5 EVOLUTION OF THE ROLE OF MARKET STRUCTURE IN ANTITRUST ANALYSIS AND THE RETURN OF STRUCTURAL PRESUMPTION: *ET TU,* CADE?[1]

Evolução do papel da estrutura de mercado na análise antitruste e o retorno da presunção estrutural: Et tu, Cade?

Bernardo Gouthier Macedo[2]
Sócio-Diretor na LCA Consultoria Econômica – São Paulo/SP, Brasil
Lucas Portela de Mauro[3]
Diretor na LCA Consultoria Econômica – São Paulo/SP, Brasil
Anna Olimpia de Moura Leite[4]
Diretora na LCA Consultoria Econômica – New York/NY, EUA

STRUCTURED ABSTRACT

Context: the increasing relevance of digital platforms has raised concerns about the effectiveness of current antitrust policies in addressing long-term competitive risks.

Objective: the article aims to analyze the arguments for reintroducing structural presumptions in antitrust analysis, particularly in merger control, and the implications of this approach for the role of economic evidence.

Method: the study employs a literature review and qualitative analysis of legal and economic arguments related to antitrust enforcement and market structure. It examines the historical evolution of antitrust analysis, from the strict structuralism of the past to the current focus on effects-based evaluations.

Conclusions: the study concludes that the reintroduction of structural presumptions in antitrust analysis signals a shift towards stricter enforcement and a greater emphasis on preventing potential competitive harm. The study also highlights the importance of balancing structural presumptions

1 **Editor responsável:** Prof. Dr. Victor Oliveira Fernandes, Conselho Administrativo de Defesa Econômica (Cade), Brasília, DF, Brasil. **Lattes:** http://lattes.cnpq.br/5250274768971874. **ORCID:** https://orcid.org/0000-0001-5431-4142.
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2 Mestre e doutor em economia pela Unicamp. Sócio-Diretor da LCA Consultoria Econômica.
E-mail: bernardo.macedo@lcaconsultores.com.br **ORCID:** https://orcid.org/0000-0002-9891-6038

3 Economista, Diretor na LCA Consultoria Econômica.
E-mail: lucas.mauro@lcaconsultores.com.br **ORCID:** https://orcid.org/0009-0009-1875-3821

4 Mestre em Economia pela USP e Doutoranda na New School for Social Research. Diretora na LCA Consultoria Econômica.
E-mail: anna.olimpia@lcaconsultores.com.br **Lattes:** http://lattes.cnpq.br/6799293897895906 **ORCID:** https://orcid.org/0009-0000-6909-2562

with effects-based analysis to foster innovation and protect competition in the digital age.

Keywords: reversal of the burden of proof; market structure; structural presumption; merger control; economic evidence.

RESUMO ESTRUTURADO

Contexto: a crescente relevância das plataformas digitais tem levantado preocupações sobre a efetividade das políticas antitruste atuais em lidar com riscos competitivos de longo prazo.

Objetivo: o artigo busca analisar os argumentos para a reintrodução de presunções estruturais na análise antitruste, particularmente no controle de fusões, e as implicações dessa abordagem para o papel da evidência econômica.

Método: o estudo emprega uma revisão da literatura e análise qualitativa de argumentos jurídicos e econômicos relacionados à aplicação do direito antitruste e estrutura de mercado. Examina a evolução histórica da análise antitruste, desde o estrito estruturalismo do passado até o foco atual em avaliações baseadas em efeitos.

Conclusões: o estudo conclui que a reintrodução de presunções estruturais na análise antitruste sinaliza uma mudança em direção a uma aplicação mais rigorosa e uma maior ênfase na prevenção de potenciais danos à concorrência. O estudo também destaca a importância de equilibrar as presunções estruturais com a análise baseada em efeitos para fomentar a inovação e proteger a concorrência na era digital.

Palavras-chave: reversão do ônus da prova; estrutura de mercado; presunção estrutural; controle de fusões; evidência econômica.

Classificação JEL: K21; L40.

