1 THE MIDLIFE CRISIS OF THE ANTITRUST GOALS: WHERE DOES THE BRAZILIAN COMPETITION AUTHORITY STAND AMONG HARVARD, CHICAGO AND NEO-BRANDESIANISTS?

A crise da meia-idade dos objetivos do antitruste: onde está autoridade de defesa da concorrência brasileira entre Harvard, Chicago e Neo-Brandesianos?

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STRUCTURED ABSTRACT

Conceptualization: The article aims to analyze the evolution of competition as well as the crisis regarding its objectives.

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Recebido em: 11/04/2022 **Aceito em:** 17/09/2022 **Publicado em:** 14/12/2022

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Objective: rethink antitrust objectives, leaving aside the unidirectional objective of consumer welfare.

Methodology: The authors analyzed academic articles that led to the present discussion, especially considering the Brazilian scenario.

Results: It was found that despite being aware of the global discussion on antitrust objectives, Brazil is still in the early stages of the debate.

Conclusion: The brazilian antitrust authority is still in the initial phase of the debate, not having deepened the discussion about the objectives of the antitrust.

Keywords: antitrust; Harvard; Chicago; neo-brandesianists; consumer welfare.

RESUMO ESTRUTURADO

Contextualização: O artigo tem como objetivo analisar a evolução do direito concorrencial até o momento atual, bem como a crise quanto aos seus objetivos.

Objetivo: Verificar a necessidade de se repensar os objetivos do antitruste, deixando de lado o objetivo unidirecional do consumer welfare.

Método: Os autores analisaram de maneira crítica os artigos acadêmicos existentes que levaram a presente discussão, especialmente considerando o cenário brasileiro.

Resultado: Verificou-se que apesar de ciente da discussão global sobre os objetivos do antitruste, o Brasil ainda encontra-se em fase inicial do debate, não estando em uma crise da meia idade como Harvard e Chicago.

Conclusões: Foi possível concluir que a despeito da ciência da discussão existente no mundo, a autoridade concorrencial brasileira ainda encontra-se em fase inicial do debate, não tendo se aprofundado na discussão sobre os objetivos do antitruste.

Palavras-chave: Antitrust; Harvard; Chicago; neo-brandesianists; consumer welfare.

> From a historical point of view, precision is necessary: competition law as we know it today is not the same as in its origins. It has undergone important qualitative mutations, related to those of the means of production, and so relevant that they may lead us to assume that new fields of law were created (BAPTISTA, 1996, p. 4).

1. INTRODUCTION

This paper aims to present a brief historical overview of the emergence and development of competition law, as well as the movements that influenced its creation and evolution, as well as the objectives that led to the competition defense policy and the theoretical divergences present in

the specialized literature and Brazilian case laws. This introduction is part of this paper, as its first chapter.

The second chapter will present a brief overview of what motivated and how was the birth of competition law in the North American. The third chapter will then present the first school of thought that guided competition law, called the Harvard School. This school defended that concentrated market structures, whether oligopolistic or monopolistic, would, *per se*, be harmful to the market. Louis Brandeis, an associate justice of the North American Supreme Court, between 1916 and 1939, coined phrases that synthesized this line of thought, such as "big is bad", "small is beautiful" and "the curse of bigness". It will also be described the counterarguments of the structuralist thought (BORK, 1993; HOVENKAMP, 2018).[4]

The fourth chapter, and under the influence of the neoliberal movement, is based on idea that the State should, as much as possible, avoid intervening in the economic domain. This would allow companies to compete more vigorously in the market. The Chicago School proposed that competition laws would have a single economic objective, namely the *consumer welfare*. For decades antitrust law developed under the mantra that State interventions in the economic domain based on antitrust law should only occur when market practices could cause a decrease in consumer welfare. Thus, market practices should only be penalized when they resulted in a net negative effect for the consumer, regardless of the structure of the market analyzed.

However, in the fifth chapter it will be presented that this singular objective of competition law has been questioned lately, as it is unable to prevent the formation of large economic conglomerates, especially big techs. This new current, called the "hipster antitrust" or, as they nominate neo-brandesianists, began to advocate a return to the origins of antitrust objectives. According to them, competition law should have a multidimensional approach, considering political, social, and economic concepts.

Having all that in mind, the sixth chapter aims to make a quick review of the case law in Brazil that has mentioned the discussion about the antitrust goals. How is the Brazilian competition authority dealing with that discussion? Are we equally in a midlife crisis or we are still teenagers analyzing Harvard, Chicago and Neo-Brandesianists? As we will see, the competition authority in Brazil has never deeply analyzed this discussion and has issued different decisions about the matter.

Finally, the seventh chapter will present the conclusion on this topic addressed and present how the Brazilian Antitrust Authority is dealing with this discussion.

2. A BRIEF OVERVIEW OF THE BIRTH OF THE ANTITRUST LAW IN NORTH AMERICA

Competition law was born and developed in North America. The first registered legislation is

4 In the American Tobacco and Standard Oil decisions of 1911, the Supreme Court had shifted the already ambiguous terms of the Sherman Act toward even greater uncertainty. In the Standard Oil case, the court in effect determined that only "unreasonable" restraints of trade were illegal tinder the Sherman Act, not all such restraints. This "rule of reason", as it came to be called, satisfied none of the parties most directly concerned in the antitrust dehate. [...] More than anything else, executives of both peripheral and center firms wanted certainty: a bright line between legality and illegality. Many of them began to think that continuous administration of economic policy by a regulatory commission was preferable to what they saw as the spasmodic whims of individual judges (McCRAW, 1984, p. 130).

