Legal fictions and economic realities: identifying competitors in antitrust policy

Gustavo Onto (Center for Research on Culture and Economy, Universidade Federal do Rio de Janeiro)

Paper for the workshop Real Economy: Ethnographic Inquiries into the Reality and the Realization of Economic Life, Rio de Janeiro, June 16-18, 2016

ABSTRACT

Based on an ethnography conducted at the Brazilian antitrust governmental agency – the Administrative Council for Economic Defense, CADE – this article describes how regulators identify competitive economic agents in order to determine the market share held by each of them in a given market affected by corporate merger or acquisition. In order for regulators to be able to estimate the probability of future damage to competition arising out of a corporate merger, it is necessary for them to ascertain the number of competitors or economic agents in a given market and who they are. This task has become more complex for regulators in that, as a result of the increasing financialization of the economy, several companies are interconnected by means of networks of corporate ownership and/or control that are not explicit and which frequently derive from investments made by private equity firms. The difficulty that arises is how to identify the boundaries of a given economic agent in a context in which companies are increasingly inter-connected financially, legally and administratively. By describing the procedures adopted during an investigation into a merger in the higher education sector, it is possible to demonstrate that the difficulties in identifying independent economic agents – single units that are related to other market players only in terms of competition – reflect what market regulators term 'divergences' between the legal nature or form of the corporations (i.e. their legal personality) and the economic "facts" or "reality". According to professionals who carry out antitrust investigations, when circumstances arise in which the legal form of corporations cannot be considered an approximate representation of the 'real' economic agent, the competitors in a given market can only be identified and determined by ascertaining the specific nature of relations between relevant individuals ('natural' persons) and legal entities (corporations). This article aims to demonstrate the manner in which economic reality is conceived as interpersonal relationships in antitrust policy decisions, as regulators try to visualize certain corporate management practices or policies that may lie hidden behind the guise of legal personality or form.

Keywords: competitor; legal personality; economic reality; antitrust policy.

Introduction

The Brazilian Administrative Council for Economic Defense (CADE), an administrative and judicative body that is under the auspices of the Ministry of Justice, is responsible for the federal competition defense policy, or antitrust policy, as they are also called. This policy is based on a central premise of economic liberalism, which affirms that the greater the competition in markets, the greater the benefits for consumers and for national economies. According to an authoritative North-American legal commentator on Economic Law, competition between companies for the sale of products and services drives down consumer prices and encourages companies to be more innovative and productive (Hovenkamp, 2005). In practice, the Brazilian antitrust authority has the task of investigating acts of business concentration and other business practices, in order to establish whether or not they breach the Law of Competition to the detriment of other companies and consumers[1]. The Brazilian antitrust authority is responsible for authorizing or prohibiting acts of concentration – mergers, takeovers, joint ventures etc. to which end it needs to estimate whether or not they are likely to prejudice future competition in a given market. Business practices commonly deemed anti-competitive include the formation of cartels, predatory pricing, and others.[2] If the antitrust agency, which is staffed by professionals from various professional backgrounds, mainly economists and lawyers, find that companies have engaged in one of more of these practices, it imposes administrative penalties on the offending parties.

Each case referred to the Council – whether relating to an act of concentration or to other conduct – is dealt with in administrative proceedings that always involve an investigation into markets where companies operate, its competitors and the consumers. This information enables the analysts to draw conclusions as to probability of the merger altering competitive conditions in a market, to the detriment of other participants. In order to decide whether to approve or reject a merger, CADE

[1] A new Competition Law, number 12.529 of November 30, 2011, came into force in May 2012, replacing the former law, nº 8.884 of 1994.
[2] Anti-competitive practices may be "unilateral" when they involve the actions of one company alone or "coordinated" when two or more companies act jointly.
[3] This article is based on ethnographic research carried out between March 2012 and August 2013 into
[2] Anti-competitive practices may be "unilateral" when they involve the actions of one company alone or "coordinated" when two or more companies act jointly.

professionals need, first of all, to identify all the participants in the market under investigation – i.e. all the competing companies including those who submitted the merger application – and their respective market share in terms of offer of the product/service or the returns/turnover. This information is necessary in line with the established view that a reduced number of participating companies/competitors in a market increases the likelihood of the required merger causing excessive concentration, giving rise a new company with excessive market power i.e. a market share that is significantly larger than that of the other participants. On the other hand, when a market has several competitors other than the merger applicants, there is a greater likelihood that the merger will not be harmful to competition, as the new company will not be capable of prejudicing the other participants or consumers in the market.

This study, drawing on the ethnographic material taken from investigation procedures conducted by CADE into a corporate merger in the private higher education sector, describes the manner in which the investigators identify market participants or competitors in circumstances in which it is not easy to ascertain who the players are.[3] With the development of capital markets in Brazil, an increasing number of companies from various sectors have opened up their capital for trading on the stock exchange, selling shares to several purchasers who consequently become the effective owners and, in some cases, the administrators of said companies. When such companies, the administrative or share control of which is apportioned between a range of individuals and legal entities (banks, investment funds and others) request approval for mergers, the question arises as to how CADE antitrust officials are to define the boundaries/limits of a given entity for the purposes of calculating market share.

This paper demonstrates how regulatory antitrust practices have construed the economic agents whose actions are the object of competition legislation. As demonstrated in other articles (Onto, 2014, 2016), neither these agents nor the markets in which they operate are pre-established and must therefore be defined and

[3] This article is based on ethnographic research carried out between March 2012 and August 2013 into CADE's analysis and judgment of administrative proceedings. The fieldwork was undertaken at the office (chambers) of one of the commissioners of the antitrust agency and at one of the antitrust coordinating offices. The research resulted in a PhD dissertation defended in February 2016 on the Graduate Program in Social Anthropology at the National Museum, Federal University of Rio de Janeiro, Brazil.

conceptualized on a case by case basis through knowledge practices necessary for the antitrust authority to reach its decision.[4] Furthermore, recent difficulties in identifying competitors in a market have thrown the spotlight on the manner in which such competitors are construed, with questions being raised inside the antitrust agency as to the usefulness of relying on legal form as a means of ascertaining 'economic reality'. As an alternative approach, regulators have been attempting to plot the relations of corporate ownership and control involving various companies and the individuals that are part of said bodies and that connect them.

