

Antitrust between success and failure

A sociological and ethnographic reappraisal of Brazilian competition policy

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Introduction¹

If we were to go back in time and compare the reality of the mid-1990s to the present time, I have no hesitation in affirming that, in the last quarter of a century, antitrust analysis has become one of the areas of knowledge which, from the perspective of Law and of Economics, has evolved the most in Brazil. This success is shared between the public and private sectors, by academia and the third sector. (Alexandre Barreto, *President of the Brazilian Antitrust Authority – CADE, November 2, 2020*)

Market concentration, alongside financialization and the climate crisis, is increasingly perceived as a major problem in contemporary capitalism. The fact that significant economic sectors are in the hands of a small number of powerful corporations – a phenomenon that is epitomized by Big Tech domination of the “digital economy” – is causing widespread concern. Excessively concentrated markets can be dysfunctional for the competitive logic that underlies them, as well as for consumers and for small and medium-sized companies, whose very survival is threatened. That in turn aggravates existing social and economic inequalities and may even undermine established democratic structures, for example through the conversion of economic power into political power.

One explanation of this emerging phenomenon is states’ reduced capacity to prevent concentration and tackle abusive conduct on the part of major corporations. Antitrust law (and policies), pushed by international organizations as a mainstay of government efforts to tackle these problems, have had very limited success in practice. According to analysts, the reason for that, particularly in the United States and Europe, is that in both academia and the political arena there seems to have been a departure from the ideals of economic democracy or competitive markets that originally were the cornerstone of antitrust law (see Klobuchar 2021, Stoller 2019, and Wu 2018, among others). Others point to the currently dominant ideology which tolerates business concentration (Davies 2014; Wigger 2008; Miola 2014; 2016). Furthermore, certain recent economic developments, in particular Big Tech, are largely beyond the reach of the current regulatory frameworks (e.g., Kira and Coutinho 2021).

In this paper we put forward an additional explanation for the increasing concentration of economic power,² namely that states find themselves unable to control economic power largely because of the emergence, in recent decades, of a “competition expertise” on how to regulate markets. This comprises the epistemic community of actors in the fields of competition law and economics, and the body of actors, knowledge, discourses, and practices that underlie and guide intervention in the economy (Eyal and Buchholz 2010). The key point for us is that, somewhat paradoxically, this expertise, whose *raison d’être* is ostensibly the state’s ability to control economic power, in fact focuses primarily on controlling state power. From this perspective, together with other hypotheses raised in the literature, we argue that the crisis of concentration of economic power has not been caused by institutional and governmental failure. It is rather the consequence of the success of a regulatory framework that is implemented with the overall aim of controlling state power.³

In identifying and analyzing this expertise for the purposes of this paper, we rely on sociological, ethnographic, and historical research from the past decade. We draw on empirical material that we gathered during the course of earlier studies on Brazilian competition policy and the antitrust authority (Miola 2014; 2016; Onto 2009; 2014; 2019a; 2019b). The empirical basis for the present study includes: interviews; participant observation; ethnographic analysis; historical and historiographic narratives; official government documentation and internal organizational documents of the Brazilian antitrust authority CADE (Conselho Administrativo de Defesa Econômica); reports and documents of international agencies; legislation and rules on competition; studies on legal and

economic theory; and other academic studies on the functioning of antitrust authorities.

We focus on the Brazilian case as a clear example of the phenomenon in point. We note that, as is the case in other countries,⁴ the current Brazilian antitrust system is characterized by tolerance of the concentration of economic power (Miola 2014; 2016; Fialho 2020). Between 1994 and 2018, for instance, out of almost 10,000 merger reviews decided by CADE, only 0.21% were rejected and 2.1% were subjected to restrictions (Fialho 2020, 233). The vast majority – 97.6% – were approved without (substantive) restrictions (Fialho 2020, 233).

The development of Brazilian antitrust law reflects consolidation of the predominant expertise on competition. Interestingly, the Brazilian antitrust apparatus is widely considered, by both domestic and international commentators, to be highly successful. It has been praised for its adherence to international benchmarks and “best practices.” The antitrust authority CADE has, on more than one occasion, won international plaudits as “the best in the Americas,” being ranked higher than the reputable North American ones.⁵ Following legislative reforms introduced in the 1990s, CADE was often touted as an example of functional and innovative technocracy within the Brazilian state.⁶ In our view, this institutional construction of CADE and the antitrust norms it enforces reflect the characteristics of an expertise on competition that focuses on controlling state powers. This development has not always been free of conflict and tension.