Canadian and called Competition Act (1885).[5] In turn, the development of competition law – as well as the broad reach this field of study has attained – has occurred in the United States. The beginning of the discussion regarding this field of study dates to 1877, when a strike movement started by railroad employees in the State of West Virginia spread throughout North America and resulted in a massive blockage of transport, causing a significant shortage of goods in the main urban centers.

This movement, which spread to several economic sectors, had the support of several public authorities, as well as private agents, taking on significant proportions in the North American economy and political system. At the time, the main dissatisfaction was related to the power amassed by large conglomerates (*trusts*)[6] and, consequently, the way in which such private agents were able to influence the political-economic scenario, asserting their interests at any cost.[7]

For no other reason trusts and antitrust law (a nomenclature that derives from that name) were at the center of the debates during the presidential election in the United States of America, with the repudiation of trusts and the promise to fight them being a common point among candidates (FERRAZ, 2014). Finally, to stop these conglomerates and their harmful effects on the market and consumers, the Sherman Act (1890)[8] emerged and was later complemented by the Clayton Act (1914) and the FTC Act (1914).[9]

The Brazilian author Calixto Salomão[10] claims that the emergence of the Sherman Act would be related to consumer protection. On the other hand, Paula Forgioni,[11] also Brazilian, argues that the legislation would have been drafted with the purpose of protecting the market itself, which was self-destructive given the excess of economic freedom and lack of control by authorities. Lina Khan[12], current president of the Federal Trade Commission, mentions that the purpose of the Law would be to preserve "open markets", as well as increase opportunities for new entrants, thus preventing large corporations from extracting wealth from consumers and producers, and, consequently, market concentration and abuse.

5 Canada is credited with pioneering competition law in 1889, by enacting the *Act for the prevention and suppression of combinations formed in restraint of trade,* whose purpose was to combat arrangements or combinations aimed at restricting trade by fixing prices or restriction of production (cartels), which was incorporated three years later into Canada's first Criminal Code. In this legislation it was made explicit that the fixing of prices and other agreements between competitors were species of abusive conduct (GABAN; DOMINGUES, 2009, p. 4).

6 U.S. antitrust was born in 1890 out of a concern for the power and exploitations of the new, large, and powerful business organizations called trusts (FOX, 2013, p. 1).

7 Characteristic of this position is the cartoon shown by Schapiro (2018, p. 715). According to the drawing, trusts were seen as the "bosses" of the senators and, consequently, the most important political agents in the North American scenario.

8 For further information about elements that influenced the original version of the Sherman Act, see Diniz (2018).

9 Not since 1912, when Teddy Roosevelt ran for President emphasizing the need to control corporate power, have antitrust issues had such political salience. While Roosevelt did not win, Congress passed the Federal Trade Commission Act and the Clayton Act in 1914, significantly strengthening the Sherman Act. (SCHAPIRO, 2018, p. 715).

10 The exposition of the political-economic factors relevant to the approval of the Sherman Act makes it possible to correctly outline the issue. First, it is quite evident that the biggest concern with monopolies at that time was their negative economic effects on the consumer (SALOMÃO FILHO, 2007, p. 71).

11 Indeed, this legislation should be understood as the most significant legal document to showcase the reaction against the concentration of power in the hands of a few economic agents, and seek to regulate it. It should not be said that the Sherman Act constitutes a reaction against economic liberalism, as it aimed precisely at correcting distortions that were brought about by excessive capital accumulation, that is, correcting the distortions created by the liberal system itself. Despite the contrary opinion of part of the North American literature, the Sherman Act tried, at first, to protect the market (or the productive system) against its self-destructive effects (FORGIONI, 2012, p. 65).

12 Taken as a whole, the antitrust laws were intended to preserve open markets and enhance opportunity, prevent large firms from extracting wealth from producers and consumers, and safeguard against extreme concentrations of private power (KHAN, 2018, p. 7).

https://doi.org/10.5286/rdc.v10i2.987

The Sherman Act would, therefore, represent the redemption of liberalism which, without the proposed regulation, would allow monopolistic concentrations and the formation of large conglomerates and cartels which would distort the natural rules of competition. This vision sought to establish small businesses, workers, traders, and farmers as a group to be protected by legislation.[13]

In this sense, and to combat the various forms of abuse of economic and political power, Antitrust Law was born without a clear and well-defined objective. In our view, however, the lack of direction was not problematic, since the central aspect of these legislations was to fight very powerful economic conglomerates that had great influence over the economic and political system and not, necessarily, to protect the market and free competition.

Throughout its evolution, and as will be shown later in the third and fourth chapters, antitrust policy and law was strongly influenced by two movements, namely: the Harvard School, whose principles prevailed until the 60s, and the Chicago School, which is the dominant school of thought until the present day,[14] but which has had its conclusions and objectives questioned by a new movement.

3. A BRIEF OVERVIEW OF THE HARVARD SCHOOL

The Harvard School, also called the Structuralist School, influenced the birth and early development of antitrust laws. Especially concerned with concentrated market structures, it proposed that the main goal of antitrust law would be to maintain a plural market, with a diversity of competitors, preferably small ones.

The Harvard School was naturally strongly influenced by the reality of its time, that is, the existence of large corporations which upheld their own interests using their immense economic and political power to the detriment of small traders, consumers, workers, as well as much of the economy and society.

There was no doubt, as there isn't today, that the abuse of market power has harmful effects on the economy and society and must be repressed. To this end, and supported by the thinking of the Harvard School, American authorities began to condemn a series of practices perpetrated by dominant companies, such as vertical practices and mergers and acquisitions.