In the next section of this paper I explain that envisaging a potential 'competition problem' arising out of a proposed merger requires an analytical identification of the agents that compete in the relevant market. I also examine the reasons this identification has become increasingly complex in contemporary antitrust analysis. I then describe the procedures that were adopted in order to identify an agent as part of the analysis of a case that arose in 2013 and the manner in which this investigation is interpreted by those that undertook it. In closing, I set out reflections on the conceptualization of economic reality that is exposed by these identification procedures.

Difficulties in singularization

The "competition sheriff" (as CADE is referred to in the Brazilian press) is known for its role in analyzing major mergers and for its investigation of the formation of cartels by large corporations. The legislation on Competition does not, however, limit the agency's role to the investigation of companies that are large enough to be well-known amongst the general public. In fact, the law does not even define the type of legal entity over which CADE is to exercise its powers. Article 31 of the Law n^{o} 12.529/2011 establishes that:

[4] This article joins a series of studies that has argued that both state and legal regulation, on the one hand and the 'economy' or the 'markets' on the other are mutually constituted by means of knowledge practices that involve a range of concepts, theories, artefacts and types of profession (see, inter alia, Elyachar, 2005; Holmes, 2014; Mitchell, 2002).

> This Law applies to individuals (natural persons) or legal entities from either the public or private law spheres, and to any legally constituted or de facto associations of entities or of persons, even those constituted on a temporary basis, with or without having formal legal personality and even if they carry out their activities under the regime of legal monopoly (Brasil, 2011).

The 'subject of the Antirust law' is, in the words of the jurist Paula Forgioni (2013, p.145) "*any [person or entity] that is capable of* performing an act that restricts competition" (my emphasis). However, given the legal definition of such acts, they are generally committed only by entities that have the legal form of corporations ('legal entities'). In relation to acts of economic concentration, the law, in article 88, states that:

> …the parties involved are to submit to CADE acts of economic concentration in which, cumulatively: I – at least one of the groups involved in the operation has registered, in its last financial statement, gross annual billing or total volume of business in the country, in the year prior to the operation, equivalent to or higher than R$ 400,000,000 (four hundred million reais); and II – at least one other group involved in the operations registered, in its last financial statement, gross annual billing or total volume of business in the country, in the year prior to the operation, equivalent to or greater than R$ 30,000,000 (thirty million reais)[5].

This definition of the acts that must be notified to CADE means, in practice, that only relatively large companies submit requests for approval of acts of concentration. In industrialized countries most of the goods and services used by the population are produced, distributed and sold by business organizations rather than individuals. The violations of the economic order referred in the Brazilian Competition Law are, therefore, committed by such business organizations that compete with other similar entities in the various markets. In practice, business organizations that engage in such conduct or that have the scale or turnover necessary to fall within the legal definition have the legal form of 'juridical person' (legal entity).

The fact that the legislation does not expressly specify the legal personality of the subject of legal rules on competition should not be considered a legislative oversight. It should, rather, be seen as characteristic of antitrust policy, in line with which decisions are based on economic analyses of the functioning of markets and businesses. In these analyses, the legal form of the parties involved in a merger i.e. whether they are listed or closely held corporations, partnerships or individuals

[5] Equivalent, in June 2016, to USD 110,000,000 and 8,300,000 respectively.

('natural' persons) is less relevant than the manner in which they act and relate to other market participants. In other words what counts, for the purposes of the analysis of the antitrust body, is identifying the specific 'economic agent', whatever their legal personality may be. [6]

As stated above, when CADE receives a request for authorization for an act of business concentration (merger) submitted by, for example, two legal entities, its role is to consider whether the proposed union will be prejudicial to other competitors or to consumers in the affected markets. The prejudice to competition is analyzed on the basis of chapter II, article 36 of the competition legislation, which specifies that:

> Acts (whatever the manner in which they are performed) constitute a violation of the economic order, independently of the existence of culpability, whenever they have the objective or the potential to produce the following effects (even if said effects are not actually generated): I – limiting, distorting or in any other way prejudicing free competition or free initiative; II – dominating a relevant market of goods and services; III – arbitrarily increasing profits and; IV – exercising a dominant position in an abusive manner.

And, immediately after that:

> § 2 A company or group of companies is presumed to have a dominant position whenever it is capable of altering market conditions in a unilateral or coordinated manner or when it controls 20% (twenty per cent) or more of the relevant market. CADE may alter this percentage share for specific sectors of the economy.

The legislation therefore sets out certain requisites or markers that guide the analysis and antitrust investigation into acts of corporate concentration. According to the wording of the law, acts aimed at 'dominating the market' constitute 'violations of the economic order'. As such, the characterization of market 'domination' and the possibility of its 'abuse' by the applicants for authorization to merge uses a criterion of 'participation' in the affected markets, which is also known as 'market share'. This numerical criterion provides analysts with an indication of the possible existence of violation i.e. of the possible 'exercise of market power'. In Brazil, if the future

[6] It is worth noting that whilst the law applies the notion of 'person' ('natural' person or 'juridical' person) conferring rights and obligations accordingly, economic theory relies on the concept of "agent" to describe any entity that acts in a given market, producing or consuming products or services either as an 'individual' or as a 'firm' (these being the categories normally used in microeconomics). The use of the notion of agent implies that economic theory focuses precisely on the economic conduct of the entities and particularly the manner in which they make decisions and exercise choices relating to consumption or to production.

company arising out of the merger of two or more applicants will hold a market share of over 20%, CADE analysts may suspect that the merger will be prejudicial to competition in the market, in other words that it will be prejudicial to other competitors or to consumers.

