Direito & Práxis
revista

Competition law and neoliberalism: the regulation of economic concentration in Brazil[1]

Direito da concorrência e neoliberalismo: a regulação da concentração econômica no Brasil

Iagê Zendron Miola

Universidade São Judas Tadeu (USJT) and Law and Democracy Nucleus of the Brazilian Center for Analysis and Planning (Cebrap), São Paulo, Brazil. E-mail: iagezm@gmail.com.

Article submitted and accepted for publication in November 2016.

[1] Preliminary versions of this article benefited from the criticism of several people. I am thankful to all those who commented on this paper at the 2015 Harvard Law School Institute for Global Law and Policy Workshop in Doha, especially Jorge Esquirol, Rafael Sakr and Umut Öszu. I am also grateful to Bronwen Morgan, Robin Malloy and David Whyte, who discussed a previous version of this article at the Law and Society Association Annual Meeting, also in 2015, in Seattle. I am also thankful to Aline Viotto for the thorough review and suggestions.

Abstract

The intriguing coincidence between the global diffusion, in the 1990s, of measures of privatization and market liberalization characteristic of neoliberalism, and the worldwide spread of competition laws to control the economic power of corporations has been often naturalized or silenced. How to make sense of the fact that the liberalization of markets was accompanied by more regulation directed to control the behavior of corporations? The hypothesis here developed is that competition law, as it has been practiced, contributed to the production of an economic arrangement propelled by neoliberal ideals. I argue that the dominant approach to the enforcement of competition law has legitimized one of its defining traces, the concentration of economic power. To illustrate this hypothesis, the article gathers empirical evidence from a case study of the enforcement of the regulation of economic power by the Brazilian competition authority, the Administrative Council for Economic Defence (CADE), between 1994 and 2010.

Keywords: competition law – economic concentration – neoliberalism – CADE

Resumo

Com frequência, a intrigante coincidência entre a difusão global, nos anos 1990, de medidas de privatização e liberalização de mercado características do neoliberalismo e a criação e reforma de leis de concorrência para controlar o poder econômico das empresas é silenciada ou naturalizada. Como explicar que a liberalização dos mercados foi acompanhada de mais regulação voltada a controlar o comportamento das empresas? A hipótese desenvolvida neste artigo é que a regulação concorrência, da maneira que foi implementada, compatibilizou-se com a produção de um arranjo econômico propagado pelos ideais neoliberais. Argumento que a abordagem dominante sobre a aplicação do direito concorrencial (enforcement) legitimou um dos traços definidores do neoliberalismo, a concentração do poder econômico. Para ilustrar essa hipótese, o artigo reúne evidências empíricas de um estudo de caso sobre a prática da regulação do poder econômico pelo Conselho Administrativo de Defesa Econômica (CADE) no Brasil, entre 1994 e 2010.

Palavras-chave: direito da concorrência – concentração econômica – neoliberalismo – CADE

1. Introduction

Economists, lawyers and even some social scientists often naturalize or silence about the coincidence of two phenomena that has been quite intriguing. On the one hand, the global diffusion, more intensely in the 1990s, of measures of privatization and market liberalization characteristic of neoliberalism. On the other, during the same historical period, the worldwide spread of competition laws to control the economic power of corporations. How to make sense of the fact that the liberalization of markets was accompanied by more regulation directed to control the behavior of corporations?

From a functionalist perspective, such coincidence is actually not intriguing at all. The regulation of corporate power through competition law would prevent and combat the excesses of corporations when they compete for markets. The control of competition would be a necessary and natural counterpart of liberalization and privatization, an exemplary legal device created for domesticating corporate power liberated by deregulation and privatization. Even further, together with regulatory agencies that exercise control over certain markets, competition law would epitomize a refutation to the very existence of neoliberalism as a political and economic reality.

In this article I try to offer a distinct account about the regulation of corporate power exercised through competition law and of how it relates to broader transformations in the economy and society encompassed by neoliberalism. The hypothesis here developed is that competition law, as it has been practiced especially in the 1990s, contributes to the production of an economic arrangement that is propelled by neoliberal ideals. I argue that the dominant approach to the enforcement of competition law has legitimized one of its defining traces, the concentration of economic power.

To illustrate this hypothesis, the article gathers empirical evidence from a case study of Brazilian competition law enforcement. Brazil is taken as an emblematic example of the coincidence that motivates this inquiry, as liberalization of the 1990s was paralleled by the structuring of a new legal and institutional framework to regulate the concentration of economic power and the behavior of companies in market competition. 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. This law created the Brazilian System for Competition Defence (SBDC), and implemented what became to be considered a "modern" system of competition regulation.

The article seeks to contribute to what can be seen as a growing literature that problematizes the dominant perspectives about the regulation of corporate power through competition law. These are studies that have stressed that since the 1980s – and most intensely in countries of the global South and in Europe since the 1990s – competition law has been increasingly functional for neoliberal globalization. The article expands this hypothesis in three senses: conceptually, by identifying connections so far not deeply explored; empirically, by grounding such description in data about legal enforcement; and geographically, since competition law has not been assessed in such terms in Brazil, thus corroborating researches about other contexts such as the US (Eisner 1991, Davies 2010), Europe (Buch-Hansen and Wigger 2016, in this number, and Wigger 2008), and Turkey (Türem 2010, 2016).

The argument is developed in four parts, besides this introduction. In Section 2, I detail the available knowledge about the roles of competition law in the awake of economic liberalization. Section 3 proposes an alternative conceptual framework to study the connection between competition law and the economic tenets of neoliberalism, combining notions of a critical political economy and instruments of the sociology of law. Section 4 presents and discusses empirical evidence of such connection from the case study on Brazil. Section 5 concludes.

2. What is known about the roles of competition law?

Under the auspices of the Washington Consensus, the 1990s were marked by the global agenda of reforming states and economies to which the rhetoric of competition was central. Several of the problems faced by governments of the global South were attributed to the absence of free markets in which firms could

compete. Monopoly – especially through state-owned enterprises – and what was reputed to be excessive government control over the economy were characteristics of a state and economic model that needed to be reformed. Hence, policies of liberalization and privatization were undertaken worldwide.

Another component of such reformist drive was the attempt to ensure that, once opened, markets were kept competitive. This was to be done through a special branch of the law: competition law (and regulation in general). It is common sense that competition law, as we know of it today, originated in the US in the late 1800s, with the enactment of the Sherman Act[2]. A century later, however, this form of economic regulation was globally diffused[3]. Aydin (2010) and Braithwaite (2008) note, for instance, 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 was especially 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, 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 laws regulating competition, in the 1990s the proportion more than doubled, reaching 50% of countries in the year 2000 (Aydin 2010, p. 56). As Sassen (2008, p. 236) explains, the spread of competition law from its original context (the US) has historically accompanied the opening of markets in new regions – since the first half of the 20th 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.

The enactment of new competition laws or the revision of existing ones is part of a phenomenon of a global regulatory reform, intensified since the

[2] In the US legal tradition, competition law is better known as "antitrust law". In this article, the terms are used interchangeably. For a history of the origins of antitrust law in the US, see Sklar (1988) and Freyer (1992).

[3] A prior wave of global diffusion of competition laws from the US can be identified in the post-war period, when the regulation of corporate power (especially cartels) through competition regulation was brought by the US to the occupied territories of Germany and Japan, as showed by Sassen (2008) and Picciotto (2016, in this volume). Competition law was seen as an important tool to dismantle the cartels that were at the basis of the defeated regimes.

1990s[4]. Although much of the official history indicates that competition laws were first enacted in the 1990s in most countries, legal provisions to regulate corporate power can be identified much before that. What can be reputed as new is the form and content of the laws that spread in the 1990s, most notably its "technocratic" aspiration.

Brazil offers an illustrative example. Most authors locate the origins of the regulation of economic power in Brazil in the late 1930s, and identify several historical points of inflection. In this course, they depict the creation of a new competition law in the 1990s as a reform process that led to an "evolution"[5]. Provisions to regulate corporate power, inspired by the Sherman Act, can be located as early as in 1938, during the Vargas administration, such as the Decreto-Lei 869 of 1938, or later the Decreto-Lei 7.666 of 1945, which created a Committee of Economic Administrative Defence to protect the "popular economy". The law 4.137 of 1962 is also exemplary of a legislation to tackle the abuses of economic power.

In narrating the history of competition policy in Brazil, legal scholars and economists often view this arena of regulation as being ineffective in the period that extends from 1938 until the 1990s. Before the 1990s, antitrust policy is depicted as an instrument of political clashes between domestic interests and foreign corporations (Forgioni 2005), a more "ideological than descriptive" form of regulation (Nusdeo 2002, p. 218). 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 solely served the purposes of governmental economic policy of the military regime, strongly based on intervention and facilitating the concentration of national capital. There would be an "ideological climate" historically incompatible with the development of an

[4] Besides competition laws, sectorial regulation and the "regulatory agencies" devised to implement it are also part of such "explosion". 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. 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).