This school of thought believed that concentrated market structures were harmful to society, so both monopolistic and oligopolistic markets were seen as problematic for consumers and small producers and, therefore, for the market itself and the North American economy.[15] Influenced by

13 The Sherman Act was passed in 1890, prior to the beginning of the Progressive Era, and it reflected largely populist concerns. Although both Gilded Age populism and progressivism tilted left in important respects, there were sharp differences between them. Populism was to a much greater extent "politics in the raw," with small business and farmers being the principal interest groups seeking protection. The perceived threats were big business, with a focus mainly on railroads and banks. Populism was initially heavily agrarian, and only later became aligned with the much more urban labor movement. As most populist movements, it was also quite anti-intellectual, strongly suspicious of higher learning. [...] The first set of explicitly progressive antitrust reforms were the Clayton Act and the Federal Trade Commission Act ("FTC Act"), both passed in 1914 during Woodrow Wilson's first term (HOVENKAMP, 2018, p. 77).

14 It is not the goal here to review all the schools of thought which have influenced competition law, since it would be necessary to present other relevant positions, such as the Austrian School, the Ordoliberal School, among others.

15 This is troubling because monopolies and oligopolies produce a host of harms. They depress wages and salaries, raise consumer costs, block entrepreneurship, stunt investment, retard innovation, and render supply chains and complex systems highly fragile. Dominant firms' economic power allows them, in turn, to concentrate political power, which they then

Edward Chamberlain, Edward Mason, and Joe Bain, this trend indicated that competition law should focus on the protection of small players, seeking to achieve the distribution of wealth in society (BAKER; SALOP, 2015), small businesses protection,[16] concentration of political power (WALLER, 2019; PITOFSKY, 1979), preservation of the competitive process through the maintenance of a plural market, with multiple competitors,[17] as well as other social and political aspects, always based on the deconcentrating of market power held by large corporations.

It is for no other reason that, at the time, the US Supreme Court issued several rulings indicating that the objective of competition law would encompass political, social, and economic objectives. It is worth remembering that the first decision that discussed the objectives of antitrust came in 1897, just seven years after the Sherman Act, in the judgment of the United States v. Trans-Missouri Freight Ass'n (166 U.S. 290 323, 1897). In this case, the US Supreme Court held that the purpose of antitrust was "to protect small merchants and men of value", even at the cost of raising domestic commodity prices.

As the Brazilian author Eric Jasper (2019, p. 12) exposes, throughout the prevalence of the Harvard School as dominant school of through, the Supreme Court significantly expanded what the scope of competition law. In this context, in several precedents, it declared that the Sherman Act would have the following objectives: (i) to prevent market concentration, preserving, whenever possible, the organization of industries in small competing units; (ii) to protect companies' freedom to sell and trade goods; (iii) to protect the public from market failures; (iv) to preserve the freedom of companies to compete with "vigor, imagination, devotion, and ingenuity"; (v) to prohibit practices that prevent companies from accessing the market; (vi) to ensure equality of opportunity and protect the public from monopolies and cartels; and (vii) to be a compass of economic freedom to preserve free competition.

According to Stucke (2012) the US Supreme Court has already defined the objectives of the Sherman Act as the followings: (i) to prevent the concentration of markets and preserve the industrial organization in small units; (ii) to protect companies' freedom to trade; (iii) promoting consumer welfare, efficient pricing, and price competition; (iv) protect the public from market failures; (v) preserve economic freedom and freedom of competition; (vi) condemn practices that exclude competitors from the market in which they find themselves; (vii) protection of equal opportunity and public protection against male equality of opportunity arising from the destruction of competition in and the occurrence of monopoly trade coincidences; (viii) be a true "Magna Carta" freedom of the economy in the United States; and (ix) certain precautions for monopolies that, in any case, limit opportunities and freedoms.

It can be seen, therefore, that competition law was not confined to a single economic objective[18], and there was a tendency for competition law to consider public interests in a broad

use to win favorable policies and further entrench their dominance (KHAN, 2018, p. 4).

16 This view was strongly influenced by Louis Brandeis, former associate justice of the North American Supreme Court. In this sense, "It is evident that Brandeis' thesis was based on the assumption that the most important thing for competition is the structure of the market, including the number of players, which is in line with the structuralist model of the Harvard School" (GUIMARÃES, 2021).

17 From the earliest days of antitrust laws in the United States, the promotion and preservation of democracy was one of the goals of the drafters and supporters of state and federal antitrust law. While the political content of antitrust law in the United States has waxed and waned over the ensuing decades, competition law and policy has always recognized the need for a pluralism of economic actors and interests (WALLER, 2019, p. 807).

18 As explained by Buchain (2014, p. 235), another school [Harvard School], called the non-economic or public interest approach, argues that competition policy stems from multiple values, which are not easily quantified nor can they

https://doi.org/10.5286/rdc.v10i2.987

sense, as it pursues meta-legal or socio-political ends.[19] It so happens that this broad definition of antitrust, with multiple objectives aimed at social aspects, biggened to fear several dominant companies in their markets of been penalized by antitrust authorities. Considering that since 1897 the Supreme Court had understood that the protection of consumers and small businesses should be the central objective of antitrust policy, the emergence of criticisms of this position in the 1960s should not be viewed as strange,[20-21] but as a battle for the economic power of the companies.