Reflecting on the work of Wendy Brown (2015, 40), we might argue that Brazil is a clear example of generalized paradoxical processes resulting from a neoliberal remodeling of the state as a business entity (or “firm”). The state is constrained to serve and facilitate the economy rather than able to confront it. Beyond that, we examine the narrative underlying the heralded success of Brazilian antitrust policy and identify the institutional frameworks, social relations, and bureaucratic practices that sustain a policy that is, in reality, incapable of combating the concentration of economic power and the inequalities that arise from it.⁷

This text is organized into five parts, including this introduction. In the second part, we describe the construction of the history of success of antitrust policy, exploring the narrative of “development” and “evolution” from a precarious “pre-history” to a “modern” regulatory framework in the 1990s. In the third part, we describe how expertise in controlling state

power, which came into being at the time of the creation of “modern antitrust law,” was then consolidated with the establishment of a Brazilian “antitrust community.” This professional community grew to exercise a “monopoly” over Brazilian competition law,

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dominated by a close-knit group of actors that remains relatively cohesive because of its individual members’ similar professional and personal trajectories. In part four, we examine in greater depth the content of this expertise and the way it is applied to regulatory practice, in other words, how it is translated into bureaucratic practices for controlling state power. In closing, we set out some broader considerations based on this case study.

“Modern” antitrust policy and the establishment of expertise on controlling the state

Since 1990, control of business concentration and corporate anticompetitive practices in Brazil has been overseen by the Brazilian System for the Defense of Competition (SBDC), of which the Administrative Council for Economic Defense, CADE, is the mainstay. CADE was established in 1962 and underwent major reform in 1994 and 2011. It is the federal agency tasked with overseeing and regulating competition between companies. CADE rulings are issued by lawyers and economists who are appointed by the President of Brazil to sit as commissioners.

According to the Brazilian legal and economic literature, Brazilian antitrust policy was widely used under the nationalist President Vargas and the post-1964 military dictatorship as a means of dealing with clashes between developmentalist aspirations and the interests of foreign corporations (Forgioni 2005). Government authorities relied on it as a form of regulation that many authors characterize as being heavily influenced by ideology rather than practice (e.g., Nusdeo 2002, 218). Notwithstanding the establishment of a competition authority, competition policy was seen

mainly as a means of promoting an interventionist economic system and the concentration of Brazilian national capital (Considera and Correa 2002; Todorov and Torres Filho 2012). The state regulated markets through such instruments as price controls and indexing – overriding the formation of prices by market mechanisms – and by means of guaranteed monopolies over strategic economic activities granted to state-owned companies. That impeded “competition logic,” rendering it non-viable (Salgado 2004, 362).

Business entities and their legal advisers mistrusted the model for regulating competition that existed in Brazil in the early 1990s. Even within CADE there were those who voiced considerable dissatisfaction with the existing legal structure. In 1992, council members entered into discussions with the Ministry of Justice with a view to introducing fresh legislation and in 1993 the Ministry announced a new commission to that end. The commission was formed of eight members, most of whom were legally trained and worked or had worked in the public administration.

The draft law was submitted to Congress and approved in June 1994, as part of the economic recovery plan known as the *Plano Real*. Law 8.884 of 1994 institutionalized what came to be considered a modern system for the defense of competition. The newly designed framework for CADE required that council members have “known expertise in legal and economic affairs.” They were to be granted fixed mandates to guarantee their autonomy. State-owned companies were, for the first time, to be subject to competition legislation. Perhaps the most significant development was the institution of a system for controlling business concentration (merger reviews). In this system, mergers and acquisitions were, depending on their scale, to be subject to CADE authorization, following an economic impact assessment.

