CHAPTER SEVEN

Corporate personhood and the competitive relation in antitrust

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> On the face of it, North American railroads are no longer controlled by trusts, and are therefore subject to free-competition; on the face of it, the Steel Trust has now been split off into forty independent companies that rival each other in terms of goodwill and fair prices. And now that Standard Oil has disappeared, innumerous oil pipelines transport oil to ports and reservoirs, with the price being set by a free market. The trusts have fragmented; it might appear that it is no longer the Rockefellers, the Schwabs, the Armours that control the oil, the steel, the canned meat. But everyone knows that behind this apparent compliance with the law, North American capitalists have held on to the essential part of their organizations. Their chosen men administer all the new companies. Most of the shares are still held by the same capitalists. And North American industry is increasingly under the "control" of certain groups of magnates.[1]
>
> —Marcel Mauss, *La Nation*

1. "En apparence, les chemins de fer américains ne sont donc plus trustés, ils sont soumis au régime de la libre concurrence, en apparence la Steel Trust est maintenant

In July 2014, the Brazilian antitrust agency *Conselho Administrativo de Defesa Econômica* (CADE; the Administrative Council for Economic Defense) approved a merger between two corporations, Kroton and Anhanguera, which led to the establishment of the world's largest private higher education company. The new company began its life with a market value of approximately 10 billion dollars and over 1.2 million students. What most struck the regulators, more so even than the scale of new enterprise, was the underlying phenomenon that was sweeping through the Brazilian educational market. The merger was, in fact, the latest in a series of deals that had transformed the Brazilian educational sector into an extension of the national financial sector. Almost all the major centers of higher education were being bought up by banks and investment funds. This mass financialization posed a significant challenge to the antitrust authority and was considered by commissioners to be "a sensitive competition issue." Given that the ownership of these companies and, therefore, their administration, was distributed among similar individuals and/or corporations, it became increasingly difficult to pinpoint the extent of their influence on the market and, therefore, to distinguish between competitors. The question that arose was this: If market entities are apparently related, how is it possible to ascertain whether or not a market is competitive? This problem, so succinctly described by Marcel Mauss, is as old as antitrust itself. It raises fundamental issues about the relationship between corporate personhood, economic agency, and competition, which this chapter explores through an ethnographic perspective on regulatory knowledge practices.

In seeking to encourage fair competition, antitrust (or competition) policy in Brazil and elsewhere has followed two main directions. The primary is the launching of investigations into current or past business practices that might be harmful to other companies or consumers in a given market, such as the formation of cartels that increase prices for consumers on the basis of agreements

brisée en 40 compagnies indépendantes, et rivalisant de bonne volonté et de bon marché. Et la Standard Oil disparue, de nombreux pipe-lines indépendants mènent aux ports et réservoirs un pétrole dont les prix sont débattus par un libre marché. Les trusts se sont morcelés; apparemment ce ne sont plus Rockefeller, Schwab, Armour, qui possèdent le pétrole, l'acier, la viande conservée. Mais tout le monde sait que, sous les apparences d'obéissance à la loi, les capitalistes américains ont maintenu l'essentiel de leurs organisations. Ce sont leurs hommes qui administrent la totalité des nouvelles compagnies. Les majorités d'actions appartiennent toujours aux mêmes capitalistes. Et l'industrie américaine est de plus en plus sous le 'contrôle' de quelques groupes de magnats" (Mauss [1920] 2013: 306).

between companies.[2] In Brazil, where the antitrust authority is responsible both for the investigation and for the judgment of antitrust issues, companies found to have broken the rules face stiff penalties.

A second is the activity of so-called merger review, which is the focus of this chapter. The antitrust authority is responsible for authorizing or prohibiting corporate concentrations—mergers, acquisitions, joint ventures, et cetera. The decision is based on a finding as to the probability of the proposed concentration altering market conditions to the detriment of other participants in the near future. Each merger review case referred to the antitrust authority is dealt with in administrative proceedings that always involve a comprehensive investigation into the characteristics of the markets in which the relevant companies operate, including an inquiry into the conduct of competitors and consumers.

In order to decide whether to approve or reject a merger, antitrust regulators first of all need to identify all the participants in the market under investigation—that is, all the competing players, including, of course, those who submitted the merger application. They then need to consider the respective market share of the competitors, which is estimated in terms of the volume/quantity of products each one sells on the market, or by means of analysis of each competitor's turnover. This procedure is in line with the established (structural approach) view that a reduced number of participating competitors in a market increases the likelihood of the proposed merger causing excessive concentration. This concentration is, in turn, considered likely to afford the new company disproportionate "market power"—a market share that is significantly larger than that of the other participants (Hovenkamp 2005). On the other hand, when a market has several competitors in addition to the merger applicants, there is less likelihood that the merger will be harmful to competition, as the newly merged company will not be capable of prejudicing the other participants or consumers in the market. Thus, the identification of the agents that compete on the markets and the estimation of their relative market share constitute a prerequisite to assessing the effects of a corporate merger on market competition.

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2. Corporate practices commonly deemed anticompetitive include cartels, price-fixing, exclusionary dealing contracts, tying (bundling), nontransparent, noncompetitive, and/or corrupt bidding processes. Anticompetitive practices may involve the actions of one company alone or may be "horizontal" when two or more companies act together.