1 INTRODUCTION

Antitrust merger analysis is especially complex. Through mergers, firms may combine activities with the goals of increasing productive capacity, achieving economies of scale, leveraging synergies and complementarities between assets and capabilities, among other motivations with a solid economic rationale. These pro-competitive effects coexist with potential negative impacts arising from the increase in market power after a merger: there is empirical evidence of a positive correlation between the number of sellers and prices (Hovenkamp; Shapiro, 2018), a higher likelihood of coordination amongst agents, exercise of monopoly power by a dominant firm, and the risk of negative effects on non-price factors, such as quality and innovation.

There is societal concern in establishing a framework to preserve potential positive outcomes and free enterprise, a framework which recommends that restrictions imposed by authorities be

based on evidence demonstrating the likelihood of competitive harm resulting from a particular transaction or unilateral conduct by firms. Decisions are generally made with an aversion towards the risk of overenforcement.

This was the framework in place for a long time mostly in the US, prevalent until recently. We may call it 'efficiency presumption' – as opposed to structural presumption, the focus of this paper. The rise of the so-called "Big Techs" and the increasing significance of digital disruption across markets have sparked widespread debate about their impact on society, the economy, and politics. This disruptive moment is a topic of intense discussion in various fields worldwide, including antitrust policy.

In antitrust, the prevailing perception is that the usual tools employed may not be capable of detecting long-term risks associated with concentration and unilateral conducts in these markets. This perception has prompted a broader revisitation of paradigms - although not necessarily limited to digital platforms[5].

In particular, the importance of market structure and the relative balance between the risks of overenforcement and underenforcement merit special attention. For those who argue that the consequences of underenforcement are more harmful, the adoption of structural presumptions – namely, the shifting of the burden of proof from the competition authority, which would otherwise need to demonstrate a probable loss of welfare, to the merging parties, who must instead show that the transaction is welfare-enhancing - may constitute a necessary adaptation in the way antitrust policy is implemented.

In this context, the present article seeks to bring general questions about the role of market structure in the assessment of competitive risks in Brazil and globally, especially in the case of merger analysis. Specifically, it aims to investigate arguments and perspectives regarding the reintroduction of structural presumptions as an analytical tool and the implications that the reversal of the burden of proof may have for the role of economic evidence in antitrust analysis.

Thus, the central research questions guiding this article is: "To what extent Cade's antitrust methodology, historically effects-based, could be reconsidered to incorporate structural presumptions in merger control and what would such an approach (if based on the historical application of structural presumptions in US antitrust) mean to the relevance of economic evidence in Brazilian antitrust analysis?" The objective is to analyze this shift through a comparative examination of theoretical arguments and practical cases, as well as to provide insights into how these trends could be applied by the Brazilian antitrust authority or how it could change Cade's reliance on economic or effects-based evidence.

This article employs a narrative literature review and a qualitative comparative analysis of legal and economic reasoning in landmark merger control cases in the United States and Brazil. The literature review draws on academic works, institutional reports (OECD, Cade, U.S. DOJ, and FTC), and major publications on antitrust theory and policy enforcement spanning 1960 to 2024. The selected materials were chosen with the goal of combining seminal contributions in antitrust law and economics – which shed light on how structural presumptions were introduced and evolved within U.S. antitrust

5 A discussion about the role of non-price effects, especially innovation, started as a result of a wave of mergers at the seeds market (Bayer/Monsanto, Dow-Dupont, Syngenta-ChemChina, such as described in OECD, 2018).

policy – with recent studies discussing the revival of structural presumptions. This approach aims to provide a framework for understanding the potential shift in Brazilian antitrust policy, particularly in light of policymakers' goals to reintroduce structural presumptions into merger analysis.

The qualitative analysis involved examining judicial and administrative decisions where the reasoning explicitly discussed market structure or burden-shifting arguments. For the U.S. cases, Brown Shoe (1962), Von's Grocery (1966), and Philadelphia National Bank (1963) were selected as seminal examples of the structuralist phase – as they highlight the context on which structural presumptions were first applied in antitrust. For Brazil, cases such as Kroton/Estácio (2017) and Knauf/Trevo (2023) were analyzed, as they are cases in which Cade mentioned structural presumptions as part of the reasoning for the decision. These cases were compared using thematic analysis, identifying how structural presumption appeared in the reasoning and how the burden of proof was distributed. The goal was to understand whether recent decisions signal a substantive shift in enforcement philosophy.