In practice, that means that when a request for merger is submitted to CADE officials, they seek information as to who is competing in the affected markets and their respective market share. The market share of each competitor is estimated by means of the volume/quantity of products each one sells on the market or by analyzing each competitor's turnover. This estimation presupposes a prior definition of precisely who the competing agents in the relevant markets are. Each of these agents must be construed as a separate or discrete economic unit, which acts independently and competes with the others for the sale of each of the product categories in issue. In other words, an agent that, ontologically, is the equivalent a rational and individual acting in pursuance of his own interests. Otherwise, the agent's market share cannot be measured in practice.

Generally, this identification of the economic agents is not difficult in that, in the vast majority of cases before CADE, the analysts consider that the 'juridical persons' (legal entities) that file the request for merger and other ones they identify as acting in the market are also and coincidentally the relevant economic agents in competition. In other words there is no need to look beyond the legal form of the juridical persons in order to establish the identity of the economic agents. In these cases, the economic agents in the relevant markets are considered to be the juridical persons that operate in said market. This consideration is possible because the owners and controllers of the companies (i.e. of the 'juridical persons') do not generally have significant holdings in other companies. In other words, the business organizations (juridical persons) in question are normally owned by the same individuals (natural persons) that control then administratively. Even today, the vast majority of Brazilian companies are family owned and administered so that it is relatively straightforward for analysts to group the companies, their owners and their administrators into one independent economic unit; one competitor.

It has, however, become more complicated for antitrust analysts to equate certain juridical persons with competitive agents in a market, in that the limits/boundaries of

these competition agents appears to have extended beyond the defined limits of the legal form adopted by the business organizations applying for permission to merge. The development of the capital markets in Brazil and, in particular, the growth of investment funds, has made it more complex to identify the owners and controllers of the companies. The growth of the financial market has led to the dispersal of ownership, by enabling any interested party to own shares or securities issued by a company. Given that the ownership of a company and, therefore, its administration, can be distributed to a number of individuals and/or juridical persons, it has become more difficult to pinpoint the precise boundaries between one company and another i.e. what the limits of a given company are. Companies are increasingly interconnected by means of common ownership or administration, complicating the work of an agency that needs, as described above, to clearly define the agents that are competing in given market with a view to estimating their market share. How are the antitrust regulators to identify and separate the precise autonomous and independent agents in a market when the individuals and juridical persons that own the shares and the exercise administrative control over various companies in a market are related in different ways?

This problem has become more frequent in cases in which the applicants for permission to merge are owned and controlled by investment funds, giving rise to a 'sensitive competition issue' according to CADE officials. If a fund holds the shares and the administrative control of more than one company in a single market, it might be capable of exercising an influence over the companies in such a way that they do not compete with each other, as competition would be prejudicial to the fund itself. The problem then faced by analysts is how to know whether the juridical person that submitted the application for permission to merge is in fact competing with other business in the same market when a private equity firm holds shares in both the applicant company and in other companies that are supposedly its competitors. When the investments of a private equity firm are apportioned between various companies, does this lead to all these companies effectively being part of the same group, acting in a concerted and unidirectional manner? If that is indeed the case then the companies that receive such investment cannot be considered competitors, or distinct economic agents, but, rather, part of the same "economic group".

These problems and issues of public policy arising out of the development of the capital markets are relatively new in Brazil, but emerged and became recurrent in countries such as the United States many years ago. In fact, US antitrust policy developed as a means of combating major corporations, many of which had formed monopolies operating in various sectors of the economy. At the end of 19th century US corporations – i.e. business organizations legally structured in such a manner as to permit and encourage dispersed share ownership – developed and expanded rapidly in the country. During this time, the so-called separation or 'disassociation' of share ownership from administrative control became a significant economic, legal and social phenomenon (Barrionuevo Filho, 1987).

Prominent social thinkers who had a particular interest in the phenomenon of the separation of ownership and control in the corporate form of business organization included Karl Marx and Marcel Mauss. Both writers considered that corporations, characterized as they were by a collective form of ownership, foreshadowed the future socialization of capital[7]. Marx considered publicly listed companies to be "*the abolition of the capitalist mode of production within the capitalist mode of production itself, and hence a self-abolishing contradiction, which presents itself prima facie as a mere point of transition to a new form of production*" (Marx, Capital, cited in Barkan, 2012, p. 193). Marcel Mauss, in his (recently re-edited) manuscripts agrees with Marx's analysis, identifying in this trend towards dilution of ownership (i.e. the emergence of companies listed on stock exchanges) a prelude to socialization or, in his own words the "nationalization of capital" (Mauss, 2013). In the chapter entitled "*Les faits économiques*" which Mauss dedicated almost entirely to an analysis of the formation and effects of North American cartels and trusts, he defended these new 'capitalist collectives' and their 'public character', stating that "*non seulement la propriété, mais encore sa gestion sont portées à la connaissance du marché, de l'assemblée des citoyens de la nation, peuvent être jugées par leur valeur présente et future – surtout future – et peuvent être comptées*" (Mauss, 2013, p. 304).

Other thinkers were much more skeptical about the benefits of these new business structures. In 1926, the institutional economist Thorstein Veblen, in his last work,

[7] Marx was referring to mid-nineteenth century English corporations which were, in general, established by public authorities, whereas Mauss was referring to private North American corporations, in particular the trusts of the late nineteenth and early twentieth centuries.

Abstentee Ownership: Business Enterprise in Recent Times, stated that modern North American companies did not have a defined owner, in that ownership was divided between hundreds of shareholders on the Stock Exchange. He foresaw (prophetically) that this could cause economic crises due to the fact that these new organizations were excessively oriented towards finance rather than productivity. Some years later the jurists Adolf Berle and Gardiner Means, in their classic study *The Modern Corporation and Private Property* (1932), empirically demonstrated that the separation between ownership and control had become the defining characteristic of companies of the period. Administrative control was now in the hands of an individual or group of individuals appointed to the company's board of directors (administrative board) (Berle & Means, 1932, p. 66), who might, or might not, also be owners. These writers considered that the growth of such corporations might lead to excessive economic concentrations in the markets. These possibly harmful consequences for competition led to the introduction of legislation such as the 1950 *Celler-Kefauver Antitrust Act* which prohibited a company from purchasing shares in another if the consequence of the purchase would be future reduction in competition between the two (Sklar, 1988).[8]