Drawing on the ethnographic material taken from investigative procedures conducted by Brazilian antitrust analysts, this chapter describes how regulators identify or singularize market competitors in circumstances in which it is not easy to precisely quantify or identify them. This particular difficulty has become more commonplace in markets such as the private educational sector, in which the applicants seeking permission to merge are owned and controlled by investment funds. If a fund holds shares in more than one company in the market, or otherwise exercises administrative control over such companies, it may be capable of influencing the companies so that they do not compete with each other, because competition would be prejudicial to the fund itself. The problem then faced by analysts is how to know whether the company submitting the application for merger is in fact competing with other businesses in the same market, when a private equity firm holds shares in both the applicant company and in other market participants. When the investments of a private equity firm are apportioned between various companies, does this lead to all these companies effectively being part of the same assemblage, acting in a concerted and unidirectional manner? If that is indeed the case, then the companies that receive such investment cannot be considered competitors, or distinct economic agents but rather should be classed as part of the same economic group.

According to regulators, these difficulties in singularization are due to the fact that the legal form of corporations, presented when companies file a petition to merge, might not reflect the economic reality of the extent and nature of their participation in a given market. Recent work in the anthropology of corporations has highlighted practices of reification that confer upon corporate entities a marked degree of coherence, unity, and intentionality (Welker, Partridge, and Hardin 2011). These studies describe the manner in which different conceptions of corporations are enacted through routine internal corporate practices (Welker 2014) or by legal developments, including case law from the courts and the teaching of legal scholars. They also describe the effects of these reifications.[3] The manner in which corporate personhood is perceived,

3. For studies that refer to US legal history and case law reflecting the transformation of the legal rights of US corporations, illustrating how companies have increasingly acquired legal status and treatment equivalent to that afforded to human beings, see Barkan (2013) and Coleman (2014).

ascertained, and classified has highly significant consequences in terms of corporate responsibilities and liability, powers, and duties.[4]

In a similar vein, this article considers "what is neglected or obscured when corporations are construed as persons" (Kirsch 2014: 210) in the context of antitrust policy. What are the effects of mobilizing corporate personhoods in merger reviews? These effects become visible when we contrast the usual legal-economic reifications of companies applying for authorization to merge with the more recent regulatory analytical procedures for the identification of competitors in a market, which suggest a relational perspective of corporations and economic agency. The task of identifying the agents that compete in a given market is complex, as examining property relations alone is insufficient to adequately distinguish between them (Strathern 1996). As I describe below, the analytical difficulties that follow on from the recent financialization of markets has led to a need for regulators to expressly consider the ontological nature of the entities being investigated, and to identify and characterize various forms of relations between natural and legal persons.

In the next section, I describe the dual legal and economic nature of corporate entities that are subject to regulation in accordance with Competition Law and demonstrate how this duality is taken for granted in most antitrust rulings. In the following two sections I recount the procedures that regulators adopted in order to identify the market share of a competitor in a 2013 investigation of a proposed merger in the private higher education sector. In the case in question, the issue of how to identify an economic agent led the investigators to question the standard ways in which governed entities were conceptualized in antitrust analysis and to adopt a fresh approach. I conclude the chapter with some remarks on the pragmatic meanings attributed to competition in antitrust practice, as evidenced by CADE's approach to the merger application I describe.

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4. An example of this is the research of anthropologist Suzana Sawyer (2006) into the legal arguments employed in a dispute between a US oil company and Ecuadorian rural dwellers. The author cites various instances in which the accused company, ChevronTexaco, was ascribed human qualities that rendered its actions comprehensible. This was applied to all the subsidiaries of the company in several countries, which were dealt with as the offshoot of a larger entity. According to the researcher, the representatives acting in the lawsuit used the personal pronoun *tu* (second person singular) to refer to the company. This form of qualifying the company, rendering its actions coherent, was one of the means used to hold the company legally liable for damage caused by a petrol spill in a rural region of Ecuador (Sawyer 2006).

LEGAL ECONOMIC MESHES[5]

The "competition sheriff" (as CADE is frequently referred to in the Brazilian press) is best known for its role in analyzing major mergers and for its investigation of the formation of cartels by large corporations. The Brazilian legislation on competition does not, however, limit the agency's role to the investigation of companies that are large enough to be known among the general public. In fact, the law does not even define the type of legal entity over which CADE is to exercise its powers.[6]

The "subject of Antirust law" is, in the words of the Brazilian jurist Paula Forgioni "any [person or entity] that is capable of performing an act that restricts competition" (2013: 145). However, the legal definition given to these acts means that they are generally deemed to have been committed only by entities that have the legal form of corporations. In industrialized countries, most of the goods and services used by the population are produced, distributed, and sold by business organizations rather than individuals. The violations of the economic order referred to in the Brazilian Competition Law are, therefore, committed by such business organizations, which compete with other similar entities in various markets. In terms of CADE's role in authorizing mergers, the premerger notification procedures and requisites mean that in practice only large organizations are subject to antitrust/merger regulation.[7]

5. Part of the material included here and in the following section was previously published in Onto (2017).

6. Article 31 of the Law 12.529/2011 establishes the following: "This Law applies to individuals (natural persons) or legal entities from either the public or private law spheres, and to any legally constituted or de facto associations of entities or of persons, even those constituted on a temporary basis, with or without having formal legal personality and even if they carry out their activities under the regime of legal monopoly." http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/view.

