SHAPING ANTIMONOPOLY LEGISLATION? THE LOBBYING OF BUSINESS ELITES IN BRAZIL

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ABSTRACT

Many people insinuate that large corporations lobby against effective antimonopoly legislation. But what, in fact, is the evidence to support those allegations? This article collects and examines data and documents — legislative records, academic literature, documents of business associations, and press archives — about the lobby of Brazilian business elites on antitrust legislation. It aims to contribute to the academic debate by being the first academic work to comprehensively look at corporate lobbying on Brazilian antitrust bills and legislation, from the first antitrust regulations in 1938 to the current Antitrust Act of 2011. The results of the analysis show that Brazilian business organisations and their leaders have consistently monitored and tried to influence the outcome of antitrust bills and legislation. The article finds a pattern of business elites lobbying for a less interventionist antitrust legislation or the entire repeal of the antitrust legislation. The current Antitrust Act 2011 was turned less interventionist than the Act of 1994, by amendments proposed by a heavily corporate-funded senator in his electoral campaign, who worked accordingly with the lobby of the National Industry Confederation (CNI).

Palabras Clave: Antitrust Law. Antimonopoly. Business Elites. Lobbying. Rent-seeking.

MOLDANDO A LEGISLAÇÃO ANTIMONOPÓLIO? O LOBBY DAS ELITES EMPRESARIAIS NO BRASIL

RESUMO

Muitas pessoas insinuam que grandes empresas fazem lobby contra legislações antimonopólio. Mas quais, de fato, são as evidências para amparar tais alegações? Este artigo coleta e examina dados e documentos — documentos legislativos, literatura acadêmica, documentos de associações empresariais e arquivos da imprensa — sobre o lobby das elites empresariais brasileiras sobre projetos de lei e legislação antitruste. O artigo tem como objetivo contribuir para o debate acadêmico ao ser o primeiro trabalho acadêmico a olhar de forma abrangente para o lobby das elites empresariais brasileira em projetos de lei e legislação antitruste, desde a primeira regulação antitruste em 1938 até a atual Lei nº 12.529/11. Os resultados da pesquisa mostram que as organizações empresariais brasileiras e seus líderes têm monitorado e tentado influenciar de maneira consistente o resultado dos projetos de lei e legislação antitruste. O artigo encontra um padrão de elites empresariais fazendo lobby por uma legislação antitruste menos intervencionista, ou mesmo a revogação total da legislação antitruste. A atual Lei nº 12.529/11 tornou-se

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menos intervencionista do que a Lei nº 8.884/94, por meio de emendas propostas por um senador fortemente financiado por empresas em sua campanha eleitoral, que trabalhou em consonância com o lobby da Confederação Nacional da Indústria (CNI).

Keywords: Direito Antitruste. Antimonopólio. Elites empresariais. Lobby. Rent-seeking.

INTRODUCTION

In 2017, Mr Cláudio Melo Filho, a director of Odebrecht (corporation leader of the Brazilian construction sector at the time), declared in a leniency agreement that Senator Romero Jucá intervened in the antitrust bill nº 3937/2004 — which resulted in the Antitrust Act 2011 — to favour the corporation.[2] Regardless of the controversial legality of that particular case, it is safe to affirm that it illustrates a frequent phenomenon: business elites have constantly monitored the making of antimonopoly — i.e. antitrust and competition[3] — legislation in Brazil and lobbied political institutions to avoid it, as will be seen throughout this article.

The history of antitrust is pervaded by myths; and it is no different in Brazilian antitrust (CABRAL, 2018). Myths spread when there is a lack of knowledge — and there are very few research studies on Brazil's antitrust history[4] (CABRAL, 2020). There is even less research when it comes to the history of Brazilian **law-making**. It is worrisome that the topic has received such small attention from academia because, in order to rigorously understand the evolution of antitrust law, it is essential to examine how the legislation — which legitimises and shapes antitrust enforcement[5] — was made.

This article will try to contribute to the literature in different aspects. By collecting and discussing evidence through a case study, I will try to shed some light on the assumption that firms who hold market power usually lobby to prevent the enactment of antitrust legislation aimed to regulate them — or, at least, try to shape antitrust legislation to avoid (what they view as) excessive regulation and sanctions. As far as I am aware, this will be the first paper in the literature to comprehensively look at corporate lobbying on Brazilian antitrust bills and legislation, from the first antitrust provisions (in the 1930s) to today. Moreover (and again as far as I am aware), there is still no academic research about the business elites' lobbying on the congressional bills that resulted in the current Antitrust Act 2011 (Law nº 12.529). Therefore, this article will also add to the existing literature in that sense. Finally, it can be argued that the contributions of this case study may transcend antitrust law: it may inform the discussion about how should be structured the regulation of political competition — especially when it comes to lobbying.

