”, which indicates that other institutions were not presenting operations of concentration to CADE (Arcanjo Neto 2006, p. 17).

in an interview, “this is a fight of lawyers. You and I can produce good arguments for both sides”.

According to an interviewee, the resort to AGU was once again product of the actions of BACEN’s bureaucracy, as the “Central Bank’s young Turks” were “lobbying” inside the Bank and in AGU for a favorable opinion. Around the same time, as another interviewee revealed, SEAE was acting together with BACEN’s President, Armínio Fraga, in order to elaborate a consensual solution, in which economic concentrations in the financial sector would be under CADE’s supervision, but the Central Bank could claim “systemic risk, as they called it, and take over the issue – breaking a bank was something not desired”. However, as this interviewee maintained, this negotiated solution would have been blocked by the “lobby of the financial sector and of the Central Bank itself”. Thus, divergences were also occurring within BACEN.

Through the *Parecer GM-020* decision of April 5<sup>th</sup> 2001, AGU responded to the consultancy made by the Central Bank. Against BACEN, which defended its exclusive competence to analyze concentrations in the financial sector, CADE’s Attorney’s Office, as well as the Ministry of Justice maintained the need for a complementary jurisdiction between the monetary and the antitrust authorities. The position defended by CADE and the Ministry was that of a “complementary competence” in the regulation of economic concentrations and an exclusive jurisdiction of CADE in conduct cases. In this sense, BACEN would have exclusive competence to decide about economic concentrations only if a “prudential question” was at stake, i.e. if the case generated risks to the “stability” of the financial system. If not, CADE would be entitled to analyze a merger involving financial institutions. As explained by an interviewee the idea of “complementary competences” means that “if [a case] is important, the Central Bank must rule”.

This take on the controversy was supported by a study authored by Gesner Oliveira in 2001, a year after he left CADE’s presidency (Oliveira 2001), which was attached to CADE’s Attorney’s Office report to AGU. Based on a review of the international experiences of the regulation of the banking sector, and on an economic, institutional and legal approach to the issue, Oliveira’s policy paper advocated a complementary jurisdiction between BACEN and CADE, in which the Central Bank would be responsible for the “tasks of technical and economic regulation”, while CADE would “enforce antitrust law” (Oliveira 2001, p. 12). In practice, the proposal meant that BACEN would review concentrations under a prudential perspective, and if it didn’t represent a risk, CADE could assess it. Conduct of financial

institutions, in turn, would be entirely subjected to the regulation of the competition authority. As Oliveira maintained (2001, p. 52), his proposal “rejected two extreme and simplistic views”:

On the one hand, the notion that economic concentration would be necessarily beneficial to the financial system due to the reduction of the systemic risk. On the other, that concentration would inevitably elevate the risk of abuse of economic power in the financial system.

Rather than reflecting a dichotomy between these views, Oliveira (2001, p. 52) understood that the implementation of a shared jurisdiction was part of a “need for a sequential evolution” in the regulation of the financial sector, a step further in the “restructuring of the Brazilian financial system” initiated in the early 1990s. The first “phase” of this evolution would be one of “antitrust exemption” to concentrations among financial institutions, in which “authorities introduced institutional changes necessary to the adaptation of the national banking system to the new international parameters, as well as to the price stability obtained with *Plano Real*” (Oliveira 2001, p. 53). According to Oliveira’s paper, these “new parameters” were largely established between 1994 and 1999, based on “the facilitation of incorporation of institutions facing solvency difficulties, reinforcement of credit security and depositors protection, tariff liberalization and the sanitation of the public system”, i.e. privatizations (Oliveira 2001, p. 53)<sup>347</sup>.

In other words, the “phase” of “antitrust exemption” would be a necessary step to achieve a “stable and competitive environment” (Oliveira 2001, p. 53). The shared jurisdiction reclaimed by Oliveira and endorsed by CADE’s General Attorney’s Office in 2001 thus did not exclude the exclusivity of the Central Bank in regulating financial concentrations, as it would be part of a “necessary”, although by then superseded phase. Rather, it implied a model of regulation to be applied to a financial sector that was already substantively restructured despite antitrust regulation.

The complementary role of CADE that was defended in that document was thus not incompatible with BACEN’s worries about possible blockages to concentrations in the

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<sup>347</sup> Oliveira (2001, p. 55) illustrates the restructuring of the Brazilian financial system with the following elements: the decrease in the number of banks after 1994 from 273 to 233; the promotion of “adjustments” in 104 institutions, involving liquidation, incorporation, and transfer of assets; and incentives to privatization of state banks. In the data he provides in the paper (Oliveira 2001, p. 55-57), it is possible to visualize what was in practice understood as a “stable and competitive system”: a lower number of banks, a decrease in the participation of state-owned banks (for instance, while in 1994 state banks held 13,4% of net assets of the market, in 1998 it was about 3.1%), and an increase in the participation of the private sector, notably of foreign agents (for instance, in 1994 banks with foreign control detained 5,9% of assets in the market of banks, and by 1998 this number increased to 19,5%). Another study that illustrates how the 1990s was the period in which the banking sector most intensely concentrated was done by Troster (2003).



financial sector, as articulated by Gustavo Franco in 1997. As an interviewee maintained, this was also a worry of banks, “which feared that CADE would retard the approval of concentrations”. An indicator of this claim of compatibility can be found in Oliveira’s (2001, p. 50) quote in CADE’s annual report of 1998, when he was the agency’s president, which affirmed that “CADE has not been considering the increase of market concentration level as a necessary and/or sufficient condition to an operation to be considered potentially harmful to competition”. In what looks like a defense of CADE’s practice, Oliveira (2001, p. 50) argued that “a sample of CADE’s decisions proves that the existence of numerous cases in which approvals with or even without conditions were given”. And he added: “in some procedures the HHI even reached the maximum of 10000 (pure monopoly) and they were approved” (Oliveira 2001, p. 50).

Mobilizing several legal arguments to evaluate the dispute, and even debating the study developed by CADE’s former president, AGU decided that the Central Bank had “exclusive competence” to analyze economic concentrations in the financial sector, dislocating CADE from its “preventive” roles in respect to the financial sector. The opinion was approved by the President of the Republic on the same date. As an interviewee described it, this was a “political opinion” that consolidated the “law of the strongest”: “in politics, the strongest prevails, and obviously the Central Bank was stronger”.

Instead of settling the struggle, AGU’s opinion inaugurated another round of legal disputes. The debate from this moment on was not only about who had the jurisdiction over the financial sector, but also if AGU’s opinion, when confirmed by the President, was legally binding on CADE. In 2001, in analyzing a MR in which a Swiss financial group acquired part of the assets of a Brazilian financial institution, CADE affirmed its jurisdiction to regulate concentrations in the sector<sup>348</sup>. The bottom line of the decision was that AGU’s opinion was not binding on CADE, given the institutional autonomy guaranteed to a regulatory agency (Maranhão e Osmo 2012, p. 9). The case was controversial among commissioners. CADE’s president, by then the lawyer João Grandino Rodas, and the case’s rapporteur Hebe Romano (also a lawyer) understood that BACEN had exclusive jurisdiction over the sector, although AGU’s opinion was not binding. However, the other five commissioners decided that CADE was competent to evaluate the operation, and that there were “complementary” competences shared by the two institutions, in which BACEN had exclusive jurisdiction in “exceptional hypotheses” of “systemic risk” (Maranhão and Osmo 2012, p. 10).

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<sup>348</sup> This was the MR number 08012.006762/2000-09 through which the group *Zurich Financial Services* acquired part of the capital of a subsidiary of *Grupo Finasa*, decided on November 28th 2001.

Following this decision, BACEN became more “worried” about the regulation of financial concentrations, as an interviewee revealed. The Bank sent “10 of its experts to attend one of PinCADE’s events, created a sort of ‘antitrust division’ inside the Bank, enacted ordinances, and so on”. However, although the case was approved without restrictions by CADE and BACEN seemed more cooperative, tensions continued. In November 2002, the battle entered the legislative arena. The Executive submitted to the National Congress a bill proposed by the Ministers of Finance and of Justice (by then Paulo de Tarso Ribeiro), which explicitly established the exclusive competence of BACEN to regulate concentrations in the financial sector<sup>349</sup>. According to the bill’s justification (item 7), its objective was to “assure the prevalence of considerations pertinent to the strengthening of the system over issues related to potential harms to the economic order”. In this view, BACEN would be “the regulatory authority which is closest to the market under its supervision”.

Almost one year later, another bill was started in the Federal Senate. The Senate’s President, Antonio Carlos Magalhães, submitted a bill that established complementary jurisdictions between CADE and BACEN<sup>350</sup>. The bill provided that the Central Bank is entitled to exercise a first analysis of a merger in the financial sector. If it understands that the operation may affect “the reliability of the financial system”, BACEN is responsible for the final decision. If not, the case is passed to CADE, which decides on its legality. In the justification of the bill, Senator Magalhães presented a criticism of the Central Bank’s regulation of the sector, stating that:

Brazilian society has not observed satisfactory actions of the Brazilian Central Bank, the organ responsible for regulating the National Financial System, to solve the harms caused by the lack of competition in such an important economic sector.

In October 2002, the struggle once again shifted its focus by entering the judiciary. Two banks involved in a merger (*Banco BCN S.A.* and *Banco Bradesco S.A.*) were required by CADE to submit the operation to its evaluation through a MR. In disagreement with the agency’s decision, the banks asked a Federal court to revoke CADE’s decision. In 2003 the court decided that the banks were not obliged to submit the operation to CADE, so the agency appealed to a Regional Federal court (TRF). Five years later, in 2007, the TRF of the 1<sup>st</sup>

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<sup>349</sup> *Projeto de Lei Complementar n. 344/2002*. The last movement of the bill in Congress dates of 2005.

<sup>350</sup> Originally presented in the Senate as the *Projeto de Lei do Senado n. 412/2003*, it was approved and later sent to the House of Representatives, where it became the *Projeto de Lei Complementar n. 265/2007*. The last movement in Congress was on February 26<sup>th</sup> 2014, when the *Constitution, Justice and Citizenship Committee* decided that the bill is constitutional and may proceed in the legislative process.

Region decided in favor of CADE, even excluding the binding character of AGU's opinion (Maranhão and Osmo 2012, p. 11). The corporations then appealed to the Superior Court of Justice, which in 2010 decided in favor of the banks, liberating them from the obligation to submit the operation to CADE and affirming the binding effects of AGU's opinion (Maranhão and Osmo 2012, p. 12). However, it never decided on the substantive aspect of the jurisdictional conflict between CADE and BACEN, which since then waits for a decision of the Brazilian Supreme Court (Maranhão and Osmo 2012, p. 13).

In 2008, a truce between CADE and BACEN can be identified. The Attorney Offices of both institutions signed a joint document that required AGU to review the opinion issued in 2001 (Maranhão and Osmo 2012, p. 14). The proposal replicated the content of the bill of 2007, thus establishing that BACEN would be exclusively entitled to regulate concentrations in the financial sector if the case concerned the stability of the financial system. If not, CADE would subsequently consider the case. Also around these years, as an interviewee who worked in the field by then revealed, CADE was working closely with the Central Bank to "heal the wounds of the previous period". This cooperation involved talks to "make the Central Bank adopt Merger Guidelines for analyzing concentrations in the banking sector, in an attempt to anticipate the bill that was in Congress since 2002". As described in the previous section, CADE nevertheless continuously decided cases involving financial institutions in the years following the signature of the 2008 protocol.

It is thus not surprising that the controversy was once again revived a few years later, already in the period in which, as described in Chapter 5, CADE started to be seen as more "interventionist" and "politicized". In 2011, SDE received a representation of a Federation of workers accusing the state-owned commercial bank *Banco do Brasil* of practising anticompetitive conduct related to the imposition of exclusivity clauses in credit contracts (Maranhão and Osmo 2012, p. 15)<sup>351</sup>. SDE rejected the representation, stating that since the investigated corporation was a financial institution, BACEN would be entitled to regulate it. The Secretariat based its decision on the interpretation that AGU's opinion of 2001 had binding effects, obliging the submission to BACEN. CADE's plenary did not accept SDE's decision, and determined that the AP should proceed. In his decision, the rapporteur Marcos Paulo Verissimo affirmed CADE's complementary jurisdiction over the financial sector, and maintained that AGU's opinion had no binding effects (Maranhão and Osmo 2012, p. 16). CADE's plenary unanimously endorsed the decision.

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<sup>351</sup> AP number 08700.003070/2010-14, initiated by the *Federação Interestadual dos Servidores Públicos dos Estados do Acre, Alagoas, Amapá e outros*.

CADE's decision was dated August 2011. Eight months later, the Central Bank started a counter-offensive. In April 2012, BACEN issued an ordinance establishing its exclusive competence to regulate concentrations involving financial institutions<sup>352</sup>. Interestingly, in this document BACEN details the steps that shall be followed by economic concentrations presented to be regulated, even giving the same name to the procedure as that in the SBDC – *Ato de Concentração* (MR) –, and incorporating traditional concepts of competition policy, such as “relevant market”, “barriers to entry”, and the “efficiency” gains to be promoted by the operation. In this context, although I was not able to determine whether it was due to BACEN's latest move, after almost two years stuck in the National Congress, the bill proposed in the Senate that established the complementary jurisdictions of CADE and BACEN was revived in July 2013.

Versions of these positions – from views sustaining the exclusive control of BACEN over concentrations in the financial sector, to compromise proposals that advocate a shared competence – were identified in the interviews conducted with the agents of the field of competition policy. Interestingly, I was not able to identify a diametrically opposed position to the exclusive jurisdiction of BACEN, i.e. a view that CADE must be solely entitled to regulate concentrations in the sector, in any interviews or in the reconstruction of the controversy.

Even within the field of competition policy there are those who advocate the desirability of BACEN holding exclusive jurisdiction over concentrations in the financial sector. Often this position is maintained by the resort to the peculiarities of the financial sector, which would make unfeasible any kind of regulation of concentrations by CADE, even if in a “complementary” way. This is because, as some lawyers and economists interviewed maintained, the division of competences between CADE and the Central Bank would imply the risk of generating bank runs. As a former commissioner suggested when discussing the bill that established a shared competence presented in the Senate in 2003:

The bill offers a solution [to the controversy] stating that every Merger Review that generates a prudential problem cannot be analyzed by CADE. But the problem is: how can the Central Bank announce that there is a prudential problem? It is complicated for the Central Bank to say that. BACEN may ignite a bank run. [...] So maybe the best is to divide: CADE regulates conduct, and BACEN concentrations.

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<sup>352</sup> *Circular n. 3.590*, of April 26<sup>th</sup> 2012.

Interviewees also frequently tied a shared or, even more radically, an exclusive jurisdiction for CADE over the financial sector to what seems to be the lack of a specific “expertise” in the field of competition policy. As two former commissioners explained, the position held by BACEN – most notably by its bureaucracy – was motivated by a worry about CADE’s limitations. One of them, for instance, argued that “their worry was that CADE wouldn’t have enough agility, that CADE would disturb it, that CADE *didn’t know the financial sector well, that it didn’t know its needs well*” (my italics). The other linked this worry to the presence of lawyers in the field of competition policy:

[BACEN’s bureaucracy] had this view that it would be crazy to let CADE stick its nose into the issue. They thought the financial sector was too important to at some point be left for a prosecutor to decide about it. [...] There was this prejudice against jurists, against lawyers. They thought lawyers had no experience, not even lawyers working in the financial sector. For them, lawyers had no idea about this. They would be amateurs.