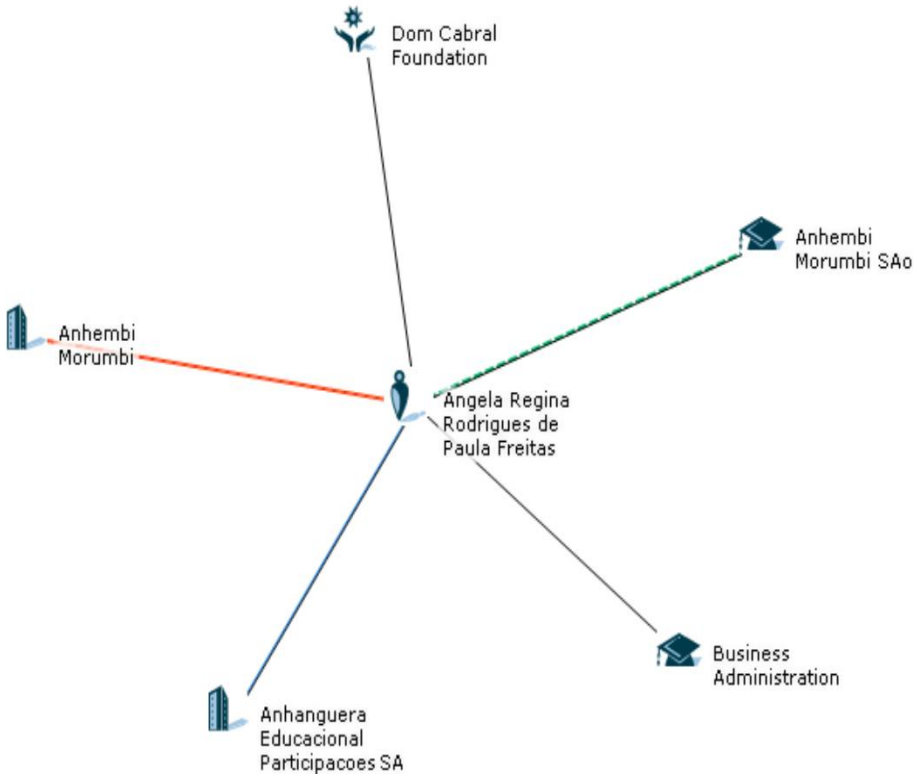
In relation specifically to antitrust policy, the difficulties of singularization or identification of the competition agents in a given market has hindered the estimation of market share and, therefore, of ascertaining the likelihood of a competition problem arising as a result of a corporate merger. In the next section, I demonstrate how Brazilian antitrust analysts have dealt with the problem of construing and identifying competition agents in a given market, in a context in which companies are increasingly interconnected. This increasing difficulty has given rise to a reflection

[8] The separation between the owners of the company and its controllers also attracted considerable interest in the field of organizational sociology, from the 1980s onwards. These studies, which later came to be regarded as the foundation of the so-called 'new economic sociology', sought to explain, drawing on institutional, relational or political variables the conduct of organizations. The ownership of these organizations was distributed amongst several shareholders, including families, insurance companies, banks, pension and investment funds, but the companies could be administered either by these owners or by managers, directors and executives. The researchers therefore tried to ascertain what factors, such as personal relations (Burt, 1983; Mintz and Schwartz, 1985), position in the "organizational field" (DiMaggio, 1985; Fligstein e Brantley, 1992), "conceptions of control" (Fligstein, 1990), amongst others, influenced the formulation of corporate decisions and objectives. In sum, part of the sociological literature sought to explain how the companies or other organizations, behaved in an environment in which corporations are embedded in a range of formal and informal relations with other organizations, including the State (Granovetter, 1985).

on the reliance on the articles of incorporation (legal form) of companies and a search for other means of ascertaining the 'reality' of economic agents for antitrust purposes.

Two competitors and one professor[9]

One morning in November 2012, during my fieldwork inside the office of one of CADE's commissioners, a legal advisor from another office came in and asked the three analysts that were working whether anyone had used the tools on the website *MarketVisual*. As none of us had even heard of the site, she explained what she was using it for and showed us a printout of the following image:



[9] The material used in this section resulted from observation of the parties during an investigation undertaken as part of case no. 08012.0038886/2011-87, and from conversations and interviews of the officers responsible for the investigative work. I have also drawn on the public version of the case records, accessed via the CADE website (www.cade.gov.br) on February 15, 2014.

Figure 1: Network of relations based on the name of Ms. Ângela Rodrigues (CADE, 2013, p.1896)[10]

According to the advisor, the website gathered publicly available information on listed companies in Brazil and abroad. In fact, disclosure of the information in question is mandatory in accordance with a normative instruction of the Brazilian Securities and Exchange Commission. MarketVisual gathers together information on the corporate, financial and administrative structure of the companies and publishes it in the form of tables or images of organograms or networks. These tables or images identify different types of relations between individuals and legal entities. In her investigation, the advisor (Camila) carried out a search on the name of Ms. Ângela Rodrigues and found that Ms. Rodrigues had an 'administrative link' with the 'Anhanguera' company (represented by the blue line) and a 'link of a financial nature' represented by the red line, to 'Anhembi Morumbi', as well as other links that were of slightly less interest. The advisor considered that this map was further evidence that she was "on the right track" in the investigation, in which she was seeking to establish whether two or more suppose competitors were in fact part of the same economic group, in other words whether they could be jointly considered to be one competitor, one agent in the market. The reason for that being that these two competitors were connected via a person who was at the center of the network represented in the image.