As there's a lack of specific literature examining the Brazilian authority's interpretation of structural presumptions and the comparative link between U.S. and Brazilian precedents, we believe this article furthers the understanding about how American antitrust paradigm changes regarding the role of presumptions may affect Cade's reliance on economic evidence for their own decisions.

2 MARKET STRUCTURE AND ANTITRUST ANALYSIS

The role of market structure in antitrust analysis has long been a controversial topic. Robert Bork harshly criticized the direct association between concentration and the competitive performance of a market (Bork, 2021). In an article titled The Crisis in Antitrust (1965), he points out that "From its inception with the passage of the Sherman Act in 1890, antitrust has vacillated between the policy of preserving competition and the policy of preserving competitors from their more energetic and efficient rivals" (Bork; Bowman Jr., 1965, p. 363).

Bork, a founding father of the Chicago School and a conservative icon in the US judicial landscape, was reacting to the then prevalent antitrust analysis framework. By then, antitrust law adopted the presumption that a concentrated market structure was sufficient reason to conclude that a particular horizontal merger or acquisition would harm the competitive environment and should therefore be blocked – 'structural presumption'. In cases like Brown Shoe (United States, 1962) and Von's Grocery (United States, 1966), even small concentrations were blocked. In the former, Brown Shoe Co., a company primarily involved in the shoe manufacturing sector, held 4% of the national shoe production (in dollar volume) at the time. Kinney Co., which was focused on the retail sector, held only 1.5% of production and 1.2% of retail sales in the shoe market (Bork; Bowman Jr., 1965). Despite the low market shares, the view prevailed that the objective of antitrust law was to prevent the potential harm of a concentrated structure at its roots:

> *If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved (United States, 1962, at 343-44).*

In the Von's Grocery case, the resulting concentration from the merger of two grocery retailers

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was only 7.5%. Citing the fact that many acquisitions had occurred in that market, the Court decided to block the concentration (Hovenkamp; Shapiro, 2018).

In *United States v. Philadelphia National Bank* (United States, 1963), the U.S. Supreme Court blocked the merger between Philadelphia National Bank (PNB) and Girard Trust Corn Exchange Bank - the second and third largest commercial banks in Philadelphia, respectively. The risk directly derived from the resulting concentration was the main factor in the decision:

> *[...] a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects (United States, 1963, at 362).*

A side note: this case distinguishes itself from Brown Shoe or Von's Grocery by explicitly mentioning the absence of refuting evidence against structural presumption (i.e. implying that the presumption could be challenged) – something not seen in previous or later cases from that period. On the other hand, Sullivan (2016) argues that the language, stated objectives, and application in subsequent cases suggest that even PNB wasn't a departure from Brown Shoe and wasn't interested in the possibility of a rebuttal – "it recognizes a permissible inference of illegality where market concentration evidence is so overwhelming that it obviates the need for the plaintiff to produce further proof of the likely anticompetitive effects of a merger." (Sullivan, 2016. p. 420).

The response to this deterministic interpretation of market structure in antitrust analysis was especially influenced by Bork's Chicago School of Law and Economics and led authorities - mostly in the U.S. but also at other jurisdictions - to adopt case-specific approaches, focusing on the net effect of mergers or conduct on the final price to consumers. Under the premise that markets are self-regulating, Chicago School proponents advocated for a non-interventionist approach, unless there was clear evidence that the conduct or merger under review would result in net negative impacts.

Proponents of the Chicago School views on antitrust argued that the analysis should focus primarily on the impact on consumer prices as the key metric for assessing competitive effects (Bork, 2021). Other considerations - such as the protection of small businesses or the dispersion of economic power - were interpreted as political goals that should not guide antitrust policy. This view assumed that consumer welfare[6] would be best served by a system that prioritized economic efficiency.