[5] 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), and Aguillar and Coutinho (2012).

effective competition policy prior to the 1990s, as the government favored negotiation among firms to organize the market as part of its interventionism and of import substitution policies (Considera and Correa 2002). Through price control mechanisms, the government is said to have stimulated economic concentration and agreements among competitors, rendering unfeasible the "logic of competition" (Salgado 2004, p. 362).

In this context, the enactment of a new competition law is taken as part of a broader regulatory reform. It is often described as a step in a historical evolution of economic policy-making motivated by a "need" for the state to adjust to a new context opened by economic liberalization and privatizations. Reform is depicted as an expression of institutional modernization, an evolutionary rupture with the preceding years of economic interventionism characteristic of the developmental state (Braithwaite 2008, Jordana and Levi-Faur 2005, Levi-Faur 2005, Jordana et al 2011, Naím and Tulchin 1999 and Peña 2006).

There are two main roles often attributed to competition law as the result of this evolutionary process[6]. On the one hand, to promote a competitive, efficient economy, as a reformed competition policy is said to impose limits to economic power. Regulatory reform entails, in this sense, an attempt of the government to control a recently liberalized market and, in doing so, to guarantee its proper functioning. Regulatory and competition agencies would balance the effects of market liberalization by effectively promoting competition and dismantling the legitimization of state and even private monopolies that would be characteristic of the economic that existed prior to reform.

In promoting competitive markets, competition law is said to generate goods to society as a whole. By targeting anti-competitive behavior, such as the formation of cartels, and by controlling and eventually impeding certain

[6] The goals attributed to competition regulation "vary temporally and ideologically" (Moura e Silva 2007, p. 7). Defining what is the objective of competition law lies at the core of several disputes in this field of regulation. There are several possible political and economic foundations connected to antitrust regulation, such as the control economic power, the protection of the freedom of enterprise, the redistribution wealth, the protection of consumers, the promotion of economic efficiency, or the promotion of economic integration and development. Illustrative of such is the historical divide between the Harvard and the Chicago schools of competition law (Hovenkamp 2010). The description that follows highlights what seems to be a "consensus" around the goals of competition law reform in the 1990s.

economic concentrations, competition law would avoid what economic theory identifies as the dangers of monopoly power: the excessive control of a corporation over the offer of goods and services, and the increase in prices and decrease in quality it implies. In doing so, it promotes the welfare of consumers. The modern regulation brought by reform would thus generate benefits for consumers, the "immediate stakeholders of competition rules" (Salomão Filho 2007, p. 82-87).

The Brazilian case again provides thoughtful illustrations about these roles. For Martinez (2011, p. 42), 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". Peña (2006, p. 738-740) states that the Brazilian reformed regulatory regime brought "economic efficiency and consumer protection as their main goals" of competition defence, and hence a system was "created de facto" after reform. Schuartz (2009, p. 8) puts forward a similar understanding, 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. It was from the 1994 reform onwards, thus, that a modern framework of "competition was fostered and enforced" (Trubek et al 2013, p. 283)

The outcomes of a reformed competition policy are thus generally portrayed as bringing universal benefits: to corporations, to individuals (consumers) and to the market and society as a whole. These accounts of competition law reform tacitly or explicitly imply the dissolution of the puzzle that opens this article. Often, as it was described, competition law is described as naturally compatible with neoliberal reforms, as it is justified as a necessary element for the adequate functioning of a liberalized market. It is therefore frequently an unproblematic element of a set of transformations brought about in a context of economic liberalization.

At times competition law is also a mean to challenge neoliberalism as an incorrect conceptual tool to understand the set of reforms of the 1990s. The creation and reform of competition law agencies 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 (Jordana and Levi-Faur 2005, Levi-Faur 2005, Braithwaite 2008, Jordana et al 2011). The existence of technical instruments of regulation mobilized by governments to control market agents, such as competition law, would suggest that neoliberalism actually implies forms of controlling itself, or even more radically, that these are inherently anti-neoliberal. 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 and competition law is therefore seen as evidence of the non-neoliberal character of the period (Gilardi et al 2006, p. 127).

Hence, for many of the described approaches, the notion of neoliberalism would not be an "analytically insightful" way of characterizing the transformations of capitalism in the end of the 20th century (Braithwaite 2008, p. 10), even constituting a "fairytale" that has never become an "institutional reality" (Braithwaite 2005, p. 2). Neoliberalism would not only be incorrect in grasping reforms, but in direct tension with the creation of rules to govern corporations, as it is the antithesis of regulation (Braithwaite 2008, p. 08), contrary to what would be better defined as "regulatory capitalism" (Jordana et al 2011, p. 1344).

When not entirely silenced in the available literature, the intriguing connection between competition policy reform and neoliberalism is thus explicitly challenged. My argument, however, is that these accounts are not convincing in describing how competition law relates to the attempts of reforming economies and societies in neoliberalism. This is because they share methodological and conceptual assumptions that imply limitations to explain and assess the transformations of economic governance implied by competition law. 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 (Suchman and Edelman 1996; Edelman and Suchman 1997).

Twining (2005a, p. 3), for instance, identifies what are "questionable assumptions" often underlying approaches on legal reform such as those

frequently applied to competition law, and discusses what would be several "significant omissions" associated with them. One of these omissions is the absence of an empirical evaluation and measurement of the regulation 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).

A similar criticism is implied by Suchman and Edelman's (1996) assessment of neo-institutionalist approaches to the study of law, which is also useful for understanding the dominant descriptions of the relationship between competition law and neoliberalism. In these authors' view, neo-institutionalist 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). Law is taken as explicit, what obscures 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 into regulatory practice (Suchman and Edelman 1996, p. 933).

Bringing those criticisms to the domain of competition law, it is possible to identify an important shortcoming in the described literature: the main reference to describe the roles of regulation is what the law affirms as its objectives – i.e. to promote competition and to protect consumers. The methodological assumption that underlies these descriptions is that the roles effectively performed by regulatory mechanisms can be grasped from how competition law itself define to be its institutional attributions. By assessing 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. In depoliticizing it, any connection to neoliberalism can be easily (although wrongly, as I will argue) circumvented.

In addition, the opposition between competition regulation and neoliberalism is built upon a problematic premise. Competition law refute the characterization of deregulation reforms and privatization as neoliberal because it would demonstrate the existence of state control existence for assuring free markets. Regulation and competition would thus be incompatible terms with

what is attributed to neoliberalism. As I will try to describe, neoliberalism does not represent the opposite of regulation or competition, but rather a *specific way* of defining, in a broader economic model, how competition between corporations should occur, and consequently what is the most appropriate way of regulating it.

3. The critical political economy of competition law in action

How, then, to study the connections between competition law and neoliberalism without incurring in the identified shortcomings? The authors I mobilized to present the critique above give a hint on how to build an alternative framework. 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"[7]. As Halliday and Osinsky (2006, p. 466) suggest, "[t]he criterion of impact must be law in action, not law on the books". In a similar line, Twining (2005a, p. 33) argues that the analysis of impact involves a necessary "shift from legislation to enforcement".

In subscribing to the distinction between the "law on the books" and the "law in action", I am not affiliating with perspectives that are preoccupied with "*discrepancies* between legal rules and legal practice" (my italics), i.e. to study the "gap" between how the law *should* operate and how it *actually* operates (Nelken 1981, 1984, p. 169-170)[8]. Instead, this proposal implies understanding that the law is not monolithic and explicit, but rather that it "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). In the specific case of

[7] The notion of "law in action" originated in the tradition of American legal realism, notably sociological jurisprudence, between the end of the 19th and the beginning of the 20th century (Treves 2004, p. 140-145), in opposition to "law in books". The concept has been appropriated by law and society scholars as an analytical device to distinguish the discipline's approach from legal doctrine, i.e. for studying what the law is as it is practiced, not as it is formally described.

[8] Considering the "law in action" as a measure of distance between what the law is and what it *should* be is a frequent approach to the law in Latin American that Esquirol justly criticizes as a tradition of "legal failure", i.e. "casting law in the region as effectively incapable of performing the functions expected of law" (Esquirol 2011, p. 11).

competition law, it implies asking what does it mean, in practice, to "promote competition" and to "protect consumers"; what corporate behaviors are permitted and what are considered illegal; and what concentrations are perceived as harmful or not. Since these concepts are considerably broad to enable an array of interpretations, inquiring into the "law in action" means searching for the interpretations that actually emerge in decision-making.

Since the main goal of this article is to assess how competition law relates to neoliberalism, it is necessary to make explicit the "substantive" elements of what I understand to be the defining characteristics of the neoliberal project of transforming the economy. Based on a critical political economy of neoliberalism, I identify a set of trends that serve as parameters to analyze the competition law in action.

Despite nuances of scope and emphasis, it is possible to identify relatively consensual elements around what would be basic features of neoliberalism[9]. A first point of convergence is that neoliberalism entails, on the one hand, a theory (Saad-Filho and Johnston 2005; Harvey 2007; Kotz 2002), a "thought collective" (Mirowski 2009, p. 428-431; Plehwe 2009, p. 4). The neoliberal intellectual tradition, as it developed since the 1940s, 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[10], 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

[9] As described by Davies (2014) and Mirowski (2009), neoliberalism is not a unified doctrine, although the different existing neoliberal approaches hold some elements in common. For a history of the origins and distinct strands of neoliberal theories, see Harvey (2007) and the articles in the collection edited by Mirowski and Plewhe (2009).