4. A BRIEF OVERVIEW OF THE CHICAGO SCHOOL

The Harvard School advocated for the protection of a deconcentrated market structure, with the greatest possible number of economic agents, preferably small companies, preventing the formation of oligopolistic or monopolistic markets. In contrast to this vision, in the 1960s and 1970s, the Chicago School developed. It was deeply influenced by neoliberal thinking, by the increase in international competition, and by the dynamism of the global economy.

Members of the Chicago School argued that state intervention would do more harm than good to consumers and the market,[22] because it would disincentivize companies to be more efficient, preventing economic growth.[23] Consequently, false convictions about the role of antitrust imposed on the basis of structuralist thinking would be extremely harmful to the economy, especially when

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be exclusively represented and reduced to the objective concept of economic efficiency, this is because the multiplicity of values reflected in the entire social culture and its institutions must be received as elements of application for the defense of competition.

19 As also shown by Buchain (2014, p. 248): Attempts to add so many objectives into competition policy tend to generate an incorrect interpretation and a distortion of its application. It is unlikely that a legislative framework will express clear and economically accurate patterns of behavior in the competitive market when trying to achieve different goals. On the contrary, laws of this nature can generate market distortions and weaken the competitive process.

20 Bork (1978, p. 133) explains: First, antitrust enforcement is a very costly procedure, and it makes no economic sense to spend resources to do as much harm as good. There is then a net economic loss. Second, private restriction of output may be less harmful to consumers than mistaken rules of law that inhibit efficiency. Efficiency that may not be gained in one way may be blocked because other ways are too expensive, but a market position that creates output restriction and higher prices will always be eroded if it is not based upon superior efficiency. Finally, when no affirmative case for intervention is shown, the general preference for freedom should bar legal coercion.

21 Critical to any coherent antitrust policy is administrability. Simply ticking off concerns and assigning them to antitrust policy is worse than useless unless the concerns can be tied to a coherent set of rules for determining liability and remedies. For example, if we say that small-business protectionism should be an antitrust goal then we must have antitrust rules for implementing it. A rule that simply says that in every antitrust dispute the smaller firm or interests aligned with it should win would drive the economy into the stone age. We would end up condemning mergers simply because they reduce costs, above cost price cuts because smaller firms are unable to match them, or cost-saving vertical integration because unintegrated firms cannot claim the same cost savings. So where does one draw the line? One serious advantage of an output-maximizing rule is that it provides a rational target to shoot at, although one must not exaggerate the ease of implementation (HOVENKAMP, 2018, p. 109).

22 Faced with this excess of state intervention, the Chicago School came to understand that the authorities ended up incurring two types of errors in their decisions. On the one hand, there would be Type I errors, consisting of false acquittals, that is, illicit conduct which is not repressed by the authority. On the other hand, there would be type II errors, considered the worst by this school, which consisted of wrongful convictions, that is, lawful and efficient conducts that ended up being condemned by the authorities, resulting in false convictions.

23 According to Schapiro (2018, p. 745): The fundamental danger that 21st century populism poses to antitrust in that populism will cause us to abandon this core principle and thereby undermine economic growth and deprive consumers of many of the benefits of vigorous but fair competition. Economic growth will be undermined if firms are discouraged from competing vigorously for fear that they will be found to have violated the antitrust laws, or for fear they will be broken up if they are too successful.

applied to rational economic agents,[24] since their practices would be lawful, pro-competitive, and beneficial to the consumer in most of the cases. Thus, an argument that emerged in the 1960s was that a multidimensional and sociopolitical approach to competition law would lead to inconsistent reasoning regarding its application, which would have culminated in the undesirable consequence of imposing similar condemnation on both anti-competitive and competitive practices.[25]

In this scenario, the alleged instrumentalization of competition law, along with the lack of clarity regarding the application of existing competition rules, would cause, according to those liberals, enormous legal uncertainty, since there would have no predictability of which practices could be conducted by companies, especially those that held market power.

As explained in the third chapter, the Harvard School played a fundamental role in the development of the North American competition defense policy. Its theoretical basis was fundamental to allow large conglomerates that abused their economic and political power to be dismantled, putting brakes on economic liberalism. However, despite its importance, some authors argued that it ended up bringing some degree of legal uncertainty to the market and also stunting economic growth.

This school was strongly influenced by neoliberal thinking and had an extremely benevolent view of companies. It believed that the market would be capable of self-regulation and that state intervention, regardless of its mechanism, had greater potential to harm the market than to correct its failures. Not by chance did this school understand that vertical practices would be, for the most part, beneficial and would have the power to maximize the well-being of the consumer. Taking liberal values to the extreme, the Chicago School stated that the State should not intervene in the economic domain to prevent those conducts. Furthermore, it considered that even cartels should not be seen as a long-term problem, as their instability[26] and the interest of other agents in maximizing wealth would lead to the end of the collusive conduct.

Thus, the Chicago School considered the conception of the Harvard School that concentration consisted in a market flaw naive. For Chicago, market concentration was one more point to consider, but in no way could it be the core of competition law. Through scholars Robert Bork, Frank Easterbrook, Richard Posner, and Bowman Jr., the Chicago School consolidated the understanding that antitrust law should focus exclusively on economic welfare through efficiency, since, for them, competition is related to the ability to expand supply. Furthermore, it argued that antitrust policy would not need to concern itself with increasing purchasing power, as it would achieve this objective indirectly, by prohibiting cartels and monopolies, focusing solely on market efficiency.

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24 For further information on the discussion of game theory and rational economic agents, see Ros (2021).

25 It is conventional to call such "errors" in the application of the antitrust law as being type I errors and type II errors. The Type I Error, or "False conviction", consists of the mistake of condemning a company for practices that are actually pro-competitive. In turn, the Type II Error, or "False acquittal", refers to the acquittal of a company involved in anticompetitive practices.