Other interviewees, who defended BACEN’s exclusive jurisdiction over the financial sector, also referred to the need for a specialized expertise in order to regulate it. According to two former commissioners, the financial sector would be “too sensitive” and “too complex for CADE”, and “no place for amateurs”. Similarly, a third former commissioner maintained that while “the financial sector is about macroeconomics, issues decided by CADE are microeconomic”.

Together with sections 6.1 and 6.2, the description of how the field of competition policy relates to financial capital thus portrays both the kind of economic phenomena it regulates, and how it regulates it. Hence, among the empirical tasks derived from the framework sketched in Chapter 3 to analyze the relationship between competition policy and neoliberalism, the one still pending is to describe the outcomes of antitrust regulation at a societal level. In the next section, I therefore explore what are the constitutive roles of the field for society.

#### **6.4 The subjects protected by antitrust: between consumers and workers**

On the very first day of my fieldwork visit to the federal capital Brasília, I got a cab and asked the driver if he could take me to CADE’s building, at “*SEPN 515 Conjunto D, Lote 4*”. Brasília’s encrypted addresses are very peculiar, and it takes time for a visitor to understand them. I wasn’t familiar with them, and couldn’t give the driver any indication

besides the official address. After I told him the place I wanted to go, the driver just nodded, but remained silent. Cabdrivers in Brasília go up and down to governmental buildings all the time, transporting politicians, businessmen, bureaucrats, lobbyists, etc. I was confident he knew where to take me. After a while, however, the driver looked back through the mirror, and with a strong accent of the Northern Brazilians who constructed Brasília and first populated its once desert landscape, he asked: “CADE is that institution for consumer protection, right?”. Somewhat hesitant, I confirmed – “Yes, that institution for consumer protection”. After no more than 10 minutes we arrived at CADE’s building.

The driver’s question illustrates the public image of the Brazilian antitrust authority, historically constructed by the institution itself and by the agents of the field of competition policy. It also converges with how mainstream narratives describe the field’s role in society. As reviewed in Chapter 1, antitrust policy is said to have the role of protecting consumers through the promotion of competition. In economic terms, this social category is depicted as that of the direct “beneficiaries” of regulation. Under a legal point of view, consumers are the “subjects” entitled to the rights protected by antitrust policy.

In Chapter 2, I described how the construction of the primacy of “consumers” as an organizing category of society in respect to the state and the economy has been an integral part of the neoliberal project. As argued, together with the “outcomes” of competition policy explored in the previous sections, a defining feature of neoliberalism can be found in a social dimension: the transformation of citizenship and the creation of neoliberal subjects, to which the category of consumers, or the “citizen-consumer” fits smoothly. This, I maintained, is one side of the coin – the positive social agenda engendered by neoliberalism. The other side is that of the deconstruction of social forms that are not useful to or compatible with the economic and political tenets of the neoliberal project. As discussed in Chapter 2, among the social forms most notably targeted in this negative dimension is “labor”.

As presented in Chapter 3, given the relation between neoliberalism and the attempt to dissolve a social model erected on the “capital-labor” relation and replacing it by that of “capital-consumer”, the proposal to assess competition policy’s linkages to neoliberalism on a social dimension was translated into an analysis of how the category of “labor” is incorporated into the practice of the field of competition policy. In other words, in this dimension of the “outcomes” of competition policy, the focus lies on understanding how the antitrust field “digests” social categories such as “workers”, “employees”, and “labor”. As argued, this inquiry comprises the “constitutive” roles of the analyzed field in society,

complementing the “facilitative-regulatory” roles towards the economy, and provides parameters to evaluate if and how they relate to the neoliberal project’s implications in a social dimension, as maintained by the critical political economy from which I depart.

To pursue such an analysis, as described in Chapter 3, in this section I present how CADE and the agents of the field deal with “labor” in decision-making. In the first part of this section, I portray the different ways in which labor-related issues appear in the regulation produced by the field of competition policy. The empirical sources for this description are the procedures analyzed by CADE and its decisions. In the second part, I present the views and normative stances of the agents of the field regarding the incorporation of “labor” as an element of competition policy. This description is based on interviews conducted with lawyers and economists involved with the field.

#### *6.4.1 The selective absence of “employment”*

The reform of competition policy that resulted in law 8884 of 1994 included “alterations in the employment level” as an element to be considered by CADE in the imposition of conditions for the approval of Merger Reviews<sup>353</sup>. As described in Chapter 4, one of the agents of reform who later became a commissioner in CADE – the economist Lucia Helena Salgado – couldn’t specify the exact origin of this norm, but attributed it to lawyers who worked in the commission. Moreover, in her view, the inclusion of “employment” concerns in antitrust law would be “unorthodox”, but compatible with both the European inspiration of Brazilian competition policy, and with “our tradition of a welfare state”.

Such a perspective can also be noticed in the first annual reports published by CADE, precisely when Salgado was a commissioner. In the 1996 report, for instance, the Council dedicated some pages to publicizing how it understood the relation between competition policy and labor, and to present initiatives taken to “attenuate the impact” of the process of “industrial restructuring through mergers, acquisitions, and joint-ventures” on the employment level (CADE 1996, p. 35). According to the official report, such phenomena “although they may increase efficiency, sometimes present negative effects on the employment level”, as in most cases a concentration “involves the reduction of staff and/or the relocation of human resources to different geographical markets” (CADE 1996, p. 35-36).

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<sup>353</sup> Article 58, first paragraph of the law 8884/94.

These effects were said to be a “negative externality” that would be faced by competition policy, as its “ultimate goal is the maximization of welfare, which implies the minimization of social and private costs” – including in “the labor market” (CADE 1996, p. 36). The “most perverse side” of unemployment generated by the “context of corporate restructuring” would be the “low versatility of the dismissed labor force”, which faces an “unreceptive labor market for the specializations developed in the former employment” (CADE 1996, p. 37). In CADE’s report, this was characterized as a specific form of unemployment – “frictional unemployment” – “generated by the lack of compatibility of the workers’ qualifications at the moment of dismissal with the profile demanded by the market” (CADE 1996, p. 37). In other words, “frictional unemployment” would occur when workers are unemployed but there is a “reasonable demand for labor in the market”.

CADE’s annual report of 1996 describes an initiative to “attenuate or even avoid the social and economic costs associated with frictional unemployment” (CADE 1996, p. 37). This initiative was the creation of a “Protocol of Productive Restructuring and Professional Retraining”, signed by CADE and the Secretariat of Professional Formation and Development of the Ministry of Employment and Labor on February 19<sup>th</sup> 1997. Under this protocol, CADE would seek to “re-train” the workers dismissed as a result of economic concentrations, thus “preventing short term frictional unemployment from becoming long term structural unemployment, much more deleterious in terms of social and familiar disaggregation” (CADE 1996, p. 37).

In doing so, CADE would “neutralize the macroeconomic inefficiencies generated by movements associated with the seeking of microeconomic efficiency”, and contribute to the pursuit of “full employment”, “consecrated as a constitutional principle of the economic order” (CADE 1996, p. 38). Such programs of “re-training” were even more ambitious, according to CADE’s report, as they wouldn’t be “restricted to the formation of a labor force for already constituted corporations”, but also seek “training with the objective of developing small businessmen who would create their own businesses” (CADE 1996, p. 38). The transformation of dismissed workers into businessmen was seen by CADE as a “healthy process, as it increases competition, especially in the services sector, and moreover, it opens space for a new attitude of entrepreneurship and competition” (CADE 1996, p. 1998). Linking this initiative as a form of achieving the goal stated in the norm of the 1994 law that



mentioned “full employment” as a condition to be fulfilled through TCD, CADE’s 1996 report mentions two cases decided by the Council that would illustrate such concerns<sup>354</sup>.

The reports of activities of the years subsequent to 1996 also mentioned the attention given by CADE to the topic of labor, although to a lesser extent. In the 1997 report, the only references to the issue are the signing of the protocol with the Ministry of Employment and Labor, which is inserted among the activities developed by the council that year, together with a conference organized on the same date about “*Employment and Competition*”, with the participation of the Ministers of Justice and Labor, CADE’s president (Gesner Oliveira), and others.

In the report of 1998, the only reference to labor appears in a quote from a doctoral thesis about competition policy in Brazil authored by Ruy Santacruz Lima (Lima 1998), by then a commissioner in CADE, used to describe the authority’s practice in the previous years. In this quote, Lima (1998, p. 119) affirms that most restrictions established by CADE until then were of a behavioral type, including those “related to employment”. These, according to him, would demand a “reasonably sophisticated bureaucratic apparatus” that would in turn “create a form of intervention incompatible with the modern regulation of markets” (Lima 1998, p. 119). Also according to this quote endorsed by CADE’s annual report, the imposition of commitments related to the “employment level” would “attach reins to the strategic planning of a corporation and in the execution of its commercial policy”, and “reduce the liquidity of assets, hardening its subsequent sales, and inhibiting investments”, besides “making corporate decision-making more rigid, and reducing the efficiency of the firm, and thus of the market” (Lima 1998, p. 119).

In the early 2000s, a last explicit reference to labor issues can be identified in the reports of CADE. The annual report of 2001 mentions the participation of one of CADE’s commissioners in a seminar conducted in Brasília about “*Globalization and its consequences for the Brazilian worker*”. As I will detail later on this section, the same commissioner was involved in the discussion of employment conditions to be imposed in one of CADE’s most famous cases. After this reference, and besides some citations of cases in which the “employment” issue was raised, labor matters are absent from CADE’s report. The concerns with labor were thus more present in the Council’s official reports precisely when the field was still consolidating and seeking its legitimacy as an arena of regulation – whether before other governmental institutions, the market, or society as a whole.

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<sup>354</sup> MR 27/1995 (*Colgate/Kolynos*), and MR 16/1994 (*Grupo Gerdau/Korf GmbH*).

But how have these concerns been translated into concrete regulatory practices? Following a strictly formalist evaluation of competition policy's roles in society, it could be affirmed that, given the presence of a norm on the "employment level" in the 1994 law, as well as institutional discourses described above, not only "consumers" are protected by antitrust law in Brazil, but also "employment". However, given that the conceptual framework adopted in this research intends to reach conclusions about the field's outcomes on the economy and society based on the "law in action", I will now present elements that show how this norm has actually been enforced.

Since "employment level" appears as one of the elements that may establish the "Term of Commitment to Performance" (TCD) that can be signed by CADE and corporations on which conditions are imposed for the approval of a concentration, this is the first and most obvious place to look for the presence of "labor" in the practice of antitrust policy. Of the 93 TCDs issued by CADE from 1994 to 2013, only 7 of them refer to workers, labor or employment, as depicted below in chronological order. As the table indicates, these were mostly issued during the period that inaugurated a properly "technical" antitrust policy in Brazil, from June 1996 to the year 2000. All of the 4 TCDs issued in this period determined an obligation to establish programs for the "retraining and reinsertion" of workers dismissed due to the concentration's "efficiency" in the labor market.

**Table 85.** TCD with employment clauses

MR	Corporations	TCD date	TCD clause	Type of condition
0019/1994	Ajinomoto Co. Inc., Oriente Indústria e Comércio S.A	28/02/96	Second Clause, item "E"	Employment level
0024/1995	Crown Química S.A., Grace Produtos Químicos e Plásticos Ltda.	12/3/97	Second Clause, item "E"	Retraining & Reinsertion
0027/1995	K e S Aquisições Ltda., Kolynos do Brasil S.A.	19/03/97	Clause 3.7, items "D" and "E"	Retraining & Reinsertion
0079/1996	Alcan Alumínio do Brasil S.A., Alumínio Penedo Ltda., PANEX S.A. Indústria e Comércio	1/4/98	Second clause, item "L"	Retraining & Reinsertion
08012.00584 6/1999-12	AmBev	19/04/00	Clause 2.4	Employment level + Retraining & Reinsertion
08012.00442 3/2009-18	Perdigão S/A, Sadia S.A.	13/07/11	Clause 3.3	Employment level
08012.00187 5/2010-81 <sup>355</sup>	Cimpor Cimentos do Brasil Ltda, Votorantim Cimentos S.A	4/7/12	Clause 3.1.4	Employment level

**Source:** elaborated by the author

<sup>355</sup> This MR is related to other 4 operations analyzed separately by CADE in which the same company figured in the acquiring pole: MR numbers 08012.001879/2010-60, 08012.002018/2010-07, 08012.002259/2012-18, and 08012.002018/2010-07. In all of them, the same TCD was established.

These programs were mostly understood as training the labor force to look for jobs in another sector or company. For instance, in MR 27/1995, the program entailed offering employees dismissed as the result of the operation from jobs in literacy training, technical courses about industrial production such as “total productive maintenance” and “focused factory”.

In all TCDs in which “Retraining & Reinsertion” measures were established, these were not seen as incompatible with the dismissal of workers as the result of the merger analyzed, but rather as a mitigating instrument for a process that was not to be necessarily avoided. In MR 24/95, for instance, the obligation was to “develop a program of reinsertion of professionals who *will be eventually dismissed*” (my italics). Similarly, in MR 08012.005846/1999-12, clause 2.4 of the TCD defined that the corporation resulting from the analyzed merger would have to “promote programs of retraining and reinsertion of *workers whose dismissal is directly associated with the constitution or selling of assets, or to the deactivation of its production lines*” (my italics). Even in this MR, in which, as depicted in the table above, “Retraining & Reinsertion” conditions were combined with the maintenance of the employment level, dismissals were not to be blocked. In a report about the TCD’s implementation, CADE’s commission responsible for monitoring conditions imposed in decisions (*Comissão de Acompanhamento de Decisões – CAD/CADE*) affirmed that “clause 2.4 does not oblige AmBev to keep or readmit employees nor to guarantee to dismissed employees employment in other corporations”<sup>356</sup>.

The other 3 TCDs in which labor-related clauses were identified are part of two other periods that, as described in Chapter 5, are seen by the field as qualitatively different. The first was concluded within the first MR depicted in the table above by the end of CADE’s first composition as a reformed antitrust authority, in February 1996. In a considerably different way than how CADE inserted conditions connected to employment after the arrival of the council led by Oliveira, this decision explicitly determined that the acquiring corporation was obliged to “guarantee the maintenance of the existing employment level in its industrial units connected with the production of” a specific chemical component in whose relevant market concentration was understood as high by CADE. Item “E” of this TCD’s second clause nevertheless mentioned two possible exceptions to this rule: “with the exception of dismissals for cause, and those implied by changes in the productive process”.

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<sup>356</sup> Nota Técnica 24/2004 of CAD/CADE in the monitoring of the TCD signed in MR n. 08012.005846/1999-12.

The other two TCDs on the list were also enacted in another period qualitatively different from that which the agents of the field identify as of a predominantly “technical” council. In 2011 and 2012 – when CADE allegedly was once again becoming more “politicized” and “interventionist” – these TCDs imposed solely “employment level” conditions. However, if analyzed closely, it is possible to identify a peculiarity in the use of this type of clause. In both MRs, the obligation to maintain the “employment level” determined by CADE was related to assets that were to be alienated as a condition for the approval of the operation. In MR 08012.004423/2009-18, decided in 2011, CADE determined that the corporations involved should “demand from the acquiring company [of the assets to be sold] the guarantee that the current level of employment of all units transferred will be maintained for a minimum of 6 months after the acquisition”. This was thus similar to the first TCD on the table, in 1996, although with a deadline. In MR 08012.001875/2010-81, decided in 2012, however, the clause on “employment level” had the main goal of protecting the value of the assets that were to be alienated. As CADE determined in clause 3.1.4 of that TCD,

during the [*confidential period*] for the achievement of the obligation of alienating the assets described above, the corporation agrees to maintain intact the productive units that will be alienated, preserving tangible and intangible assets, its market value and the general employment level.