The legislation introduced the foundations of a modern policy for defending competition in Brazil, but there was of course no guarantee that it would work in practice. Market players were generally wary of the new law, suspicious that it might be a mechanism for state intervention in the economy, against the grain of the political context of liberalization. The first few years of CADE operations under the new rules appeared to justify these concerns. Nine proposed mergers were submitted for authorization between 1994 and 1996. CADE did not fully accede to any of them. Seven were granted partial authorization and two were rejected outright. Counsel for the affected companies complained bitterly to the Ministry of Justice, seeking to overturn the rulings. In 1996, the Ministry threatened to subject CADE to direct oversight.

The upshot was that less than two years after the introduction of groundbreaking legislation in 1994,

the reform of Brazilian antitrust policy was at risk, undermined by tensions between the business-oriented legal representatives of Brazilian companies and the more traditionally-minded members of CADE. The crisis was resolved by what could be interpreted as a process of legitimation, which, rather than introducing significant institutional change, altered the profile of CADE members appointed to sit as commissioners. This process paved the way for the emergence of a competition expertise that was quite distinct from that which had existed up to then.

From 1996 onwards, there was a process of ring-fencing competition regulation vis-à-vis government policy, which continued up to the 2020s.⁸ Empirically, this process was perceptible in the change in profile of the CADE members. Up until the crisis provoked by the repeated rejections of mergers and acquisitions, economists who sat on the council were current or former public servants and graduates of Brazilian academic institutions with a well-known “developmentalist” bent and therefore inclined to favor state intervention. From 1996 onwards, there was a distinct change in the profile of economists appointed to the council: the new intake was younger, often had a private-sector background, academic and institutional connections with the United States and in particular with the New Institutional Economics (NIE), as taught at Harvard, Berkeley, and MIT (Miola 2014; Onto 2009). NIE at that time portrayed 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 Coase, Williamson, and North illustrate. It “share[d] 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, x). As Chang (2002, 547) maintains, a key premise common to NIE and neoclassical economics is the “market primacy assumption,” which understands “state intervention and the other non-market, non-state institutions (e.g., the firm) as man-made substitutes for the ‘natural’ institution called the market.”⁹

These NIE-affiliated economists brought with them to CADE expertise that was very much focused on controlling perceived excessive state intervention in the regulation of competition. They sought to promote this by means of the “economization” of competition policy (Onto 2009). In other words, by applying economic methods in which state intervention in business concentrations was subject to an analysis of their economic efficiency (see Berman 2021). That was a departure from their predecessors’ methodology, which they considered to be unscientific and politicized.

Another transition occurred in terms of the jurists who sat on the CADE council. There was a distinct generational, institutional, professional, and intellectual shift. Again, the new appointees after the crisis of 1996 were significantly younger than previous members. They were, in the main, graduates from the top-ranking academic institutions of Rio de Janeiro and São Paulo, with a professional background at leading Brazilian law firms. An increasing number were specialists in competition law. They were generally more open to theoretical and practical crossover between law and economics and to the analysis of the law from an economic viewpoint (Miola 2014, 309–13).

In their role as regulators, these council members moved away from the “legalistic approach” which had characterized competition policy between 1994 and 1996 and was considered by many to be problematic. They contributed to CADE’s institutional autonomy and to the legitimation of economic science as an appropriate basis for decision-making. The openness to economics of this group of lawyers recruited to CADE was probably due to their keenness on dialogue between law and other disciplines, such as sociology and philosophy of law. This “interdisciplinarity” and their familiarity with the trenchant criticisms of a traditional legalistic approach that was far removed from empirical knowledge was one possible explanation for their recruitment to CADE (Miola 2014).

Even jurists whose role at CADE was considered to be more “traditional” played a significant role in the legitimation of the new system. In that sense they contributed to the juridification of competition policy, consolidating regulatory procedures that limited the discretion of antitrust decision-making. They also contributed to the institutionalization of CADE as an agency independent of the executive, developing the legal merits to ensure that CADE’s decisions were not open to judicial review. All this while keeping the legal objectives of the antitrust authority unchanged.

The intake of economists and lawyers with a new professional and academic profile was reflected in CADE’s decision-making. In the first two years of the “modern” Council – between 1994 and 1996 – when the “old-guard” specialists were still in office, 77.7% of the cases referred to the Council were then made subject to state intervention. The overall average between 1994 and 2012 (the life period of the 1994 law) fell to just 5.26% of the cases (Miola 2014, 254). Two out of the eight merger rejections to ever be enacted by CADE between 1994 and 2012 happened in the first two years. The other six rejections would take more than 15 years to happen. State intervention became the exception rather than the rule, demonstrating the application to competition legislation of an expertise that was quite capable of controlling state power.