[10] As Paulani (2005, p. 116-129) and Harvey (2007, p. 20) maintain, neoliberalism entails a reaction against interventionist perspectives embodied by Keynesianism and socialism, but also encompasses 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).

society as a whole should 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" (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", then "capital has a natural right to flow freely", without governmental interventions (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 eventually generate a healthy market. At this point it is possible to identify an illustrative divergence between classic liberalism and neoliberalism. While the first was highly suspicious of intense economic concentration (represented by monopoly), neoliberalism maintains that monopoly is not necessarily harmful to the functioning of the economy (Mirowski 2009, p. 438)[11].

This is a facet of neoliberal thinking that touches directly on competition law. 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 US antitrust law in the 1980s (Davies 2010; Van Horn 2009). This perspective

[11] Here is an example of the variety within neoliberal thinking. As Mirowski (2009) notes, this position towards monopoly has not been uniform. 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.

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). In other words, anticompetitive results of a monopolistic or oligopolistic economy are ephemeral, and eventually come to an end if market mechanisms are let to work freely (Van Horn 2009, p. 229).

Moreover, the Chicagoan approach provides intellectual grounds for the understanding that monopoly is justifiable if it proves to be efficient. According to this view, the organization of production in the monopolistic or oligopolistic form may be superior to a dispersed form of organization, for instance, in producing more at lower costs, or in enabling costly investments in technological innovation – i.e., in the jargon, in allocating resources more efficiently. Once one of the methodological assumptions of neoliberal economics (more precisely, of neoclassical theory that underlies neoliberalism) is that corporations behave rationally, concentration will pursue concentration only if "they are convinced that they can achieve efficiencies" (Crouch 2011, p. 56). Hence, "mergers and amalgamations, leading to the emergence of giant corporations, will always lead to improved efficiency" (Crouch 2011, p. 56). Government intervention through, for instance, antitrust law 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 a* competition free of undue interventaion.

The rise of neoliberalism as a dominant ideology in the 1990s 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 of the 1970s led to a new, global stage of capitalist development, to which neoliberalism provided a functional intellectual and practical vehicle. The notion of neoliberalism therefore also comprises a set of more or less coherent concrete policies, defined in distinct ways: "new rules of functioning of capitalism" (Duménil and Lévy 2005, p. 10), a "strategy of governance" (Munck 2005, p. 68), or a "political project" (Campbell and

Pedersen 2001, p. 1). But what are the defining traces of the global neoliberal reconstruction of the capitalist economy and society?

There is one characteristic of the neoliberal political project which is of special interest to assess competition law in action[12]. This is a model of global corporate expansion and concentration. As Chesnais argues (1996, p. 14; 91), the 1970s initiated a period of "extreme centralization and concentration of capital", as the physiognomy of corporate groups originated in the center of capitalism (the U.S., Europe and Japan) substantially grew throughout the 1980s[13]. 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.

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)[14]. In the economic model inaugurated by neoliberal globalization, therefore, the space for capitalist competition is increasingly occupied by large corporate groups.

Concentration was to a great extent conducted through foreign direct investment in the form of mergers and acquisitions (Chesnais 1996, p. 91), and during the 1980s it was mostly restricted to cross-country transactions among

[12] Two other trends of neoliberalism not explored in this article, but that are also connected to competition law is the regulation of financial sector and its growing hegemony in the economy and a societal shift promoted by an individualized conception of a society of consumers. They are both discussed in detail elsewhere (Miola 2014).

[13] As Chesnais (1996, p. 94-95) argues, concentrated forms of production and commercialization are not a distinctive feature of this period. What is new 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).

[14] Harvey (2007) also points to the Chinese insertion in the international market in this period as part of the process of global expansion and concentration of capital.

advanced economies (Picciotto 2011, p. 119; Chesnais 1996)[15]. In the 1990s, however, movements of concentration expanded even further, as new frontiers of accumulation were opened in the periphery of the capitalist system through liberalization and privatization policies, of which Latin America is emblematic.

If, according to neoliberal theory, the state distorts the optimal functioning of the market, its direct interference in the 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[16] of certain economic sectors, and the liberalization of finance and trade[17] are traditional neoliberal solutions to this "problem". In the 1990s, these measures were intensely diffused, especially to countries in which the model of import-substitution industrialization entailed several governmental restraints to capital flows, and an important participation of state-owned enterprises in the economy. Privatization measures are thus 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).

In Brazil, for instance, the 1990s were a period of a wave of privatization in strategic sectors such as petrochemicals, steel, mining, fertilizers, railways, harbors, banking and finance, energy and telecommunications (Filgueiras 2006, p. 194). As in other contexts, 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

[15] 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). Finally, M&A are an efficient strategy to conquer new markets by acquiring existing commercial labels, distribution networks and clients (Chesnais 1996, p. 64).

[16] 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".

[17] 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. Financial liberalization comprises measures such as "encouraging money centre and stock market activities in developing and newly industrialised countries" (Toporowski 2005, p. 110).

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 privatizations consecrated a monopolistic control of strategic economic sectors.

The brief description of these trends, here taken as characteristic of neoliberalism, enables assessing how competition law in action has responded to this phenomenon. As already announced, I take empirical evidence from a case study of Brazilian competition law to illustrate that the regulation of economic power was not in tension with neoliberalism, but rather that it legitimized the consolidation of one of its tenets: the expansion and concentration of capital.

4. Economic concentration and competition law: evidence from Brazil

In order to portrait the competition "law in action" in Brazil, in this section I present data that enables describing how it has responded to the pressures of capital expansion and concentration[18]. In many countries, the regulation of competition takes place in a juridified system that has on its center an administrative tribunal in charge of deciding on the legality of corporate concentrations and behavior. In Brazil, the institution responsible for this role has been CADE, as part of the Brazilian System of Competition Defense – SBDC (Sistema Brasileiro de Defesa da Concorrência) instituted by the law 8.884 of 1994, more recently reformed by the law 12.529 of 2011[19]. In CADE, a group of commissioners, mostly lawyers and economists, is in charge of decision-making. These commissioners, chosen from citizens over 30 years old and with "notable

[18] For a complete description of the empirical data synthesized in this article, see Miola (2014).
[19] A more recent landmark of competition policy's official history dates from 2011. In this year, the law number 12.529 was enacted, and came into force in May 2012. The new law restructured the SBDC institutionally, and made mostly some procedural changes in the model of competition regulation of 1994.

legal and economic knowledge", are appointed by the President of the Republic and approved by Senate. They enjoy a mandate, so they "can be removed only under very special circumstances", which according to the Council itself confers "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).

As already described in section 2, the creation of the SBDC is connected to the economic transformations that occurred in the period of liberalization, notably privatizations and deregulation. As CADE's official history indicates,

> [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).

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 2007). 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.

One of the key-roles attributed to competition law is to regulate the concentration of economic power[20]. In Brazil, this role was institutionalized by the 1994 reform[21]. Concentration occurs, for instance, through mergers, acquisitions and the formation of joint-ventures[22]. The law of 1994 established

[20] Another important role is the control of corporate behavior or conduct (so-called "repressive" role), such as unilateral practices that may affect markets (such as the abuse of dominant position) or collusive practices, such as the formation of cartel. The analysis of how CADE exercises its repressive role is not part of this article. Data on the enforcement of Brazilian competition law in respect to corporate behavior and its relationship to neoliberal policies can, however, also be found in Miola (2014, p. 366-386)

[21] As Schieber (1966, p. 165) describes, the 1962 competition law already had 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.

[22] As defined by CADE, a merger is a "corporate act through which two or more independent economic agents form a new economic agent, ceasing to exist as distinct legal entities"; an acquisition occurs "when an economic agent acquires the control or the substantive share of stocks of another economic agent"; and a joint-venture is "an association between two or more economic agents for the creation of a new economic agent without the extinction of the agents

the mandatory notification to CADE of concentration cases of a certain economic weight, or that implied market concentration of at least 20%[23]. In this system, when corporations concentrate (e.g. if one firm acquires another), prior to the operation they must ask for the regulators' authorization – in this case, to CADE and its commissioners. This leads to a procedure often called "merger review", through which the possible economic impacts of this concentration are analyzed. This review can have three distinct results: to clear the operation, fully authorizing it be consumed; to approve it with the imposition of certain restrictions or conditions (i.e. firms have to undertake some adjustments in the operation to mitigate potential harmful effects); or to reject it, entirely impeding the operation to be conducted.

In order to portrait how Brazilian competition law has responded in practice to the impulses of the economy in respect to the expansion and concentration of capital, it is useful to depict what economic phenomena in fact "enter" this regulatory arena, and what regulatory responses they receive. In other words, the connection of competition law in Brazil to neoliberalism can be grasped from the study of how CADE regulates economic concentration submitted through merger reviews.