26 Its instability, on the other hand, is a consequence of the difficulties inherent in the prolonged maintenance of illicit schemes with collective participation and, above all, of the gains inherent in timely breaches and secret betrayals: if the illicit agreement exists and, for example, one of the participants offers the good to eventual consumers for a value lower than that agreed by the cartel, the latter can substantially increase its earnings, even above those obtained by core agreement member. These two factors represent the great difficulty and possibilities that open up to the leniency agreement. In order to obtain confessions, it is therefore necessary to create a complex system of incentives, which makes it more attractive for the offender to choose to confess and stop earning the gains he had been obtaining through the practice of the infraction (RUFINO, 2015, p. 52).

In short, and unlike the structuralist school, the Chicago School relied on two main assumptions: (i) the best antitrust policy available in the real world to maximize efficiency was the one obtained from the neoclassical price theory; and (ii) economic efficiency whose results are shared with the consumer would be the antitrust objective.[27] And here is the catch of this school of thought: it sought to eliminate sociopolitical concepts from the analysis of competition law[28] and indicate that it should focus exclusively on an economic concept: consumer welfare:

> *If consumers lose from a practice, then it is counted as inefficient, or anticompetitive, even if producers gain more than consumers lose. The consumer-welfare model is fundamentally neoclassical in its understanding of markets, but it articulates the goal of antitrust as higher output, and thus lower prices (HOVENKAMP, 2018, p. 89).*

In other words, the Chicago scholars undermine the theoretical basis of the Harvard School, as it proposes that it was not the role of the state to maintain a plural market structure, but rather to encourage companies to be efficient and always seek to maximize consumer welfare,[29] regardless of market structure: oligopoly, monopoly, or a perfectly competitive market.[30] The main focus of this thought, therefore, was economic efficiency leading to consumer welfare.[31] By pursuing consumer welfare, antitrust law would not need to look for any other objective.

Following this school, it came to be common sense that companies should compete vigorously for consumers, which would mean lowering the price of products, in addition to creating more innovative products. Efficiencies achieved would be passed on to consumers, which would imply an improvement in consumer welfare. In this sense, objectives such as income distribution, price reduction per se, among other socio-political objectives, would be unnecessary[32] and even undesirable, as they could give rise to legal uncertainties.

In this scenario, the Chicago School began to develop, based on liberal values, being a more permissive line of thought with vertical and unilateral practices. It is precisely this allegedly permissivity that has led to criticism of the Chicago School, as will be discussed throughout the next

27 As explained by Bork (1978, p. 91) [t]he whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.

28 In 1980, American antitrust law had no "paradigm" in the sense of loss or gain that could be calculated. Antitrust was guided by principles. It was for diversity and access to markets; it was against high concentration and abuses of power. Powerful firms were assumed to have incentives to use their power. AAG Baxter introduced a new perspective and a paradigm. He did so most powerfully through merger guidelines.3 The perspective was that business acts are usually efficient (welfare increasing) and should be presumed so. The paradigm was that mergers and conduct are not anticompetitive in the eyes of the antitrust law unless they reduce consumer surplus (FOX, 2013, p. 3).

29 Greater antitrust enforcement generally would improve the distribution of income and wealth by reducing the impact of market power, particularly if the agencies fully embrace the consumer welfare standard (BAKER; SALOP, 2015, p. 19).

30 Basic economic theory demonstrates that when firms have to compete for customers, it leads to lower prices, higher quality goods and services, greater variety, and more innovation. [...] When there is insufficient competition, dominant firms can use their market power to charge higher prices, offer decreased quality, and block potential competitors from entering the market—meaning entrepreneurs and small businesses cannot participate on a level playing field and new ideas cannot become new goods and services (BOUSHEY; KNUDSEN, 2021, p. 6).

31 Thus, for the reasoning which underpins the economic approach, competition policy has the sole objective of maximizing economic efficiency. According to this view, public policies regarding competition do not admit the selection of sociopolitical objectives, such as the reduction of regional inequalities and others that were designated in the Brazilian Constitution, rejecting them as intrinsic to competition policy because they depend on the judgment of subjective values and, therefore, are impossible to consistently apply to competition law (BUCHAIN, 2014, p. 235).

32 As brilliantly explained by Elzinga (1977, p. 1194).

chapter.

5. A BRIEF OVERVIEW OF THE NEO-BRANDESIANISTS AND THE MIDLIFE CRISIS OF THE ANTITRUST GOALS

For decades, the use of the consumer welfare concept was the main target of the antitrustlaw[33] and allegedly provided greater legal certainty for companies following state investigations.[34–35] It so happens that for the neo-Brandesianists, referred to as "antitrust hipsters"[36] or "romantics",[37] the use of a strictly economic concept made antitrust law very permissive, which caused – or at least contributed to – several problems,[38] such as concentration of wealth, economic concentration, increased inequality, increased profit margins without passing on efficiencies to consumers, among others.[39]

This "new" movement defends a return to the origins of antitrust, through which the authorities should stop using a single economic concept and should reorient antitrust towards other

33 The adoption of the consumer welfare standard as antitrust's lodestar has come with numerous benefits that have reoriented antitrust jurisprudence over the last fifty years to more effectively protect competition. At its core, the consumer welfare standard provides a coherent, workable, and objective framework to replace the multiple, and often contradictory, vague social and political goals that governed antitrust prior to the modern era. By providing a disciplined framework for antitrust analysis, unified under a singular objective, the consumer welfare model fosters the rule of law and helps prevent arbitrary or politically motivated enforcement decisions. Similarly, promoting the use of the consumer welfare approach by competition authorities worldwide reduces the opportunity for enforcers to use their domestic competition laws to pursue non-economic objectives, including a protectionist agenda that targets U.S. and other foreign businesses. By realigning antitrust under a singular objective grounded in economics, the consumer welfare standard heralded the advent of the modern antitrust revolution that squarely rejects populist desires to balance multiple non-economic factors in favor of a consistent and coherent framework focused on the straightforward, but elegant, question of whether a transaction or commercial arrangement makes consumers better off (WRIGHT et al., 2019, p. 11).