To achieve these goals, the article is divided into two main parts. The first part will look at business lobbying on the making of antitrust legislation in Brazil from 1938 to 1996. The second part will implement an investigation about the business lobbying

[2] The leniency agreement was struck with the Federal Public Prosecution Office in the criminal sphere. There is an ongoing lawsuit. The documents found in this research were not able to confirm that the senator favoured the corporation. MPF (Ministério Público Federal), Delação Premiada, Cláudio Melo Filho. Available at: <https://www.poder360.com.br/wp-content/uploads/2016/12/Delacao-ClaudioMelo-Odebrecht-dez2016.pdf> accessed: 16 February 2021.

[3] The three terms are used interchangeably throughout this article.

[4] Particularly when compared with the academic literature on jurisdictions such as the US and Germany.

[5] The Brazilian competition authority is CADE (an acronym for *Conselho Administrativo de Defesa Econômica*).

and political influence in the legislative process of the bill that resulted in the current Antitrust Act 2011. I will look at legislative records, academic literature, documents of business associations, campaign finance data and press archives.

2. THE ANTITRUST LEGISLATION FROM 1938 TO 1994

Although the data on lobbying practices is precarious due to lack of regulation, lobbying in Brazil has a long corporatist tradition — that is, centred on a business confederation and state federations, with other business associations also playing important roles. Thus, it is possible to look at congressional records, press archives and academic literature to see how business associations lobbied on antitrust bills.

This section is organized according to five landmarks of Brazilian antitrust legislation: (1) the Decree-Law nº 869 from 1938; (2) the Decree-Law nº 7666 from 1945; (3) the Antitrust Act 1962; (4) the Law nº 8158 from 1991; and (5) the Antitrust Act 1994.

2.1. The Decree-Law nº 869 from 1938

Though being criminal legislation, the Decree-Law nº 869 enacted in 1938 was the first Brazilian legislation to introduce antitrust provisions (CABRAL, 2020), such as provisions forbidding cartel, price predatory and bundling.[6] Business elites reacted against the enactment of the legislation. However, their main criticizes were against the provisions related to the regulation of the sale of goods on instalment credit terms. The incipient antitrust provisions provoked only a marginal discussion (CABRAL, 2020).

2.2. The Decree-Law nº 7666 from 1945

The Decree-Law nº 7666/45,[7] also known as "Lei Malaia", was the first Brazilian legislation enacted exclusively to cover antitrust issues. It created a Brazilian competition authority and introduced a mergers review.

The Decree was severely criticised by business elites. Even though Roberto Simonsen — at the time arguably the most influential business leader — gave contributions to the government about the theoretical background of the decree during its writing process (Cabral 2020), that was not enough to prevent the overwhelmingly negative reaction against the legislation.

The National Confederation of Industry (CNI), the Federation of Trade Associations of Brazil, and the Union of Agricultural Associations of Central Brazil sent a note to president Getúlio Vargas repudiating the legislation.[8] They lobbied against what they viewed as excessive government intervention: the Decree-Law would disrupt companies that create wealth; concentrations such as trusts and cartels only existed in "super capitalised" economies, which was not the Brazilian case; trusts, cartels and agreements were typical of depressing economies, and the Brazilian economy was a prospering one; the Decree-Law was too restrictive in its provisions concerning merger control, dissolution of companies, expropriation, and so on. They also argued that there

[6] Decreto-Lei nº 869, de 18 de novembro de 1938, DOU 21/11/1938.
[7] Decreto-Lei nº 7.666, de 22 de junho de 1945, DOU 22/06/1945.
[8] The full opinion is available at CARONE, 1976, pp. 369–377.

was already criminal legislation (Decreto-Lei nº 869/38), which established as a crime the "attacks against free competition"[9], and no one was ever condemned for practising that crime. In addition, those associations complained they were not heard about the bill; and affirmed that, although they were not against the idea of antitrust law, the Decree-Law differed from the United States' antitrust law (therefore, they proposed an alternative version of the antitrust bill).

In comprehensive research about the decree, Mário Cabral (2020) notes there were other lobbying efforts, such as another letter from the head of the Federation of Trade Associations of Brazil to president Vargas, in which he argued that the legislation was harmful to the Brazilian economy.

In addition, several media companies criticised the provision which established a pre-merger notification system for the sector (JAMBEIRO et al., 2003, p. 215).[10] Numerous newspapers reported the tremendous negative reaction from business associations and right-wing politicians (CABRAL, 2020). There was an intense rivalry between Agamemnon Magalhães, who was Vargas' minister of justice at the time and the leading brain behind the decree, and media tycoon Assis Chateaubriand. Consequently, Chateaubriand's newspapers reacted fiercely against the legislation by claiming that it was enacted to be used as a political weapon against the media tycoon (CABRAL, 2020).