4.1 The concentrations regulated in Brazil

Empirical data produced in another study helps to illustrate this connection (Miola 2014). In this study the merger reviews decided by CADE between June 13th 1994 – right after reform – and December 15th 2010 were analyzed. In this 17 years period, CADE decided 6378 merger reviews[24]. Figure 1 below indicates

---

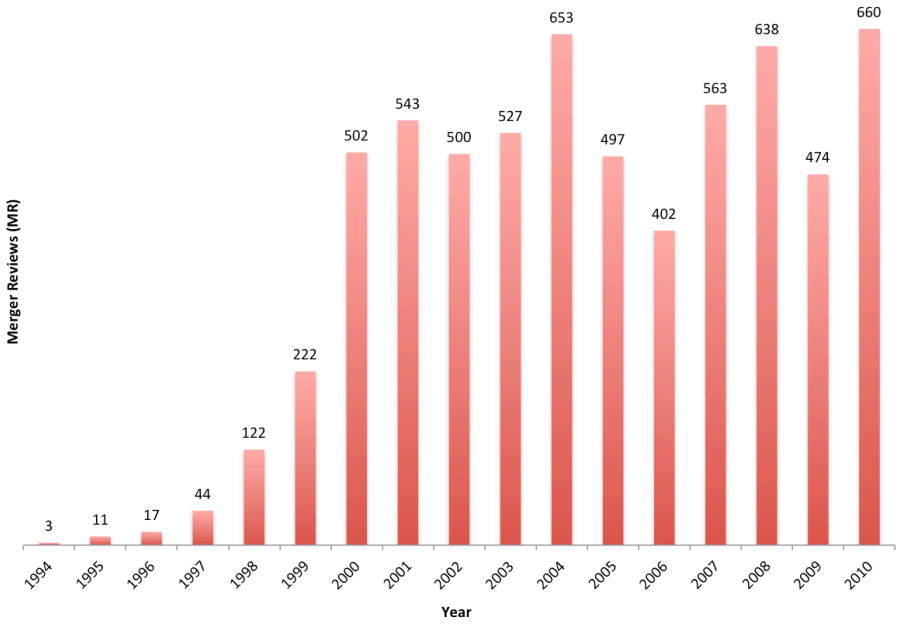
that originated it. It may have as its goals research and development of new products and services, or acting in a new, distinct Market from the individual markets of each company". Available at: <http://www.cade.gov.br/servicos/perguntas-frequentes/perguntas-sobre-atos-de-concentracao-economica>. Acessed in 15/11/2016.

[23] Currently, the submission of a concentration to CADE is mandatory if one of the involved corporations has annual revenues equal or superior to 750 million Reais and at least one of the other corporations involved has revenue equal or superior to 75 million Reais. This change was introduced by the Interministerial Ordinance n. 994/2012, of the Brazilian Ministries of Justice and Finance, based on Article 88, first paragraph of the Law 12.529 of 2011.

[24] The number of total cases decided by CADE are not uniform in the institution's own official reports, not in secondary sources (such as Martinez 2011 and Salgado 2004). Hence, in order to

how the demand of concentrations for CADE's analysis increased precisely from 1995 onwards, under Fernando Henrique Cardoso's administration, with the intensification of privatizations and liberalization[25].

Figure 1. Number of merger reviews decided by CADE (1994-2010)



Source: Miola (2014, p. 142)

Describing the profile of economic concentrations decided by CADE in such a large universe would be very difficult, since it would demand individually analyzing more 6 thousand cases. Hence, in the study on which this article bases its empirical description (Miola 2014) a representative sample of merger reviews

determine the universe of decisions in the period, all merger reviews indicated in 562 trial sessions reports from 1996 to 2010 were listed, which offers a homogenous source of data and enables individualizing all cases – a necessary condition for constructing a sample. For 1994 and 1995, year in which session trial reports are not available, the repository of decisions was built upon Franceschini's (2004) database.

[25] 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 (Anuatti-Neto et al 2005, p. 152; Filgueiras 2006, p. 194). The liberalization of several sectors was also intensified through a series of Constitutional Amendments (EC), especially from 1995 onwards, such as the EC 05/95, 08/95 and 09/95 which broke state monopoly over gas distribution, telecommunication services and oil, respectively (Coutinho and Schapiro 2013, p. 594).

decided between 1994 and 2010 was built[26]. This sample enabled a qualitative dive into the analysis of these cases profiles and of how they are decided by CADE. It encompasses 871 merger reviews. Based on this sample, I produced statistics that enable describing, with reasonable confidence, the profile of the universe of merger reviews decided by CADE in the analyzed period.

In the sample, 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. A series of other forms 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 1. Types of operation in merger reviews (1994-2010)

Type of operation	***%***
Acquisition	81,7
Joint-Venture	7,3
Merger	3,6
Other	7,4
Total	100

Source: Miola (2014, p. 337)

[26] Since the number of cases decided in some years (especially between 1994 and 1999) is too small if compared to the overall average, a simple random sample would imply a high risk of under-representing some decisions of the period. The risk is even higher for extracting conclusions, since the difference in case load coincides with political shifts (from FHC administration to Lula's). Besides, another risk of a random sample from CADE's universe of decisions is the fact that, as I will detail later, the number of cases approved with some kind of restriction is much lower than the number of cases approved without restrictions. Hence, if this difference were not taken into account, restricted cases would also be under-represented in the sample. To circumvent these problems, the study adopted the technique of stratified random sampling, building different representative strata for two periods according to the political cleavage – from 1994 to 2002 and from 2003 and 2010 – and two types of decisions (with and without restrictions). Conservative parameters were adopted in calculating sample size in each strata, in order to assure confidence to the data produced. A sample error of 5% and a confidence level of 95% were taken in building the sample. The relative "weight" of each stratum to the general population was taken into account in the production of the statistics here described. For a detailed explanation of the sampling in this study, see Miola (2014, p. 145-149). For each case of the sample, data was collected from CADE's electronic process system.

Most operations presented to CADE (57%) were of national scope, that is, operations restricted to the Brazilian market (Miola 2014, p. 367). A considerable proportion of almost 43%, however, was of global scope, which means operations of a scope larger than the Brazilian market, directly affecting it or not. Frequent examples of this type of operation are those in which two foreign corporations merge or acquire each other e notify the Brazilian antitrust authority. These operations may or may not imply consequences to the Brazilian market – for instance, when due to a global merger there is a change in the share composition of a subsidiary that operates in Brazil.

According to the sample, economic concentrations decided by CADE occurred in 29 different economic sectors[27]. 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 (Miola 2014, p. 335-336). 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 of concentrations decided by CADE. Historically 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.

[27] The categories of economic sectors are those defined by CADE's official typology, as formalized by the resolution number 15 of 1998 and as applied by the Council in each of the analyzed cases.

Table 2. Top 15 economic sectors of merger reviews (1994-2010)

Economic Sector	%	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
Other	17,5	100

Source: Adapted from Miola (2014, p. 336)

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. It was 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 private 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 Ultrafértil, Arafértil, and Fosfértil, or was opened to outside investors, such as in the case of Petrobras.

The high 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.

Between 1994 and 2010, also based on the sample of Miola (2014), most merger reviews decided by CADE entailed the accumulation of capital by foreign agents, be it in the form of a foreign company acquiring another foreign corporation, or of a foreign company acquiring a Brazilian one. The proportion of concentrations favoring foreign firms is higher, however, if movements of cooperation among foreign firms, or between them and Brazilian enterprises are considered: 77,8% of cases regulated by the Brazilian competition authority between 1994 and 2010 involved some sort of concentration benefiting foreign firms[28].

Table 3. Capital movement in merger reviews (1994-2010)

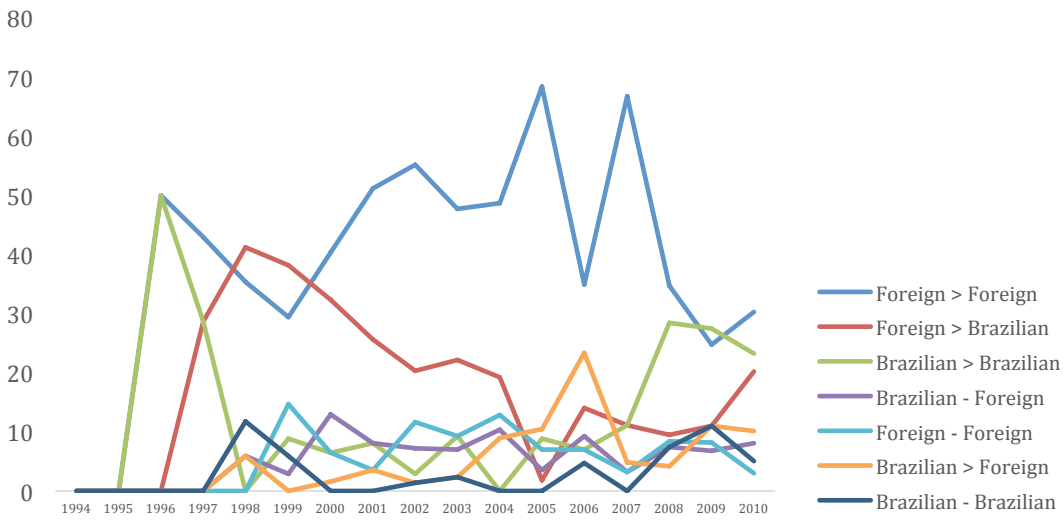
Form of concentration	***%***
Foreign > Foreign	44
Foreign > Brazilian	19
Brazilian > Brazilian	12,7
Brazilian – Foreign	7,5
Foreign – Foreign	7,3
Brazilian > Foreign	6,2
Brazilian – Brazilian	3,2
Total	100

Source: Miola (2014, p. 338)

[28] The symbol ">" indicates that the agent on the left side has incorporated (through an acquisition) the agent on the right. The symbol "–", in turn, means that the agents combined their capital, be it in the form of a different firm (through mergers), or in a joint-ventures.