34 But a strictly followed consumer-welfare approach, condemning a restraint or practice only when it realistically threatens an anticompetitive output reduction, has one additional advantage: properly followed, it gets antitrust out of the business of favoring particular special-interest constituencies other than consumers themselves (HOVENKAMP, 2018, p. 93).

35 Antitrust jurisprudence went from being confused and ineffective to the modern doctrine that can – and does – effectively protect consumers and prevent anticompetitive business practices while allowing practices that are a normal part of the competitive process and benefit consumers (WRIGHT et al., 2018, p. 8).

36 As explained by Schmidt (2018, p. 1), hipster antitrust is a terminology that was coined by attorney Konstantin Medvedovsky in June 2017, having been popularized with the help of former FTC advisor Joshua D. Wright.

37 Romantics are taking over the antitrust law" [...] Overall, the effectiveness of antitrust authorities should be enhanced by applying reason to antitrust law rather than fears, feelings, or sentiments. The romance must be taken out of antitrust. [...] Antitrust law is the subject of numerous debates questioning its effectiveness in the digital age (SCHREPEL, 2020, p. 2).

38 According to Foer and Durst (2018) the consumer welfare model designated as the exclusive goal for antitrust is both confusing and incomplete. In the same way Wu (2018) points that the good faith version of the consumer welfare standard has failed on its own terms. Hoping to impart a scientific-like certainty to the antitrust law, it has not succeeded; and instead run into the limits of a legal system to assess the full range of costs and benefits that would be necessary to the enterprise. This single objective neglected a range of harms important to the health of the economy among others dynamic costs, quality effects, and projected prices, let alone potential harms to labor markets and political considerations.

39 As pointed by Schapiro (2018, p. 718), a number of progressive think tanks and advocates have issued reports over the past two years documenting the decline in competition in the American economy, linking that decline to increasing inequality, and offering policy proposals to reinvigorate competition policy. The American Antitrust Institute (2016) , a respected organization long committed to more effective antitrust enforcement, published a report in June 2016 entitled "A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward". This report lists three main symptoms of declining competition: rising concentration, higher profits to a few big firms combined with slowing rates of start-up activity, and widening inequality gaps. The report rather boldly claims (AAI, 2016, p. 7): "There is a growing consensus that inadequate antitrust policy has contributed to the concentration problem and associated inequality effects".

objectives, such as social and political objectives.[40] This "return to the origins"[41], *ie*, the birth of antitrust law, would turn competition policy to broader objectives, renouncing the principles of the Chicago School.[42] [43]

Lina Khan, one of the main exponents of this movement, antitrust authorities should take into account other principles for the achievement of antitrust policy, choosing a holistic approach to identify the damage caused by dominant companies, recognizing that violations of competition law would harm workers, independent companies, and consumers.[44] It so happens that antitrust objectives seem to be under a midlife crisis.

6. THE DISCUSSION IN THE BRAZILIAN PERSPECTIVE

Despite the vigorous debate regarding the objectives of the Antitrust Law, especially in the United States, the scenario seems different in the Brazilian jurisprudence.

The case law in Brazil and the Brazilian legislation seems to identify the existence of multiple objectives for the competition law. In this sense, both the Brazilian Constitution and antitrust law enumerate several social objectives for the economic order and antitrust policy. As we can see from

40 The previous articles in this series showed the need for Antitrust Law to take into account other objectives than mere consumer protection, even more so when this purpose is considered by the restrictive bias of the consumer welfare standard, in the terms proposed by the Chicago School. [...] More than that, new approaches, insofar as they go beyond the single-pointed vision of Antitrust Law, not only do not ignore the need for consumer protection, but also seek to do so in an even broader and more comprehensive way. effective, overcoming a series of problems related to the restrictive criterion of maximizing consumer welfare. For this reason, criticisms are pertinent in the sense that consumer protection must (i) be expanded, seeking to redeem its commitments not only regarding lower prices, but also quality, diversity, and innovation; and (ii) be effective, no longer content with mere presumptions and conjectures, many of which depend on a series of variables in the long term, and must be based on the real assessment of the impacts of the actions of the agents holding economic power over consumers both in the short, medium, and long term (FRAZÃO, 2020). For this group of scholars, antitrust should concern itself not only with the effects of anticompetitive conduct and concentrated market structures, but also with the effects on social problems, which range from the effects of a more unequal society to the harmful effects of climate change, passing by themes of "national interest" (whatever that means). In this sense, the criticism made is that observing consumer welfare and economic efficiency (ideas concerning the old Chicago school) would no longer be sufficient antitrust policy objectives and these should change, in order to achieve the welfare of the society, in a holistic way, incorporating a series of issues, such as equity and worker welfare (SCHMIDT, 2018).

41 According to Khan (2018, p. 6), democrats, meanwhile, last year identified renewed antitrust as a key pillar of their economic agenda, promising to "revisit our antitrust laws to ensure that the economic freedom of all Americans—consumers, workers, and small businesses—come before big corporations that are getting even bigger."