The core of the argument is that an overly cautious approach against big firms, excessively concerned with market structure (overenforcement), could cause more harm than good. According to this view, the presumption of illegality based solely on market structure could lead to misguided decisions, inhibiting pro-competitive conduct and mergers that could generate efficiencies and benefits for consumers (Signorino, 2013). This is because simplistic structural analysis would fail to consider factors such as market contestability, the possibility of new entrants, and the efficiencies generated by certain transactions.

6 In Borks's formulation, consumer welfare, albeit the name, could be better defined as Total Welfare. Lower prices, total output and productive efficiency would be considered evidence of enhanced welfare and the goal *of* antitrust: "The only legitimate goal of antitrust law is the maximization of consumer welfare", which he equates to "the maximization of wealth for society as a whole" (Bork, 2021, p. 66-67).

Moreover, the Chicago School warned that excessive state intervention could undermine the market's ability to self-regulate, reducing incentives for innovation and the spontaneous promotion of competition. According to Easterbrook, "judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not" (Easterbrook, 1984, p. 1). This would be particularly harmful in dynamic sectors with rapid technological evolution, where authorities would struggle to keep up with changes and accurately identify the competitive impacts of certain conduct or mergers.

Baker and Shapiro (2007) point out that these critiques were powerful because they were based on a shift in the understanding of industrial organization economics. The mainstream approach in antitrust enforcement during the 1960s ("structure-conduct-performance"), founded on the idea that market power could easily be identified through concentration and market share indicators, came under scrutiny. It began to be considered that companies with a high market share could be profitable not only because they exercised market power but also because they had achieved greater cost efficiency or other types of efficiencies. Most market moves were seen as efficiency-led, what we may call an efficiency presumption.

With the evolution of economic theory, theories of imperfect competition began to challenge the Chicago School's more radical *laissez-faire* outlook towards antitrust. The overly price-focused approach, based on the probable efficiencies of most conduct or mergers, evolved to a more nuanced perspective. The post-Chicago School understanding emphasized the need to balance expected efficiencies and risks, as well as to anticipate non-price-related issues - especially in markets with high entry barriers, rapid innovation, and strategic behavior (Castaldo; Koo, 2024).

Thus, the synthesis of the debate between structuralists and the Chicago School in the second half of the 20th century is the paradigm in which, while the criterion of consumer welfare remains the central objective of the analysis, market structure plays a key role in anticipating risks in antitrust assessments. The typical analytical framework applied in antitrust investigations confirms this assertion. Following the usual steps: the relevant impacted market is defined, relevant market shares are estimated, Herfindahl-Hirschman Indexes (HHIs) are calculated, etc. It is noticeable how the determination of a transaction's impact on the competitive environment essentially starts by assessing its impact on market structure. Different to the structuralist approach in cases such as Brown Shoe or Von's Grocery, however, inferences based on market structure also work in reverse, that is, transactions resulting in unconcentrated structures are usually presumed efficient. Unilateral conduct by companies without market power is rarely considered anticompetitive. In contrast, the effort exerted by authorities in cases where remaining rivalry is low is significantly greater.

This application differs from a procedural device for burden shifting and instead represents – as Sullivan (2016, p. 442) puts it – a "substantive factual inference based on economic theory" regarding how concentration may affect markets. In other words, market structure plays a role as probative evidence of risks posed by a merger, as higher concentrations are associated with an increased likelihood of market power abuse. Economic evidence for the likelihood of positive or negative effects remains at the center of the analysis, however, and authorities continue to focus on building a robust case for illegality.

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3 STRUCTURAL PRESUMPTION AND CHANGING ANTITRUST POLICY ENFORCEMENT

The analysis of economic incentives for engaging in anticompetitive practices is as old as Adam Smith. The classical economic thinker argued that, in the capitalist system, firms have incentives to reduce the level of competition (Stiglitz, 2009). The rationale is that increasing profit through competition restrictions is more immediate than investing in the improvement of a better product. As a principle, it is understood that the proper functioning of the market economic system depends on competition amongst firms. Given the recognition that companies tend to adopt anticompetitive practices whenever feasible, there is a market failure to be addressed. Antitrust policy aims to correct this failure (Stiglitz, 2009). As discussed so far, mainstream ideas on how to tackle these objectives are constantly shifting.