This condition seeks to avoid the dismissal of labor force before the asset transfer determined by CADE could hamper the productive potential of those assets, which were to be sold precisely with the objective of strengthening another competitor.

Besides TCDs, in the analysis of MRs that compose the sample described in section 6.1, I was also able to identify 8 cases that enable visualizing yet distinct forms in which labor-related issues appear in the production of antitrust policy in Brazil. In 6 of them, employment was connected with the conditions imposed for the approval of the operation. As the table below reveals (also in chronological order), the first MR of the group established the maintenance of the “employment level” as one of the conditions for the approval of the operation, together with other behavioral clauses. This is consistent with the mobilization of this type of labor-related condition identified in TCD, as the MR was decided in the initial years of decision-making under the reformed law.

The other 5 MRs illustrate another way in which labor can be noticed in CADE: the imposition of modifications in non-inducement clauses, i.e. contractual clauses agreed by the

corporations involved in the operation in which it is determined that one company will not induce or influence the other firm's workers to become its employees.

**Table 86.** Employment measures in MRs without TCD

MR	Corporations	Decision date	Type of condition
11/1994	CILPE - Companhia de Industrialização de Leite do Estado de Pernambuco, Yolat Indústria e Comércio de Laticínios Ltda	23/11/94	Employment level
08012.00327 4/2001-12	The B.F. Goodrich Company e Dana Corporation	6/3/02	Non-inducement clause
08012.00299 0/2004-25	JMS do Brasil Participação Ltda. e J. Malucelli Seguradora S.A.	27/10/04	Non-inducement clause
08012.00091 8/2004-63	Sudamericana Agencias Aéreas y Marítimas S.A. e Metalnave S.A. Comércio e Indústria	15/12/04	Non-inducement clause
08012.00077 7/2005-60	Bemis Company Inc. e Dixie Toga S.A.	27/04/05	Non-inducement clause
08012.00224 3/2005-78	Novartis AG e Hexal AG	18/05/05	Non-inducement clause

**Source:** elaborated by the author

In MR 08012.003274/2001-12, the only condition was the reduction of the period of the non-inducement clause from 10 to 5 years, in line with conditions concerning non-compete clauses, as described in section 6.1. In the other 4 MRs, the condition imposed by CADE involved the modification of the substantive scope of the clause. For instance, in MR 08012.002990/2004-25 and 08012.000777/2005-60, CADE determined that the non-induce clause that prohibited shareholders and their relatives from acting as consultants or autonomous professionals in the sector of the operation did not encompass the possibility of working as an employee of a competing firm. Similarly, in MR 08012.002243/2005-78, CADE determined that exceptions to the non-inducement clause were to encompass “employees”, together with other categories mentioned in the contract, such as lawyers, investment bankers, and accountants. In several of these decisions, CADE’s commissioners based the imposition of such conditions on the right to labor guaranteed in the Constitution of 1988.

In another MR identified in the sample, the topic of employment was also present, although not as a condition for the approval of the operation. This was the MR 08012.006483/2005-41, decided on October 13<sup>th</sup> 2005, in which CADE describes the operation as “the *acquisition* by *Mecalux* of the shares of *ThyssenKrupp Ingeniería y Sistemas S.A.*, its assets, liabilities, *employees* and contracts” (my italics). In this sense, “employees” appear among the assets *acquired* by one corporation. The approach to “employment” as an asset appears on yet another set of regulatory instruments mobilized by

CADE: the “Agreement to Preserve Reversibility of Transaction”, or APRO. As described in Chapter 4, the APRO entails a kind of “precautionary order”, concluded between CADE and the corporations involved in an operation, in which the Council detected a high potential of anticompetitive effects. Through the APRO, corporations agree to preserve the corporate structures existing prior to the concentration, until the analysis of the MR is concluded by the authority.

Of the 32 APROs listed by CADE in its institutional website<sup>357</sup>, I was able to locate labor-related clauses in 15 of them, depicted in the table below in chronological order. In *all* of these APROs, the maintenance of the “employment level” was specified by CADE to the corporations.

**Table 87.** APRO with employment clauses

MR	Corporations	APRO date	APRO clause
08012.006976/ 2001	BR Participações e Empreendimentos S. A., G. Barbosa e Cia. Ltda. e Serigy Participações e Empreendimentos Ltda.	3/7/02	"F"
08012.001697/ 2002-89.	Nestlé Brasil Ltda / Garoto SA	27/03/02	-
08012.011518/ 2006-45	MAHLE Gmbh and Dana Corporation	21/03/07	I.1.2
08012.002813/ 2007-91	Petróleo Brasileiro S/A and Braskem S.A	25/04/07	V
08012.002816/ 2007-25	Ultrapar Participações S.A. Refinaria de Petróleo Ipiranga S.A.	25/04/07	V
08012.002818/ 2007-14	Ultrapar Participações S.A. / Petróleo Brasileiro S/A and Braskem S.A / Refinaria de Petróleo Ipiranga S.A.	25/04/07	V
08012.002820/ 2007-93	Petróleo Brasileiro S/A Refinaria de Petróleo Ipiranga S.A.	25/04/07	V
08012.003302/ 2007-97	Companhia de Bebidas das Americas - AmBev / José de Sousa Cintra	16/05/07	I, "C"
08012.003267/ 2007-14	GTI S/A / VRG Linhas Aéreas S/A	30/06/08	6
08012.004423/ 2009-18	Sadia S.A. / Perdigão S/A	8/7/09	2.4, "C"
08012.003189/ 2009-10	Medley S.A. Indústria Farmacêutica / Sanofi-Aventis Farmacêutica Ltda.	26/08/09	3.2, "I"
08012.010473/ 2009-34	Companhia Brasileira de Distribuição / Casa Bahia Comercial Ltda.	3/2/10	2.2, "A" e "B"
08012.005889/ 2010-74	Fischer S.A. - Comércio e Indústria e Agricultura / Citrovita Agro Industrial Ltda.	20/10/10	2.3, "G"
08012.010038/ 2010-43	Diagnósticos da América S.A. / MD1 Diagnósticos S.A.	26/10/11	2.2, "E"
08012.008378/ 2011-95	VRG Linhas Aéreas S.A. / Webjet Linhas Aéreas S.A.	26/10/11	2.1.5

**Source:** elaborated by the author

These clauses specified, for instance, that during the period of duration of the APRO, corporations would not implement “substantive changes in the involved companies that imply

<sup>357</sup> Available at: < <http://www.cade.gov.br/Default.aspx?a59968ac47c44bde36d547de2bfe051ff71735f1070919> >. Last accessed on November 19<sup>th</sup> 2013.

the dismissal of workers, and the transfer of personnel among its facilities”, or that they would “maintain the employment level, with the exception of changes implied by the normal course of business and the economic context”. In some cases, CADE attached to the APRO’s “employment level” clauses the prohibition of “unjustified dismissals of workers as a strategy to integrate corporations”.

As the examination of this element related to labor illustrates, in the APRO the “employment level” was to be protected while CADE analyzed the operation, as it was considered a component of the assets of the corporations. The approach to “employment level” as an asset is confirmed by the final outcome of CADE’s decisions in these MRs. Among these 15 operations in which an APRO was established, 13 of them were approved with conditions, of which 4 with some sort of structural restriction, and 1 was rejected. However, in only one of them was the maintenance of the “employment level” part of the conditions – MR number 08012.004423/2009-18, described among the TCDs with labor-related clauses, in which CADE imposed the protection of employment during 6 months by the company that would acquire the assets that were to be sold as a structural restriction<sup>358</sup>. Thus, in 12 of the 13 operations in which an APRO protecting the “employment level” was issued and in which restrictions were imposed on the approval of the MR, it did not become a condition.

Besides the presence of “employment” clauses as conditions imposed through TCDs or decisions in MRs, as well as its protection as an asset in APRO, there is a fourth place in which labor-related issues can be noticed in the practice of competition policy. This entails the mobilization of arguments related to the effects of operations on employment by corporations that submit MRs to CADE. Within the sample of MRs analyzed in section 6.1, one such case was identified. In analyzing the MR 08012.007085/1998-06, CADE (more precisely SEAE’s report, on page 630 of the procedure) describes the arguments presented by the involved corporations to support the operation’s approval. Among these arguments, which SEAE places within the “evaluation of efficiencies”, there is the suggestion that the operation would “increase [...] the labor force by 15% - from 108 to 120 direct jobs, together with the increase of exports and the decrease of prices”.

In other cases, the “employment level” was treated not as being increased by the merger, but rather as to be *protected* by it – coincidentally, these cases comprised 3 of the 8

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<sup>358</sup> In another MR (08012.006976/2001) in which an APRO was established, employment also appears, not as a condition, but as an “option” for the company acquiring the assets to be sold under the determination of CADE. As the TCD issued in that MR stated, “the acquirers must have *the option* to acquire [a certain product and blend], as well as *to employ key-workers of the acquired company*” (my italics).

MRs to have ever been entirely rejected by CADE, as mentioned in section 6.1. In the two MRs involving corporations in the sugar cane and alcohol fuel sector, the “employment level” was argued as a justification for the formation of an official cartel. As the corporations maintained in the presentation of the MRs, among other reasons, the merger was needed due to “reasons of preponderant national economic interest”, which encompassed the protection of “1 million direct jobs (representing more than 40% of rural workers in the state of São Paulo alone)”<sup>359</sup>. In the vote taken in the year 2000, the case’s rapporteur did not acknowledge such allegation, maintaining that the corporations did not “present evidence that the [merger] benefited the maintenance and the improvement of the conditions of workers”, and that although the sector “is responsible for a high number of jobs in the country”, the MRs “implied no benefits to workers”<sup>360</sup>.

In another MR rejected by CADE – the acquisition of *Garoto SA* by *Nestlé do Brasil Ltda.*, also referred in section 6.1 –, the debate around the “employment level” can also be identified, besides its presence in the TCD. In this operation, the use of the “employment level” argument was not a corporate strategy, as in the case mentioned above, but rather a claim of other agents in society. The operation was presented to CADE in 2002, and the Council enacted a decision that rejected the MR in 2004. In the meantime, given the Brazilian “post-merger review” system, the operation produced effects, i.e. *Nestlé* exercised control over *Garoto* even before CADE’s decision, although limited by the APRO signed in 2002. In 2004, CADE required *Nestlé* to sell all assets of *Garoto* to a competitor, and defined the several ways in which it should happen.

Among the forms laid down by CADE for the reversal of the operation, one was that the acquiring company could “not include all the assets that corresponded to the productive capacity of the sold company”, meaning that *Garoto*’s equipment and machinery could be sold to different buyers. This possibility raised several concerns in the regional government of Espírito Santo, the state where *Garoto*’s factory was based, and in the *Union of Workers of the Food Industry of Espírito Santo (Sindialimentação)*, which organised employees of that company. The worry, articulated, for instance, by the mayor of the city that hosted *Garoto*<sup>361</sup> and by Congressmen of Espírito Santo<sup>362</sup>, was that the dispersal of the company’s assets

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<sup>359</sup> MR 08012.002315/1999-50, p. 16-17.

<sup>360</sup> Rapporteur’s vote, p. 80.

<sup>361</sup> See, for instance, an article published by newspaper *Folha de São Paulo* on February 4<sup>th</sup> 2004, entitled “*For mayor, decision on Garoto threatens jobs and collections in Vila Velha*” (*Para prefeito, decisão sobre Garoto ameaça empregos e arrecadação em Vila Velha*).

<sup>362</sup> On February 18<sup>th</sup> 2004, representative Manato (PDT/ES) made a speech at the National Congress’ plenary, criticizing CADE’s rejection of the operation, which would imply “financial, employment and credibility



would imply its total deactivation. In a statement of 2011, when the case had already been before the courts for 7 years, the labor union of Espírito Santo maintained that “possibility of fragmenting the industry” in the selling of assets “may affect not only the 3.500 workers of the company, but the whole production chain around *Garoto*, considered part of the heritage of the state”<sup>363</sup>. In this case, it was thus CADE’s rejection of the MR – especially the way in which this rejection was determined – that generated fear in governments and workers that massive dismissals could occur.

The *Brasil-Álcool* and *Nestlé-Garoto* cases illustrate what some interviewees considered to be a recurrent practice in competition policy: the mobilization of arguments related to employment to exercise pressure on CADE. As a former member of the SBDC described it, this type of argument would be an “easy way for a corporation that merges and intends to raise prices as a result of the merger to mobilize public opinion in its favor: ‘If you oblige us to sell, we will lose many jobs’”. According to the same agent, politicians would also resort to these claims: “No governor says ‘We are defending our campaign sponsors’. They always say: ‘We are defending jobs’”. In a similar way, another former commissioner maintained that this type of argument is “A kind of introduction, by corporations, of a social question inside the decision-making practice of the antitrust authority. It is very common for corporations to bring it up, when it’s in their interest”.

#### 6.4.2 *Legal competences and economic trade-offs*

The trends identified in how CADE incorporates labor-related claims into its regulatory practice can be attributed to the dominant view shared by most agents of the field about its pertinence within competition policy. As interviews revealed, this perspective entails distinct and sometimes interconnected arguments which can be grouped around three lines. These might explain why employment has appeared only marginally as a condition determined in decision-making, and frequently in the form of “Retraining & Reinsertion” measures, or mostly treated as an asset when the “employment level” is at stake.

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losses”. A similar manifestation came from Senator Gerson Camata, also from Espírito Santo, who accused CADE’s decision as being “against Brazil”, since in 2002 “the governor [of Espírito Santo] and the Senators of that state looked for someone who could buy [Garoto] in order to guarantee employment”. The speech of Camata is available at the Federal Senate’s Diary of February 6th 2004, p. 02871-02872.

<sup>363</sup> Extracts from an article produced by and published in the union’s website. Available at: <<http://sindialimentacao.blogspot.com.br/2011/08/sindialimentacao-e-cade-discutem-em.html>>. Last accessed on November 20th 2013.

The first line of reasoning noticed in several interviews is that competition policy wouldn't be an adequate device to deal with labor-related issues. In this group can be placed arguments that stressed that CADE has no legal competence to deal with employment matters, and/or that the topic does not belong to competition policy concerns. As a former member of the SBDC maintained, while stressing that although he held that position he was "not neoliberal", inserting labor concerns in the regulation of "corporate transactions" decided by CADE would be "wrongful" and even "stupid":

Employment levels must be a central concern for the state. But it is not in deciding on or governing a corporate transaction that it must be done. This is a wrongful and stupid way to do it. It should be done through inflation control, the improvement of public accounts, inducing competitiveness in the economy, education. I am not affiliated to PSDB, I am not a neoliberal. But that's what I think.

Another interviewee highlighted the possible "usurpation" of competence that may occur if the antitrust authority deals with the topic:

Imagining that CADE can unilaterally impose a restriction that, for instance, concerns the maintenance of the employment level, is not trivial. This is an issue that raises at least two questions: is this really within the scope of competition law? To what extent doesn't it usurp a competence that is not ours? [...] I've seen many opinions arguing that CADE has no right to deal with the topic, also because labor law would offer enough instruments for that purpose.