The “antitrust community” and the reproduction of expertise in controlling state power

A field researcher in Brazil who attends academic or professional conferences or colloquiums on economic and/or competition law, or even CADE tribunals inevitably comes into close contact with the self-proclaimed “antitrust community.” This is how professionals working in competition law and economics refer to themselves collectively. In the case of Brazil, it usually refers to a nationally-bounded – although highly internationalized – group. The term covers CADE staff members, academics, lawyers, and economists, particularly those in consultancy roles, advising businesses. These actors frequently have divergent and conflicting roles, notwithstanding which they consider themselves to be participants in a common project: sustaining and developing national antitrust policy.

The academic and professional trajectories of CADE tribunal members are indicative of the intense relational dynamics that sustain and reproduce the relative stability and cohesion of antitrust expertise in Brazil. We examine below some of the institutional characteristics of Brazilian competition policy that may explain this dynamic.

CADE is managed by a tribunal with a president and six commissioners. The tribunal sits in judgment on cases involving cartels and stipulates the applicable penalties. It also reviews corporate mergers and acquisitions. The commissioners have a two-year mandate, which may be renewed for a further two years. Appointments are made by the government (the President of Brazil), subject to approval by the Senate, and appointees are usually selected from the ranks of the existing “antitrust community,” based on criteria of economic or legal knowhow demonstrated in and consolidated by inter-community academic and professional relations (research groups, academic panels and tutorship, professional associations, conferences and other events, or collaboration in joint publications).

Tribunal members maintain and even strengthen their ties to the antitrust community throughout their time at CADE. At the end of their term of office they are commonly recruited as legal or economic advisers to companies, which they may then represent in antitrust proceedings before CADE, drawing on their knowledge of the agency. This dynamic may diminish the likelihood of theoretical, ideological, or political divergence between tribunal members, thereby fostering the self-reproduction of a very particular body of expertise that is cohesive and largely immune from internal conflict or clash of views with the private sector.

This ideological unity is reinforced by the members' academic trajectories. Between 1994 and 2011, for example, 11 out of the 17 commissioners who were economists were graduates from a select group of Brazilian universities and most had completed postgraduate studies in the United States. They engendered a "de-politized" perspective on competition policy at CADE, based on a lower level of intervention and therefore less conflict with the private sector.¹⁰

Furthermore, between 2000 and 2011, no less than 14 out of the 16 jurists sitting on the Tribunal were from the city of São Paulo, and 11 were former students at the University of São Paulo (Miola 2014). They, like the economists, also often had international experience and familiarity with US legal practice, as well as inter-disciplinary experience. The relational aspect between the lawyers is key to understanding antitrust practices in the more recent period. It was not uncommon (as continues to be the case) for CADE sessions to be presided over by commissioners who were former law school classmates of counsel for one or more of the parties.

The existence of an "antitrust community" dominated by certain academic and professional profiles does not mean that there is absolute homogeneity in CADE decision-making, however. Differences in approach do exist. Such differences often correlate with differences in the commissioners' professional and academic trajectories – in other words, differences in expertise. Throughout CADE history, there have been instances of the recruitment of "outliers" who did not hail from a typically technical antitrust background. In the early years of the 21st century, for example, members of the antitrust community considered certain Council members to have an "interventionist" or "politicized" profile. That reflected the ascension at CADE, during this period, of lawyers who did not conform to the typical profile that dominated the Council at that time, namely because they had no training or experience in US law or worked in the public sector. The same was said of economists who were seen as heterodox because of their Keynesian or structuralist approach and, again, because of their being from a public sector background.

Despite these occasional internal differences and sporadic tensions, the affirmation that Brazil's modern antitrust system is characterized by excellent technical practice is very closely linked to the consolidation of an antitrust community that promotes recruitment to the regulatory agency of lawyers and economists from broadly similar backgrounds. This community facilitates internal cohesiveness in the production of antitrust policy and the reproduction of expertise that has, as one of its guiding values, the control of state power.