Foreign companies, in turn, complained that the legislation was protectionist. Reportedly, the United States Ambassador in Brazil sent a telegram to president Vargas (CORSI, 1996, pp. 32–33).

Arguably, business elites' disapproval was one of the factors that influenced president Vargas' removal from office in October of that same year (CORSI, 1996, p. 35).[11] With Vargas out of office, the legislation was revoked a month later. Brazil's first competition legislation, thus, was in force only for three months.[12] The revoke of the decree was celebrated by business elites, as reported by newspapers (CABRAL, 2020).

2.3. The Antitrust Act 1962 (Law nº 4137/62)

In 1948, a new antitrust bill was proposed (nº 122/48). Again, business elites lobbied against it.

According to congressional records, the Federation of Industries of the State of Pernambuco (FIEPE), the Trade Association of Pernambuco (FACEP) and the Federation of Wholesale of the Eastern Northeast promptly sent a brief to the National Confederation of Industry (CNI), which was later filed in Congress, arguing that the bill intended to transform the industries "into slaves of the government".[13] They particularly criticised the provisions that would give CADE power to grant or deny a licence for export or import of products; and to determine what should be the cap of prices and fix the normal percentages of profit. Similarly, the Trade Association of Santos

[9] All speeches quoted in this article that were made originally in Portuguese have been translated to English by me.
[10] See also SILVA, 2009, pp. 111–112.
[11] See also TODOROV; FILHO, 2012, p. 215. José Linhares, the president of the Supreme Court, acted as temporary president of the Republic for three months; and one of his acts was the revoke of the Vargas' antitrust Decree-Law.
[12] Although the legislation was published in June, it came into force in August.
[13] Pages 58–66 of the bill's dossier. Câmara dos Deputados, Projeto de Lei nº 122/1948.

(ACS) filed a brief in the Chamber of Deputies arguing that the bill aimed to implement economic dirigisme.[14] The Federation of Industries of São Paulo (FIESP), a highly influential industrial organization in Brazil, also reportedly lobbied against it.[15]

The bill nº 122/48 was then discussed for over a year at committees of the Chamber of Deputies but it was eventually forgotten (CARVALHO; RAGAZZO, 2013, p. 40). In 1955, a new competition bill (nº 3/55) was proposed with a similar content, but it also ended up overlooked by congressmen (CARVALHO; RAGAZZO, 2013, p. 40).

In 1961, president Janio Quadros proposed another draft of an antitrust bill to Congress, which was again promptly criticised by business elites' associations. The Trade Association of São Paulo (ACSP) published an opinion arguing that:[16] the Brazilian economy was small, therefore, it would be impossible to have a large number of players competing in such small markets; the bill would undermine corporations' capacity to earn profits, thus blocking future investments; the existent Brazilian criminal legislation was sufficient to inhibit anticompetitive acts; the concept of abuse of economic power was too broad and interventionist; they feared political harassment by the government; the provisions that established seizure of corporate's books would be an excessive state intervention; all antitrust bills that have been discussed by the parliament (i.e., bill nº 122/48, bill nº 3/55, and the president Quadros's bill) were inadequate.

Likewise, the National Confederation of Commerce (CNC) argued that president Quadros' competition bill was too interventionist:[17] the competition bill constrained basic liberties protected by the Constitution; unduly punished pro-competitive practices; there would be excessive state intervention in the seizure of books and files; they feared political persecution, arbitrariness and potential excessive enforcement of the legislation by the Brazilian antitrust agency (then named as CADEC) and, thus, argued that it would be more reasonable to grant the judiciary with the powers to interpret and enforce the legislation.

Moreover, press accounts reported that the High Council of the Producing Classes (CONCLAP) argued that Quadros' bill would be a danger to free enterprise, and an obstacle to national development.[18]

Perhaps influenced by business' vigorous repudiation of president Quadros' bill, congressmen then re-started the discussion of the bill nº 3/55, which was reportedly considered a less interventionist one.[19] The FIESP agreed and published an opinion praising this as an "evolution".[20] But the federation criticised the fact that the bill nº 3/55 had increased the list of anticompetitive acts. Consequently, the FIESP suggested the removal of many provisions related to the definition of anticompetitive practices, and argued that the conceptualisation of economic power abuse was broad and unclear.

[14] Pages 9–10 of the bill's dossier. Câmara dos Deputados, Projeto de Lei nº 122/1948.
[15] FIESP's brief is not attached in the bill's records at the Congress, but the Trade Association of Santos mentioned that FIESP filed a brief against the bill as well.
[16] The full opinion is available at *O Estado de São Paulo*, 3 May 1961, p. 21.
[17] Ibid.
[18] Ibid.
[19] MAGALHÃES, 1986, *apud* NAVARRETE, 2013, p. 23.
[20] The full opinion is available at *O Estado de São Paulo*, 9 May 1961, p. 27.