In this agent's view, the concern with labor has however exercised influence in CADE due to the pressures of the public opinion: "This became a social demand, which is a problem. We have seen that the press and society have expectations about CADE that are not proper for an antitrust authority". Another interviewee manifested a similar view. To her, although employment was included in the law of 1994 as an element to be observed in the celebration of a TCD, it was something "alien" to competition policy:

Employment must not be the objective of competition policy. This is not our objective. Gesner [Oliveira] did something about protecting employment. There was also article 58 [of the 1994 law] about the TCD that you had to consider employment. But I think this is absolutely alien to competition policy. Competition policy must not get into this issue. It's a mistake.

As suggested by another former interviewee, although the law opened a way for the inclusion of employment concerns, "economic theory" wouldn't support it:

According to economic theory, this is not a fundamental worry. But the law gave a margin for a certain interpretation that it was possible to accommodate interests that were external to competition in the analysis.

The same interviewee maintained that, in practice, the view of what he called “economic theory” on labor prevailed, as there was a consensus among commissioners about “what matters” within “CADE’s competence” – “the welfare of consumers”.

We had a consensus that, in the end, the net welfare of consumers is what matters in a merger review, and that it’s not very reasonable to include these external factors because it is something that is not under CADE’s competence.

As several interviewees affirmed, the idea that CADE has no competence to evaluate the implications of concentrations in terms of unemployment does not mean that they understand it as an irrelevant question. Rather, as a former commissioner affirmed, “this is an extremely important question, but not because it is important that CADE is competent”.

The lack of competence of the field of competition policy to dig into the effects of concentrations on labor is related to a second line of reasoning frequently identified in the interviewees’ responses: the trade-off between economic efficiency and employment level. As many respondents mentioned, economic concentrations seek to obtain efficiency, and this often includes the reduction of the labor force, which implies dismissals. As a former commissioner affirmed:

A merger seeks to generate efficiencies. And this production of efficiency may mean “cutting heads off”. If two companies are merging, you won’t need two managers, you won’t need two heads of production. You concentrate that into a slimmer structure and gain more efficiency.

In the view of another former commissioner, this would be a somewhat unavoidable “perverse” side of economic concentrations, especially in cases implying the replacement of “man” by technology, as in the example mentioned in the following response:

Every merger has a perverse side: you substitute man by a machine. So you decrease your costs, and raise your profits. When you cut expenses, the first thing to do is to cut expenses with man – people that work.

The imposition of obligations of “Retraining & Replacement” are explained as a measure to moderate processes implied by more efficient structures. As the same interviewee maintained in the interview, the creation of such obligation, even if “anti-economic”, as the interviewee defined it, would be a “human aspect” that could be considered.

Although most agents of the field see the trade-off between economic efficiency and labor protection as practically unavoidable, its affirmation in the decision-making process is not necessarily obvious. As a former member of the SBDC affirmed, resorting to the argument of “competence” to escape from the debate about employment was sometimes a better strategy to deal with claims of employment protection, rather than stating that in the end dismissals “promote benefits to society” in reducing costs, especially when pressures came from labor unions:

Several labor union leaders that feared dismissals visited me. I never told them what I really thought. They visited, I listened to them, but one of the problems was that [dismissals] are a way of generating efficiency. Unfortunately, it was on the Merger Reviews: “We will save [*in the sense of “saving money”*] people. We will fire this many people”. [...] The idea is that it promotes benefits to society, which means reducing costs. So people visited us, and they didn’t realize that this was a benefit for the company, that it counted in favor of the company in capital account surplus. And the increase of capital account surplus would somehow affect consumers. [...] But we didn’t say that it was an advantage for the corporation. We said that it was something we couldn’t deal with. (The comment in italics is mine)

The trade-off between efficiency and employment is also often mitigated by the agents of the field – notably economists – through the idea that although a merger may imply dismissals in the short term, in the long run it actually generates more employment. As a former commissioner affirmed to justify why employment clauses are not within CADE’s competence and thus should not be imposed, “competition generates employment”:

I’m against [including employment in decision-making]. None of my TCDs had employment clauses. This is not a function of competition policy. It depends on the school [of thought]. For me, competition generates employment. I don’t have to worry about the employment level. I have to worry about the rules of competition, because it will affect the interaction among agents.

As another interviewee maintained, the employment generated through competition after a merger is also qualitatively different:

The merger process itself may lead to a reduction [of employment], but this reduction is in the short term, because if the operation actually produces efficiency, it will generate another kind of employment, with another type of qualification and in another place.

Another interviewee replicates this perception in an even more economic fashion:

When you have a competitive merger, as opposed to an anticompetitive merger, you will be generating jobs in net terms. There will be losses of jobs in gross terms, but in net terms more employment will be created, which compensates the former.

Although the agents of the field frequently understand labor-related issues to be outside the domain of competition policy, and to constitute an inevitable trade-off with economic efficiency pursued through concentrations, its presence is often “authorized” in at least one aspect of regulation produced by CADE. This is precisely the instrument in which I detected a recurrent presence of “employment level” clauses: the APRO. As a former commissioner maintained, the post-merger review system instituted by the law of 1994 generated the “problem” of preserving the assets of corporations that CADE could potentially determine to sell – including employees. The clauses established in APROs to maintain the “employment level” were introduced to solve this issue, rather than, as this commissioner affirmed, “a concern about labor rights”:

It is natural that in these operations you have people dismissed. But there was a problem that could happen in the [law of 1994]. A problem that now [with the law of 2011] has been solved. You could promote a merger and wait for CADE’s decision. So you made the merger and started “cutting heads off”. This was a frequent problem. If CADE suspected that it was a potentially dangerous operation, it made an APRO, and put in a clause stating that the corporation couldn’t dismiss anybody: “you can’t fire directors, you can’t change key-positions”. [...] It wasn’t so much a worry about labor rights. It was much more a worry with maintaining the health of corporations.

This view was replicated by other agents, such as another former commissioner who stressed the centrality of the “asset of human capital” for corporations:

What did worry us? Cases of APRO, because when we had no pre-merger review system, this was a problem. I don’t want unemployment if that asset of human capital is something essential to the corporation – for instance, a manager who holds the knowledge over some areas so that, if he is dismissed, it will deteriorate the company as an asset. Hence, it was basically focusing on the prior objective of preserving the reversibility of the

operation, preserving the health of assets. But employment as a final goal, as a commissioner in CADE, I don't believe it is my objective.

This rationale could be transformed into a structural condition for the approval of an operation, when the selling of assets was imposed by CADE. As a former commissioner maintained in quoting the example of a case identified in the previous section within those in which a TCD involving an employment clause was present, such a condition may refer to this concern about preserving an asset of the corporation:

In CADE, there was a growing perception that in many sectors some jobs entail a tacit knowledge about the company, which is essential for the production of its final good. So if you disarticulate this structure for a period of time, you may disarticulate the final product. The president of [*a corporation*] has no idea about those things. Those who really know it are the employees. So they had to stay for a while, for that set of assets to be adequately transferred to the acquirer. (My comments in italics)

Since employment is frequently seen as not belonging to the field, or at most an asset to be protected, several interviewees associate its incorporation beyond those limits into decision-making as a sign of a non-“technical”, or an “ideological” regulation. As a former commissioner suggested, analyzing employment effects in MRs is “not very technical, because this is not the objective [of competition policy]. CADE is there to protect consumers”. In a similar line, another former commissioner mentioned the inclusion of labor concerns as an indication of “ideological” decision-making:

It would be ideological, for instance, to consider the following: ‘I will not analyze the impact of an operation in terms of its net effects for society because I consider that the most important thing is that CADE decides that employment must be guaranteed, even if it means consumers paying more.

In both examples, as in other extracts quoted, what is seen as the proper objective of competition policy is sacrificed by the inclusion of labor concerns: the protection of the interests of “consumers”.

Converging with the trends identified in Chapter 5, these criticisms often target the initial years of decision-making under the new law of 1994 (between 1994 and 1996), and the recent past, from 2011 onwards. Not by chance, these are the two periods in which, for instance, most TCDs imposing clauses concerning “employment level” were identified. As an interviewee suggested, the inclusion of the topic in decision-making gradually “disappeared” after a while, especially due to the “influence of economics”:

It [employment clauses] eventually disappeared, and nowadays it is not much talked about. Also due to the strong influence of economics, and because it was gradually accepted that [dismissals] are part of the contingencies of concentrations.

As former commissioner maintained, in the beginning of the 1990s the inclusion of “employment level” arguments evidenced that “people didn’t know what competition policy was about” – and this approach resurged in a recent past:

People didn’t know what competition policy was about, but due to culture. It was very confusing. There was many things such as “You have to assure the employment level somewhere”. [...] And you observe some TCDs of 2010, 2011 with structural clauses, more objective in theory, but still raising this issue of “employment level”.

Not by chance, those agents who are often reputed as “outliers” of the field, or those in charge of producing competition policy since the recent past, when it became “politicized” and more “interventionist”, are associated with the incorporation of employment issues into antitrust policy. For instance, in explaining why “labor issues” are not under CADE’s competence, a former commissioner mentioned that a lawyer who joined the Council – and who was considered in several interviews an “outlier” of the field – once conducted several public hearings with labor unions to discuss the *Nestlé-Garoto* case, and its impacts on workers. These hearings, according to this interviewee, motivated the judicial review of CADE’s decision, as the courts considered them a “new fact” generated by the antitrust authority, and which violated the corporations’ rights.

Other examples of the convergence between the periods in which CADE is seen as not so “technical” and the insertion of employment concerns can be found in how commissioners themselves defend the appreciation of the issue. For instance, a commissioner who served on CADE between 1994 and 1996 affirmed in an interview that “employment” should be one of the “efficiencies” of economic concentrations:

I thought it was interesting that one of the efficiencies of the operation was employment, because if efficiency must be shared with society, how is it possible to approve a merger that results in a large number of unemployed people? I always shared the understanding that it is possible for a competition authority to consider the maintenance of employment as an efficiency.

Similarly, the views expressed by agents who are part of the more recent period of an alleged “politicization” of CADE about the inclusion of employment concerns in antitrust policy are much less conflicting than the dominant perspective so far described. As the interview with a former commissioner revealed, the compatibility of measures directed to protecting employment with competition policy is articulated with a criticism of the “fundamental logic” of the field:

The fundamental logic of competition legislation can be summarized in the following way: in capitalism, corporate structures can concentrate and get bigger. And the legislation puts a ‘comma’: ‘Now, if it will cause too much trouble, the final result will not happen’. This is the logic of competition law. When it says that it is possible to concentrate and get bigger, the legislation itself opens the way for the process of reducing the labor force, of dismissals, etc. This is a portion that is internal to this legislation.

Despite the understanding that the legislation itself opens the way for dismissals, the same commissioner maintained that the “employment concerns” do have a place in decision-making. This is articulated through a legal approach to competition policy that contrasts to that observed in the majority of agents, and to a sort of “subversion” of the concept of “efficiency”, as most agents of the field share it:

Does that mean that concerns about employment, employment level, labor policies are excluded from this decision-making agenda? No. Why? First, this internal logic that organizes competition law is inside a political order that is composed by many other logics. All these logics are submitted to an organizational structure that is the Constitution, which in turn establishes in article 170 the principle of full employment. This principle by itself ‘de-absolutizes’ the insularity of competition in respect to employment. [...] Second, within decision-making, the question of employment is introduced by corporations themselves. Hence, it is not external to competition policy. Third, efficiency and the maintenance of productive structures can be composed by the maintenance of employment, because employment equals tacit knowledge.

Another former commissioner who served CADE in the same period also expressed a view that maintains the compatibility between employment concerns and competition policy, and even affirmed that he dealt with the topic to a “lower extent than expected”:

I expected more [discussions about employment levels]. It was not very much demanded in CADE. This is not precisely an antitrust theme, but I can give you an example in which it came up in a very clear way and made us take action. In case [X], for instance, the volume of assets to be transferred



[due to CADE's imposition] was very large. There was a large volume of employment at stake. Thousands of jobs. [...] Our decision was to determine that whoever acquired those assets would keep the employment level for 6 months. People can come in or out of the plant, but the level shall remain stable.

Not by chance, these views are expressed by agents that joined CADE when it resumed the establishment of “employment level” clauses in TCD – which was present in the initial years, but became peripheral, if not entirely absent after the council entered what is frequently perceived as its “technical” phase, from 1996 onwards.

## **6.5 Outcomes for a neoliberal economy and society**

Based on the description of the types of economic phenomena regulated by the field, and how it regulates them, as well as on an inquiry into how competition policy deals with certain social groups in its practice, it is now necessary to discuss the findings in light of the conceptual framework from which I departed. In this final section I therefore discuss if and how the trends identified in the practice of the field fit what I affirmed to be the defining features of the neoliberal project for the economy and society.

### *6.5.1 The economy facilitated by competition policy*

The description of CADE's decision-making in respect to Merger Reviews conducted above empirically illustrated what kinds of economic phenomena are regulated by the field of competition policy in Brazil, as well as how they are regulated. From the data presented, it is possible to visualize that the economic phenomena that demand the field's regulation resemble the economic impulses characteristic of neoliberal globalization: most operations occurred in economic sectors affected by privatization and liberalization measures (Filgueiras 2006); they mostly appeared in the form of acquisitions (Chesnais 1996, p. 91); and the vast majority of cases entailed the expansion and concentration of foreign capital, especially from the US, but also from other countries of the “center” of the capitalist system, such as Germany, the UK and France, be it in the form Foreign > Foreign, or Foreign > Brazilian (Harvey 2007, p. 80).

In detailing the profile of these economic concentrations, I showed that about a third of operations (35%) entailed some sort of horizontal integration, and that 15.6% implied

levels of concentration above the legal limit of 20% established in the competition act of 1994. The highest degrees of concentration, as well as the largest amounts of market share acquired in these operations were more often related to acquisitions of Brazilian firms by foreign companies, if compared, for instance, to acquisitions among Brazilian corporations. This finding indicates that an important portion of the majority of operations involving foreign firms represented the consolidation and expansion their positions in the Brazilian market.

Although in the majority of cases horizontal concentrations were not identified, especially due to the global character of a large number of operations, several of them revealed a process of arrival of foreign capital into Brazil, where foreign corporations had no prior activities. Interestingly, decisions in MR legalized many of these operations, even if they maintained high levels of concentration, due to the understanding that since they did not represent horizontal integrations, they constituted a mere “substitution of agents”. A similar argument was identified with respect to privatizations, in which state-owned monopolies were transferred to private parties. In this sense, the new frontiers of accumulation opened by liberalization, deregulation and privatization measures were to a great extent respected by competition policy decision-making. Moreover, CADE largely endorsed operations involving companies that held close to or effective oligopolistic and monopolistic positions when operations did not imply an increase of market power, but solely a transfer of ownership.

The analysis of the types of restrictions imposed by CADE revealed, in turn, that not only were conditions imposed in a minority of cases that generated some sort of integration, but also that *substantive* conditions were even more rare. In the case of behavioral restrictions, the vast majority of corporations that received this type of condition were required to perform adjustments in the “non-compete clause”. With respect to structural restrictions, besides showing that they reach a tiny number of cases – which indicates an “institutional preference” for behavioral conditions, instead of challenging the market structure –, the empirical evaluation of CADE’s decisions evidenced how this type of condition is associated with the level of concentration implied by operations: the higher the level, the larger the proportion of structural conditions. Nevertheless, even in the highest levels of concentration, the majority of operations were approved without any questioning of the market share generated by it. Moreover, the absence of any sort of structural restriction in levels up to 40% reveals that CADE in practice “legalizes” any economic concentration that complies with this limit. Thus, although the formal legal limit is 20% of market share, the idea of 40% as a proportion that

does not generate antitrust concerns has been instituted in regulatory practice. As described in Chapter 4, this was precisely the limit that the agents of reform most aligned with the neoliberal economic tenets and connected to international experiences wanted to establish in the law.