Technique and the demand for objectivity: The content of expertise

The competition expertise that has developed in Brazil, which is extremely cohesive and has a low pre-disposition to conflict, has affected regulatory practice in different ways. From the 1990s onwards, CADE has been increasingly organized and managed in line with a corporate logic. While it is difficult to measure and evaluate the generation or maintenance of national markets' competitive dynamics, certain internal qualities of the antitrust authority, such as its technical capacity, the objective rationality of its decisions, and the time-efficient and practical nature of its proceedings, have become preminent criteria for assessing public antitrust policies. Such characteristics and ways of assessing antitrust policies, as well as the related technicalities that we analyze below, must be understood as an important part of global processes for the dissemination of state and bureaucratic models in the late 20th century and later. These examples illustrate how certain "public goods" such as transparency and efficiency (Bear and Mathur 2015), adopted and promoted by competition experts, have framed ways of assessing organizational success and facilitated the control of state power in various areas of regulatory practice.

At the institutional level, the 2009 establishment at CADE of a Department of Economic Studies, composed of a team of economists and operating independently of investigation and judgments, helped to consolidate CADE's image of "technical soundness" and reinforced the perception that its economic analyses were impartial and objective. This department is responsible for producing studies and drafting reports to assist the other branches of CADE "so as to ensure that CADE decisions are technically and scientifically sound and up to date" (CADE 2020). This institutional transformation was aimed at enabling "discussion and diffusion of technical knowledge of economics, broadly and horizontally (in other words involving all CADE departments and the community in general)" (CADE 2020). By ensuring that quantifiable economic data is present in its decision-making, CADE has adhered to the practice of recognized international models.¹¹

The production of CADE procedural guidelines is yet another example of the "technical materialization" of the rationale that state intervention must be subject to strict control. The first of such documents CADE published was the 2001 Horizontal Merger Guidelines, a step-by-step guide to the agency's economic analysis of corporate mergers and acquisitions.¹² The guidelines, which are based on US mod-

els, can be considered a bureaucratic artefact. They are more a showcase of the technical soundness and objectivity of analytical procedures than an accurate representation of the practices actually adopted by the regulators. Under the guidelines, it is apparent that state intervention is deemed justifiable only if based on scientific – especially mathematical – data along established criteria. The guidelines include procedural steps that reflect current economic and legal theory and recent case law on antitrust analysis.

These guidelines, by imparting to public and private agents a certain degree of foreseeability and transparency with regard to their regulatory actions, are similar to other artefacts produced by CADE, such as flowcharts and organograms. More importantly to that effect, annual CADE management reports¹³ set out details of the time the agency takes to analyze and judge the cases before it, seeking to demonstrate its increasing efficiency and capacity to keep pace with the demands of the economy. These time-based and quantitative indicators on decision-making (duration of analysis, number of cases decided in a given time period) make it possible to evaluate the Brazilian antitrust agency's capacity and management compared with agencies abroad. A significant part of CADE's perceived success, as reflected in the awards it has won and its favorable media coverage, arises from this new production of data and documents that set out internationally recognized organizational performance criteria.

Final remarks

The elements presented here regarding the workings of the Brazilian antitrust authority illustrate, albeit anecdotally, the emergence, reproduction, and content of expertise in the enforcement of competition law. This expertise is related to the Brazilian state's limited ability to control economic power, in that it (the expertise) is more focused on controlling the power of the state. That in turn provides us with a hypothesis that may explain the apparent paradox at the heart of the Brazilian case: while antitrust law is achieving concrete politico-institutional and organizational success, Brazilian antitrust policy is *nevertheless* increasingly perceived as being ineffective in combating abuses of economic power. The competition expertise

that has been institutionalized and practiced has been instrumental in successfully controlling the power of the state. This expertise privileges a specific economic interpretation of antitrust policy, is secured by a socially bounded and cohesive group of regulators, and promotes policy assessment frameworks that emphasize organizational goals to the detriment of visible market effects. The antitrust system's politico-institutional and organizational success has therefore been framed in terms of its effectiveness as a mechanism for controlling state power. In fact, this mechanism has made the antitrust system less effective when it comes to tackling the consequences of concentrations of economic power for the economy.