Unfolding the movement of capital in a time series provides yet another set of information, as the figure below indicates. In most of the 17-year period covered by the sample, acquisitions of foreign corporations dominated CADE's decisions portfolio. 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. Moreover, given that the year CADE usually decides a while (even months) after the operation was submitted, the "boom" of concentrations generated by foreign firms also coincides with the series of deregulation, liberalization and privatization measures in Brazil.

Figure 2. Proportion of merger reviews according to capital movement in time (1994-2010)



Source: Miola (2014, p. 339)

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 the merger reviews 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.

It is particularly interesting that acquisitions of foreign firms by Brazilian corporations, which were largely marginal, gained space in 2003. 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 of tensioning with neoliberal policies in place since the 1990s, as "developmentalist" policies for the formation of "national champions" started to emerge, through an "industrial policy" for the concentration of national corporations (Coutinho and Schapiro 2013). This shift also coincides with the grave 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 is that of the countries of origin of corporations involved. 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%). The data thus indicates that most of the concentrations involved the expansion of corporations from developed countries[29].

[29] 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,

Table 4. Origin of capital acquirers in merger reviews (1994-2010)

Country	%
United States	35,7
Brazil	25,7
Germany	5,9
United Kingdom	4,6
France	4,5
Netherlands	3,2
Spain	3,1
Canada	2,5
Italy	2
Switzerland	1,6
Japan	1,1
Other	10

Source: Miola (2014, p. 340)

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%[30].

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.

[30] 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.

Table 5. Origin of capital acquired in merger reviews (1994-2010)

Country	%
Brazil	38,3
United States	25,5
Germany	6,9
United Kingdom	5,0
France	4,9
Netherlands	3,1
Switzerland	2,3
Italy	2,1
Japan	1,4
Canada	1,1
Others	9,4

Source: Miola (2014, p. 341)

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. The data on the prevailing origins of the acquired and acquiring capital converges with what Chesnais (1996) describes as a distinctive characteristic of competition in the neoliberal global economy: an intense cross-country transactions among advanced economies.

Among the operations analyzed by CADE between 1994 and 2010, in 40% of them the antitrust authority recognized the existence of some kind of concentration, vertical or horizontal[31]. More than one third of operations (34,8%) implied some sort of horizontal integration (including vertical integration or not), in different levels (as illustrated on Table 6). In 5,6%, although horizontal concentration was not identified, vertical integration was observed (Miola 2014, p. 342).

[31]Vertical integration occurs when a company acquires assets within the supply chain in which it is economically active, e.g. when a certain firm acquires one of its suppliers. Horizontal integration, in turn, occurs when a company acquires assets in the same productive sector where it acts, e.g. a merger between direct competitors. In this study, the highest market share generated in all the relevant markets involve in an operation was taken as proxy of economic concentration.

Table 6. Level of horizontal concentration observed in merger reviews (1994-2010)

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: Miola (2014, p. 343)

In the majority of cases horizontal concentrations were not identified, especially due to the global (and not national) character of a large number of operations. Several of them also reveal a process of arrival of foreign capital into Brazil, where foreign corporations had no prior activities – what does not imply a horizontal concentration[32].

4.2 Regulatory responses to concentration

The analysis of the overall proportions and types of restrictions imposed by CADE reveal, in turn, that the practice of competition regulation has not directly tackled concentration, but largely embraced it. In the universe of more than 6 thousand decisions enacted between 1994 and 2010, CADE approved 88,5% of merger reviews without restrictions. The second most frequent type of decision identified was to "dismiss" the merger review, in 6,4% of cases[33]. In 4,9%, CADE approved the concentration with some sort of restriction. Finally, out of the universe of 6378 merger reviews decided between 1994 and 2010, only 8 were

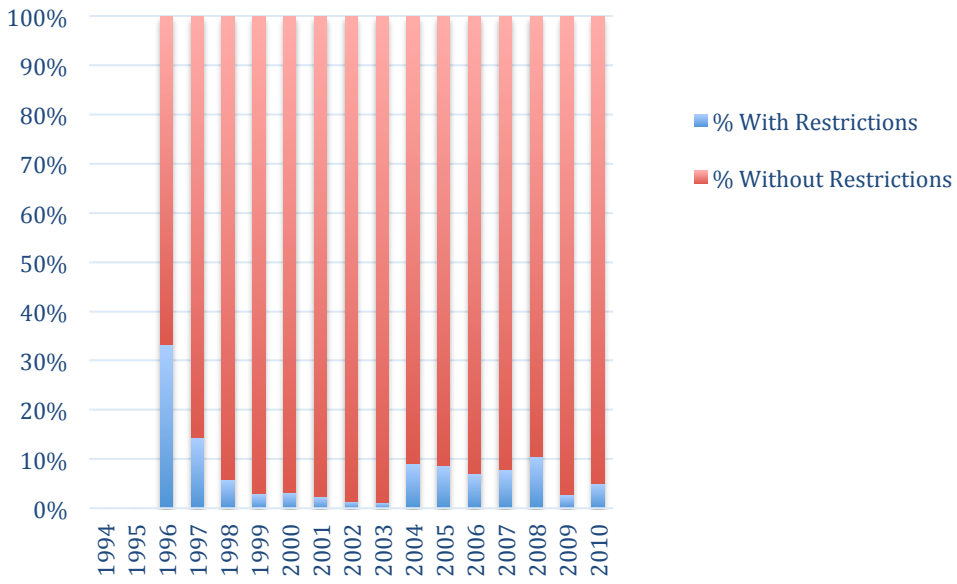
[32] A more complete study would have to pay attention to vertical integration separately, since they are of special relevance as a mean for the internationalization of production (as in increasingly important global supply chains).

[33] These are decisions in which CADE did not analyze the merit of the merger review, for reasons such as "loss of object" or "operation withdrawal". In practice, the effect of this type is the same as an "approval without restrictions", as the operation is cleared.

rejected (0,1%). The high incidence of approvals without restrictions shall not be immediately taken as evidence of an absolute tolerance toward economic concentration. This is because, as described on Table 6 (above), 65% of merger reviews submitted to CADE did not imply any sort of horizontal concentration[34].

Going further into the investigation of the sample, however, much more interesting data can be found on the regulatory responses given by CADE to economic concentrations. Although the graph below cannot be taken as a perfect representation of the initial years of CADE (1994 and 1995), since decisions from the period are of a small number, it evidences two interesting trends. Starting in 1996, the number of restrictions imposed to concentrations is in continuous decrease.

Figure 3. Types of decisions in merger reviews (1994-2010)



Source: Miola (2014, p. 351)

A possible explanation for this phenomenon is that it was precisely in 1996 that a group of commissioners much more aligned with the dominant ideas

[34] The large number of cases submitted to CADE with little or no impact n competition has been historically attributed to the text of the Law 8.884 of 1994, which imposed mandatory submission of acts without any potential for harming competition. One of the changes promoted by Law 12.529 of 2011 was precisely to restrict the profile of operations that are obliged to be submitted to CADE.

of liberalization and deregulation than their predecessors was appointed to CADE (Miola 2014). The new regulators were mostly economists of the tradition of new institutional economics and corporate lawyers that conceived competition law in a much more compatible way with concentration[35]. The graph 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 (as demonstrated in Miola 2014, p. 255-300).

Several of the operations submitted to CADE were legalized even though they maintained high levels of concentration, due to a dominant understanding that since they did not represent horizontal integrations, they constituted a mere "substitution of agents"[36]. A similar argument was identified with respect to merger reviews involving privatizations, in which state-owned monopolies were transferred to private parties[37]. In this sense, the new frontiers of accumulation opened by liberalization, deregulation and privatization measures were to a great extent confirmed by competition regulation. 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 from a monopolistic or oligopolistic company to a substitute.

Figure 3 indicates that in 2004, however, occurred a raise in the level of restrictions, which can also be noticed in the universe of decisions. From this

[35] Although new institutional economics (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, Oliver Williamson, and Douglass 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 as a man-made substitute for the "natural" institution of the market. The famous adage coined by Williamson (1975, p. 21) – "in the beginning there were markets" – is illustrative of such assumption.

[36] Examples of such cases are the merger reviews 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 no variations of market shares (Miola 2014, p. 348).