Also, the analysis of the only 8 cases ever to be rejected by CADE tends to confirm these trends – and not only because they compose a nearly irrelevant proportion of MRs decided. As shown above, these decisions rarely targeted foreign capital, and when they did, rejections were either part of a period that anteceded the field’s effectively “technical” phase, or were in practice ineffective, as the dispute was judicialized. When targeting Brazilian firms, the two MRs involving the sugar cane sector illustrate how the field was functional for the neoliberal pressures of liberalization: rejections were imposed on concentrations motivated precisely to try to resist pressures from the opening of the economy.

Hence, as suggested by the discourses of agents mapped in Chapters 4 and 5, as well as the economic theory that underlies neoliberalism, the analysis of decisions shows that economic concentrations and the size of corporations has not been a major determinant in the imposition of restrictions. Not only were no operations that generated levels of concentration of up to 40% structurally challenged, but also above this level the determination of de-concentration was always largely a minority.

If compared to the economic phenomena analyzed in Merger Reviews, the description above also indicates that a considerably different economy is regulated through Administrative Procedures. Many sectors most frequently investigated in APs were not among those often regulated in MRs. Industrial sectors of high economic and strategic importance that figured in the top-10 sectors regulated in MRs were never above 0.5% of cases investigated in AP. Also, while in MRs the distribution of cases among economic sectors was more varied, APs tended to concentrate in 5 economic sectors, which together comprised almost 85% of procedures. The presence of “General Services” with more than 50% of APs decided by CADE illustrates the accentuated focus of the field’s “repressive roles” in respect to certain economic sectors.

Connected to this difference are also the distinct scopes of the economic phenomena regulated by CADE through MR and AP. While economic concentrations of a global scope and involving sectors of national dimension were present in a considerable number of MRs, Administrative Procedures revealed a regulatory activity much more interested in national and, most notably, in regional dynamics. Not by chance, Brazilian companies were involved

in the vast majority of conduct investigated by CADE, while foreign capital, on the contrary, was present in most MRs. Foreign companies present in APs were mostly located in the “Pharmaceutical and Hygiene Industry”, and although they were all decided under the law of 1994, several of these procedures dated from a period prior to the reform of competition policy – i.e., before the modern reform of antitrust took place.

Moreover, the local and regional character of CADE’s “repressive roles” was also revealed when convictions were analyzed: more than half of APs in which penalties were imposed had a union of professionals on its passive pole – and as described, these were mostly of regional scope. The types of conduct more often persecuted and convicted by CADE were strictly related to the sectors, kinds of capital involved, and scope of economic phenomena it investigated.

In the description above, I also showed that besides being focused on regional economic phenomena, mostly targeting Brazilian corporations, and in investigating unions and associations in a considerable proportion, an important proportion of APs also constituted a mechanism to solve disputes among corporations. Not only were around 30% of APs authored by corporate agents, but these were far more penalized by CADE than investigations started by the SBDC itself or other governmental organs. Also, more than half of convictions occurred in APs begun by corporations, thus indicating that CADE has mostly repressed conduct contested by agents of the market. The so-called “shift of focus toward AP” that began in 2003 accentuated these trends. CADE became more incisive in imposing penalties since then, but mostly on the very sectors, capitals, scope, and conduct observed since the mid 1990s.

Hence, in the arena of conduct, competition policy has largely served to discipline local agents – notably those who traditionally negotiated with the state the rules of competition in the model of price control – and to solve intra-capital disputes. In targeting those agents, the expansion of foreign groups into the Brazilian market – a general trend observed in MRs – has also been favored, notably in the cases of health services, which comprise the vast majority of penalties imposed. The targeting of conduct related to prices is an indication that in this dimension the field has focused on attacking practices that, as described in the reform process, were seen as the most harmful in the economy. Therefore, the claim of a “shift of focus” from MR to AP, which by itself characterizes an understanding that concentrations are hardly problematic *per se* – and which fits the dominant neoliberal economic thinking –, is also a shift in terms of the type of economy to be regulated: from

economic phenomena involving foreign capital and its expansion and accumulation, to the disciplining of Brazilian corporations and regional markets, and most notably of national groupings in the form of associations or professional unions.

Based on the empirical assessment of the profile of the economy regulated by CADE through both MR and AP, and the regulatory patterns identified, it is possible to draw a more general conclusion about what in Chapter 2 I framed as the field's "facilitative-regulatory" roles. The Brazilian antitrust agency's decision-making thus evidences that it tends to, on the one hand, facilitate economic concentration, especially in privatized and liberalized economic sectors, and on the other, more frequently in favor of foreign capital that expands into the Brazilian market. If APs are brought into the picture, these trends are even reinforced, as the targets of CADE's "repressive roles" were almost entirely Brazilian economic agents, and especially regional and local associations.

In the "regulatory" dimension of the legal field, the question raised was to determine how "political processes and more subtle institutional processes shape the form and impact of regulation on the economy and infuse economic interests into the law", and vice-versa (Edelman and Stryker 2005, p. 543). Crossing the "facilitative" roles of competition policy with the analysis of the field's construction and dynamics (Chapters 4 and 5, respectively), it is thus possible to visualize how this regulatory system has been instituted in such a way as not to hamper the expansion and concentration of capital. The "economic interests" mentioned by Edelman and Stryker (2005, p. 543) were detected in the very genesis of the field and in the battles to assure that its practice would occur and be preserved accordingly. It is not by chance, thus, that its outcomes, as reflected by MR and AP, mirror the field's structure, agents, positions and habitus – including the "deviant" decision-making in the period prior to the 1996 revolution. In other words, CADE's decision-making, rarely confrontational to concentrated market structures, is a reflection of the reform of the field, which, although in a far from pacific way, institutionalized the neoliberal understanding that high levels of economic concentration are justifiable if it proves to be "efficient" (Davies 2010).

The field's "facilitative-regulatory" role has thus been similar to what Sklar (1988), Picciotto (2011), Freyer (1992) and others describe in respect to antitrust policy in the US between the end of the nineteenth and the beginning of the twentieth centuries: to legitimize the transformation of the economy into an oligopolistic system of competition. In the case of Brazil, this process of legitimation occurs in a radically different economic context. Its

practice nevertheless evidences that competition policy has largely legalized and thus legitimized the accumulation of foreign capital, be it through global operations or through the entrance of foreign capital into a recently liberalized market, and also of national corporations, who have equally benefited from the minor interference of CADE in market structures. This finding converges with other studies that stress the relationship between competition policy and neoliberalism in facilitating economic concentrations in other settings, such as in Europe (Buch-Hansen and Wigger 2011; Wigger 2008), and in the United States (Davies 2010, Eisner 1991).

As Sklar (1988, p. 166) explains in the analysis of the corporate reconstruction of capitalism in the US, also in the case herein discussed antitrust policy did not *cause* “corporate reorganization” – the causes of this phenomenon of concentration and global expansion of capital “lay elsewhere”: in the market and in politics. Nevertheless, to link the findings with Sklar’s study once again, it is also possible to conclude in respect to the field of competition policy in Brazil that “while regulating corporate administration of the market to keep it within the bounds of reasonableness and the claims of the public interest, [antitrust] sanctioned and legitimized it” (Sklar 1988, p. 168).

### *6.5.2 Financialization and financial exceptionalism*

In order to address the relationship between competition policy and what in Chapter 2 I identified to be another defining feature of neoliberalism – the hegemony of financial capital –, in the third section of this chapter I complemented the description of what economy is regulated by the Brazilian antitrust field and how it is regulated with a focus on economic phenomena related to financial capital. The description of how financial capital is regulated by antitrust explored two distinct and yet complementary spaces.

On the one hand, based on the sample of MRs and APs analyzed on sections 6.1 and 6.2, I identified what sorts of economic phenomena are related to financial capital and how they are regulated. The description evidenced that both the incorporation of productive sectors by financial capital, as well as concentrations and conduct among financial institutions are subjected to the field’s regulatory practice. From the data presented, it was possible to see that, in consonance to the general trends in MR and AP, CADE has imposed no structural restrictions on the different types of operations involving financial capital, or penalties for alleged anticompetitive conduct.

These findings indicate the existence of connections between the concrete outcomes of antitrust policy and neoliberalism in at least two senses. First, as described in Chapter 2, what makes the hegemony of financial capital a defining feature of neoliberalism is the unprecedented extension of financial capital in the contemporary economy, and the “increasing role of financial motives, financial markets, financial actors and financial institutions in the operation of the domestic and international economies” (Epstein 2005, p. 3) – which includes its expansion into domains of the so-called “real economy”. This is what can be defined as the process of “financialization”. As CADE’s decisions grasped from the sample of MRs indicate, operations in which financial institutions such as hedge funds acquired assets of companies in the productive sector comprise a recurrent type of economic phenomena regulated by competition policy. It was even possible to locate an example of what Chesnais (1996, p. 239-240) understands to be another facet of financialization: the financial sector becoming a new area of activity for industrial groups, which in the case identified, acquired assets of an industrial group working in a different economic sector through a hedge fund.

In all cases of this type – which are probably of a higher number, since I only considered those classified by the antitrust authority as occurring in the “Financial Sector” – CADE approved the operation without restrictions. Given the practice institutionalized in the field, this was quite logical, since if a financial group acquires assets of a productive sector, it is hardly a case of horizontal concentration, as the “products” of the involved corporations are largely different. In this sense, the financialization of productive sectors is naturalized in the field’s practice as any other kind of concentration. Another example of such naturalization can be found in Chapter 5 (section 5.4.2), where I described how the very mention of the term “financialization” in a case in which a hedge fund acquired assets of a corporation of the educational services sector by a commissioner of the so-called “politicized” or “interventionist” period motivated a severe criticism by an agent of the “technical” phase of CADE.

Also, concentrations among financial institutions thrived with no major setbacks in CADE’s regulation, thus facilitating yet another space of the process of financialization: the quantitative expansion of financial capital’s activities and profits (Kotz 2008, p. 5). Moreover, it was illustrated that the financial sector enjoyed “antitrust exemption” precisely during the period in which it most intensely concentrated, be it due to CADE’s leniency, to BACEN’s pressures and threats on banks, or both.

The most telling element to see the linkage between competition policy and neoliberalism in respect to financial capital is, however, the very struggle to determine if and how it should be submitted to competition regulation. The second dimension explored in the chapter was thus how the actual regulation of financial capital by the field of competition policy is at the center of intense jurisdictional disputes within the field and between it and other spheres of government. As described, the position that advocates BACEN's exclusive jurisdiction finds support even within the field of competition policy. Despite the existence of contrasting positions about the issue, and beyond the "fight of lawyers" that has dominated the controversy, it was possible to identify that independently of the position, BACEN is granted the last word at least in "important cases".

Reasons to sustain such a prominent role for the Central Bank were often based on appeals to expertise, and to what is depicted as an unavoidable "need" to prevent financial concentrations from being subjected to antitrust regulation in some cases frequently, thus indicating a sort of financial exceptionalism to antitrust regulation exercised by the field of competition policy. Such active deconstruction of competition policy's jurisdiction over financial capital and the reinforcement of BACEN's competence reveals another connection between the practice of the field and neoliberalism. This is because, as maintained in Chapter 2, the creation and affirmation of "independent central banks" was an integral part of the series of neoliberal institutional reforms of economic regulation that took place most notably in the 1990s (Carruthers et al 2001, Arestis and Sawyer 2005). In the case of Brazil, the shaping of BACEN according to international standards occurred practically in parallel to the reform of competition policy (Loureiro 1997, p. 110-111). Moreover, since the 1990s the Brazilian Central Bank was gradually dominated by neoliberal ideology – most notably monetarism –, and became the main operational organ of economic policy in the Cardoso administration (Novelli 2001, p. 188). Hence, as the dominant autophagic stance of the field of competition policy in transferring its competence to regulate the financial sector to BACEN is inseparable from the features and roles exercised by the Bank, this movement implied the assurance that an institution even more clearly aligned with neoliberal economic tenets would be in charge of regulation.

The deconstruction of competition policy's jurisdiction over the financial sector becomes even more revealing if compared to another frontier in which the field has engaged in jurisdictional battles. This is the intersection between the field of competition policy and more traditional institutions of the legal field, most notably the Judiciary. As in relation to the



Central Bank, this jurisdictional battle has also been fought through appeals to expertise. In several of the interviews conducted, the agents of the field indicated that the Judiciary should abstain to interfere in the merit of CADE's decisions, among different legal arguments, due to a lack of "expertise" in antitrust. As the interview with a former commissioner revealed, CADE should concern itself with the substantive aspects of regulation, and the judiciary should only "observe due process and the rationality of penalties" because "the Judiciary is not equipped to discuss the merits". As the same commissioner affirmed, "[d]ifferently from the US, in Brazil our Judiciary has many problems, and there is no specific judicial area for economic law". A similar view can also be seen in how lawyers perceive this relation, as exemplified by the opinion of another former commissioner, who sees antitrust as "a subject that is not known by judges, first because it involves economic issues, and second because it is not usual for the courts".

In Brazil as elsewhere, the field of competition policy, its institutions and agents, have not only affirmed its jurisdictional monopoly over the merit of antitrust regulation, but conducted a series of initiatives to both delimit its boundaries and infuse antitrust expertise into the Judiciary<sup>364</sup>. These initiatives compose what can be seen as a sort of "judicial reform" agenda propelled by transnational organizations, governmental institutions, and agents connected to the antitrust field. Examples can be found both internationally and locally.

At the international level, for instance, the International Competition Network has historically conducted debates and produced advocacy instruments related to the judiciary, such as the *Working with Courts and Judges Project*. Another example can be found in a proposition elaborated by the OECD and the World Bank named *"A framework for the design and implementation of competition law and policy"* (World Bank 1998). In this document, besides defining key-concepts of competition policy, these institutions offer a model of a competition act to serve as a reference for countries to create their own legislation. Within this legal model there are clauses concerning the relationship between competition policy and the Judiciary with a special focus on "developing economies" such as Brazil, in which the authors state that: "because the judiciaries in transition and developing economies are inexperienced in dealing with free market problems, it may be advisable to set up specialized courts to hear competition cases". According to them, "concentrating these cases before specially trained

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<sup>364</sup> In the study of the "Reagan revolution" in American antitrust, Eisner (1991, p. 207-210) also identifies several measures adopted by the DOJ to "shape the courts doctrine", such as, for instance, strategic litigation and legislative reforms to infuse Chicagoan standards into the judicial activity and thus reduce what was perceived as the courts' "discretion" in analyzing antitrust cases.

judges should speed up the acquisition of expertise and produce more consistent, predictable decisions” (World Bank 1998, p. 147).

Similar initiatives have also been noticed in Brazil. For instance, as can be observed in CADE’s annual reports, commissioners have participated in meetings organized by associations of federal judges (CADE 2005), and in seminars dedicated to the debate about the relationship between the judiciary and competition policy (CADE 2007b). In 2010, CADE has also published a brochure entitled “*Competition defence in the Judiciary*”, which targeted judges, prosecutors among other legal professionals and aimed at “diffusing, in an easy and pleasant way, concepts about the competition defence law” (CADE 2010, p. 5).