The Federation of Brazilian Commerce Associations (FAC) also lobbied against the bill nº 3/55.[21] The federation argued that: several economic sectors in Brazil had one or a few players because there was a shortage of capital in Brazil. Thus, they argued, the elimination of monopolies and oligopolies in those sectors should have been made through industrial policy to inject more capital into the markets, and not through antitrust enforcement. Moreover, the FAC argued that the legislation should consider that many industries were monopolised or oligopolistic because they were still developing; therefore, the provisions of the legislation should be flexible to consider specific structural, cyclical and regional variations. In addition, they argued, there should be a distinction between minor abuses that harm just a few individuals and entities, and major abuses that harm the community. The FAC also argued that the creation of an administrative competition authority would violate the Constitution; and the abuse of political power by the government would be worse than the abuse of economic power by corporations. Therefore, they argued, the judiciary should be responsible for the enforcement of the legislation, and the economic aspects of the case should be dealt with by a technically qualified body, with representatives of the producing classes. The federation also argued that the legislation should not ban "exaggerated profits". Finally, they complained that business associations should be heard in the making of antitrust legislation, and argued that they were, in theory, in favour of antitrust legislation, but not the one proposed through the bill.

According to Loureiro (2010), the FIESP, the FAC, the ACSP, the CNC, and the CONCLAP handed out their written opinions to the president of the Republic, the president of the Chamber of Deputies, the vice-president of the Senate, party leaders, and congressmen in general. In addition, Loureiro mentions that the FIESP and the Federation of Trade Associations (FAC) sent lobbyists to the Congress' committees of justice, economy and finance (where the bill was intensively discussed), and also directly approached congressmen of these committees. There are also reports that the Federation of the Industries of the State of Guanabara attended the meeting at the economy committee (FRANCESCHINI; FRANCESCHINI, 1985, p. 11).[22]

After years of parliament discussions, the bill nº 3/55 finally passed in 1962 and became Brazil's first Antitrust Act (Law nº 4137/62).[23] Loureiro (2012, p. 146) notes that the businessmen's lobbying was partially successful because some of their criticisms seem to have been incorporated in the final text. The FIESP even praised the enactment of the Antitrust Act 1962 by affirming that it would "be a useful instrument in the hands of the government" in combating inflation (LOUREIRO, 2012, p. 149).

The Antitrust Act 1962 prematurely became "dead law", however. Two years after its enactment, business elites backed a military coup that resulted in an authoritarian regime (1964–1985).[24] With the support of business elites — who reportedly still viewed competition law with distrust (PRADO, 2014, p. 266)[25] — the military administration

[21] The full opinion is available at *O Estado de São Paulo*, 26 April 1961, p. 22.
[22] For more details and other lobbying efforts, see also LOUREIRO, 2012, pp. 129–151.
[23] Lei nº 4137, de 10 de setembro de 1962, DOU 27/11/1962 e retificado em 30/11/1962.
[24] See, e.g., SCHNEIDER, 2004, p. 107; PAYNE, 1994, pp. 16–38; DINIZ, 2010, p. 104.
[25] In addition, Cabral (2020) argues that large foreign corporations and the US State Department were reticent about the Brazilian Antitrust Act 1962. They feared that the legislation could be used as a tool to intervene and expropriate private firms because a few years later, Leonel Brizola, then governor of the state of Rio Grande do Sul, expropriated the Brazilian branches of two foreign international corporations in the telecommunications and energy sectors.

implemented developmentalist economic policies that established price control on many industries. The military government created the Interministerial Price Council (the CIP) that organised cartels in many industries; fixing minimum and maximum prices.[26] Miola (2014, pp. 227–228) observes that business elites supported "the model of price control and sectorial arrangement of prices, such as the CIP". The competition authority (now already named CADE), on the other hand, significantly lacked in human and financial resources during the period (NAVARRETE, 2013, pp. 28–66). CADE frequently lacked minimum quorum due to delays in the military presidents appointing new commissioners to vacant places (CARVALHO; RAGAZZO, 2013, pp. 48–52). Thus, it seems reasonable to affirm that, during the military regime, Brazil had a de jure competition law, but was far from a de facto one.[27]

2.4. The Law nº 8158 from 1991

Industrial associations continued to work against the idea of an effective antitrust law even during the National Constituent Assembly that promulgated the Constitution of 1988 (which legally grounded the fresh Brazilian democracy). In the Assembly's discussions about a constitutional provision which establishes that "the law shall repress the abuse of economic power", industrial associations lobbied against a ban on oligopolies and monopolies, and against the establishment of their restrain as a constitutional principle (MIOLA, 2014, p. 188).