[37] In such a context, the transfer of state control over an economic sector to a private agent was often seen as a "pro-competitive operation", as illustrated by the extracts from the rapporteur's opinion enacted in the merger review number 53500.002120/1998. For him, no "modification in the level of concentration" was detected in such case, although the privatized company held 65% of the market.

moment to 2008, the annual average of restrictions in the sample was of 8,6%, never below 7%, and even reaching 10,6%. This information must be taken cautiously. Due to the small number of cases restricted it is not safe to infer that in this period CADE became more restrictive towards economic concentration. 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, in the sample, the addition of one case may increase substantially the proportion of cases restricted in one year[38]. However, it is precisely in 2004, and most intensely in 2008, the profile of commissioners once again started to change in CADE. Economists more affiliated to developmental economics (critical of neoliberalism) and lawyers of a distinct strand started to be appointed, what can explain a more restrictive regulatory practice (Miola 2014, p. 300-311).

In general, however, not only were restrictions imposed in a minority of cases that generated some sort of integration, but also *substantive* conditions affecting the structure of concentrated corporate power were even more rare. Traditionally, there are two sorts of restrictions in competition law. Some restrictions (or "remedies" in competition jargon) are said to be "structural" when they affect the proprietary structure of the corporations involved in the operation. These restrictions comprise, for instance, the determination that a corporation must sell its shares to another one in order for the merger to be approved. Other possibilities are, for example, the split of corporations, and the selling intellectual property rights. Other "remedies" are called "behavioral" to the extent that they impose restrictions to the exercise of these rights. For instance, when CADE determines measures that modify the relationship with end-consumers, establish supply commitments, impose restraints on predatory pricing and prevent the use of exclusive and/or long term contracts, among others, so the merger review can be approved.

[38] Moreover, the increase in the proportion of restrictions may be related to yet another reason: several of the merger reviews 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 atos de concentração were concentrations mobilized by a single corporation that produces elevators and provides maintenance services – Elevadores do Brasil Ltda, controled by the firm Elevadores Otis Ltda, which in turn belonged to the US group United Technologies CO. The American corporation acquired a series of contracts of several smaller Brazilian firms, generating various merger reviews.

As the Table 7 indicates, based on the sample of cases that were somehow restricted by CADE, in only 11,5% of them the actual market concentration was tackled through the imposition of measures to de-concentrate. This means that while 94,7% of all economic concentrations were approved without conditions, 4,7% received behavioral restrictions, and 0,6% of them were limited in its structure of concentration.

Table 7. Types of restrictions imposed in merger reviews (1994-2010)

Type of restriction	%
Behavioral	88.5
Structural	11.5

Source: Miola (2014, p. 358)

Data gathered by Cabral and Mattos (2016) confirms this trend in respect to the universe of concentrations regulated by CADE up to 2013. The authors notice that in only 4 years of the whole period (2003, 2005, 2009 and 2012), the proportion of cases involving structural conditions surpassed that of behavioral restrictions (Cabral and Mattos 2016). All these years pointed by Cabral and Mattos (2016) are part of the period *after* the moment of most intense alignment between competition law and neoliberal ideas held by commissioners. Once again, this shift parallels what some authors describe as a broader shift in policy-making, from that of a "moderate neoliberalism" to a model of increased interventionism in the economy, often characterized as "new state activism" (Coutinho and Schapiro 2013, Trubek et al 2013), or a neo-developmental state (Boschi 2010, Bresser-Pereira 2010) especially from 2006 onwards[39].

This data on the types of restriction indicates, therefore, an "institutional preference" for behavioral restrictions, instead of imposing restrictions that affect market structure. As Table 8, below, reveals, based on the sample, even in

[39] Such new model is said to question many of the neoliberal assumptions about the free market, but interestingly in respect to competition law, it may also have a "concentrationist" approach, as the industrial policies formation of "national champions" indicate. A possible difference, to be assessed elsewhere, is that concentration is taken as instrumental for development and fostered in selected sectors for specific corporations, that of national origin.

the highest levels of concentration, the majority of operations were approved without any questioning of the market share generated by it. Moreover, in the vast majority of cases in which corporations received a behavioral condition they were only required to perform minor contractual adjustments that did not affect the actual market concentration, such as "non-compete clauses"[40].

Table 8. Types of restriction in merger reviews according to levels of concentration

Level of concentration implied by the operation	% 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: Miola (2014, p. 361)

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 indication of a dominant position is 20% of market share[41], the idea of 40% as a proportion that does not generate antitrust concerns has been instituted in regulatory practice. This was precisely the limit that the agents who acted in the reform of competition regulation in the 1990s and who were most aligned with the neoliberal economic

[40] These are adjustments in the so-called "non-compete clause", 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. CADE determined, in several of these cases, the reduction of the time period and the adjustment of the geographical scope of these clauses.

[41] Article 20, paragraph third of the law 8.884 of 1994, later replicated by Article 36, second paragraph of the law 12.529 of 2011.

thinking wanted to establish in the law, but were defeated in the reformist process of 1993-1994 (Miola 2014, p. 217-233). More importantly, the analysis of restrictions imposed reveals that, even in the higher levels of concentration, measures that actually affected the concentrated structure were rare, corresponding to 2,5% of cases in levels between 40 and 60%, and 30% in the highest level. In other words, in any scenario, the impositions of structural restrictions is absolutely exceptional in CADE's regulatory practice.

The trend of tolerance towards concentration is also confirmed by the analysis of the only 8 cases rejected by CADE between 1994 and 2010 in the universe of decisions – and not only because they compose a nearly irrelevant proportion of merger reviews decided. As Table 9 below indicates, they all implied levels of concentration above 60%, and 5 of them implied concentrations above 80%.

Table 9. Rejected merger reviews (1994-2010)

Year of decision	Economic Sector	Capital movement	Level of concentration (%)
1994	Non-Metallic Mineral Products Industry	Brazilian – Brazilian	68,0
1994	Automotive Industry and Transports	Foreign > Foreign	95,5
2000	Agriculture	Brazilian – Brazilian	85,0
2000	Agriculture	Brazilian – Brazilian	70,0
2004	Food Industry	Foreign > Brazilian	100,0
2008	Non-Metallic Mineral Products Industry	Foreign – Foreign	98,0
2009	General Services	Brazilian – Brazilian	100,0
2010	Non-Metallic Mineral Products Industry	Brazilian > Brazilian	71,0

Source: Miola (2014, p. 363)

The actual extension of rejections, which is already minimal if compared to the universe of decisions, can nevertheless be even more apprehended if some specificities involved in at least 6 of these operations are taken into account. For instance, two of the rejected merger reviews were decided in the

first year of competition policy enforcement in Brazil under the reformed law of 1994[42]. One of them was precisely the very first merger review presented to CADE. In that moment, CADE was formed by lawyers and economists of a profile that was considered traditional (as opposed to what was perceived as the ideological modernity of the 1990s). The Council was extensively criticized for its "excessive" interventionism – i.e. precisely for not being aligned with the ideological consensus of liberalization, what would happen only after 1996 due to a new composition of commissioners (Miola 2014). These decisions epitomized, in the view of many of the critics, the erroneous path that competition law was taking in its early years.

CADE's regulatory practice between 1994 and 1995 was perceived as mistaken precisely for "excessively" intervening in corporate concentration, in the opposite direction to the trends of market liberalization. Hence, since these rejections were strongly criticized by the dominant view of competition law, they can be taken as a reversed confirmation of the tolerance towards economic concentration that hegemonized the Council from that moment on. The "fixing" of regulatory practice would come in 1996, with a new composition of commissioners in CADE, by then more aligned with the foundations of neoliberal thinking on concentration and competition – precisely the period in which measures of liberalization and privatizations were intensified and also, as illustrated above, it is possible to observe a considerable reduction in rejections and in the imposition of restrictions to concentration.

Two other merger reviews decided after 1996 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[43]. 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

[42] 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.
[43] Merger review number 08012.002315/1999-50.

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[44].

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, to liberalize prices[45]. The idea behind both merger reviews was basically to enable firms to "survive" those measures. The first comprised the creation of an "official cartel", to be legalized by CADE, and the second also aimed to institute a mechanism of price administration by market agents themselves. The corporation created in 1999 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).

Both merger reviews were rejected by CADE only on November 2000, 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 and international competition. Hence, although these merger reviews figure as "rejected" cases in CADE's decisions portfolio, in practice they can be seen as cases that produced its effects and were not effectively challenged by regulation.

In 2004 and in 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*[46]. Presented in 2002, the merger review 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. The other case, of 2009, dealt with the transfer of health insurance clients and rent contracts of a hospital located in a countryside city of

[44] Merger review number 08012.004117/1999-67.
[45] In 1975, following the oil crisis of 1973, the Brazilian state started to subside 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 to abolish price control mechanisms, the extinction of the IAA was determined. In 1991, several formerly administered prices were liberalized, the sugar cane sector included. Only in 1998, however, the movement would be completed: it was determined that the prices of sugar, sugar cane and alcohol were to be fully liberalized on February 1st 1999.
[46] Merger review number 08012.001697/2002-89.

the state of Rio Grande do Sul to a local medical cooperative[47]. 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.

The data gathered from the Brazilian case illustrate that, from 1994 to 2010, economic power was in general regulated in a way to be compatible with – not contradictory to – the neoliberal understanding on how should competition occur, i.e. how big should corporations be and hence how should the economy work. Focused on a single case, this description converges, however, with similar trends of tolerance towards concentration observed elsewhere in the same period, such as in the US (Davies 2010), and in the European Union (Levy 2003, Wigger and Buch-Hansen 2016, in this volume)[48].