The case on which Camila was working involved the acquisition (by Anhanguera) of the Instituto Grande ABC de Educação e Ensino S/C Ltda. (IGABC) and Novatec – Serviços Educacionais Ltda., both members of the Anchieta Group and located in the São Paulo metropolitan region. IGABC provides services in the field of higher education and runs the Faculdade Anchieta University. Novatec, which operates in the same field, runs the Faculdade de Tecnologia Anchieta University and the Colégio Anchieta. Both companies were being taken over by Anhanguera Educacional Ltda. which develops and provides a range of higher education services in Brazil. In the year in question, Anhanguera was "the largest private profit based professional training organization in Brazil and the largest listed company, in the Education sector,

[10] This image is available in the records of the proceedings contained on the CADE website (www.cade.gov.br) in black and white. In order to access the colors that were (and are) an important part of the investigation undertaken by the advisor I searched the website www.marketvisual.com, to which access is free, for the name of Ms. Ângela de Castro Rodrigues. The site provided the same colored image that was set out in the Opinion of the CADE commissioner before it was scanned and a copy made available in black and white on the CADE website.

in terms of market value" (CADE, 2013, p. 1881). Anhanguera, at that point in time, had 54 *campi*, 450 distance learning centers and over 650 professional training locations.

Some days after the advisor undertaking research for the administrative proceedings introduced me to the MarketVisual software I talked to her about how she had come to investigate the name of Ms. Ângela Rodrigues and why, as an individual ('natural person') Ms. Rodrigues was so relevant to the analysis – particularly given that, as the advisor herself had told me, it was unlikely that the investigation would lead to CADE rejecting the proposed merger. Camila told me first of all that she had discovered something that was already a cause of considerable concern to the CADE commissioners – the growing acquisition by private equity firms of shares in companies that provide private higher education services in Brazil. As was stated in the opinion of the rapporteur Commissioner for the case, the jurist Alessandro Octaviani, the formation of large-scale private education groups in Brazil is a process "for which there is no precedent in world history" (*idem*, pgs. 1859). Of the five main Brazilian educational groups, four are run by companies from the financial sector (*idem*, pg. 1861)[11]. In the case in hand, the advisor (Camila) discovered on the internet, both in media reports and on the website of the applicant, that two companies in the private higher education market, namely Anhanguera (the proposed incorporating company) and Anhembi-Morumbi (a supposed competitor) had some form of relationship via legal entities and 'natural' persons (individuals).

According to the news report found by the advisor under the headline 'Two competitors and a professor in common' ('*Duas concorrentes e um professor em comum'*), published in the *O Estado de São Paulo* newspaper on June 11, 2012, "Professor Gabriel", as he was known, had sold the administrative 'control' (51% shareholding) of Anhembi-Morumbi (of which he was the founder) to a multinational company operating in the field of education, Laureate Education Inc. Despite having

[11] As is set out in the Opinion of the commissioner, the Grupo Estácio is controlled by the GP Investments fund, Grupo Anhanguera is controlled by the Pátria bank and fund, Kroton is controlled by the Advent Internationale fund and Anhembi-Morumbi/Laureate Education is controlled by the North-American fund KKR (Kohlberg Kravis Roberts). Only the Unip university did not, at that time, have an investment fund as its owner or controller. The commissioner also emphasised the scale of these investments, stating that, out of "the 15 largest educational companies in the country, nine have an investment bank or fund as part of their management and governance structure". (*idem*, pgs. 1860-1861)

sold control of the company, which had supposedly been transferred to the majority shareholders, he continued to "advise [on issues pertaining to] the administration of the members" (*idem*, pgs. 1883). The company in charge of this corporate restructure at the Anhembi-Morumbi University was a well-known financial consultancy and fund manager, Pátria Investimentos, run by acquaintances of Professor Gabriel's daughter, Ângela Rodrigues, who worked in the university's financial department.

In the advisor's opinion, things 'began to get complicated" when, according to the report, two years after the partial sale of Anhembi-Morumbi, Pátria was also responsible for the public offering of the shares of Anhanguera. To this end, Pátria set up a specific fund, the FEBR (Education Fund for Brazil - *Fundo de Educação para o Brasil*), which purchased 17% of the shares in Anhanguera. The 'Rodrigues family', the owner of Anhembi- Morumbi, secured for itself, via negotiation, a guaranteed 70% share in the fund. Even with just 17% of the shares, the FEBR, a juridical person, became the controlling shareholder of Anhanguera, according to the report. The advisor, Camila, therefore discovered that the founder of the Anhembi-Morumbi University, Prof. Gabriel Rodrigues, who continued to have an influence over the decisions taken by his (former) company, was also a shareholder in a fund that held shares in, and controlled, Anhanguera.

As the advisor explained, the 'Gabriel question' gave rise to practical difficulties in the analysis of the private higher education market in the São Paulo metropolitan region and indeed in the country as a whole and it was necessary to establish the extent of the market share of the applicant. In her view, although the case involved the takeover of universities by a third-party company, Anchieta, it was necessary to establish Anhanguera's share of the market and to ascertain what type of relationship it had with its supposedly major competitor, Anhembi-Morumbi. If the common presence of Professor Gabriel imposed on the companies conduct that rendered competition impossible, the market share of both companies, Anhanguera and Anhembi-Morumbi, would need to be considered together because the two companies "would be operating as one agent in the market".

In addition to researching newspapers, journals, magazines and websites, the advisor sought relevant information from the records of the Company Registries (*juntas comerciais*) of the Federal District, the States of São Paulo, Rio de Janeiro and Minas

Gerais, which are available online. The information obtained cast doubt on the declaration made by the applicant Anhanguera in its petition (Statement of Claim) to the effect that no member of the Executive Board or of the Board of Directors of the educational group acted as director or executive at other companies operating in the same sector. According to information set out in the Minutes of Board of Directors of Anhanguera on September 15, 2010 (this being a document that was submitted to CADE by the Applicant), Ms. Ângela Regina Rodrigues de Paula Freitas, the daughter of Professor Gabriel Rodrigues, had a seat on the Anhanguera Board. The advisor then discovered an entry on the records of the São Paulo Companies' Registry (Junta Comercial do Estado de São Paulo- JUCESP) that indicated that Ângela Rodrigues was also a director of ISCP, the Anhembi-Morumbi/Laureate university (pg. 1888). Ms. Ângela Rodrigues also had other commercial relationships that linked the two (supposed) competitors. For example, in accordance with the Minutes of the Anhaguera General Meeting of October 29, 2010, Ms. Rodrigues had an office at Rua Casa do Ator, n^{o} 99, in the district of Vila Olímpia, in São Paulo. Consultation of JUCESP records revealed that this was the address of one of the *campi* of the Anhembi-Morumbi/Laureate University (pg. 1889). Recourse to MarketVisual and network information it set out provided further evidence that Ângela Rodrigues and Gabriel Rodrigues had links with the two companies that were, supposedly, competitors.