Antitrust law is currently undergoing a period of change in what can be considered to be the mainstream point of view, especially driven by the rise in relevance of the digital economy. There is an almost consensual perception in the literature and among authorities worldwide that the specific characteristics of digital platforms make players in these sectors elusive to competition regulation. The concern with adapting the regulatory framework to address issues related to Big Tech has sparked a broader discussion about the role of authorities and the perception of risks related to underenforcement in general – not necessarily limited to digital platforms.

In this context, there is growing support for the application of "rebuttable structural presumption" as a procedural device. The concept of structural presumption, in this case, refers to the adoption of the premise that certain market structures harm consumers and economic performance - making mergers that result in a concentration above a certain threshold *prima facie* illegal. The burden of proof to demonstrate that this premise does not apply to a particular transaction is shifted to its proponents.

It is important to emphasize that this is not a form of deterministic structuralism that sets a threshold beyond which a transaction would become *per se* illegal. As Salop (2015) points out:

> *PNB [United States v. Philadelphia National Bank] does not "conclusively presume" that all mergers are anticompetitive. Mergers combine production facilities, which leads to plausible efficiency benefits. The anticompetitive presumption applies only to certain mergers that are "inherently suspect (Salop, 2015, p. 272).*

Lancieri and Valletti (2024) argue that the focus on proving consumer harm for each specific transaction ignores inequalities in resources and access to information between private parties and authorities. Such challenges are magnified by the current increase in the number of transactions and in the complexity of the required analysis, which tend to diminish antitrust enforcement as a larger number of deals pass without proper antitrust scrutiny. According to the authors, adopting the presumption that "all mergers above certain thresholds are illegal unless the merging parties can prove that the merger specific efficiencies will be shared with consumers and yield tangible welfare gains" (Lancieri; Valletti, 2024, p. 10) is a necessary tool to mitigate this issue.

The authors base their argument on what they perceive as a strong economic rationale behind

structural presumption. To illustrate, the authors initially consider a simple linear Cournot model based on a linear inverse demand function. By considering the ratio between producer surplus and consumer surplus, the result shows that this ratio is equal to twice the HHI, an indicator commonly applied to estimate market concentration. The result implies that the increase in concentration is directly related to the ratio between producer and consumer surplus. The higher the HHI, the lower the consumer surplus. According to the authors, Spiegel (2021) demonstrated that the relationship holds for other oligopoly models, while Nocke and Whinston (2022) demonstrated that changes in the HHI impact consumer surplus across various Industrial Organization models.

Current antitrust policy takes this economic rationale into account, as pointed out at the end of Section 2, and Lancieri and Valletti (2024) acknowledge this. Whenever the HHI variation exceeds a certain threshold, the analysis of a merger undergoes deeper scrutiny. Antitrust analysis is consistent with economic rationale because some transactions can generate efficiency gains, which may lead to price reductions and, consequently, increase consumer welfare. The authors indicate that this condition occurs when the marginal cost of the merged firm is lower than the marginal cost of the pre-merger firm. Additionally, the reduction in marginal cost would be greater if the companies involved in the transaction had market power in the pre-merger scenario.

Donna and Pereira (2024) present the economic rationale behind structural presumption for non-horizontal mergers, based on firms that sell differentiated products in concentrated markets. The authors argue that mergers of this nature, depending on the case, can reduce competition even in the absence of explicit anticompetitive behavior. Donna and Pereira (2024) conclude by emphasizing the importance of rigorous analysis of non-horizontal mergers by antitrust authorities, considering their potential anticompetitive effects. In the authors' words:

> *Denying that mergers have efficiencies, elimination of the double marginalization, or distributional effects that may benefit some parties and harm others would be a baseless negation. Our reading is that the M[erger] G[uideline]s acknowledges these trade-offs. The weights, however, have shifted (Donna; Pereira, 2024, p. 31).*

Lancieri and Valletti (2024) and Donna and Pereira (2024) revisit the economic rationale to contribute, in a well-founded manner, to the discussion of the future direction of antitrust policy. Both studies do not deny the need for detailed scrutiny, on a case-by-case basis, but through distinct and complementary arguments, they point out that the anticompetitive effect of mergers and acquisitions is being given greater weight than in the recent past, though not necessarily more than it received in the more distant past[7].