42 At its core, the Hipster Antitrust movement calls for a total rejection of the commitment to economic methodology and evidence-based policy that lies at the heart of modern antitrust enforcement. The Hipster Antitrust movement would reject Chicago School free marketers' approach to antitrust just as readily as it would Post-Chicago interventions. [...] These include a return to "big-is-bad" antitrust enforcement based upon firm size without regard for effect on consumers, making presumptively unlawful broad categories of mergers and acquisitions outright (e.g., all mergers beyond a certain size threshold even in the absence of potential horizontal or vertical issues), and abandoning the consumer welfare standard to take into account effects on income inequality and wages (WRIGHT et al., 2019, p. 5).

43 Hovenkamp (2021) points out that is necessary to be careful about those changes. Although the progressive wing of antitrust does a better job of identifying the economic problems that the economy faces, some of its proposed solutions are calculated to make them worse. The pursuit of business concentration or bigness for its own sake will injure consumers far more than it benefits small business, the intended beneficiaries. A proposal to forbid large platforms from selling their own products in competition with the products of others will harm both consumers and small business, although it will benefit some large firms.

44 There are a few key principles that should animate the agency's approach across its work. First, we need to take a holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers (KHAN, 2021, p. 1).

the Brazilian Constitution,[45] the economic order is founded on several sociopolitical objectives, such as (i) national sovereignty; (ii) private property; (iii) social function of property; (iv) free competition; (v) consumer protection; (vi) environment protection, (vii) reduction in regional and social inequalities; (viii) pursuit of full employment; (ix) preferential treatment for small-sized enterprises.

In this scenario, once the Brazilian Constitution raised several sociopolitical objectives, it would be inaccurately to establish one single goal for the Competition Law in Brazil. Echoing this position, Frazão (2020) explains that although the Constitution (art. 173 § 4) makes clear concerns regarding the abuse of economic power, the major law also establishes other objectives for the economic order (art. 170), as mentioned above. According to the author, the Constitution highlights other important principles that need to be equally considered while applying the Law. Therefore, the author explains that "from the constitutional point of view, the single-pointed view of Antitrust Law is not justified, only focused on consumer protection".

Consequently, the antitrust law should be guided not only by the economic objective of consumer welfare but take into consideration other sociopolitical objectives. According to Borges (2020) in extensive research of the jurisprudence of acts of economic concentration from 1994 to 2008, the orientation of a single-point objective led to an exaggeration of efficiency-based antitrust objectives and blindness to non-efficiency-based antitrust objectives, which contributed to the generation of economic inequalities. Also, some economic studies have indicated that in the US markets have become more concentrated, companies have started to realize higher profits while employee salaries and working conditions have worsened, which has led to the current questioning of the antitrust *status quo*.[46]

Regarding case law in Brazil specifically, there are some precedents that mentioned the discussion about the objectives of antitrust. However, this matter has never been a real point of interest for our competition authority. The Brazilian author Eric Jasper (2019, p. 2) mentions that the "Brazilian Competition Law presents diffuse objectives and jurisprudence of CADE was not able to expressly articulate an objective or set of objectives for the defense of competition in Brazil". The author has conducted a review of the jurisprudence and has analyzed 95 documents, such as cases, normative rules, technical notes, and concluded that the Brazilian Competition Policy fails to define adequately the objectives of the Law.

In these cases, the antitrust authority has defined the objective of the antitrust policy in several different scenarios, such as (i) the preservation of freedom of initiative, free competition, the social function of property, consumer protection, and repression of the abuse of economic power; (ii) economic well-being; (iii) consumer welfare; (iv) the protection the competition itself; (v) efficient

45 Article 170. The economic order, founded on the appreciation of the value of human labor and on free enterprise, is intended to ensure everyone a dignified existence, ac cording to the imperative of social justice, with due regard for the following principles: I – national sovereignty; II – private property; III – social function of property; IV – free competition; V – consumer protection; VI – environment protection, which may include differentiated treatment in accordance with the environmental impact of goods and services and of their respective production and delivery processes; (CA 42, 2003) VII – reduction in regional and social inequalities; VIII – pursuit of full employment; IX – preferential treatment for small-sized enterprises organized under Brazilian law and having their headquarter and management in Brazil (CA 6, 1995).

46 Several economic studies emerged in this period. As an example, we quote Baker and Salop (2015, p. 14): "To the contrary, median income and wealth both declined in real terms between 2010 and 2013. Over essentially the same period, the real income of the top 1% grew by 31.4%,4 and the income share of the top 1% increased from 17.2% to 19.8%. The fact that economic growth has effectively been appropriated by those already well off, leaving the median household less well off, raises serious economic, political, and moral issues." An example of this discussion was brought by journalist Catherine Rampell (2015).

allocation of resources in the economy; (vi) social policies and social effects; (vii) among others.

Also, in a recent case,[47] CADE's General Superintendence has issued a technical note suggesting that the three major telecom companies should be sanctioned for collusive behavior in a public bid in which they participated together. The judgment has not finished, but it was mentioned the fact the discount provided of approximately 20% should be relativized and could not be considered as an undisputed proof of efficiency.

The Federal Prosecutor has issued a Technical Note in which indicated that "[h]owever, the gains of efficiencies cannot be competition cost. There must be a balance between efficiency and broad competition, even despite the legal provision of the consortium institute in public bids."[48] It seems, by this position, that the achievement of efficiencies and consequently the price reduction for the consumer, which seems to be the foundation stone of the Chicago School has been relativized.