7. In relation to "acts of economic concentration"—mergers, acquisitions and other forms of union—the law, in Article 88, states that "the parties involved are to submit to CADE acts of economic concentration in which, cumulatively: I—at least one of the groups involved in the operation has registered, in its last financial statement, gross annual billing or total volume of business in the country, in the year prior to the operation, equivalent to or higher than R$400,000,000 (US$110,000,000); and II—at least one other group involved in the operations registered, in its last financial statement, gross annual billing or total volume of business in the country, in the year prior to the operation, equivalent to or greater than R$30,000,000 (US$8,300,000)" (June 2016 exchange rates).

The fact that the legislation does not expressly specify the legal personality/form of the entities that are subject of legal rules on competition should not be considered a legislative oversight. It is, rather, characteristic of contemporary antitrust policy, in which regulatory decisions are based on economic analyses of the functioning of markets and market players. In these analyses, the legal form/personality of the parties involved in a merger—that is, whether they are listed or closely held corporations, partnerships, or individuals ("natural" persons)—is less relevant than the manner in which these parties act and relate to other market participants. In other words, the antitrust agency aims to identify specific "economic agents" in the market, whatever their legal personality may be.[8] This can be clearly seen from the criterion stipulated in the legislation for the characterization of the unlawful act of "dominating a relevant market of goods and services." Article 36 of Law 12.529 provides that "a company or group of companies is presumed to have a dominant position whenever"

> § 2 [. . .] it is capable of altering market conditions in a unilateral or coordinated manner, or when it controls 20% (twenty percent) or more of the relevant market. CADE may alter this percentage share for specific sectors of the economy.[9]

The legislation therefore sets out certain requisites or markers that guide the antitrust investigation into acts of corporate concentration. According to the wording of the law, acts aimed at "dominating the market" constitute "violations of the economic order." As such, the characterization of market domination and of possible abuse of market position by the applicants for authorization to merge draws on a criterion of participation in the affected markets, also known as "market share." This numerical criterion provides to analysts an indication of the potential existence of violation of the statutory rules—that is, of the possible abusive exercise of market power. In Brazil, if the future company arising

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8. It is worth noting that while the law applies the notion of *person* ("natural" person or "juridical" person), conferring rights and obligations accordingly, economic theory relies on the concept of *agent* to describe any entity that acts in a given market, producing or consuming products or services either as an "individual" or as a "firm" (these being the categories normally used in microeconomics). The use of the notion of agent implies that economic theory focuses precisely on the economic conduct of the entities and particularly the manner in which they make decisions and exercise choices relating to consumption or to production. For an analysis of the notion of agent in economic theory, see Ross (2010).
9. http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/view.

out of a merger will hold a market share of over 20 percent, CADE antitrust analysts are likely to consider that the merger will be prejudicial to competition in the market; in other words, that it will be harmful to other competitors or to consumers. Therefore, in line with knowledge practices common to many governmental bodies, the first step CADE officials usually take when presented with a request for authorization to merge is to seek information as to who the competitors are in the relevant market and to ascertain their respective market shares.

Estimating market shares presupposes a prior definition of precisely who the competing agents are. Each of these agents must be construed as a separate or discrete economic unit, which acts independently and competes with the others for the sale of specific products or services. In many cases, this singularization of economic agents is not difficult. Indeed, in most merger cases the analysts consider the economic agents in the relevant market to be the legal entities filing for merger and other legal entities that compete with them. In other words, for many (and possibly most) markets, there is no need to look beyond the legal form of corporate entities in order to establish the identity of the competing agents. That is possible because the owners and controllers of the companies do not generally have significant holdings in other companies operating in the same market. Furthermore, the corporate entities involved are usually owned by the same individuals that control them administratively. Even nowadays, the vast majority of Brazilian companies are family owned and administered, so that it is relatively straightforward for analysts to group the companies, their owners, and their administrators into one independent economic unit, as one competitor.

The fact that in most cases, the corporate persons requesting authorization for the merger can be taken as representative of the market competitors means that CADE's task of identifying and distinguishing economic agents is generally relatively straightforward. In addition to possessing this juridical-economic quality, these entities are deemed, during the administrative proceedings, to have a "volition" of their own (Foster 2010), which allow regulators to assume that they take rational decisions, based on the furtherance of their own interests and, most importantly, that these decisions are taken autonomously (see Welker 2016). Until recently, there did not appear to be any need for the investigating officers in Brazil to question these corporate meshes. However, because of the financialization of the economy, the lines have been blurred, as the scope and reach of market competitors appear to have extended beyond the defined

limits of the legal form or personhood adopted by the companies applying for permission to merge. The difficulties of singularization or identification of the competition agents in a given market has become an obstacle to estimating market shares and, therefore, of ascertaining the likelihood of a competition issue arising as a result of a corporate merger.

REALIZING MARKET AGENTS

The antitrust authority, based in the Brazilian capital, Brasilia, is staffed by approximately 300 professionals who hail from various professional backgrounds, predominantly economics and law. Six commissioners, including the Chair of the Council (and Head of the CADE agency), sit on the Administrative Council and are responsible for the final ruling on cases. Each commissioner has either four or five assistants that help them in the investigation procedures and economic analysis.

Toward the end of 2012, I spent some weeks observing the work of the assistants to one of the commissioners on a merger between two small companies in the higher education sector.[10] One of the assistants, Camila, a thirty-five-year-old lawyer, explained the case to me, and also explained why CADE professionals considered it so significant, particularly bearing in mind that it was unlikely that the investigation would lead to CADE rejecting the proposed merger.[11] In fact, Camila's colleagues joked that she was "borderline obsessed" with the case, to the extent that her computer screensaver was a photograph of the eighty-year-old businessman who "was behind the investigated companies." This was the "the guy who commands the market," according to Camila.