4 STRUCTURAL PRESUMPTION IN BRAZILIAN ANTITRUST POLICY

Cade's Horizontal Merger Guidelines directly point to a presumption of competitive risk based on market structure, even establishing objective criteria for transactions that trigger its application: those in which the post-operation market has an HHI higher than 2,500 points and generate an index variation greater than 200 points.

7 For a scholarly thorough and comprehensive historical analysis of the structural presumption concept, from a juridical point of view, see Zingales (2013). Cf. also Kwoka (2016).

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> *Transactions that result in markets with an HHI above 2,500 points and involve a variation in the index greater than 200 points (ΔHHI > 200)* ***are presumed to generate an increase in market power. This presumption may be rebutted by persuasive evidence to the contrary*** *(Cade, 2016, p. 25, emphasis added).*

However, this is not a presumption of illegality, but rather of an "increase in market power". Cade's analysis – even in complex cases with high resulting concentrations – is notably guided by a careful, effects-based evaluation, focused on case-specific economic evidence and decisions grounded in the rule of reason. The authority's willingness to structure customized remedies to address identified risks demonstrates a concern for defending the efficiency goals sought by firms, even in transactions within highly concentrated markets[8]-[9].

Castaldo and Koo (2024) point to Cade's 2017 block of the merger between Kroton and Estácio, two of the largest institutions in the higher education private sector in Brazil, as an example of a somewhat recent application of structural presumptions in horizontal mergers. In our view, that is not really the case. Although the resulting market structure was paramount to the decision to block the merger, the case didn't involve any shifting of the burden of proof. In its report, the General Superintendency clearly states that holding a high market share does not necessarily imply that the new company will unilaterally exercise its market power. It emphasizes the need for the authority to assess whether the market in which the companies operate offers the necessary and sufficient conditions for any attempt to exercise market power.

In line with the Merger Guidelines, the resulting market structure that would follow the transaction allowed for the presumption of an increase in market power, not necessarily for the conclusion of restricting the transaction. Thus, the decision is based on the assessment of several factors related to competitive conditions in the affected markets, including entry barriers, remaining and potential rivalry, and expected efficiencies – not on shifting the burden of proof towards the involved parties. The serial acquisitions observed in the market and skepticism about the effectiveness of the proposed remedies were also important factors in the decision.

A better example of structural presumption being applied by the Brazilian competition authority can be found in the recent case between Knauf do Brasil and Trevo Industrial de Acartonados, in the national drywall market. Commissioner Victor Fernandes' opinion on the transaction presents an interesting and explicit defense of the relevance of applying structural presumptions, including presuming the transaction's illegality, as a means to address the challenges antitrust analysis faces in anticipating coordination risks – for which the analytical economic tools are underdeveloped, and the damages are difficult to remedy ex-post[10]. He concludes, therefore, that the resulting market structure, combined with market characteristics such as high entry barriers, justifies the presumption that the transaction would cause competitive harm.

Commissioner Diogo Thomson, in his concurring opinion, also refers explicitly to structural presumption:

8 See Merger n° 08700.000149/2021-46 (Localiza & Unidas), Merger nº 08700.004940/2022-14 (Ultragaz & Supergasbras), amongst others.