In this way, it is worth mentioning that also the Brazilian Antitrust Law fails to establishes a single objective for our antitrust policy, when it defines on its first article that "[t]his Law structures the Brazilian System for Protection of Competition - SBDC and sets forth preventive measures and sanctions to the violations against the economic order, guided by the constitutional principles of free competition, freedom of initiative, social function of property, consumer protection and repression against the abuse of the economic power." Since the existence of several different objectives, it is not a surprise, in the same way, that concluded Jasper (2019), that our jurisprudence is not able to correctly articulate an objective or set of objectives for the defense of competition in Brazil.

Considering the midlife crisis of the antitrust goals in the United States, it is possible to assess that Brazil is under an adolescent crisis but has not became aware of that yet.

7. CONCLUSION

In conclusion, antitrust law was born to fight trusts. At the time, the means used to tackle the activities of these large conglomerates and cartels were irrelevant. What mattered was the purpose, which gave rise to a law based on multiple sociopolitical objectives. This fact was extremely important and enabled competition law to achieve its intended purpose at that time. It so happens that having different goals allowed competition law to be used to pursue different purposes. Supported by the Harvard School, antitrust authorities sought to deconcentrate markets.

Later the purpose of antitrust law became the maintenance of deconcentrated market structures with the greatest possible number of agents, preferably small ones. Mergers and acquisitions and vertical practices came to be considered illegal.

The Chicago School then began to advocate for the use of a single economic concept, that of consumer welfare, so that the state should only intervene if economic practices negatively impacted consumer welfare. After decades of being widely used, this vision came to be considered too permissive, as it opened the door for the resurgence of large corporations. This permissivity came to be questioned by neo-Brandesians.

The Neo-Brandesians claim a return to the origins of antitrust law,[49] guided by the expansion

47 Brazil. Administrative Process n. 08700.011835/2015-02.

48 Technical Note n. 05/2021/WA/MPF/CADE.

49 Horton (2018) points that it is time to return to an antitrust regulatory system that better reflects Congress's dynamic

of the objectives of competition law, which should be concerned with political, social, and economic issues. This vision, however, encountered enormous resistance, as it is believed that it would mean a return to legal uncertainty and economic disorganization which were the downfall of the Harvard School.

It is undeniable, however, that neo-Brandeisians sought to debate highly relevant points, such as the reduction of inequalities, workers' wages, concerns about democracy, political systems, among others. Ignoring the school's criticisms and simply trying to dismiss them by calling them romantic or hipsters does not seem to be smart. Competition law will need to deal with new problems, such as access to data,[50] income distribution, and workers' wages, in addition to other social and political issues.

This is a new reality that brings a new discussion and new problems. Ignoring this new perspective is just like a grown man ignoring adulthood problems. Just like in our lives, facing new dilemmas does not mean that we have to question the journey and rethink everything that we have achieved. In this sense, the mere existence of sociopolitical problems and digital concerns does not necessarily mean that antitrust should go back to its origins and have more than a single economic objective.

This scenario about new dilemmas, new problems, and new perspectives for antitrust seems clear in the USA, in which especially the big techs obliged the antitrust doctrine to rethink the competition police. Synthetizing this position Newman (2022) mentions that the link between output and consumer welfare would break down once a variety of conduct would push output and welfare in opposite directions.

As examples of practices that could push consumer welfare and output in different directions the author mentions: (i) creating, exploiting, or alleviating Information asymmetries'; (ii) externalizing costs; (iii) coercion, contractual tying, technological tying, foreclosure strategies, (iv) Interbrand vertical restrain; (v) among others.[51] Once output and consumer welfare might not be pointing at the same direction "outputist analysis is often unworkable in markets—for labor, social networking, online search, and more— that are of particular interest to contemporary antitrust" (NEWMAN, 2022, p. 1).

However, the discussion is well developed in USA, this scenario seems different in Brazil. This stem from the fact that most of the discussion of the "contemporary antitrust" comes from the big techs which created and established zero price markets in which the consumer welfare perspective based solely on price is maybe inapplicable.

As a teenager, Brazilians know the discussion, but stills without a clear definition of what are the objectives of antitrust, especially when considering the case laws judged by CADE. Although the Brazilian Competition Authority has issued some precedents that mentioned the discussion, this matter has never been a real point of interest for our competition authority.

historical balancing and blending of multiple fundamental American social, political, moral, and economic values. To do so, we must begin rediscovering antitrust's lost values, and recommence our historic pursuit of an ethical, moral, and fair free-enterprise system truly devoted to the long-term economic and social welfare.

50 For further information see Motta (2021).

51 Although the possibility of some practices could lessen the competition, it is important to establish that most of the conducts mentioned by the author could be analyzed and condemned taking into consideration the consumer welfare objective.

Also, however the case laws usually mention economic parameters, it seems that in Brazil the discussion also should take into consideration the existence of other principles to guide the economic order besides a single economic orientation. Once those principles are indicated in the Brazilian Constitution and in the Brazilian Competition Law, this debate about the objectives will probably emerge in the future, when we have become adults. Now, we can see Brazil is going through a quarter life crisis merely focusing on early discussions about Harvard, Chicago, and the New Brandesianists.

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COMO CITAR ESTE ARTIGO:

LINHARES, Athayde Amanda; ROS, Luiz Guilherme. The midlife crisis of the antitrust goals: where does the Brazilian Competition Authority stand among Harvard, Chicago and Neo-Brandesianists? **Revista de Defesa da Concorrência**, Brasília, v. 10, n. 2, p. 7-23, 2022.