With re-democratisation, Brazil began a process of economic liberalisation[28] and, in 1991, government agencies' price-fixing was completely extinct (NAVARRETE, 2013, p. 7).[29] A new legislation (nº 8.158/91)[30] was enacted introducing merger reviews, in order to complement the Antitrust Act 1962, which only regulated cartels and unilateral conducts. The Law nº 8158/91 derived from several provisional measures that had been enacted by president Fernando Collor in 1990 (TODOROV; FILHO, 2012, p. 231).[31]

The FIESP reportedly supported the enactment of the legislation.[32] We can speculate that industrial elites' support to the legislation may be related to the process of liberalisation of the economy. Perhaps Brazilian companies that wanted to receive foreign investments might have thought that institutions, such as a merger review, would attract more foreign investments.

But, after the legislation was published, businessmen reportedly reacted against the enlargement of the administrative-criminal provisions and the grant of power to a secretariat in the Ministry of Finance and to another secretariat in the Ministry of Justice to analyse mergers and anticompetitive conducts (MIOLA, 2014, p. 214).

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[26] The military regime also used the National Superintendency (SUNAB) to establish price-controlled cartels in some industries (NAVARRETE, 2013, p. 106). See also TODOROV; FILHO, 2012, p. 222.
[27] Similarly, see CABRAL, 2020.
[28] President Collor privatised state-owned companies and adopted a trade liberalisation agenda (TODOROV; FILHO, 2012, p. 232).
[29] See also CARVALHO; RAGAZZO, 2013, p. 54.
[30] Lei nº 8158, de 8 de janeiro de 1991, DOU 9/1/1991.
[31] See also NAVARRETE, 2013, p. 108. In 1987, José Sarney, Brazil's first civilian president after re-democratisation, reportedly threatened to draft a new antitrust legislation arguing that "Brazilian business do not know how to live in a free price system". However, the threat did not evolve. See *O Estado de São Paulo*, 12 May 1987.
[32] *Folha de São Paulo*, 4 August 1990.

In any event, the enactment of the new legislation had little effect: CADE still faced many difficulties in enforcing the antitrust legislation (NAVARRETE, 2013, p. 102), with significant impairment of human and financial resources (CARVALHO; RAGAZZO, 2013, p. 53).[33]

2.5. The Antitrust Act 1994 (Law nº 8884/94)

In 1993, president Itamar Franco and some members of the Congress started to build a consensus to unify the antitrust provisions among the disconnected legislation (Laws nº 4137/62 and nº 8158/91) into one Act and grant to CADE more resources to enforce it, in order to finally introduce a more effective competition law in Brazil.[34]

Business elites aggressively lobbied against the antitrust bill. The bill suffered systematic opposition from the CNI and the FIESP, according to Ruy Coutinho, president of CADE at the time (COUTINHO, 2009, p. 31).[35] Press accounts report that the FIESP lobbied senators and the president of the Republic to block provisions that would give CADE "too much power".[36] The newspaper O Globo reported that while some businessmen from the state of São Paulo did support the bill[37], the main leaders of the FIESP and the FCESP (Trade Federation of São Paulo) were radically against it.[38] The CNI's and the FIESP's leaders also gave statements against the bill to the press. The president of FIESP reportedly said that the antitrust bill was unnecessary because Brazil already had antitrust legislation: "the problem in Brazil is not legislation, but its enforcement".[39] Similarly, the president of CNI considered the bill unnecessary and "draconian" (that is, excessively harsh).[40] In addition, the congressional records show that the Trade Association of São Paulo (ACSP) filed a brief claiming that the bill should be entirely rejected.[41] Iagê Miola (2014, pp. 227–228), who interviewed lawyers and economists involved in the making of the Act, also collected relevant reports of businessmen's disapproval concerning some parts of the legislation, which were viewed by them as an excessive intervention in the economy by the state.