The case on which Camila was working involved the acquisition of two education companies: Instituto Grande ABC de Educação e Ensino S/C Ltda (IGABC) and Novatec Serviços Educacionais Ltda, both members of the Anchieta Group and located in the São Paulo metropolitan region. They were

10. The material used in this section resulted from observation of the parties during an investigation undertaken as part of case number 08012.003886/2011-87, and from conversations and interviews of the officers responsible for the investigative work. I have also drawn on the public version of the case records, accessed via the CADE website (www.cade.gov.br) on February 15, 2014.

11. The reason for the subsequent approval of the merger was that the two education companies had only minor shares of the market in the geographical region analyzed.

being taken over by Anhanguera Educacional Ltda, which develops and provides a range of higher education services in Brazil. In 2013, Anhanguera was "the largest private profit based professional training organization in Brazil and the largest listed company, in the Education sector, in terms of market value" (CADE 2013: 1881). At the time, Anhanguera had 54 campuses, 450 distance-learning centers, and over 650 professional training locations.

Camila told me that her initial interest in the case arose from the fact that it was clearly indicative of the increasing degree of acquisition by private equity firms of shares in companies providing private higher education services in Brazil. This development was already a cause of considerable concern to the CADE commissioners. As was stated in the opinion of the rapporteur Commissioner for the case (the jurist Alessandro Octaviani), the formation of large-scale private education groups in Brazil is a process "for which there is no precedent in world history" (CADE 2013: 1859). Of the five main Brazilian educational groups, four are run by companies from the financial sector (2013: 1861).[12] In the case in hand, the advisor (Camila) discovered on the internet, both in media reports and on the website of the applicant, that two companies in the private higher education market—namely, Anhanguera (the proposed incorporating company) and Anhembi-Morumbi (a supposed competitor) had some form of mutual relationship via legal entities and natural persons.

The assistant discovered a newspaper report bearing the headline "Two competitors and a professor in common" (*Duas concorrentes e um professor em comum*), published in the *O Estado de São Paulo* newspaper on June 11, 2012. According to the report "Professor Gabriel" (Gabriel Rodrigues, the man on Camila's computer screen) had sold the administrative control (51 percent shareholding) of Anhembi-Morumbi (of which he was the founder) to Laureate Education Inc, a multinational company operating in the field of education. Despite having sold control of the company, which had been transferred to the majority shareholders, he continued to "advise on administrative issues" (CADE 2013: 1883). The company entrusted with putting into effect this corporate restructure of the Anhembi-Morumbi University was a well-known financial consultancy

12. As is set out in the Opinion of the commissioner, the Grupo Estácio is controlled by the GP Investments fund, Grupo Anhanguera is controlled by the Pátria bank and fund, Kroton is controlled by the Advent Internationale fund, and Anhembi-Morumbi/Laureate Education is controlled by the North-American fund KKR (Kohlberg Kravis Roberts). Only the Unip university did not, at that time, have an investment fund as its owner or controller (CADE 2013: 1860–61).

and fund manager, Pátria Investimentos, run by close acquaintances of Professor Gabriel's daughter, Ângela Rodrigues, who, in turn, worked at the Anhembi-Morumbi financial department.

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

As the advisor explained, the "Gabriel issue" gave rise to practical difficulties in the analysis of the private higher education market in the São Paulo metropolitan region and indeed in the country as a whole, since the extent of the market share of the applicant was unclear. In her view, although the case involved the takeover of a third-party company, Anchieta, it was necessary to establish Anhanguera's share of the market and to ascertain what type of relationship it had with its supposedly major competitor, Anhembi-Morumbi. If the common influence of Professor Gabriel Rodrigues imposed coordinated conduct on the companies, which rendered competition impossible, the market share of both companies, Anhanguera and Anhembi-Morumbi, would need to be considered together, because the two companies "would be operating as one agent in the market." As such, according to Camila, the CADE decision as to whether or not to authorize the merger required investigation of the relations that Professor Gabriel Rodrigues and his family maintained with these other companies.

In addition to researching newspapers, journals, magazines, and websites, the advisor sought relevant information from the records of the company registries (*juntas comerciais*) of the Federal District, the States of São Paulo, Rio de Janeiro, and Minas Gerais, which are available online. The information obtained cast doubt on the declaration made by the applicant Anhanguera in its petition (Request for Merger) to the effect that no member of the Executive

Board or of the Board of Directors of the educational group acted as director or executive at other companies operating in the same sector. According to information set out in the Minutes of Board of Directors of Anhanguera on September 15, 2010, submitted to CADE by the Applicant, Ms. Ângela Regina Rodrigues de Paula Freitas, the daughter of Professor Gabriel Rodrigues, had a seat on the Anhanguera Board. Camila then discovered an entry on the records of the São Paulo Companies' Registry (*Junta Comercial do Estado de São Paulo*) that indicated that Ângela Rodrigues was also a director of ISCP, the Anhembi-Morumbi/Laureate University (CADE 2013: 1888). Ms. Rodrigues also had other commercial relationships that linked the two (supposed) competitors. For example, in accordance with the Minutes of the Anhanguera General Meeting of October 29, 2010, Ms. Rodrigues had a personal office at the same location as one of the campuses of the Anhembi-Morumbi/Laureate University (2013: 1889).