According to the Opinion of the rapporteur commissioner for the merger application, who drew on the findings of the advisor (Camilla), it was possible to identify both a "mesh of company relations (or holdings)", in other words a network of ownership links, and a "mesh of directors" i.e. a network of administrative control extending between Anhanguera and Anhembi-Morumbi and involving juridical persons, investment funds and individual members of the Rodrigues family. According to the rapporteur commissioner the evidence provided revealed the "true central organizer of the decisions, the *punctum saliens* of the business: the network commanded by Prof. Gabriel Rodrigues and his family, with the assistance of Pátria, and which submitted two competitors, Anhanguera and Anhembi-Morumbi/Laureate, to its strategies" (*idem*, pg. 1895). A diagram included in the Opinion of the commissioner-rapporteur enabled a clearer overview of this "mesh", "central organizational nucleus" or

"assemblage", as he variously termed it, based on the shareholdings of both of the supposed competitors:

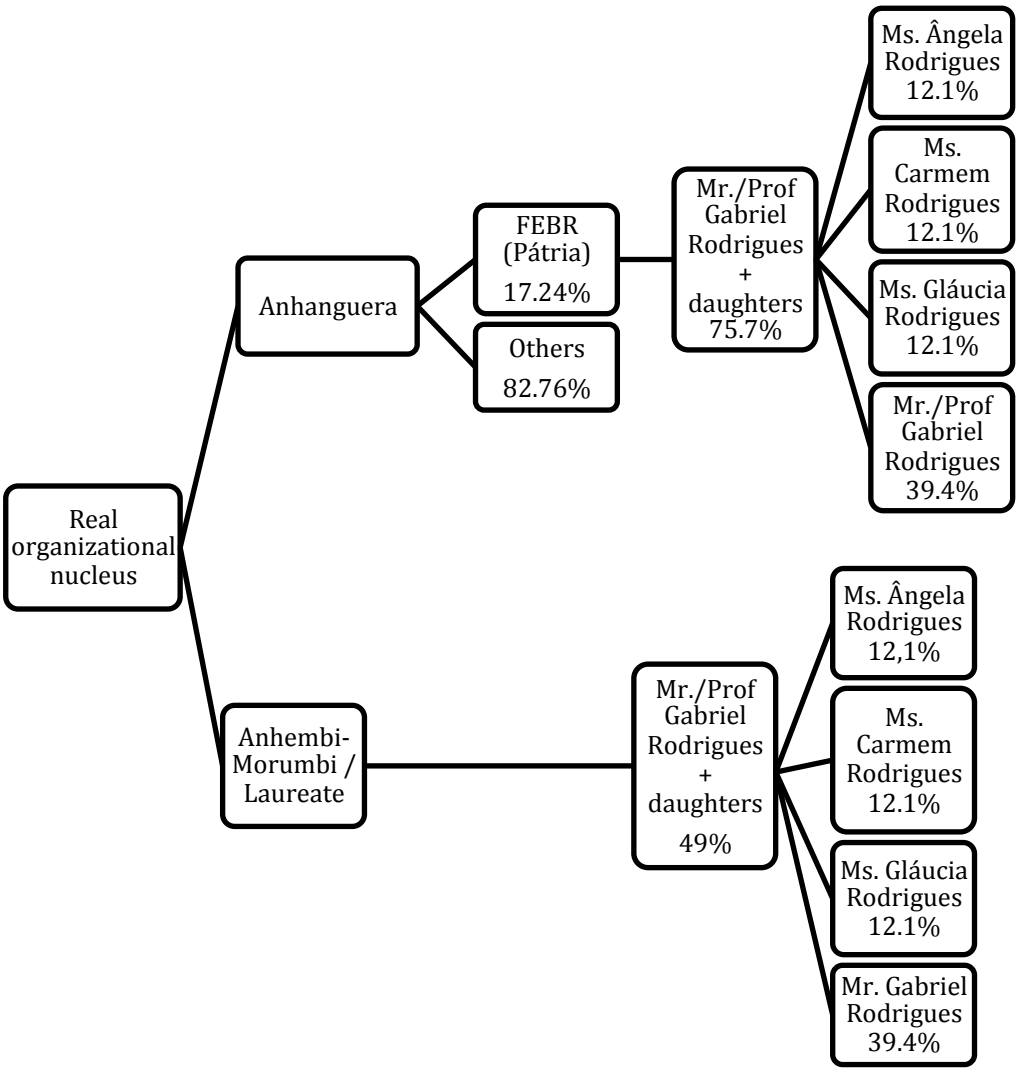


Figure 2: Chart labeled "Mesh of Shareholdings" (CADE, 2013, pg.1900)

The 'real organizational nucleus' (or 'assemblage') united the two companies, the investment funds that controlled them and the individual members of the Rodrigues family, who part-owned and partially controlled/administered the funds. In the opinion of the rapporteur, this nucleus could, in line with a previous CADE ruling, be classified as an 'economic group'. For the purposes of Economic law, an 'economic group' is deemed to exist when there is 'central direction of competition, defined by the leadership of the group, whatever the form of its constitution, which the other

members are expected to comply with' (pg. 1908). For the rapporteur-commissioner, the relations between the juridical persons and the individuals involved meant that it was reasonable to infer that the two companies had mutual knowledge of their actions and strategies and did not act in any manner that was inconsistent or prejudicial to each other.