It cannot be said that the legal antitrust system, both in Brazil and abroad, is immune to criticism. On the contrary, there are at least two potential vectors of "destabilization" related to the established competition expertise. One is that the ground is shifting even within the current competition expertise community. At the heart of the capitalist world, technology companies' concentration of economic power has led academics and professionals from many fields to question and challenge the foundations of "mainstream" competition law. These attacks are beginning to have an impact on decision-making. There has been a recent spate of appointments to key roles, in both the United States and the EU, of individuals who are highly critical of the limitations being imposed on the role of the state. Given the influence of both regions in the global antitrust community, it is quite possible (although not inevitable) that this development will influence the Global South, "diffusing" an approach that runs contrary to the one that took hold in the 1990s.

There is another source of criticism that may prove capable of provoking change in competition expertise. This source is external to the community, at least for now. Increasingly, groups and organizations that are not part of the current competition expertise community see antitrust law as a useful instrument in the control of economic power from a public interest perspective. Civil society groups and bodies that promote and defend digital rights or health-related rights through recourse to competition law are examples. In pursuing their goals, they are questioning the limits of current competition expertise everywhere, raising the bar in terms of the need for justification and legitimation.

Endnotes

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- remain of course ours. We dedicate this work to Mario André Machado Cabral, good friend and brilliant academic who left us just too early. Mario's enthusiasm for critical work on competition law and policy was and will always be an inspiration.
- 2 We use the terms "economic power" and "market power" interchangeably throughout this text, although they can have different meanings in technical legal and economic debates.
 - 3 We have been inspired by the work of David Mosse (2005), who considers that the success of a public policy depends fundamentally on the dissemination and legitimation of an intervention model to the entire community that interprets, formulates, implements, evaluates and critically reviews the policy in question.
 - 4 In the United States, for instance, Lina Khan (2018, 960–62) argues that "mounting research shows that America has a market power problem" and states that "politicians, advocacy groups, academics, and journalists have all questioned whether the failure of antitrust is to blame for declining competition".
 - 5 See: <https://www.gov.br/cade/pt-br/assuntos/premiacoes>.
 - 6 According to a former CADE commissioner, "CADE became a 'technical' body of the State, characterized by the 'technical-bureaucratic' mentality that Weber described as being *sine qua non* to the development and consolidation of 'rational' law" (O Estado de São Paulo, April 20th 2017, "Um brinde à tecnocracia").
 - 7 Many economic sectors are highly concentrated in Brazil. One famous example is the banking sector, in which four main players dominate approximately 60% of the credit market (<https://valorinveste.globo.com/produtos/credito/noticia/2023/06/06/quatro-bancos-concetraram-59percent-do-mercado-de-credito-em-2022-com-operacoes-pressionadas-pela-selic.ghtml>).
 - 8 In the specialized literature, this shift is described as a "revolution" (Mattos 2003).
 - 9 This assumption encompasses a normative understanding in respect to the "role of the state" (Chang 2002, 549): if the market is "natural," it is preferable as an arena for economic relations, vis-à-vis the state, and non-market mechanisms of "intervention" are secondary. A second defining feature of NIE, according to Chang (2002, 549), is the proposal of yet another hierarchy: that politics "distorts" the "rationality" of the market system. A corollary of this assumption is the "depoliticization" of the economy by, for instance, "strengthening the rules on bureaucratic conduct or by setting up 'politically independent' policy agencies bound by rigid rules (e.g., independent central bank, independent regulatory agencies)".
 - 10 It should be noted that Brazilian antitrust policy has never gone as far as its US equivalent in adopting, in recent decades, consumer welfare standards that in practice have undermined it. However, it has also proved ineffective in terms of inhibiting market concentration.
 - 11 The US Federal Trade Commission has the equivalent Bureau of Economics to help the "FTC evaluate the economic impact of its actions by providing economic analysis for competition and consumer protection investigations and rulemakings, and analyzing the economic impact of government regulations on businesses and consumers" (<https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics>).
 - 12 https://cdn.cade.gov.br/Portal/assuntos/internacional/legislacao/Horizontal_Merger_Guidelines.pdf
 - 13 https://www.gov.br/cade/pt-br/acesso-a-informacao/auditoria/exercicio_2018_1995/auditorias-2001

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