In order to illustrate and explain some of the multiple relations involved in the issue, Camila used the website MarketVisual, which gathers publicly available information on listed companies in Brazil and abroad. The website collects data on the corporate, financial, and administrative structure of the companies and publishes it in the form of tables or images of organograms or networks. These tables or images identify different types of relations between individuals and legal entities, as can be seen from the chart Camila used (see fig. 1).[13]

In her investigation, the advisor carried out a search of the name of Ms. Ângela Rodrigues as well as other board members of Anhanguera Group. Using the colored lines that can be selected on the website, Camila sought to highlight the relations of corporate control such as seats on boards of directors or on executive boards, as well as share ownership or financial control, family ties, or even educational background (that is, the institution at which the individual in question completed their higher education). The variety, multiplicity, and density of these relations that the lines on the chart demonstrated and made explicit constituted what the CADE advisors called an irrefutable "relevant influence" between the individuals and legal entities highlighted by the rectangles.

13. This image is available in the public records of the proceedings contained on the CADE website (www.cade.gov.br) in black and white. The original image, however, used colors that were (and are) an important part of the investigation undertaken by the advisor. The different colors represent different forms of relations as indicated in the box on the upper right corner of the image.

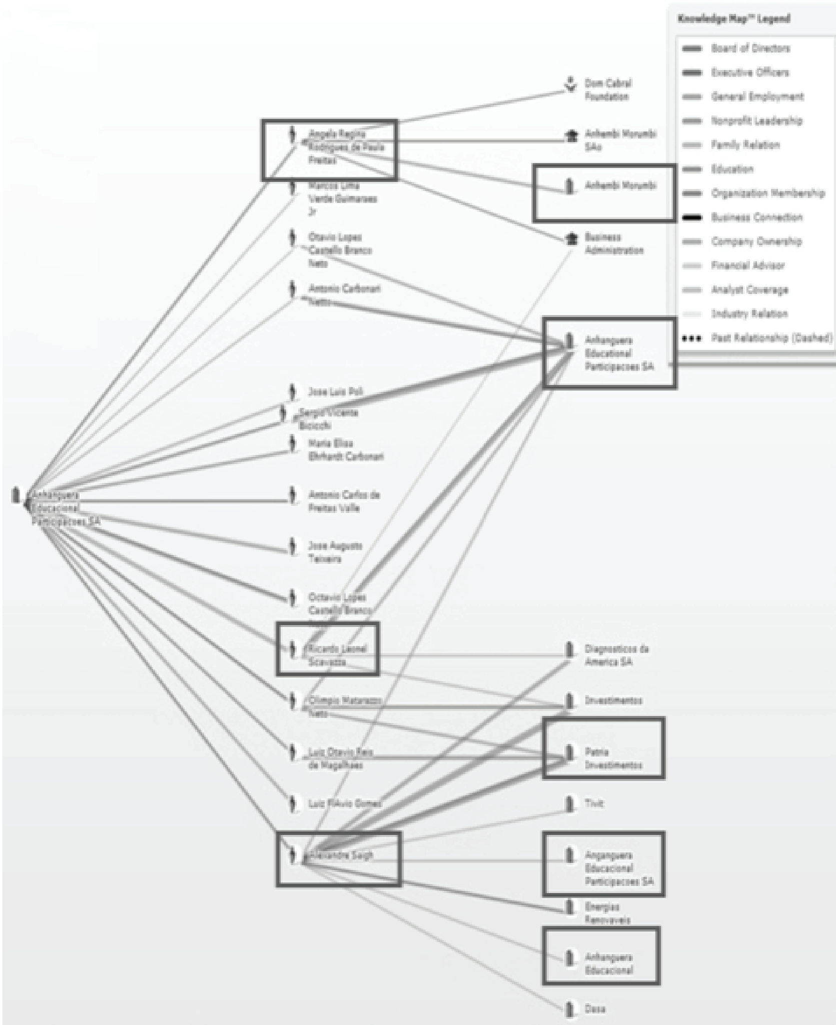

Figure 1: Chart setting out the "links between Anhanguera Educacional Participações S.A., Pátria Investimentos, Ms. Ângela Rodrigues and Anhembi Morumbi" (CADE 2013: 1898).

In his formal Opinion on the proposed merger, the rapporteur CADE commissioner, who drew on the findings of the advisor, held that it was possible to identify a "mesh of company relations (or holdings)"—in other words, a network of ownership links—and a "mesh of directors"—that is, a network of administrative control extending between Anhanguera and Anhembi-Morumbi and

involving investment funds and individual members of the Rodrigues family. According to the rapporteur commissioner the evidence provided revealed the "true central organizer of the decisions, the *punctum saliens* of the business: the network commanded by Prof. Gabriel Rodrigues and his family, with the assistance of Pátria, which submitted two competitors, Anhanguera and Anhembi-Morumbi/Laureate, to its strategies" (CADE 2013: 1895). A diagram included in the Opinion of the commissioner-rapporteur enabled a clearer overview of this "mesh" (*novelo*), "central organizational nucleus" (*núcleo organizador central*), or "assemblage" (*arranjo*), as he variously termed it, based on the shareholdings of both of the supposed competitors:

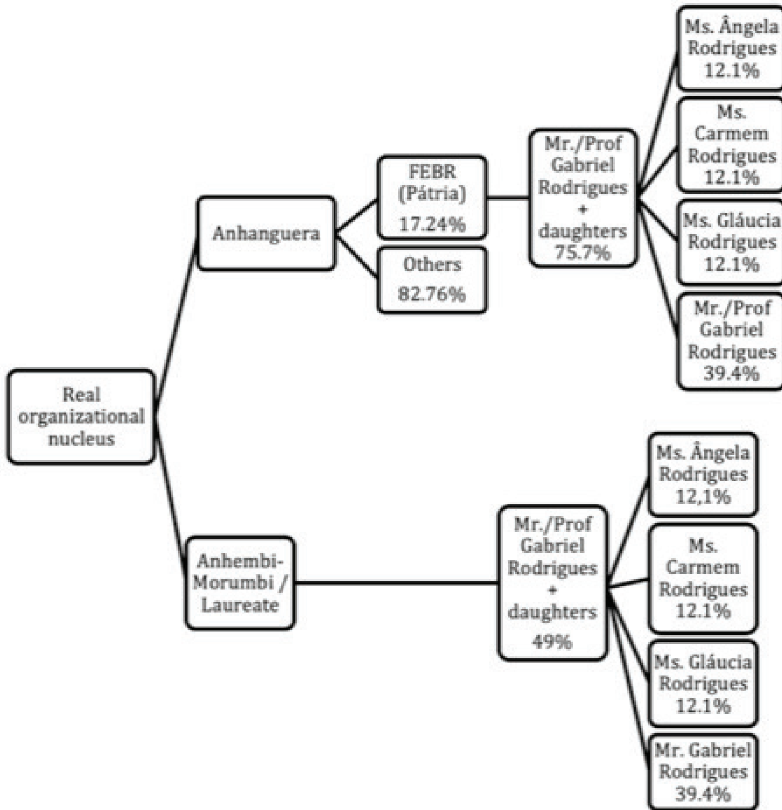

Figure 2: Chart labeled "Mesh of Shareholdings" (CADE 2013: 1900)

This "real organizational nucleus" (*núcleo organizacional real*) brought together the two companies: the investment funds that controlled them and the individual members of the Rodrigues family (who part owned and partially controlled/administered the funds). In the opinion of the rapporteur-commissioner, this nucleus could, in line with a previous CADE ruling, be classified as an "economic group." According to him, for the purposes of Economic Law, an "economic group" is deemed to exist when there is "central direction of competition, defined by the leadership of the group, whatever the form of its constitution, which the other members are expected to comply with" (CADE 2013: 1908). The relations between the legal entities and the individuals involved, in the case before him, meant that it was reasonable to infer that the two companies had mutual knowledge of their actions and strategies and did not act in any manner that was inconsistent or prejudicial to each other.

If all the entities present in this "assemblage" could be considered "to be, in effect, one competitor" for the purposes of enforcing Competition Law, then according to the commissioner it would be necessary to calculate "all the holdings and related resources of the Anhanguera/Anhembi-Morumbi-Laureate/Pátria groups" (CADE 2013: 1913), not only for the purposes of the proceedings at hand, but also whenever it was necessary to calculate the market share of participants in analyses involving any of these three companies. The investigation conducted in this case was able to demonstrate that the applicant Anhanguera had, given its ties with Anhembi-Morumbi (its purported competitor), a greater share of the market than it had formally declared.

A RELATIONAL REALITY

In handing down his decision on the merger of the companies, the antitrust agency's commissioner highlighted a key issue in the investigation undertaken by his staff. The question he posed in his written Opinion was this: "Do the legal (juridical) forms correspond to the economic fact" (CADE 2013: 1878)? He considered that the new context of dispersed share ownership and expanded administrative control of the companies required antitrust analysts to always inquire into the possibility of "convergence" between the legal personality of the corporations and their economic actions. As justification for CADE's extensive investigation into the corporate and administrative

structure of the companies operating in the market (only briefly described above), the commissioner stated that he and his advisors had sought a "realistic interpretation of the facts," paying heed to "content, rather than just form, concrete effects rather than declarations and rhetorical statements of intent; to *de facto* articulation rather than the legal (juridical) forms that are merely the external appearance of the businesses; to the true centers of command rather than the corporate architecture that masks it" (CADE 2013: 1902). He stressed the fact that had his officers "merely analyzed Anhanguera in the precise terms set out in the case records by the applicants, [the analysis] **would simply not be in accord with reality**" (CADE 2013: 1882; emphasis in the original Opinion).

In the case in hand, the legal forms clearly did not correspond to the economic facts, in that one of the companies that had applied for authority to merge could not be considered an independent competitor of one of the other companies operating in the market. According to the commissioner, this had significant wider practical implications, in that the legal/corporate forms might have the effect of covering up the identity of the actual agent that the antitrust authority needed to identify. In fact, as Annelise Riles (2011) explains, legal personality produces an effect of opacity that companies may deliberately promote. These companies take advantage of their status as corporations to avoid the liability of the individuals that are "behind the company," in the event of said individuals engaging in unlawful conduct. The techniques and relations by means of which these market competitors are established and maintained, including the relationships of ownership and control, are concealed by the aesthetic effects of the legal form (Riles 2005).