Based on these findings, it is thus possible to visualize that the field of competition policy has facilitated the expansion and concentration of financial capital in Brazil through different means: in consonance with the trends identified in MR, it has not imposed structural restrictions on either the financialization of productive sectors, or the concentration among financial institutions and, more importantly, in practice it offered an “antitrust exemption” for bank concentrations at the historical moment in which the sector was restructured. On the “regulatory” dimension, the active deconstruction of the field’s control over the financial sector, often based on a dual expertise – affirmed with respect to the Judiciary, but retreated in face of BACEN –, indicates that the politics of jurisdictional definition leans in favor of a neoliberal approach to the financial sector.

### 6.5.3 *The society constituted through competition*

In Chapter 2, I argued that together with the empirical assessment of the economy regulated by the field of competition policy, a more complete understanding of the field’s outcomes must include the investigation of the roles it exercises in a social dimension. In section 6.4 I thus described how the social categories of “consumers” and “workers” are incorporated in regulatory production, and hence what society is constituted by competition policy.

The general conclusion that can be extracted from the data presented in this section is that competition policy deals with these social groups in considerably distinct ways. On the one hand, it was possible to observe from interview extracts, as well as from the quoted decisions, that “consumers” constitute the main category mobilized in the field as the subject protected by regulation – in consonance to mainstream narratives described in Chapter 1, and

to the struggles in the construction of the field detailed in Chapters 4 and 5. On the other, the inclusion of aspects related to “workers” (or “employees”) in regulation is much more nuanced: when not entirely excluded as a group that deserves protection, “workers” are incorporated selectively. Often, the alleged lack of “competence” of CADE to protect jobs, as well as the unavoidable “trade-off” between economic efficiency and employment are arguments mobilized to sustain the priority of “consumers” over “workers” as the social category that should interest and guide economic regulation produced in competition policy.

Although the agents of the field, as well as official narratives such as those presented in CADE’s annual reports often argue that Brazilian competition policy has historically attempted to “attenuate” the impacts of economic concentrations to employment, the data presented indicates that this concern has been largely limited in both quantitative and qualitative terms. In other words, not only are cases in which discussions about employment were present a minority of CADE’s decision-making, but the alleged protection of workers has also been translated into measures that are far from incompatible with what is described as an inevitable trade-off between economic efficiency and dismissals.

As described, the “attenuation” of the effects implied by corporate restructurings on labor have mostly been articulated as the “retraining” and “reinsertion” of workers, and even as an attempt to transform employees into businessmen. Both in interviews and in decisions, these measures were explicitly made compatible with dismissals, not to hinder them. When “employment level” was to be protected, TCD were often dated from the period in which CADE was criticized as not very “technical”, and/or as the protection of an asset to be sold. Moreover, the resort to “employment level” as a criterion to be taken in the evaluation of the legality of concentrations was also mobilized more incisively as a corporate strategy than as an imposition of the antitrust authority.

Besides being present in an extremely low amount of MRs, labor-related issues were also more frequent in APROs than in TCDs. As such, they meant the protection of employment as an asset of corporations: as “human capital” to be guaranteed while CADE decided if it should be part of future de-investment conditions or not. As interviews indicated, these measures also frequently sought to protect *specific* types of jobs: “key-positions” in a corporation, those that were seen as necessary to assure the functioning of the firm. Hence, the presence of “employment level” in antitrust practice is more often linked to the goal of guaranteeing the economic feasibility of corporate assets, than to a social objective of competition policy, even though mainstream narratives frequently emphasize the European

inspirations of Brazilian antitrust legislation, and thus its supposed inclination toward objectives of such type. Not by chance, the very language that appears in cases and interviews treats labor as an asset. As described, “people” are to be “saved” just as money, and “employees” are to be acquired like any other assets, such as liabilities, and contracts.

If interpreted in light of what in Chapter 2 I described as the defining features of neoliberalism in a societal dimension, the outcomes of competition policy embedded in how the social categories of “consumers” and “workers” are incorporated into the field thus fit both sides of neoliberalism’s “social agenda”. On a “positive” dimension, competition policy consolidates a model of society predominantly organized around “consumers”, which are seen as the main beneficiaries of a free economy established through antitrust regulation. The social correspondent of the market economy is, in this sense, a market individual, whose activity, as suggested by Rose (2004, p. 165-166), “is to be understood in terms of the activation of the rights of the consumer in the marketplace”. As the main or even sole objective to be pursued by competition policy in a social dimension, “consumer welfare” is thus the translation of the consumer or market citizenship (Clarke 2004; Rose 2004; Barnett 2010; Schneiderman 2008) advanced by neoliberalism in antitrust regulation.

As described in Chapter 2, this positive program is accompanied by a negative agenda, i.e. the deconstruction of other forms of societal organization that are not functional to the market logics. In the field of competition policy, this dimension is reflected in how regulation repulses the protection of employment and thus of the social category of “workers” as goals to be pursued through antitrust regulation. However, the assessment of how labor-related issues appear in antitrust regulation evidenced other facets beyond the direct exclusion of worker protection as a regulatory objective that are nevertheless equally functional to neoliberalism’s social project. For instance, the official discourse of transforming dismissed workers into businessmen through retraining measures, such as that observed in CADE’s annual report of 1998, is consistent with what Ong (2006) identifies as a characteristic feature of the neoliberal “regime of citizenship”: an ethos of self-governing embedded in entrepreneurialism.

Also, the predominant resort to “Retraining and Reinsertion” measures can be seen as yet another form of engendering a neoliberal subjectivity (McWorther 2012): the replacement of collectivist ideas such as that of a social class inscribed in “employment” by ideas of individual responsibility (Ireland 2011; Lemke 2001). This is because the regulatory responses to the effects of economic concentrations on workers are individualized into training programs that end up transferring the responsibility of reinsertion in the labor market

to individuals. The protection of work is limited to training the individual, who becomes entitled to search for a new place in the market after the unavoidable dismissal promoted by higher economic efficiency.

These are empirical indications of what in Chapter 2 I defined as the constitutive roles of the field of competition policy. By dissolving the conceptual dichotomy capital-labor as not proper to the field, and replacing it by the tension capital-consumer, competition policy redefines what Edelman and Suchman (1997, p. 483) call the “basic typologies that identify the legally cognizable components of the social world”. While workers and employment are pushed outside of the field as a normative goal to be pursued, or at most incorporated selectively as an asset, consumer welfare is established as the backbone of regulation. In doing so, as Santos (2005, p. 36-37) suggests, the capital-labor dichotomy of “social actors”, which was a marker for the state to institutionalize disputes in the model of industrial capitalism, disappears. This shift is precisely the outcome that indicates the field’s connection with neoliberalism.

Moreover, the constitution of consumers as the legitimate social group to be protected through the modern field of economic regulation, and the removal of workers from an arena that deals with one of the cores of capitalist relations parallels the precarization of work and the increase of unemployment in Brazil (Filgueiras 2006, p. 186-189; Pochman 1995, p. 245; Pochmann 2004; Antunes 2005). For instance, in the period of implementation of several reforms in Brazil, including that of competition policy, the unemployment rate that in 1992 reached 7.2% in Brazil raised to 10.5% in 2003<sup>365</sup>. Hence, the restructuring of the Brazilian economy induced by privatizations, liberalization and deregulation, which paved the way for the phenomena of private capital expansion, and concentration regulated by competition policy was accompanied by an increase of unemployment in the country. Nevertheless, the field itself has actively expelled the topic from its jurisdiction, although recognizing that dismissals were directly connected with the actual process of economic concentration it regulated.

The deconstruction of the capital-labor relation, and its reconfiguration in terms of capital-consumer interaction has been affirmed in the field through both legal and economic

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<sup>365</sup> This rate corresponds to the so-called “open unemployment”, i.e. the percentage of people that searched for a job and couldn’t find one in the period researched. The source of data is IPEA. The increase of unemployment rates throughout the 1990s is supported by several authors, such as Filgueiras (2006), Pochmann (2004) and Antunes (2005). Filgueiras (2006, p. 188), for instance, maintains that in Brazil’s most important metropolitan area, in São Paulo, the unemployment rate (“open” and “occult”) reached 19% of the economically active population in 2003.

categories. The division of regulation into different legal domains enables dislocating “labor” from the field through the “competence” argument, which suggests that labor is to be protected or regulated by labor law or other sub-fields. Also legally, the “consumer” is the subject entitled to the rights protected by competition policy. Economic science, in turn, offers the foundations for legitimizing the exclusion of labor concerns as inevitable, especially due to the repeatedly affirmed trade-off between economic efficiency and employment protection. Conversely, in economic terms, consumers are the beneficiaries of a regulation that promotes economic efficiency.

Formally, the protection of the “employment level” as a normative goal to be observed in economic concentrations was enabled by the law of 1994. However, as was illustrated in section 6.4, its actual implementation was timid, if not entirely absent in some periods. Moreover, the latest reform of competition policy, which resulted in the competition act 12.529 of 2011, institutionalized the field’s practice in respect to mentioned social groups: the reference to “employment level” was entirely removed from the new legislation. Hence, since 2011, the sovereignty of consumers in antitrust regulation has been completely legalized in the field.

Through this practice, as noticed by Türem (2010, p. 257) in the study of competition policy’s connection with neoliberalism in Turkey, the replacement of the “citizen” by the “consumer” promoted by antitrust policy implies a “general pattern” in which “society is imagined as a unitary entity, which can gain, as a whole, from the implementation of competition laws”. In this sense, the worker that legitimately (according to the field’s standards) loses her job due to the increased efficiency promoted by an economic concentration, can be simultaneously seen as a consumer benefiting from the very same operation.

## CONCLUSION

As described in the Introduction that opens this work, the core objective of the dissertation was to evaluate what I perceive as “cacophonies” and “incoherencies” present in the “rational lines” and “forthright statements” about regulatory reform and economic globalization and to offer a distinct account of this relationship. In Part I, I mapped these narratives and pointed to the theoretical and methodological shortcomings that underlie them, which as I maintained obfuscate the linkages between regulatory reform – in the case here analyzed, of competition policy reform – and neoliberalism. Also in Part I a conceptual framework to circumvent these shortcomings was proposed, and then translated into an empirical inquiry about the construction of competition regulation in Brazil informed by the tools of the sociology of law, economic sociology, and critical political economy.

In contrast to what I defined as mainstream narratives about competition policy reform, and based on the empirical application of those tools, in Part II I presented an alternative narrative about the connections between the construction of competition regulation in Brazil and neoliberalism. The main hypothesis affirmed throughout the work is that the reform of competition policy is both rooted in the neoliberal ideology of market sovereignty, economic liberalization, and privatization, and functional for the facilitation of the economic phenomena characteristic of neoliberal globalization, as well as for the constitution of a societal model compatible with it.

The detailed findings of the empirical study that support this hypothesis were discussed in each chapter that composes Part II of the dissertation, and hence it is not necessary to restate them at this point. I would rather take the space of the thesis’s Conclusion to exercise an appraisal of the overall findings of the research in three respects: its broad implications for the mainstream narratives mapped in Chapter 1 as a form of studying regulatory reforms, for the conceptual framework from which I departed to undertake this inquiry, and for what was silenced or unanswered in this work. As Jorge Luis Borges affirms in the quote that serves as the epigraph of this work, “every rational line” implies “leagues of cacophony”. Thus, if the narrative here proposed is to be taken as a “forthright statement” about regulatory reform and neoliberalism, it has also its own amount of “cacophonies”, which will now be addressed.

### *Politics of regulation and neoliberalism*

Four indicators were provided in support of the narrative proposed about the roots and roles of competition regulation in neoliberalism. In Chapter 4 I showed that a group of corporate lawyers and mainstream economists designed reform in a way that institutionalized prospects for the regulation of competition in consonance with the expectations of neoliberal theory and politics. As I maintained in that Chapter, this was a process marked by struggles within government, and outside of it, and involved a series of political compromises that shaped the field of competition policy. In Chapter 5, I described how the production of competition regulation by the reformed field was historically monopolized by lawyers and economists who, as reformers, were mostly ideologically aligned to neoliberalism. They comprised a group of often highly internationalized and Americanized corporate lawyers and sociologists of law, as well as new institutional and Chicagoan economists, frequently with close social ties among themselves, which hegemonically conducted the practice of the field for nearly 14 years.

Finally, in Chapter 6, I depicted how the actual practice of the field by those agents reflects its constructed nature and dynamics, and has hence produced outcomes that enable and legitimize neoliberal globalization. In the economy, Brazilian competition policy has facilitated the concentration of capital in accordance with the expectations already articulated in the early 1990s, the expansion of foreign capital into a recently liberalized economy, and has kept protected the sovereign reign of financial capital. In society, the field's practice has contributed to yet another defining trace of neoliberalism: the selective exclusion of labor concerns from policy-making, and the parallel constitution of a model of consumer citizenship.

In general lines, both the strategy and the main goal of research were to put politics at the core of competition regulation, and to analyze the construction of this regulatory arena, its practice and the products it generates through a political (or politicizing) lens. In this sense, reform became the construction of a regulatory field by concrete and often conflicting agents who made institutional choices, and shaped it according to their backgrounds and views of the state and the market. Not only did reform not occur in an evolutionary and consensual way, but its consolidation was directly affected by the idiosyncrasies of the context where it happened, and was actively disputed over time. The practice of the field and the regulatory products it generated in many senses reflected the political disputes that underscored its



creation and institutionalized dynamics. Determining what is a correct decision, how should decisions be made, and what is the reach of competition policy's jurisdiction over the economy and society were questions whose answers were constructed through disputes between the agents who were capable of entering the field and influencing it. Moreover, the institutional contours and decision-making parameters that were actively constructed in the field established the boundaries of the substantive decisions made by CADE, which in turn facilitated certain economic phenomena, while restricting others.

These findings therefore confront the descriptive frameworks and explanatory models offered by mainstream narratives to study competition policy in Brazil and regulatory reforms in general, as mapped in Chapter 1, and their understanding of the rationale of reform, the ways in which it takes place, and the roles it exercises. The conceptual and methodological framework mobilized in this dissertation problematized the assumptions often endorsed by the epistemological perspectives available to understand regulatory reform, which generally depoliticize reform and its roles. This was a framework that enabled going beyond the formalism often endorsed by legal scholarship, economic science, and diffusion studies in describing reform, and its agentless accounts. Here lies what I see as a theoretical and methodological contribution of this dissertation to study economic regulation: the combination of a focus on agency to understand the process of legal and institutional construction of a regulatory arena, with a "law in action" approach that highlights the politics of practice that takes place in this environment. It was only through the articulation of such an actor-centered approach with a "law in action" perspective that the depoliticization of regulatory reform and its roles was circumvented, and hence its connections to neoliberalism could be investigated and identified.

In this work, politics is said to be central to understanding regulatory reform not in a purely abstract sense. By dissecting how the construction and practice of the field, as well as regulatory production, happen, I showed that competition policy has been connected with a specific political project: that of neoliberalism. This contrasts with mainstream narratives that, even though they do not entirely neglect the political dimension embedded in regulatory reform, end up obfuscating its linkages to neoliberalism, or explicitly denying it. At an epistemological level, the approach that underlies this research has thus served to infuse politics into the study of a technocratic object that has been frequently interpreted through a technocratic lens. With respect to those narratives that see the parallel enactment of

competition laws to economic globalization as evidence of the analytical misplacement of neoliberalism, this dissertation hence represents a contesting hypothesis.