If all the entities (individuals and juridical persons) present in this 'assemblage' could be considered "to be as if were one competitor" for the purposes of Competition Law, then according to the commissioner it would be necessary to calculate "all the holdings and related resources of the Anhanguera/Anhembi-Morumbi-Laureate/Pátria groups" (pg. 1913), not only for the purposes of the proceedings at hand, but also whenever it was necessary to calculate the market share of participants in analyses involving any of these three companies. The investigation conducted in this case was able to demonstrate that the applicant Anhanguera had a greater share of the market, given its ties with Anhembi-Morumbi, its supposed competitor. The only possible conclusion was that these companies were part of an organizational 'assemblage' whereby they acted in a coordinated manner. It was not therefore possible to consider Anhanguera and Anhembi-Morumbi as competitors in the private higher education market, even though they were different legal entities.

Diverging realities

In handing down his decision on the merger of the companies, the CADE commissioner highlighted the key issue in the investigation undertaken by his staff. "Do the legal (juridical) forms correspond to the economic fact?" (CADE, 2013, p. 1878) was the question he posed in his written Opinion. He considered that the new context of dispersed share ownership and expanded administrative control of the companies required antitrust analysts to inquire into the possibility of "convergence" between certain aspects of the legal (juridical) personality of the corporations and their economic actions, in other words the need to examine both legal (juridical) form and economic facts.

As justification for CADE's extensive investigation into the corporate and administrative structure of the companies operating in the market (described briefly above), the commissioner stated that he and his advisors had sought a "realistic interpretation of the facts", paying heed to "content, rather than just form, concrete effects rather than declarations and rhetorical statements of intent; to de facto articulation rather than the legal (juridical) forms that are merely the external appearance of the businesses; to the true centers of command rather than the corporate architecture that masks it" (idem, pg. 1902). He stressed the fact that had his officers "merely analyzed Anhanguera in the precise terms set out in the case records by the applicants, [the analysis] **would simply not be in accord with reality**" (highlighted text in the original Opinion, pg. 1882). In the case in hand, the legal (juridical) forms clearly did not correspond to the economic facts, in that one of the companies (juridical persons) that had applied for authority to merge could not be considered an independent competitor of one of the other companies that operated in the market.

According to the commissioner, some characteristics of the 'economic reality' of the case, such as the shareholdings of the individuals involved (even if they were minority holdings), the coinciding business strategies, and the interlocking directorates (a phenomenon extensively studied by organizational sociologists), made it possible to identify economic agents that extrapolated or were distinct from the legal (juridical) forms presented by certain entities. According to the commissioner, these forms can have the effect of covering up the actual agent that the antitrust authority needs to identify. [12] In the case in hand, the fact that the applicant corporation Anhanguera insisted that it be considered a single competitor in the relevant market was a very clear attempt at seeking to rely on legal (juridical) form as a means of obtaining recognition as an auto sufficient unit for the purpose of antitrust analysis. Such treatment would be clearly beneficial to Anhanguera, in terms of reducing its estimated market share. The rapporteur commissioner, alert to the

[12] In an article on corporate bankruptcies caused by the 2008 financial crisis, Annelise Riles (2011) explains that legal (juridical) personality is capable of producing an effect of opacity that companies may deliberately promote. These companies take advantage of their status as corporations to avoid the liability of the partners/members that are "behind the company", in the event of said partners/members engaging in unlawful conduct. All the techniques and relations by means of which corporations (juridical persons) are established and maintained, including the relationships of ownership and control, are obviated by the "aesthetic effects of the juridical form" (Riles, 2005) that mark and construct an identity.

consequences of relying on official forms (legal or administrative) as an analytical criterion, stated the following:

> (...) as Mark Granovetter suggests, those that believe that the structure of a company resides in its official organogram or in the formal corporate structures are "like babies lost in the woods of sociology", because the 'formal' organization of a business organization (or indeed its informal organization, in many cases) are not sufficient for the purposes of antitrust analysis (idem, pg.1917)[13]

In relation to the cases involving private equity firms, the commissioner in his criticism is not, in any way, questioning the legal (juridical) nature of the companies or the doctrine (theory) of corporate entity. His point is that when the aim is to ascertain economic reality, the forms in which companies organize themselves cannot be considered even an approximate reflection of the true competitive agents in a market. Until recently, in most of the cases filed before the antitrust authority, it was possible to rely on the units of legal (juridical) personality as a representation of economic reality. However, following the intense financialization of these corporations, to simply consider the juridical person to be the competitor in a market runs the risk of underestimating the degree of concentration in said market. The consequence of that might be the approval of a merger that prejudices consumers and other companies. In such cases, the essentially legal/technical reality perceived on the basis of legal (juridical) personality of business organizations does not converge with the reality of strategic business actions and directions, which can only be observed by identifying the relations between individuals (natural persons) and juridical entities.

Thus, drawing inspiration from some sociological studies of organizations and social-network analyses, the antitrust investigation undertaken in this case demonstrated that one of the economic agents in the market, the Applicant, had a greater market share than declared, given that its supposed competitor, Anhembi-Morumbi, was part of the same organizational 'assemblage'. This definition of agent did not in fact give rise to a different result for Anhanguera – CADE approved the merger. The CADE commissioners took the view that competition in the affected markets in the greater São Paulo region would not be significantly reduced by the merger, even with

[13] O conselheiro-relator cita em nota de rodapé o conhecido artigo do sociólogo Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, publicado em 1985 no *American Journal of Sociology*, conforme a referência bibliográfica deste artigo.

Anhanguera and its supposed competitor, Anhembi-Morumbi, being considered part of the same group. However, the findings of the investigation that highlighted the importance of detailed analysis of concentrations involving investment funds led to CADE setting out clear new guidelines in its caselaw on the examination of competition/economic concentration cases involving the higher education market in Brazil.