Moreover, the fact that the applicant corporation Anhanguera insisted that it should be considered a single competitor in the relevant market was a very clear attempt at seeking to rely on its corporate personhood in order to be recognized as an independent unit for the purpose of antitrust analysis. Such treatment would be clearly beneficial to Anhanguera, in terms of reducing its estimated market share. The rapporteur-commissioner, alert to the consequences of relying on official form (legal or administrative) as an analytical criterion, stated the following:

> As Mark Granovetter suggests, those that believe that the structure of a company resides in its official organogram or in the formal corporate structures are "like babies lost in the woods of sociology," because the "formal" organization of

> a business organization (or indeed its informal organization, in many cases) are not sufficient for the purposes of antitrust analysis. (CADE 2013: 1917)[14]

The commissioner was not, in his criticism, questioning or advancing some theory of the legal personhood of corporations. He was merely stating that if the aim was to ascertain economic reality, the legal forms in which companies organize themselves should not be considered an accurate representation of competitors. In his view, merely assessing competition in terms of the legal form of the purported competitors would risk underestimating the degree of concentration in a market and could lead to the approval of mergers that prejudiced consumers and other companies. In the case in hand, according to the commissioner, some characteristics of this reality, such as the shareholdings of the individuals involved (even if they were minority holdings), the coinciding business strategies adopted by several participants in the market, and the interlocking directorates, made it possible to identify economic agents that extrapolated or were distinct from the legal forms presented by the applicants for merger and other key players on the market.

In other terms, according to regulators, in cases such as this, economic agency can only be discerned from a particular internal perspective (Riles 2011), one that foregrounds relational qualities. As anthropologists have previously affirmed, the nature of corporations is essentially ambiguous, being both personal and impersonal at the same time—a company is simultaneously an abstract socio-legal entity and a collective (grouping) of the individuals that work for it or own it (Hart 2005; Riles 2011; Welker 2016). However, these particular perspectives on corporate personhood need to be qualified depending on the context in which they are being employed. In antitrust cases, the epistemic challenges faced extend beyond uncovering the internal ownership and administrative relations of companies. In considering a corporation solely in terms of its legal/corporate structure, as well as an independent economic agent, antitrust analysts run the risk of overlooking relations between corporate entities that are key to defining the competitive character of a market. Disregarding or looking beyond corporate personhoods in merger reviews, entirely or in part, can enable regulators to identify and highlight types and qualities of relations

14. The rapporteur cited in a footnote the well-known article by the North American sociologist Mark Granovetter (1985), referred to in the bibliography to this chapter.

between companies. This type of investigation requires the regulators to ponder and specify in greater detail their own definition of a competitive relation.

In the case examined in this chapter, the antitrust investigation, drawing inspiration from sociological studies of organizations and social-network analysis, demonstrated that one of the economic agents in the market (the Applicant), had a greater market share than it had formally declared, given that its supposed competitor, Anhembi-Morumbi, was part of the same organizational "assemblage." Despite that, following further examination of the facts, CADE approved the merger. The CADE commissioners took the view that competition in the affected markets in the greater São Paulo region would not be significantly reduced by the merger, even with Anhanguera and its supposed competitor, Anhembi-Morumbi, being considered part of the same group. However, the findings of the investigation highlighted the importance of detailed analysis of concentrations involving investment funds and led to CADE setting out clear new guidelines in its case law on the examination of merger reviews involving the higher education market in Brazil.

COMPETITION AS A FORM OF DETACHMENT

In *La Nation*, written in 1920, Marcel Mauss dedicated several pages to a phenomenon that, almost a century later, has emerged as a source of concern for Brazilian antitrust regulators. Mauss was somewhat more optimistic in his outlook than later regulators tend to be. In the chapter entitled "Economic facts," directed almost entirely to an analysis of the formation and effects of North American cartels and trusts, he set out the benefits of the new "capitalist collectives"—that is, corporations—characterized by a collective form of ownership, since they foreshadowed the future socialization of capital (Mauss [1920] 2013). For Mauss and for others, including Karl Marx (writing fifty years earlier), these new corporate forms might be considered an indication of a transition to a new economic mode of production (Barkan 2013). Others, such as the jurists Adolf Berle and Gardiner Means, were more skeptical about the benefits of these new corporate structures (Mizruchi and Hirschman 2010), and their concerns about the possible perverse effects of the separation between corporate ownership and control proved to be largely justified. They foresaw that the growth of these corporations would lead to excessive economic concentration in the market. Their predictions turned out to be accurate and this increased concentration gave

rise to legislation such as the Celler-Kefauver Act in the United States (1950), which prohibited companies from buying shares in another if the acquisition was likely to lead to a reduction in competition between them (Sklar 1988).

The problems relating to the separation between owners and controllers of companies were examined in important North American researches into power structures in the 1960s and 1970s (see Domhoff 2005). This topic has also been the focus of considerable interest in the field of organizational sociology, with researchers seeking to identify the factors—such as personal relations (Burt 1983; Mintz and Schwartz 1985), position in the "organizational field" (DiMaggio 1985; Fligstein and Brantley 1992), "conceptions of control" (Fligstein 1990), among others—that influence the formulation of corporate decisions and goals. In sum, sociological research has sought to explain how companies or other organizations conduct themselves in an environment in which they are embedded in a set of relations with varying degrees of formality with other entities or with the state (Granovetter 1985).