9 **All Cade's public proceedings mentioned in this article can be found at: https://x.gd/BQwdc.**

10 Vote on Case No. 08700.003198/2023-01.

> *Thus, even if this Council shows an interest in pursuing possible alternative theories and broadly examines the effects analysis, the existence of various elements that aggravate* ***the structural nature of the competitive issue would, in my view, imply, if not a reversal, at least a better balance of the burden of proof. It would be up to the Parties to demonstrate the existence of mitigating elements in the economic concentration process****, whether they be efficiencies or clear incentive structures that indicate the ability to maintain competition on the merits and, consequently, benefit consumers (Vote of Commissioner Diogo Thomson, AC 08700.003198/2023-01, emphasis added).*

It seems clear from the votes' emphasis placed on structural presumption, as well as on the reversal of the burden of proof, that market structure not only played a central role in the case analysis but changed the authority's approach on how to interpret the involved risks to competition brought by the proposed transaction. More than just requiring a stricter standard of review, the decision was based on the presumption that the merger should be blocked unless there was clear evidence of mitigating factors. *This is clearly the application of a burden shifting rebuttable structural presumption.*

The extensive reasoning found in the votes suggests that Cade may increasingly rely on rebuttable structural presumption in the future. This may also indicate a possible shift in the role of economic evidence in the evaluation of mergers – both in the sense of increasing its relevance (in cases where demonstrable benefits of significant efficiencies are shown or when there is consistent economic evidence that the presumption does not apply to the case), and in the sense of making it less relevant (depending on the specifics of the case and the ability of economic arguments to meet the necessary standard of proof for approval – whether due to data constraints, characteristics of the transaction, or the specific nature of the authority's concerns).

Nevertheless, it is very important to acknowledge that, despite the above, Cade seems clearly to stick to what we may call an agnostic approach to antitrust issues – or a case-by-case analysis, based on a solid economic approach. Indeed, despite explicitly resorting to the concept of structural presumption, which was never found before at Cade's reasoning – so, well worth pinpoint it here –, that concept was only of the various elements carried out at the comprehensive analysis applied by the Tribunal in order to base its final decision. The commissioners did not abandon the conventional antitrust scrutiny tools – maybe just added one more to its box.

In other words, its decision on the case mentioned above may be seen as one more instance of its agnostic case-by-case approach and should not be taken as a paradigm shift. More broadly, we may say that the use of structural presumption signals a heightened concern from the Brazilian authority regarding the long-term impacts of market concentration on competitive dynamics – raising the enforcement bar but keeping close attention to the balance of positive and negative economic impacts of the cases. Indeed, the protection of dynamic factors, such as innovation, has been receiving greater attention from authorities around the world (Castaldo; Koo, 2024). And Cade is bound to be prompted by magnified regulatory powers to tackle digital markets – as stated at the Treasury Ministry report recently released (Brasil, 2024). To live up to these enlarged powers, Cade should first give a clear signal to the market and stakeholders that its enforcement tools already in place are being used not in a too soft manner.

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5 CLOSING REMARKS

This paper examined the evolving role of market structure in antitrust analysis, tracing its journey from the strict structuralism of the early years to the more nuanced, effects-based approach prevalent till recently. The re-emergence of the discussion of structural presumptions signals a notable shift in antitrust enforcement, driven by concerns about underenforcement in concentrated markets. This renewed focus highlights a growing recognition from a part of scholars and policymakers that current antitrust tools may not be sufficient to address the long-term competitive risks posed by merger cases.

The Brazilian experience, particularly the recent Knauf-Trevo merger case, illustrates this tendency. While Cade traditionally relied on effects-based evaluations, this case inaugurated the use of structural presumptions, indicating that merging parties should have been responsible to demonstrate the absence of competitive harm. This case might suggest a potential trend towards stricter antitrust enforcement in Brazil.

Scholars advocating for structural presumptions emphasize how the complexity and resource and time requirements of the usual application of the consumer welfare method leaves authorities overwhelmed and antitrust enforcement either too slow or lenient with market concentration – leading to worse market contestability that is difficult to address after it is observed. The proposal to shift the burden of proof to the merging parties would provide for better outcomes, especially in the long run. This view is founded on economic rationale and empirical evidence regarding the correlation between market concentration and competitive harm.

The increasing acknowledgement of the long-term competitive risks faced by economics worldwide raises critical questions about the future of antitrust analysis. As we move forward, it is essential to determine which economic evidence should be prioritized to ensure effective enforcement. Should we place less emphasis on traditional market definition and give greater weight to factors like cross-price elasticity to better assess market structures? Finding the right balance between structural presumptions and effects-based analysis will be crucial to fostering innovation and protecting competition in the digital age.

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