Final Remarks

As described above, recent antitrust practice has conceived economic reality as personal (individual) relations, in order to ascertain the existence of relations between companies that cannot be identified by mere examination of the formal structures of their legal personality. As anthropologists have previously affirmed, the nature of corporations is essentially ambiguous, being both personal and impersonal at the same time – a company is at the same time an abstract social and legal entity and a collective (grouping) of the individuals that work for it or own it (Hart, 2005; Riles, 2011; Welker, 2012). Antitrust analysts have given considerable weight to this second view of corporations, investigating them (and seeking to better comprehend their dynamics) on the basis of the relations, positions and professional trajectories of relevant individuals.[14] Due to increasing financialization of business organizations, the clearly defined demarcations between companies as produced by their legal (juridical) structure, no longer appear to correspond to the reality of the actions and behavior of business (corporate) groups. These actions may be the result of coordination between various legal (juridical) entities. The practical difficulty that arises is how to identify these autonomous and collective economic agencies – groups, assemblages and nuclei – in a context in which financial, legal and administrative relationships mean that certain singularities or units in the market are nebulous.

This relational (and human) perspective of economic reality requires constant revision in each case analyzed and judged by the council (CADE). Relations between different

[14] In the investigation into the Rodrigues Family, the analysts took into consideration the Family ties between individuals, their common professional trajectories, links between residential and corporate addresses, as well as the aforementioned overlapping of administrative positions and ownership relations.

individuals and companies are more transitory than the legal forms of business organizations, and come in many forms: family ties, administrative links, business connections, geographical/spatial proximity etc. In order to investigate the transformations occurring in the different relationships, antitrust employs tools and notions that are more familiar to social scientists. Representations and definitions of economic reality or economic facts are produced and conceptualized through these electronic tools and documents that form networks that the analyst may collate. These realities are therefore pragmatically conceived as a way of resolving certain regulatory issues or governmental problems that 'legal' (juridical) realities might impose.

References

BARKAN, Joshua. 2013. *Corporate Sovereignty: Law and Government under Capitalism*. Minneapolis: University of Minnesota Press.

BARRIONUEVO FILHO, Arthur. 1987. "A separação entre propriedade acionária e controle administrativo - revisitando os clássicos". Revista de administração de empresas, vol.27 no.4, Oct./Dec., São Paulo.

BERLE, Adolf A. e MEANS, Gardiner C. 1932. *The Modern Corporation and Private Property*. New York: MacMillan.

BRASIL. 2011. Lei nº 12.529, de 30 de novembro de 2011. Estrutura o Sistema Brasileiro de Defesa da Concorrência; dispõe sobre a prevenção e repressão às infrações contra a ordem econômica; altera a Lei no 8.137, de 27 de dezembro de 1990, o Decreto-Lei no 3.689, de 3 de outubro de 1941 - Código de Processo Penal, e a Lei no 7.347, de 24 de julho de 1985; revoga dispositivos da Lei no 8.884, de 11 de junho de 1994, e a Lei no 9.781, de 19 de janeiro de 1999; e dá outras providências. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/Lei/L12529.htm. Acesso em: 08 nov. 2014.

BURT, Ronald. 1983. *Corporate Profits and Cooptation: Networks of Market Constraints and Directorate Ties in the American Economy.* New York: Academic Press.

CADE. 2013. Voto do Conselheiro Alessandro Octaviani no Processo Administrativo nº 08012.0038886/2011-87. Brasil. 2013. Requerentes: Anhanguera Educacional Ltda. e Grupo Anchieta. Disponível em www.cade.gov.br. Acesso em 15 de fevereiro de 2014.

DiMAGGIO, Paul. 1985. "Structural Analysis of Organizational Fields", *Research in Organizational Behavior*, vol.7, pp. 335-370

ELYACHAR, Julia. 2005. *Markets of Dispossession: NGOs, Economic Development, and the State in Cairo*. Durham: Duke University Press.

FLIGSTEIN, Neil. 1990. *The Transformation of Corporate Control*. Cambridge: Harvard University Press.

FLIGSTEIN, Neil e BRANTLEY, Peter. 1992. "Bank Control, Owner Control, or Organizational Dynamics: Who controls the Large Corporation?". *American Journal of Sociology*, Vol. 98, pp. 280- 307.

FORGIONI, Paula. 2013. *Os fundamentos do antitruste*. 6ª edição. São Paulo: Editora Revista dos Tribunais.

GRANOVETTER, Mark. 1985. "Economic Action and Social Structure: The Problem of Embeddedness. *American Journal of Sociology*, 91 (3) : 481-510.

HART, Keith. 2005. *The Hit Man's Dilemma: Or, Business, Personal and Impersonal*. Prickly Paradigm Press.

HOLMES, Douglas. 2014. *Economy of Words: Communicative Imperatives in Central Banks*. Chicago: Chicago University Press.

HOVENKAMP, Herbert. 2005. *The Antitrust Enterprise: Principle and Execution*. Harvard University Press. Cambridge: Massachusetts.

MAUSS, Marcel. 2013 [1920]. *La Nation*. Editado por M. Fournier e J.Terrier. Paris: Presses Universitaires de France.

MINTZ, Beth e SCHWARTZ, Michael. 1985. *Power Structure of American Business*. Chicago: University of Chicago Press.

MITCHELL, Timothy. 2002. *Rule of Experts: Egypt, Techno-Politics, Modernity*. Berkeley: University of California Press.

ONTO, Gustavo. 2014. "The market as lived experience: on the knowledge of markets in antitrust analysis. *Vibrant, Virtual Brazilian Anthropology*. Vol.11, nº1, Brasília, Jan./June.

ONTO, Gustavo. 2016. "O mercado como um contexto: delimitando o problema concorrencial de uma aquisição empresarial". *Horizontes Antropológicos*, v. 22, p. 155-184.

RILES, Annelise. 2011. "Too Big to Fail". IN: *Recasting Anthropological Knowledge: Inspiration and Social Science*. pp. 31-48. Cambridge: Cambridge University Press.

RILES, Annelise. 2005. "A New Agenda for the Cultural Study of Law: Taking on the Technicalities". *Buffalo Law Review,* vol. 53, p. 973-1033.

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

VEBLEN, Thorstein. 1996 [1923]. *Absentee Ownership: Business Enterprise in Recent Times*. London: Transaction Publishers.

WELKER, Marina. 2012. "Notes on the difficulty of studying the corporation". Unpublished manuscript, part of the Third Annual Adolf A. Berle Jr. Symposium.