5. Conclusions

In a classic study of American legal and political history, Martin J. Sklar (1988) offers a breathtaking demystification of the roles exercised by one of the cornerstones of US contemporary law: antitrust law. In this book, he dissects the emergence and development of the "antitrust question" in the late 19th and early 20th centuries. Sklar (1998, p. 1) shows that the enactment of the Sherman Act was "in essence about the passage of American capitalism from the competitive to the corporate stage of its development". He argues that although the Sherman Act originally reflected a struggle to control the power of big business, it never effectively aimed at abolishing large corporations and the combination of capital (Sklar 1988, p. 109). Moreover, its enforcement by the

[47] Merger review number 08012.008853/2008-28.
[48] As described by Levy (2003, p. 199), througtout the 1990s, the European competition authority analyzed more than 2000 merger reviews, and approved without conditions 90% of them, imposed restrictions to other 7% and rejected only 3%. Similarly, according to Cabral (2014, p. 36), between 1994 and 2013, the proportion of restricted cases is of 6%.

courts went even further in legitimizing and supporting the consolidation of American corporate capitalism, which demanded concentrated structures.

In the late 1980s, when Sklar's book was being published, a new wave of transformation was taking place, now on a global scale, affecting the two pillars of his research: capitalism and the law. The economy and the state were submitted to an intense process of reform often defined as neoliberalism. Accompanying this trend, especially from the 1990s onwards, regulatory devices and new forms of economic governance emerged. Competition law came once again to the forefront. Thirty years after the beginning of this process, and more than a hundred years after the Sherman Act, this article tackled a question that is quite similar to Sklar's: how to explain the "antitrust question"? In other words, how does competition law relate to the novel, global reconstruction of capitalism mobilized by neoliberalism?

Looking at the connection between competition law and neoliberalism as a "hidden agenda" of the practice of competition regulation, or as the "failure" of a legal reform, or even as a "corrupt" enforcement is of very little help to understand it. Why, then, as I argued in this article based on the Brazilian example, has the regulation of corporate power favored neoliberalism? A possible candidate to answer this question –not exactly attractive – is that the law simply responds to power dynamics and to economic interest, without no mediation. Of course economic and political power and the law are related in the shaping of regulation and in its enforcement. But that doesn't necessarily imply that they are entirely subjected one to the other.

An alternative way of explaining the alignment of competition law and neoliberalism was pointed throughout the article, although not explored in depth: the legal and economic ideas that dominated competition law enforcement. As described in section 3, these ideas form a genuine interpretation that advocates for concentration as something desirable (or even unavoidable) for a complex economy. This set of ideas – as any other set in this regulatory field – converges with certain political and economic interests – which in the case are mostly those of corporations that concentrate. Besides, the broader political context and the economic processes may be more or less favorable for a certain set of ideas to emerge and establish itself.

This explanation seems a better fit to understand the convergence of competition law to neoliberalism also because it doesn't fall into a dangerous inevitability. The way competition law enforcement works, as described in this article, is not predetermined or necessary. If this enforcement is the product of a certain way of understanding economic power and competition, than a different set of ideas may imply change in the law produced (as the article suggests when I described evidences of a parallel between the emergence of a "new developmental state", a new composition of commissioners in CADE and a different trend in the regulation of concentrations). The mapping of ideas that historically dominated the enforcement of competition law in Brazil, of who are its possessors, and of what political and economic forces that they relate to would be a contribution to assess the adherence of this hypothesis.

References

Aguillar, Fernando H., and Diogo R. Coutinho. 2012. "A evolução da legislação antitruste no Brasil." *Revista de Concorrência e Regulação* 7-8(Jul - Dec):139-60.

Anuatti-Neto, Francisco, Milton Barossi-Filho, Antonio Gledson de Carvalho, and Roberto Macedo. 2005. "Os Efeitos da Privatização sobre o Desempenho Econômico e Financeiro das Empresas Privatizadas." *Revista Brasileira de Economia* 59(2):151-75.

Aydin, Umut. 2010. "The International Competition Network: Cooperation And Convergence In Competition Laws." Rekabet Degisi (Competition Journal) 11(3):51-78.

Azpiazu, Daniel, and Eduardo Basualdo. 2004. "Las privatizaciones en la Argentina. Genesis, desarrollo y principales impactos estructurales." Pp. 1-47 in Las privatizaciones en la Argentina. Genesis, desarrollo y principales impactos estructurales, edited by Daniel Azpiazu and Eduardo Basualdo. Buenos Aires: FLACSO, Facultad Latinoamericana de Ciencias Sociales.

Boschi, Renato. 2010. "Estado Desenvolvimentista no Brasil: continuidades e incertidumbres." in The Brazilian State: Paths and Prospects of Dirigisme and Liberalization. Bildner Center for Western Hemisphere Studies, CUNY - New York.

Braithwaite, John. 2005. "Neoliberalism or regulatory capitalism." Pp. 1-43 in *Regulatory Institutions Network - Occasional Paper*. Canberra: Australian National University.

—. 2008. *Regulatory Capitalism. How it Works, Ideas for Making it Work Better*. Cheltenham: Edward Elgar.

Bresser-Pereira, Luiz Carlos. 2010. "Novo desenvolvimentismo: uma proposta para a economia do Brasil." Nueva Sociedad Edição Especial em Português:58-72.

Burlamarqui, Leonardo, Ana Célia Castro, and Ha-Joon Chang. 2000. "Introduction." in Institutions and the role of the state, edited by Leonardo Burlamarqui, Ana Célia Castro, and Ha-Joon Chang. Cheltenham: Edward Elgar.

Cabral, Patricia e Mattos, Cesar. 2016. Remédios em Atos de Concentração: uma análise da prática do CADE. Revista de Defesa da Concorrência, v. 4, n. 1, p. 57-94.

CADE. 2007. "Guia prático do CADE: a defesa da concorrência no Brasil." edited by Conselho Administrativo de Defesa Econômica. São Paulo: CIEE.

Campbell, John L., and Ove K. Pedersen. 2001. "Introduction: the rise of neoliberalism and institutional analysis." Pp. 1-23 in *The rise of neoliberalism and institutional analysis*, edited by John L. Campbell and Ove K. Pedersen. Princeton: Princeton University Press.

Chang, Ha-Joon. 2002. "Breaking the mould: an institutionalist political economy alternative to the neo-liberal theory of the market and the state." Cambridge Journal of Economics 26:539-59.

Considera, C., and P. Corrêa. 2002. "The Political Economy of Antitrust in Brazil: from Price Control to Competition Policy." in Fordham Conference on Competition Policy. New York.

Considera, Claudio. 2005. "Uma breve história da defesa da concorrência." Textos para discussão - UFF Economia 178(October).

Chesnais, François. 1996. *A mundialização do capital*. São Paulo: Xamã.

Coutinho, Diogo and Schapiro, Mario. 2013. Economia Política e Direito Econômico: do desenvolvimento aos desafios da retomada do ativismo estatal. In: Costa, José A. Et al (orgs.). Teoria e Experiência: estudos em homenagem a Eros Roberto Grau. Vol. 1, São Paulo: Malheiros.

Crouch, Colin. 2011. The strange non-death of neoliberalism. Cambridge: Polity Press.

Davies, William. 2010. "Economics and the 'nonsense' of law: the case of the Chicago antitrust revolution." *Economy and Society* 39(1):64-83.

—. 2014. The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition. London: SAGE.

Deranyiagala, Sonali. 2005. "Neoliberalism in international trade: sound economics or a question of faith?" Pp. 99-105 in Neoliberalism: a critical reader, edited by Alfredo Saad-Filho and Deborah Johnston. London: Pluto Press.

Duménil, Gérard, and Dominique Lévy. 2005. "Costs and Benefits of Neoliberalism: A Class Analysis." in *Financialization and the World Economy*, edited by Gerald A. Epstein. Aldershot: Edward Elgar.

Edelman, Lauren, and Mark Suchman. 1997. "The legal environments of organizations." *Annual Review of Sociology* 23:479-515.

Eisner, Marc Allen. 1991. *Antitrust and the triumph of economics: institutions, expertise, and policy change*. Chapel Hill: University of North Carolina Press.

Esquirol, Jorge. 2011. The Latin American Tradition of Legal Failure. Comparative Law Review, v. 2, p. 1-19.

Filgueiras, Luiz. 2006. "O neoliberalismo no Brasil: estrutura, dinâmica e ajuste do modelo econômico." Pp. 179-206 in Neoliberalismo y sectores dominantes. Tendencias globales y experiencias nacionales, ed. by Basualdo, E. and Arceo, E.. Buenos Aires: CLACSO - Consejo Latinoamericano de Ciencias Sociales.

Forgioni, Paula. 2005. Os fundamentos do antitruste. São Paulo: Revista dos Tribunais.

Freyer, Tony. 1992. *Regulating Big Business: Antitrust in Great Britain and America, 1880-1990 (Kindle version)*. Cambridge: Cambridge University Press.