Although the head of the CNI harshly voiced against the approval of the bill until the very last moment,[42] the bill eventually passed – with the support of all parties (MIOLA, 2014, p. 230). But press accounts reported that the right-wing Liberal Front Party (PFL) shaped the bill by reducing the fine for cartels and abuse of dominant position practices. The deputies of the then centre-left Social Democrat Party (PSDB) and the left-wing Workers Party (PT) were in favour of a minimum fine of 10% (PSDB) and 15% (PT), and a maximum fine of 50% (both parties agreed) of the firm's pretax gross

[33] See also TODOROV; FILHO, 2012, p. 231.
[34] President Franco and many congressmen viewed the bill as a helpful tool to put an end to the hyperinflation problem, by assisting the implementation of the Real currency, which was created in 1994 to fix the issue (CARVALHO; RAGAZZO, 2013, p. 55).
[35] Prado (2014, p. 295) also reports the intense lobbying from the CNI and the FIESP.
[36] *Folha de São Paulo*, 9 June 1994. Ibid, 10 June 1994.
[37] Ibid, 10 June 1994.
[38] Ibid, 13 June 1994.
[39] Ibid, 9 June 1994.
[40] Ibid.
[41] Brief filed in the bill's congressional records on 27 July 1993. Câmara dos Deputados, Projeto de Lei nº 3712/1993, fls. 393–397. The ACSP argued against CADE's prerogative to determine the preventive cessation of the practice that restricts competition, CADE's prerogative to apply fines if the corporation does not stop the practice after a preventive order, and so on.
[42] *Folha de São Paulo*, 10 June 1994.

sales in the year before the filing of the administrative proceeding. The PFL, on the other hand, announced that would only vote in favour of the bill if the fines were reduced to 1% (minimum) and 30% (maximum) of the same base calculation. The provision was then changed to accommodate PFL's demand.[43] Moreover, Miola (2014, pp. 227–229) also notes that "pressures coming from the market – be it explicit or veiled – managed to affect in a decisive form the design and practice of" the reformed antitrust law; for instance, in the adoption of an unusual post-merger review system.

In any event, it can be argued that with the enactment of the Antitrust Act 1994[44] Brazil finally had its first effective antitrust legislation (TODOROV; FILHO, 2012, p. 233) — or, at least, more effective than earlier Brazilian legislations.

Nevertheless, after the enactment of the Act of 1994, the CNI continued to fight against some of its provisions. The confederation filed a Direct Unconstitutionality Action (ADI) in the Supreme Court, claiming that seven provisions of the Act violated the Constitution and, consequently, should be removed from the legislation.[45] Five of the seven claims were related to what the CNI viewed as excessive interventions by the state, such as alleged price control and undue state intervention on business economic freedom. One of the claims was that the cap of the fine — i.e., 30% of the firm's pretax gross sales — was confiscatory. The CNI argued that the maximum fine could be, in practice, more than the annual income in many industrial sectors. As a consequence, the fine would bankrupt many companies.[46] Another claim was that the term "notwithstanding malicious intent" in article 20 would violate the Constitution because it would establish strict liability to those who practised an anticompetitive act.[47]

Moreover, the CNI and the FIESP published op-eds in the press expressing dissatisfaction with the enacted Antitrust Act.[48] Reportedly, some industrial corporations who were members of the FIESP were disappointed that Fernando Henrique Cardoso — then senator, and later president of the Republic — voted in favour of the antitrust bill.[49] The president of CNI also reportedly voiced that the Antitrust Act 1994 was confiscatory at a conference attended by the minister of justice.[50]

It is noteworthy, however, that press accounts reported three exceptions to those predominant negative reactions from business associations. And these exceptions came from organisations of small and medium companies, and their leaders. After the Act was enacted, the Union of Small and Micro Industries (Simpi) launched an official note supporting it.[51] Moreover, Emerson Kapaz, who was then the coordinator of the National Thought of Entrepreneurial Base (PNBE), an association of small and medium businessmen (see GUIMARÃES), reportedly said that the legislation enacted was very

[43] Ibid, 8 June 1994. See also Congresso Nacional, Diário, 10 June 1994, pp. 2888–2900. For a detailed account of the making of the Antitrust Act 1994, see MIOLA, 2014, pp. 215–230.
[44] Lei nº 8884 de 11 de junho de 1994, DOU 13/6/1994.
[45] STF, ADI 1094-8/DF, Rel Min Carlos Velloso, DJ 20/04/2001. The Supreme Court denied all CNI's claims. The Court's decision was a preliminary one, since it concerned the CNI's request for provisional remedies. It is extremely unlikely that the Supreme Court will ever place a final decision on the case because Brazil now has a new Antitrust Act, enacted in 2011.
[46] CNI's complaint at the ADI 1094-8/DF, p. 8.
[47] Ibid pp. 3–5.
[48] The FIESP published an opinion expressing discontentment with articles 20 and 21 of the Act. *Folha de São Paulo*, 15 June 1994.
[49] *O Estado de São Paulo*, 11 June 1994.
[50] *O Estado de São Paulo*, 19 August 1994.
[51] Ibid, 11 June 1994.

positive.[52] Likewise, Eduardo Capobianco, who was a founding member of the PNBE and president of the Civil Construction Industry Union of the State of São Paulo (SindusCon-SP) at the time, reportedly expressed support for the new legislation, after its enactment.[53]