In this way, this research has added to what can be seen as a growing literature that problematizes the dominant perspectives about economic regulation and regulatory reform through the politicization of the object of study: a body of scholarship about the “politics of regulation”. These are studies that have also pointed to the connections between competition policy and neoliberalism by exploring the construction of economic regulation through an actor-centered approach, and/or deploying a political economy perspective to analyze its roles. As I see it, this dissertation contributes to the hypothesis assessed by other researchers that since the 1980s – and most intensely in countries of the global South and in Europe since the 1990s – competition policy has been increasingly functional for neoliberal globalization. Moreover, it expands this hypothesis geographically, as the empirical domain of competition policy has not been assessed in such terms in Brazil, corroborating findings observed in other contexts such as the US (Eisner 1991, Davies 2010), Europe (Buch-Hansen and Wigger 2011, Wigger 2008), and Turkey (Türem 2010).

#### *Theoretical and methodological bridges*

This dissertation can be seen not only as a contrasting narrative and alternative conceptual framework with respect to the dominant scholarship on regulatory and competition policy reform, but also as an exercise of construction of bridges between different theoretical and methodological traditions. In the empirical inquiry developed throughout this work, I sought to combine, on the one hand, the conceptual and methodological tools offered by a reflexive sociology (present in both the sociology of law and economic sociology) for the study of lawyers and economists as agents of neoliberalism, to, on the other, the insights offered by the approach of a critical political economy for the analysis of the “law in action” produced by those agents.

Taken together, these tools resulted in a framework that enables the empirical study of *who* produces the law and *how*, and *what* law is produced and *why*. In doing this, I bridged two distinct and yet complementary emphases about the mutual influence between political and economic phenomena such as neoliberalism, and legal and institutional constructions. From the perspective of the actor-centered approach built on the contributions of the sociology of law and economic sociology, this bridge opens the way for the infusion of

substantive elements about the law produced by the agents that constitute and structure the regulatory field analyzed. As was developed in Part II of the thesis, in describing the construction and practice of the field of competition policy through the trajectory study of the agents that compose it, I sought to permanently connect the actor-centered approach to concrete institutional choices and decisions made by these agents. It was through this articulation that it was possible to visualize how agents with a certain profile shape the field and its regulatory roles, and more importantly, how the outcomes it generates, as described in Chapter 6, are consistent with the neoliberal ideology identified in most of their trajectories.

In turn, from the point of view of the critical political economy of neoliberalism, the insights of the sociology of law and economic sociology from which I departed bring in a detailed account of the institutional and legal contours that both reflected and legitimized the economic phenomena that it emphasizes. This articulation promotes attention to how law and institutions were affected by neoliberalism, and also to how the regulatory field they compose and the series of particular struggles that take place within the professional fields that operate regulatory arenas affect and condition neoliberal globalization. In this research, I showed that neoliberalism, like the very reforms it promoted, has not diffused straightforwardly, but was mediated through local agents, the institutional battles in which they engaged, and the legal and economic traditions present in the context in which neoliberalism became hegemonic. In doing so, it was possible to circumvent the risks of an economist interpretation of neoliberalism, immersing an eminently economic phenomenon in a sociological perspective.

The cross-fertilization promoted by the merging of these two emphases into a single framework increases its descriptive and explanatory strength to study regulatory reforms and neoliberalism. As such, it can be replicated for the assessment of the construction and practice of other regulatory arenas or fields of practice, be it under neoliberal globalization, or in other historical moments and political and economic contexts. For instance, the combination of an actor-centered approach, informed by the reflexive sociology of law and the economy, with the “law in action” perspective embedded in a critical political economy can be mobilized to evaluate what a growing literature has been arguing to be a recent shift from neoliberal policies to a new model of state activism, or the recasting of the new developmental state in Brazil.

### *An epilogue of prologues*

Despite what I see as contributions of this dissertation both in respect to mainstream narratives and to the conceptual and methodological framework it mobilizes, an appraisal of its results does not exclude the perception of limitations. One set of these limitations can be noticed in the research herein presented, all with a common root: the eminently exploratory character of the inquiry developed. As such, the other side of the coin of these limits is thus that they constitute an indication of possible venues for expanding and unfolding this research in distinct directions.

A first example that can be mentioned is the circumscription of the analysis to a single case study, both thematically and geographically: the construction of competition regulation in Brazil. This research strategy implies the limitation of the findings that were presented in terms of its generalizability to other regulatory domains or countries. Although in evaluating these findings I frequently connected them to other studies, the linkage between competition policy reform and neoliberalism here affirmed is confined to the empirical universe analyzed.

The resort to such a strategy was motivated by the perceived need to construct an in-depth study about a universe that was not explored through the lens herein proposed beforehand. Hence, the case study on Brazil could now be taken as the basis for a systematic comparative approach, through which it would be possible to assess if and how the agents and struggles that underlie the construction and practice of competition policy in that country, as well as the roles it performs in the economy and society can be observed in similar ways elsewhere. On the other hand, if the process of regulatory reform as well as its outcomes differ, an interesting research question would be to explain why. Such a comparative approach could be especially fruitful if applied to other Latin American countries or other countries of the global South who shared similar stories concerning neoliberalism. This venue of research would constitute a strong test for the hypothesis hereby sustained, and for the literature on the “politics of regulation” in general, especially given that the mainstream narratives that encompass the Brazilian case can often be identified in other contexts.

A second example of a limitation that can be turned into a new agenda of inquiry concerns the analysis of the outcomes produced by competition policy in the economy and society. Since in the Brazilian case systematic empirical studies about decisions and regulatory practice in competition policy are scarce, in this respect this dissertation was mostly focused on producing data about the concrete practices of the field and identifying

regulatory trends. The task of generating exploratory data in such a way implies many limitations. Several potentially interesting debates with respect to CADE's decision-making, most notably in decisions on MRs and APs, were left aside, in a trade-off between a more qualitative analysis of decisions and the construction of a general overview about regulation.

Although such a trade-off posits a limitation on the validity of the quantitative study, the empirical material generated offers first hand insights into the actual profile of competition regulation in Brazil through descriptive statistics, which may now be explored in detail and through inferential instruments. A statistical inferential study could take advantage of the database constructed for this study in order to evaluate decision-making in an explanatory form, even incorporating new variables, such as the analysis of the voting in each decision and its possible dependence on the political context, and on the profiles of decision-makers.

Still within the idea of developing the research into the Brazilian case, the quantitative study could also incorporate decisions from the period that is often characterized as that of a "politicized" or "interventionist" phase of CADE, which fits in with what has been described as the emergence of a new developmental state (e.g. by the most recent Law & Development literature). In incorporating those cases, notably from 2011 onwards, which were not available at the time of data collection, an inferential study could empirically assess if and how the practice of CADE has changed over time, and if it is connected, for instance, with the presence of regulators with a distinct profile or with other political and economic factors. The comparative approach mentioned earlier could also include the analysis of concrete decisions, using the database produced in this research, and the variables it generated, as a framework for analyzing what economy is regulated by competition policy and how, in a cross-country perspective.

A third example, connected to the former, also implies expanding the research herein presented chronologically. This is because in 2012 a new competition act was enacted in Brazil, imposing substantive institutional changes to CADE and to the SBDC as a whole. Since the study of the 1990s reform was the core object investigated, and it alone was time consuming, I was not able to address the latest reform in this dissertation. However, this recent reform can serve as another parameter for evaluating the linkages of competition regulation and neoliberalism, most notably eventual ruptures, given the recent political and economic shifts in Brazil. Incorporating into the analysis the construction of the 2012 competition act and the production of competition policy since then would provide indicators

for assessing a phenomenon only marginally explored in this work: if and how what mainstream narratives define as the “politicization” of antitrust in Brazil has occurred, and what it means in practice.

A fourth limitation that underlies this work concerns the very focus of the research, i.e. the dimension of analysis it has privileged. As an exploratory study, I deliberately focused the dissertation on what can be seen as the “hegemonic” side of economic globalization, as embedded in the construction of competition policy regulation in Brazil. I tried to describe what defines the neoliberal character of competition policy reform, how its hegemony was built in time, and what are its roles in economy and society. In doing so, this work falls into what Santos and Garavito-Rodríguez (2005, p. 2-3) characterize as a paradox of sociology of law scholarship: while focusing on the “most visible, hegemonic actors” of neoliberal globalization, it fails to “register the growing grassroots contestation of the spread of neoliberal institutions”.

Like the literature they criticize – which includes the reflexive sociology of law that I mobilized throughout this work –, my dissertation is an attempt to “unveil[...] the power struggles and alliances between and within legal elites in the North and the South through which the hegemony of transnational capital and Northern states is reproduced”, but has not addressed the potentials of the “role of law in counter-hegemonic globalization and the challenges that the latter poses to legal theory and practice” (Santos and Garavito-Rodríguez 2005, p. 5). In this dissertation, such a paradox is more the result of what I perceive as a need imposed by the nature of the object researched, and of the time and space limitations of the thesis, than an unconscious relegation of contestation as a relevant aspect of neoliberal globalization. Unveiling the connection of competition policy reform with the construction of neoliberal hegemony was privileged because I understand it as a necessary step given the scarce availability of critical accounts of the topic, even more so in Brazil.

The role of law in such counter-hegemonic movements is far from incompatible from the theoretical framework mobilized throughout this research, although the reflexive sociology of Bourdieu, as Villegas (2004, p. 67) suggests, often “obscures the emancipatory potential which occasionally arises in the discourse on rights”. The institution of a field of practice such as competition policy does not mean that it necessarily and permanently works within the logic that is hegemonically imprinted in it. That law is a relatively autonomous field and that the enforcement of the law is indeterminate and open for politics, means that it is so for both sides: hegemonic and counter-hegemonic. As Thompson (1990, p. 266) puts it,

“the forms and rhetoric of law acquire a distinct identity which may, on occasions, inhibit power and afford some protection to the powerless”.

In conducting research, some of these “occasions” were identified, even though not directly approached. As in the other cases already mentioned, although the silence in respect to these potential counter-hegemonic impulses in the field of competition policy constitutes a limitation of this work, it also indicates venues for further inquiry. One of the occasions in which resistance to neoliberal globalization can be spotted is in the dispute of the construction and practice of competition policy in Brazil by social movements and NGOs. For instance, in a MR of 2007, two NGOs in the areas of consumer and social communication rights petitioned CADE to oppose an acquisition between two companies in the communication sector that would result in a monopoly in certain regions<sup>366</sup>. Following the petition, CADE concluded an APRO with the corporations, and in August 2009 the Council approved the operation with the imposition of structural restrictions.

The example involving a consumer rights NGO also illustrates how what I highlighted as a characteristic contribution of the Brazilian field of competition regulation to neoliberalism – the constitution of a market society based on a regime of consumer citizenship – may also be a site of resistance. As Schneiderman (2010, Chapter 7) suggests, consumption can be politicized and transformed by collective action, and turned into a means to confront hegemonic globalization. Hence, assessing if and how the very transformation of consumers into the main subject protected by a field hegemonized by neoliberal ideology has opened a way for disputing this regulatory arena constitutes a valuable form of grasping the degree to which economic globalization embedded in regulatory reform has thrived smoothly, or if it has faced opposition and eventually some defeats.

Another set of such opportunities for potential resistance entails several protests mobilized by labor unions against MRs analyzed by CADE and its decisions in cases that implied the dismissal of workers. In many cases involving dismissals mentioned in Chapter 6, unions protested against CADE’s decisions, holding it accountable for the loss of jobs implied by the operations. Tensions related to labor recently gained new contours, when a prosecutor connected to the Labor Attorney General’s Office (MPT) initiated a legal battle to oblige CADE to disclose information about MR that generated dismissals<sup>367</sup>.

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<sup>366</sup> MR number 08012.013152/2007-20, in which *Grupo Abril S.A.* acquired *Fernando Chinaglia Distribuidora S.A.* The NGOs that acted in the process were IDEC (*Instituto de Defesa do Consumidor*) and *Intervezes – Coletivo Brasil de Comunicação Social*.

<sup>367</sup> The judicial procedure was initiated in October 2013, as revealed by an article published at *Consultor Jurídico* on October 8<sup>th</sup> 2013, titled “*MPT processa Cade por não entregar documentos em inquérito*”.

In the first case, while legitimating the field by joining it and disputing its stakes through the institutionalized boundaries, NGOs were also contesting concentration, and advancing a demand external to it – the democratization of mass communications – but through the language of competition law. Apparently, this was a successful initiative. On the other hand, in the second set of cases, the pressures exercised by social movements for the protection of jobs seem not to have achieved the same results. Analyzing the degree of success of such forms of mobilization of competition policy, its impacts on regulation, the strategies adopted by social movements, and the responses given by the field constitutes a research agenda that might illuminate the functioning of this regulatory arena, and thus complement the view herein presented about the roots and roles of antitrust in advancing neoliberal globalization – be it to corroborate, or to nuance it. These “cacophonies”, however, are to be solved elsewhere.



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## ANNEX I

### List of Brazilian Presidents

#### **Getúlio Vargas (1930-1945 / 1950-1954)**

Vargas was elected president in 1930, and stayed in office until 1945. The years between 1937 and 1945 are often defined as the dictatorial period of the *Estado Novo*, during which there were no direct elections. Vargas was deposed in 1945, but was again elected in 1950, being in office from 1951 to 1954, when he committed suicide.

#### **Jânio Quadros (1961)**

Elected president in January 1961, Quadros stayed in office for less than 7 months, resigning in August of the same year. The vice-president, João Goulart, took office in his place.

#### **João Goulart (1961-1964)**

Goulart initiated a period of intense interventionism and reforms, and was eventually deposed by the military coup of April 1964, which installed a dictatorship that lasted for more than 20 years. Only in 1989 the first direct elections for president since 1961 took place.

#### **José Sarney (1985-1989)**

Sarney was elected vice-president of Tancredo Neves in January 1985, through an indirect election. Neves died before the presidential commencement, hence Sarney was the first non-military president of Brazil since 1960.

#### **Fernando Collor de Mello (1990-1992)**

Collor was elected in 1989, in the first direct presidential elections since the military dictatorship. He took office on March 15<sup>th</sup> 1990, and on October 2<sup>nd</sup> 1992 the national Senate started an impeachment procedure to revoke his mandate, due to a corruption scandal. Collor resigned on December 29<sup>th</sup> 1992.

#### **Itamar Franco (1992-1994)**

Franco was elected Collor's vice-president in 1989. Once the president was driven out of office after the Senate initiated the impeachment procedure on October 2<sup>nd</sup> 1992, Franco took office temporarily, and was later confirmed president on December 29<sup>th</sup> 1992, when Collor resigned. Franco stayed in office until January 1<sup>st</sup> 1995.

#### **Fernando Henrique Cardoso (1995-2002)**

The former Minister of Finance of Franco and a member of PSDB, Cardoso was elected president in October 1994, and stayed in office from January 1995 to December 2002.

#### **Luís Inácio Lula da Silva (2003-2010)**

A leader of PT, which since the early 1990s became the major oponent of PSDB in Brazilian national politics, Lula was in office from January 2003 to December 2010.

#### **Dilma Rousseff (2011-present)**

Rousseff, a member of PT and former minister of Lula, was elected president in 2010, and took office in January of 2011.