Gilardi, Fabrizio, Jacint Jordana, and David Levi-Faur. 2006. "Regulation in the Age of Globalisation: The Diffusion of Regulatory Agencies Across Europe and Latin America." Pp. 127-47 in *Privatisation and market development: global movements in public policy ideas*, edited by Graeme Hodge. Cheltenham: Edward Elgar.

Halliday, Terence C., and Pavel Osinsky. 2006. "Globalization of law." *Annual Review of Sociology* 32(1):447-70.

Harvey, David. 2007. *A brief history of neoliberalism*. Oxford: Oxford University Press.

Hovenkamp, Herbert J. 2010. "Harvard, Chicago, and Transaction Cost Economics in Antitrust Analysis." in University of Iowa Legal Studies Research Paper: University of Iowa, College of Law.

Jordana, Jacint, and David Levi-Faur (Eds.). 2004a. *The politics of regulation : institutions and regulatory reforms for the age of governance*. Cheltenham: Edward Elgar Publishing.

—. 2004b. "The politics of regulation in the age of governance." Pp. 1-30 in *The politics of regulation: institutions and regulatory reforms for the age of governance*, edited by Jacint Jordana and David Levi-Faur. Cheltenham: Edward Elgar.

—. 2005. "The diffusion of regulatory capitalism in Latin America: sectoral and national channels in the making of a new order." *Annals of the American Academy of Political and Social Science* 598:102-24.

Jordana, Jacint, David Levi-Faur, and Xavier Fernández i Marín. 2011. "The global diffusion of regulatory agencies: channels of transfer and stages of diffusion." *Comparative Political Studies* 44(10):1343-69.

Kotz, David M. 2002. "Globalization and Neoliberalism." *Rethinking Marxism* 12(2):64-79.

Levi-Faur, David. 2005. "The global diffusion of regulatory capitalism." *Annals of the American Academy of Political and Social Science* 598:12-32.

Levy, N. 2003. 'EU Merger Control: From Birth to Adolescence', World Competition 26: 195-218.

Martinez, Ana Paula. 2011. "Histórico e desafios do controle de concentrações econômicas no Brasil." Pp. 23-67 in Concentração de Empresas no Direito Antitruste Brasileiro: Teoria e Prática dos Atos de Concentração, edited by Celso Campilongo. São Paulo: Singular.

Miola, Iagê. 2014. “Law and the Economy in Neoliberalism: the Politics of

Competition Regulation in Brazil". in "Renato Treves" International PhD in Law and Society. Milan: University of Milan.

Mirowski, Philip. 2009. "Postface: Defining Neoliberalism." Pp. 417-56 in *The road from Mont Pèlerin: the making of the neoliberal thought collective*, edited by Philip Mirowski and Dieter Plehwe. Cambridge: Harvard University Press.

Mirowski, Philip, and Dieter Plehwe. 2009. *The road from Mont Pèlerin: the making of the neoliberal thought collective*. Cambridge: Harvard University Press.
Moura e Silva, Miguel. 2007. Direito da concorrência: uma introdução jurisprudencial. Lisboa: Almedina.

Munck, Ronaldo. 2005. "Neoliberalism and politics, and the politics of neoliberalism." Pp. 60-69 in *Neoliberalism: a critical reader*, edited by Alfredo Saad-Filho and Deborah Johnston. London: Pluto Press.

Naím, Moisés, and Joseph S. Tulchin. 1999. *Competition policy, deregulation, and modernization in Latin America*. Colorado: Lynne Rienner.

Nascimento, Ruy Coutinho do. 2012. "Quatro momentos do antitruste no Brasil." Pp. 187-94 in A nova lei do CADE, edited by Laércio Farina. Ribeirão Preto: Migalhas.

Nelken, David. 1981. "The "gap problem" in the sociology of law: a theoretical review." Windsor Yearbook of Access to Justice 35(1):35-61.

—. 1984. "Law in action or living law? Back to the beginning in sociology of law." Legal Studies 4(2):157-74.

Nusdeo, Ana Maria de Oliveira. 2002. *Defesa da concorrência e globalização econômica: o controle da concentração de empresas*. São Paulo: Malheiros Editores.

Peña, Julián. 2006. "Competition policies in Latin America, post-Washington Consensus." Pp. 732-57 in *Handbook of research in trans-Atlantic antitrust*, edited by Philip Marsden. Cheltenham: Edward Elgar.

Picciotto, Sol. 2011. *Regulating global corporate capitalism*. Cambridge: Cambridge University Press.

—. 2016. " Capitalismo corporativo e a regulação internacional da concorrência. Revista Direito e Práxis, v. 7, n. 4, 2016, pp. 530-560.

Plehwe, Dieter. 2009. "Introduction." Pp. 1-44 in *The road from Mont Pèlerin: the making of the neoliberal thought collective*, edited by Philip Mirowski and Dieter Plehwe. Cambridge: Harvard University Press.

Rocha, Frederico, and David Kupfer. 2002. "Structural Changes and Specialization in Brazilian Industry: The Evolution of Leading Companies and the M&A Process." The Developing Economies XL(4):497-521.

Saad-Filho, Alfredo, and Deborah Johnston. 2005. "Introduction." in *Neoliberalism: a critical reader*, edited by Alfredo Saad-Filho and Deborah Johnston. London: Pluto Press.

Salgado, Lucia Helena. 2004. "A defesa da concorrência no Brasil: retrospecto e perspectivas." Pp. 359-83 in Reformas no Brasil: balanço e agenda, edited by Fabio Giambiagi, José Guilherme Reis, and André Urani.

Salomão Filho, Calixto. 2007. Direito concorrencial: as estruturas. São Paulo: Malheiros.

Sassen, Saskia. 2008. Territory, authority, rights: from medieval to global assemblages. Princeton: Princeton University Press.

Schieber, Benjamin. 1966. Benjamim. Abusos do Poder Econômico (Direito e Experiência Antitruste no Brasil e nos EUA). RT: São Paulo.

Schneiderman, David. 2008. *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*. Cambridge: Cambridge University Press.

Schuartz, Luiz Fernando. 2009. "A desconstitucionalização do direito de defesa da concorrência." Revista do IBRAC 16(1).

Shaikh, Anwar. 2005. "The economic mythology of neoliberalism." Pp. 41-49 in *Neoliberalism: a critical reader*, edited by Alfredo Saad-Filho and Deborah Johnston. London: Pluto Press.

Sklar, Martin J. 1988. *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics*. Cambridge: Cambridge University Press.

Suchman, Mark, and Lauren Edelman. 1996. "Legal rational myths: the new institutionalism and the law and society tradition." *Law & Social Inquiry* 21(4):903-41.

Todorov, Francisco Ribeiro , and Marcelo Maciel Torres Filho. 2012. "History of competition policy in Brazil: 1930-2010." The Antitrust Bulletin 57(2):207-57.

Toporowski, Jan. 2005. "'A heaven of familiar monetary practice': the neoliberal dream in international money and finance." Pp. 106-12 in Neoliberalism: a critical reader, edited by Alfredo Saad-Filho and Deborah Johnston. London: Pluto Press.

Treves, Renato. 2004. Sociologia do direito: origens, pesquisas e problemas. Barueri: Manole.

Trubek, David, Diogo R. Coutinho, and Mario G. Schapiro. 2013. "Toward a new law and development: new state activism in Brazil and the challenge for legal institutions." *World Bank Law Legal Review* 4:281-314.

Türem, Ziya Umut. 2010. "Engineering neoliberalism in the global South: politics of competition and regulatory reform in Turkey." *PhD Dissertation.* Institute for Law and Society. New York: New York University.

—. 2016. "'The market' unbound: neoliberalism, competition laws and post territoriality. *Journal of International Relations and Development* 19(2):242-62.
Twining, William. 2005a. "Diffusion of law: a global perspective." *Journal of Legal Pluralism* 49:1-45.

—. 2005b. "Social science and diffusion of law." *Journal of Law and Society* 32(2):203-40.

—. 2006. "Diffusion and globalization discourse." *Harvard International Law Journal* 47(2):507-15.

Van Horn, Rob. 2009. "Reinventing Monopoly and the Role of Corporations: The Roots of Chicago Law and Economics." Pp. 204-37 in *The road from Mont Pèlerin: the making of the neoliberal thought collective*, edited by Philip Mirowski and Dieter Plehwe. Cambridge: Harvard University Press.

Wigger, Angela. 2008. "Competition for competitiveness: the politics of the transformation of the EU Competition Regime." Universiteit Amsterdam.

Wigger, Angela and Buch-Hansen, Hubert. 2016. A ascensão da regulação concorrencial de caráter neoliberal na Comunidade Europeia. Revista Direito e Práxis, v. 7, n. 4, 2016, pp. 610-642.

Williamson, Oliver E. 1975. Markets and Hierarchies. New York: Free Press.

About the author

Iagê Zendron Miola
PhD in Law, University of Milan. Law Professor at Universidade São Judas Tadeu (USJT) and Researcher at the Law and Democracy Nucleus of the Brazilian Center for Analysis and Planning (Cebrap). E-mail: iagezm@gmail.com.

The author is the only responsible for writing this article.