3. THE ANTITRUST ACT 2011 (LAW Nº 12529/11)

The Antitrust Act 2011,[54] the current Brazilian antitrust legislation, is in many ways less interventionist than the Act of 1994. But perhaps the most puzzling change was the one related to the weakening of the fines for corporations' anticompetitive practices. The Antitrust Act of 2011 reduced the maximum fine established in the Act of 1994: it was 30% and now it is 20%. It also reduced the minimum fine, from the previous 1% to the current 0.1%. And it narrowed the fine's base calculation: the Act of 1994 established that the percentage should be calculated based on the "total gross pretax revenue of the company"; while the current legislation narrowed it down to the "gross sales obtained in the field of the business activity in which the violation occurred". Consequently, corporations have, in fact, been receiving smaller fines after the enactment of the Antitrust Act 2011, as expressly recognized by CADE.[55]

This section will implement a case study to try to understand the softening of these and other provisions in the current antitrust legislation, through two lenses: (1) the lobby of the CNI on the antitrust bill nº 3937/2004, which ended up becoming the Antitrust Act 2011; (2) and the overwhelming corporate electoral donations in the period, which may have enhanced the effectiveness of business lobbying.

The antitrust bill nº 3937/2004 was passed in both congressional houses by an agreement of party leaders (a common practice in Brazil). Therefore, it is not possible to analyse how each congressman voted, for example. But it is possible to look at the amendments proposed, which shaped the text of the legislation. Amendments are a key part of the legislative process because, if they pass, they end up shaping the legislation's text. Not surprisingly, the CNI frequently lobbies congressmen by suggesting amendments of the industry's interest (SANTOS, 2011, p. 103). This will be our main focus in this section.

3.1. The CNI's lobbying

Since the very early stages of the antitrust bill nº 3937/2004, the CNI expressly considered it a priority due to its "high impact on the business environment". The antitrust bill was part of CNI's minimum agenda, that is, the bills that are treated with priority by the confederation.[56] Thus, the CNI intensely monitored the antitrust bill and

[52] *Gazeta Mercantil,* 19 August 1994, *apud* BELLO, 2005, p. 129.
[53] *O Estado de São Paulo*, 15 June 1994.
[54] Lei nº 12529 de 30 de novembro de 2011, DOU 01/11/2011 e retificado em 02/12/2011.
[55] Guia – Dosimetria de multas de cartel, p. 28. *CADE*. Available at: <https://www.gov.br/cade/pt-br/assuntos/noticias/cade-estende-prazo-para-contribuicoes-a-versao-preliminar-do-guia-de-dosimetria-de-multas-de-cartel> accessed: 9 June 2021.
[56] From the 117 bills monitored by the confederation in 2008, 20 of them were considered as being part of the minimum agenda and, therefore, treated as a priority. CNI lança Agenda Legislativa da Indústria com Pauta Mínima. *Sistema Federação das Indústrias do DF (Fibra),* 7 April 2010. Available at: <http://www.sistemafibra.org.br/fibra/sala-de-imprensa/noticias/258-documento-lista-117-projetos-em-tramitacao-no-congresso-

lobbied congressmen in order to try to modulate its provisions according to the industry's interests.

The CNI's key man in Congress was Senator Francisco Dornelles, who was intensely lobbied by the confederation, as the CNI publicly confessed.[57] Dornelles was from the conservative Popular Party (PP) and was the rapporteur of the bill in the committee of infrastructure's services of the Senate.

The confederation supported and defended an amendment proposed by Dornelles that raised the criterion of minimum revenue for notification of mergers and acquisitions to CADE: only companies that have earned R$ 1 billion or more would be required to submit the merger to CADE — until Dornelles' amendment, the threshold prescribed by the bill was R$ 400 million, the same of the Antitrust Act 1994. In addition, Dornelles increased a second threshold: the other company involved in the merger must have revenue of R$ 40 million or more (and not R$ 30 million as it was established in the bill — the Antitrust Act 1994 did not prescribe a second threshold).[58] The CNI lobbied in favour of this amendment — the confederation argued that there was an excess of merger control, since 90% of the merger cases analysed by CADE were cleared without conditions.[59]

Nonetheless, the amendment ended up rejected by deputy Pedro Eugênio, from the then centre-left Workers' Party, when the bill returned to the Chamber of Deputy. The party leaders at the Chamber agreed with Eugênio's opinion on this matter, so Dornelles amendment did not pass and, thus, did not became legislation.