The literature I refer to above focusses on the essentially relational nature of modern capitalism, which can be examined by considering the ties of ownership and administrative control of corporations. Recent antitrust practice in Brazil has also been influenced by sociological studies, and has sought to devise representations and definitions of economic agency by drawing on relational visualization techniques. Regulators have increasingly examined corporate entities in the light of the relations, positions, and professional trajectories of relevant individuals. In terms of the practical difficulties faced by Brazilian antitrust regulators to which I refer in this chapter, there is a complementary movement or perspective that is characteristic of antitrust policy and that merits attention. Their focus on the competitive relations in a market highlights the practices that separate, cut, or detach market entities. These entities are then defined in terms of the extent to which they are independent of each other. Inspired by recent attention in anthropology to detachment as a mode of relationality (Candea et al. 2015), I contend that the justifications put forward by companies seeking leave to merge and the considerations relied upon by antitrust analysts in defining the contours of economic agents (that is, where they "begin" and "end") clearly reflect this movement. That, in turn, calls for reflection on certain practical notions of competition in the light of detachment.

Competitive relations can provide an insight into the ways in which "detachment and engagement are interwoven; the ways in which they limit, complement and enable each other" (Candea et al. 2015: 2). Georg Simmel's (1955)

definition of competition as a social form of interaction with a triadic structure in which two or more competitors struggle for the same scarce goods or audience (third party), *without directly* interacting with each other (see Werron 2015), already indicated that there are several possible forms in which it can be envisaged. An indirect interaction might be the result of a great variety of combinations of attachments and detachments.[15]

In the dynamics of corporate merger analyses presented above, we can see two possible practical meanings of competition, or the types of relationality that characterize it. As explained in the previous section, one of the main effects of the reification of corporations in antitrust practice—so that they are deemed to be, simultaneously, both legal entities and economic agents—is that any possible relationship between different corporate entities is denied or masked. In this context, corporate forms are means that are employed to enact detachment and segregate relations between economic agents, not simply hide internal relations within companies. Competition emerges here as a radical form of detachment that separates different persons/agents at the particular time companies file a petition to merge. Detachment in this sense is not an ethic (Cross 2011), but a corporate strategy that implies and provokes (Muniesa 2014) competitive relations to an external observer. The legal personalities and brand names employed by the companies are meant to convey to regulators (and also to consumers) that there is diversity in the market. For the legal and official representatives of companies seeking to merge, presenting the corporations and other entities in the market as being separate (or detached) from each other is a straightforward method employed to bypass potential antitrust investigations and merger prohibitions.

Regulators, however, are becoming wary of the formal means by which entities are defined in the market. For them, the indirect form of interaction that is competition can only be ascertained by defining certain degrees of detachment

15. The etymology of the term *competition* (and also *concurrence*) also indicates several possible modes of relationality. Up to the end of the fifteenth century the Latin verb *competo* had a relatively neutral meaning, denoting, in certain circumstances, simultaneity, reunion, parallelism, coincidence, or accord. Nowadays, in English, the verb *to concur* and the substantive concurrence embody this original meaning. From the sixteenth century onward, in Spain, the verb *concurro* began to be used in the sense of "running together" with overtones of "opposition" or "fighting." Competition was only associated with "rivalry" or "emulation" since the eighteenth century, with the work of Thomas Hobbes (Dennis 1977).

that are to be expected between market players. If the competing agents in a market are engaged in some form of relational assemblage, they can only be delimited in accordance with the intensities, temporalities, and the number and extent of the relations between them. The notion of "relevant influence" that is increasingly used by analysts, implies that even when there is a degree of influence and indirect relations between entities, only some of these relations and means of influence characterize a form of entanglement that signifies that the agents in question are in fact unified (and therefore not competitors for antitrust purposes). In general terms, a greater degree of intensity in relations arises from the physical presence of individuals in positions of ownership and administrative control. That may be the result or the manifestation of family/friendship ties and may be indicated by the geographical locations at which the individuals involved live and work. A perceived excess or an absence or scarcity of relations between legal entities and individuals enables regulators to gauge the closeness/distance between agents in a market. Long-term presence of close relations indicates a heightened probability of coordinated conduct. Competition is deemed to exist or to be possible when an entity begins to acquire a certain minimum degree of autonomy.

Antitrust as a governmental policy designed to regulate conduct and market relations, frequently differs between nations; however, the overriding objective in all jurisdictions is to ensure fair competition remains a principle and, whenever practicable, a structural condition of markets. An ethnography of antitrust practices of evaluation/investigation of mergers and acquisitions reveals some of the difficulties that are inherent to a relational analysis in economic regulation. The means of ascertaining competition in a given market and of analyzing the entities found to be in competition is a source of conflict between antitrust analysts and the representatives and advisers of companies seeking to merge. The advisers of the companies tend to rely on formal legal aspects whereas regulators are increasingly drawn to a relational approach. In this chapter, I have sought to portray how the reliance on corporate personhoods and certain related reifications in antitrust analysis can be misleading for regulators.

Antitrust knowledge practices illuminate underlying ontological conflicts that are present in the formulation and implementation of economic policies or regulatory contexts. That is exemplified here in the recurring potential and actual divergences between legal and economic enactments of the real. The arguments pertaining to the conditions and extent to which a legal entity can be considered the economic agent for the purposes of antitrust are also a point of

departure toward understanding of certain practical meanings that are given to competitive relations in regulatory knowledge practices. Competition is considered a form of detached agency in a variety of analytical procedures. This detachment may be in the form of a legal/formal separation of the entities, but it can also be envisaged in more subtle, relative distancing, ascertained from examination of the temporality and the intensity of relations between the agents.

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