## ANNEX II

### List of Interviewees

#	Name	Positions	Date (dd/mm/yy)	Location	Length (minutes)
1	Alberto Venancio Filho	Lawyer / Reformer	09/07/13	Rio de Janeiro	20
2	Alessandro Octaviani	Lawyer / Commissioner	26/06/13	Brasília	55
3	Amadeu Carvalhaes Ribeiro	Lawyer	09/07/13	Rio de Janeiro	48
4	Ana de Oliveira Frazão	Lawyer / Commissioner	27/06/13	Brasília	63
5	<i>Anonymous</i>	Lawyer	2012	N/A	119
6	<i>Anonymous</i>	Economist	2013	N/A	67
7	<i>Anonymous</i>	Lawyer	2013	N/A	54
8	Arthur Barrionuevo Filho	Economist / Commissioner	11/06/12	São Paulo	71
9	Arthur Sanchez Badin	Lawyer / SDE / CADE's President	15/06/13	São Paulo	71
10	Bolívar Moura Rocha	Lawyer / SEAE	17/06/13	Brasília	101
11	Carlos Emmanuel Joppert Ragazzo	Lawyer / SEAE / Commissioner	12/07/13	Rio de Janeiro	54
12	Carlos Francisco de Magalhães	Lawyer / Reformer	03/12/13	São Paulo	157
13	Celso Campilongo	Lawyer / Commissioner	28/05/13	São Paulo	156
14	Claudio Monteiro Considera	Economist / SEAE	11/07/13	Rio de Janeiro	101
15	Cleveland Teixeira	Economist / Commissioner	03/10/12	São Paulo	80
16	Clóvis de Vasconcelos Cavalcanti	Economist / Reformer	22/01/14	N/A (Email)	N/A
17	Cristiane Landerdhal de Albuquerque	CADE Staff	28/06/13	Brasília	32
18	Daniel Goldberg	Lawyer / SDE	11/06/13	São Paulo	78
19	Elvino de Carvalho Mendonça	Economist / SEAE / Commissioner	27/06/13	Brasília	72
20	Fernando de Magalhães Furlan	Lawyer / CADE's President	24/06/13	Brasília	66
21	Francisco Ribeiro Todorov	Lawyer	21/06/13	Brasília	20
22	Hebe Teixeira Romano Pereira da Silva	Lawyer / Commissioner	21/06/13	Brasília	37
23	Helcio Tokeshi	Economist / SEAE	22/07/13	N/A (Skype)	83
24	José Del Chiaro Ferreira da Rosa	Lawyer / Reformer	17/09/12	São Paulo	59
25	José Inácio Gonzaga Franceschini	Lawyer / Reformer	01/10/12	São Paulo	117
26	Lucia Helena Salgado e Silva	Economist / Reformer/ Commissioner	08/07/13	Rio de Janeiro	173

27	Luiz Fernando Rigato	Economist / SEAE / Commissioner	22/05/13	São Paulo	62
28	Mariana Tavares de Araújo	Lawyer / SDE	08/07/13	Rio de Janeiro	47
29	Mário Roberto Villanova Nogueira	Lawyer	28/05/13	São Paulo	90
30	Mário Sérgio Rocha Gordilho Júnior	CADE Staff	21/06/13	Brasília	67
31	Mauro Grinberg	Lawyer / Reformer / Commissioner	04/09/12	São Paulo	84
32	Neide Teresinha Malard	Lawyer / Reformer / Commissioner	28/06/13	Brasília	107
33	Neil Montgomery	Lawyer	20/05/13	São Paulo	74
34	Paulo Furquim Azevedo	Economist / Commissioner	15/06/12	N/A (Skype)	46
35	Pedro Dutra	Lawyer	21/09/12	São Paulo	104
36	Ricardo Machado Ruiz	Economist / Commissioner	18/06/13	Brasília	100
37	Roberto Augusto Castellano Pfeiffer	Lawyer / Commissioner	11/10/12	São Paulo	74
38	Ronaldo Porto Macedo	Lawyer / Commissioner	23/05/13	São Paulo	94
39	Ruy Afonso de Santacruz Lima	Economist / SEAE / Commissioner	08/07/13	Rio de Janeiro	61
40	Ruy Coutinho do Nascimento	Lawyer / Reformer / CADE's President	18/06/13	Brasília	98
41	Tércio Sampaio Ferraz Jr	Lawyer / Reformer	30/07/13	São Paulo	90
42	Tulio Freitas do Egito Coelho	Lawyer	14/06/13	Brasília	66
43	Ubiratan Mattos	Lawyer	29/05/13	São Paulo	51

## ANNEX III

### Interview Guide: Basic Axis

Topics	Elements	Questions
(a) Trajectory	Personal, academic and professional trajectory	<p><i>“Can you please tell me about your academic and professional trajectory until you became [engaged in reform, a commissioner, a competition lawyer, etc]?”</i></p> <p><i>“What kinds of jobs and activities have you had since you [participated in reform, left CADE, etc]?”</i></p> <p><i>“How did your appointment [to engage in reform or to CADE] occur?”</i></p>
(b) CADE’s composition and decision-making	Views on the appointments to CADE, and on its decisions	<p><i>“How do you find the appointments to CADE in a historical perspective? Do you see any variations?”</i></p> <p><i>“How do you evaluate CADE’s decisions in a historical perspective in merger reviews?”</i></p> <p><i>“How do you evaluate CADE’s decisions in a historical perspective in administrative procedures?”</i></p> <p><i>“Do you perceive any variations in CADE’s decision-making throughout time?”</i></p>
(c) Boundaries of competition policy	Normative stances on judicialization of competition policy, regulation of the financial sector, and labor issues	<p><i>“How do you perceive the judiciary’s control over CADE’s decisions?”</i></p> <p><i>“Have you ever worked in a case involving the financial sector?”</i></p> <p><i>“Have you ever worked in a case in which the issue of the impacts for the workers of the involved corporations was raised?”</i></p>



## ANNEX IV

### Interview Guide: Specific Axis to Reformers

Topics	Elements	Questions
(a) Reform process	Disputes around reform, development of reform, foreign influences	<p><i>“Who mobilized the reform agenda and supported its advancement?”</i></p> <p><i>“Who, if anyone, opposed reform of competition policy and why?”</i></p> <p><i>“Were there disagreements among the individuals involving in the draft of the bill?”</i></p> <p><i>“Were there disagreements between those individuals and government?”</i></p> <p><i>“Did any foreign individual or institution contributed to reform?”</i></p> <p><i>“Did you resort to the international experience in producing a new competition act? If so, to what countries and in what subjects?”</i></p> <p><i>“After your work in producing a draft ended, how did reform evolved?”</i></p>
(b) Institutional choices	Definition of criteria for submission of merger reviews, of the post-merger review system, CADE’s composition	<p><i>“How was the criterion of 400 million Reais as the threshold for submitting merger reviews to CADE defined?”</i></p> <p><i>“How was the criterion of 20% of market share for clearing economic concentrations defined?”</i></p> <p><i>“How was the composition of CADE’s plenary (lawyers and economists) defined?”</i></p> <p><i>“Why was a post-merger notification system established, instead of a pre-merger system? Was a pre-merger review system ever considered?”</i></p>

## ANNEX V

### Interview Guide: Specific Axis to Producers

Topics	Elements	Questions
(a) Institutional structure	Conditions of work, staff composition	<p><i>“How was the [CADE, SDE or SEAE] structured when you got there in terms of staff and conditions of work?”</i></p> <p><i>“How was your cabinet staff composed?”</i></p>
(b) Decision-making	Important cases, controversies within the SBDC, use of economic methods and theories	<p><i>“What were the most important cases in which you worked while in [CADE, SDE, SEAE]?”</i></p> <p><i>“What were the most controversial cases in which you worked while in [CADE, SDE, SEAE]?”</i></p> <p><i>“Were there disagreements between CADE, SDE, and SEAE in decision-making?”</i></p> <p><i>“What kinds of economic methods and theories did you use to analyze merger reviews?”</i></p> <p><i>“Did all commissioners in CADE had similar approaches to competition policy while you served the institution?”</i></p> <p><i>“If not, were there controversies motivated by these different approaches?”</i></p>

## ANNEX VI

### Interview Guide: Specific Axis to Professionals

Topics	Elements	Questions
(a) Law firm organization	Areas of practice, number of lawyers, presence of economists	<p><i>“In what areas does your firm provide legal services?”</i></p> <p><i>“How many lawyers work in the firm, and how many are dedicated to competition policy?”</i></p> <p><i>“Are there any economists in the firm? If not, to what economists do you resort in antitrust cases?”</i></p>
(b) Competition lawyering	Profile of legal practice, legal strategies	<p><i>“What are the origins and sectors of you clients in the area of antitrust?”</i></p> <p><i>“How do lawyers and economists interact in defining the legal strategy of a case?”</i></p> <p><i>“How do you chose an economist as a consultant for an antitrust case?”</i></p> <p><i>“What were the most important Merger Reviews in which you worked as a lawyer?”</i></p> <p><i>“What were the most important Administrative Procedures in which you worked as a lawyer?”</i></p>

## ANNEX VII

### Letter of Presentation for Interviewees (Portuguese)

UNIVERSITÀ DEGLI STUDI DI MILANO  
Scuola di Dottorato in Scienze Giuridiche  
Sezione di Filosofia e Sociologia del Diritto  
International PhD Programme in Law and Society “Renato Treves”



### CARTA DE APRESENTAÇÃO

Estimado(a) Senhor(a)

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Desenvolvo pesquisa de doutorado sobre a política de defesa da concorrência no Brasil, e escrevo para aventar a possibilidade de entrevistá-lo no âmbito deste trabalho, tendo em vista a sua atuação como Conselheiro do Conselho Administrativo de Defesa Econômica (CADE). A pesquisa está sendo realizada junto à Faculdade de Direito da Università degli Studi di Milano, sob orientação dos Professores Sol Picciotto e Luigi Cominelli, e é financiada pelo Ministero dell'Università e della Ricerca da Itália e pelo Instituto Internacional de Sociologia Jurídica de Oñati (IISJ).

**PROPOSTA DA PESQUISA:** Esta pesquisa tem por objetivos estudar o papel de advogados e economistas na estruturação e reforma do Sistema Brasileiro de Defesa da Concorrência e na produção da regulação nesta área, e a interação entre o direito e a ciência econômica nos processos de tomada de decisão no âmbito do CADE e na prática profissional no campo concorrencial.

**FINALIDADE DA ENTREVISTA:** A entrevista tem por finalidade prover informação sobre a atuação do entrevistado no direito concorrencial. Busca-se reunir informações sobre a trajetória pessoal e profissional do entrevistado e coletar as suas percepções e experiências sobre a reforma e a prática do direito concorrencial brasileiro. Entrevistas estão

sendo realizadas com servidores, conselheiros e presidentes CADE, bem como com advogados, economistas e acadêmicos que atuam na área.

**USO DA ENTREVISTA:** O conteúdo da entrevista será utilizado estritamente para fins acadêmicos, a saber, a tese de doutorado que resultará da pesquisa e eventuais publicações científicas. **Confidencialidade:** Trechos das entrevistas poderão ser classificados como confidenciais pelo entrevistado ao longo da entrevista. Se assim for manifestado expressamente, será garantida a sua confidencialidade no texto do trabalho. **Anonimato:** A identificação do entrevistado também poderá ser resguardada. Se assim for manifestado expressamente, as transcrições e citações indicarão apenas dados genéricos do entrevistado, que não possibilitem a sua identificação. **Conservação dos dados:** Os dados coletados – gravações da entrevista, transcrições, anotações e qualquer documento oferecido pelo participante – serão armazenados exclusivamente pelo pesquisador.

Coloco-me à disposição para encontrá-lo no local, dia e horário que julgue mais convenientes, bem como para prestar qualquer informação adicional que entenda necessária.

Agradeço, desde logo, a sua atenção e consideração.

Cordialmente,

**Iagê Zendron Miola**

Doutorando  
International PhD Programme in Law and Society “Renato Treves”  
Università degli Studi di Milano  
iage.miola@unimi.it  
(11) 98855-6181  
<http://lattes.cnpq.br/7508223637108048>

## ANNEX VIII

### Interview Consent Form (Portuguese)

UNIVERSITÀ DEGLI STUDI DI MILANO  
Scuola di Dottorato in Scienze Giuridiche  
Sezione di Filosofia e Sociologia del Diritto  
International PhD Programme in Law and Society “Renato Treves”



### TERMO DE CONSENTIMENTO

#### PARA ENTREVISTA

**PROPOSTA DA PESQUISA:** Esta pesquisa tem por objetivos estudar o papel de advogados e economistas na estruturação e reforma do Sistema Brasileiro de Defesa da Concorrência e na produção da regulação nesta área, e a interação entre o direito e a ciência econômica nos processos de tomada de decisão no âmbito do CADE e na prática profissional no campo concorrencial.

**FINALIDADE DA ENTREVISTA:** A entrevista tem por finalidade prover informação sobre a atuação do entrevistado no direito concorrencial. Busca-se reunir informações sobre a trajetória pessoal e profissional do entrevistado e coletar as suas percepções e experiências sobre a reforma e a prática do direito concorrencial brasileiro.

**USO DA ENTREVISTA:** O conteúdo da entrevista será utilizado estritamente para fins acadêmicos, a saber, a tese de doutorado que resultará da pesquisa e eventuais publicações científicas. **Confidencialidade:** Trechos das entrevistas poderão ser classificados como confidenciais pelo entrevistado ao longo da entrevista. Se assim for manifestado expressamente, será garantida a sua confidencialidade no texto do trabalho. **Anonimato:** A identificação do entrevistado também poderá ser resguardada. Se assim for manifestado expressamente, as transcrições e citações indicarão apenas dados genéricos do entrevistado, que não possibilitem a sua identificação. **Conservação dos dados:** Os dados coletados – gravações da entrevista, transcrições, anotações e qualquer documento oferecido pelo participante – serão armazenados exclusivamente pelo pesquisador.

**DÚVIDAS E COMENTÁRIOS:** Quaisquer dúvidas ou comentários sobre a entrevista e a pesquisa podem ser encaminhados por meio do endereço [iage.miola@unimi.it](mailto:iage.miola@unimi.it) e do telefone (11) 98855-6181. Os docentes que supervisionam a presente pesquisa podem ser contatados nos seguintes endereços: [s.picciotto@lancaster.ac.uk](mailto:s.picciotto@lancaster.ac.uk) e [luigi.cominelli@unimi.it](mailto:luigi.cominelli@unimi.it). O Programa de Doutorado Internacional em Direito e

Sociedade da Università degli Studi di Milano pode ser contatado por meio do endereço [phd@fildir.unimi.it](mailto:phd@fildir.unimi.it) e do telefone (+39) 02-50312138.

**CONSENTIMENTO:** Assinando este termo, o entrevistado manifesta o seu consentimento em participar da pesquisa e declara haver recebido uma cópia idêntica assinada pelo pesquisador.

**CONFIDENCIALIDADE:** Determinados trechos da entrevista são confidenciais?  
 Sim  Não

**ANONIMATO:** A identidade do entrevistado deve ser resguardada?  
 Sim  Não

Assinaturas:

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IAGÊ ZENDRON MIOLA

Location, Date.

Via Festa del Perdono, 7 - 20122 - Milano - Italia  
(+ 39) 0250322077 / (+39) 025031254  
<http://trevesphd.ariel.ctu.unimi.it>