But another amendment proposed by Dornelles, also supported and defended by the CNI, was successful. Dornelles proposed an amendment to reduce the maximum fine for anticompetitive acts imposed on corporations, from 30% to 20%.[60] This amendment also reduced the base calculation of the fines — from the "total gross pretax revenue of the company" to only the "gross sales obtained in the field of the business activity in which the violation occurred". The CNI admittedly lobbied for this reduction of the fine's cap and base calculation during the legislative process of the bill. The confederation argued that the cap (which was 30% in the Act of 1994) and the base calculation (which was the total revenue of the company) should be reduced to 20% of the gross sales obtained in the relevant market. Therefore, the contents of the CNI's lobbying and Dornelles' amendment were almost identical: the only difference was that while CNI lobbied for establishing the "relevant market" as the base calculation, Dornelles opted to establish the base calculation on the "field of the business activity" in which the infringement took place. Actually, Dornelles presented a version of the amendment on 8 June 2010 with the expression "relevant market", but in the subsequent version of the amendment (presented on 30 November 2010), changed to "field

nacional-de-interesse-do-setor-industrial.html> accessed: 9 June 2021. The antitrust bill was a priority for the CNI at least from 2006 until 2011, when the bill finally passed. Agenda legislativa da indústria. *CNI, Unidade de Assuntos Legislativos*. Available at: <http://www.portaldaindustria.com.br/cni/canais/agenda-legislativa-home/> accessed: 9 June 2021.

[57] Aprovada nova estrutura do Sistema Brasileiro de Defesa da Concorrência. *CNI em Ação,* 14 October 2011. Available at: <http://admin.cni.org.br/portal/data/pages/FF808081272B58C0012730BE20A57BDA.htm> accessed 22 November 2016.

[58] Parecer cj2010-05566, p. 6. *Comissão de Serviços de Infraestrutura do Senado Federal*. Available at: <http://legis.senado.leg.br/mateweb/arquivos/mate-pdf/84379.pdf> accessed: 9 June 2021.

[59] Agenda legislativa da indústria 2011. *CNI*.

[60] All Dornelles' amendments were formally presented as sub-amendments, which does not change our analysis.

of the business activity" — and this last version was the one read and approved by the committee of infrastructure's services of the Senate.[61] Perhaps the CNI agreed with the change but we do not have evidence to affirm that.

The CNI and Dornelles also converged in the justification given for the amendment. Again, they were extremely alike. The CNI argued that the amendment would be a matter of "fiscal justice" because of two reasons. Firstly, the confederation argued, because the fine's cap and base calculation established by the Antitrust Act 1994 could interrupt the companies' operations, since it would hugely impact their economic capacity — from the capacity to invest, fund and improve; to the attractiveness of the production and provision of services as a whole. Secondly, the CNI argued, "it makes no sense to impose a fine on all the company's total revenue, which includes activities that have no relation to the anticompetitive offence".[62] Very similarly, Senator Dornelles, while proposing the amendment in the Senate, gave as a justification the argument that "the payment of a fine of 30% of the annual gross revenue would certainly lead the company to halt its activities (wholly or substantially)".[63]

This amendment also reduced the minimum fine from 1% to 0.1%.[64] Dornelles argued that a reduction in the minimum fine serves the "principle of proportionality in economic matters, granting to CADE the discretion in adopting a fair value and reasonable fine".[65]

The same amendment also indirectly weakened the fines for the administrators of the companies. The administrators were benefited because the fine established for the administrator is a percentage of the fine established for the company. In other words, the fine applied for the company is the base calculation for the administrator's fine.[66] Therefore, as the fine for the company was generally reduced, so it was the fine for the administrator. In addition, Dornelles reduced the minimum and maximum percentages established in the fines for the administrators: the cap was reduced from 50% to 20%; and the percentage of the minimum fine was reduced from 10% to 1%.[67] Dornelles also made it tougher to condemn administrators because he changed the standard of evidence required to do so: CADE now needs to prove willful misconduct or gross negligence of the administrator (in the former legislation, CADE would only have to demonstrate strict liability).[68]

The amendment passed and became law. It turned the Antitrust Act 2011, the current Brazilian antitrust legislation, less interventionist than the previous Act of 1994. Corporations and their administrators have, in fact, benefited from Dornelles' amendments — they have been received smaller fines since then. CADE openly admitted that

[61] Dornelles presented four versions of his opinion, from 31/08/2010 to 30/11/2010.
[62] Agenda legislativa da indústria 2011. *CNI*.
[63] Parecer cj2010-05566, p. 5. *Comissão de Serviços de Infraestrutura do Senado Federal*.
[64] Ibid. Senator Aloizio Mercadante had already suggested this same percentage (0.1%), but of a larger base calculation, which was the total gross pretax revenue of the company.
[65] Ibid.
[66] Artigo 37, inciso III, Lei n° 12529/11. The same was established in the Antitrust Act 1994: see Artigo 23, inciso II, Lei n° 8884/94.
[67] Parecer cj2010-05566. *Comissão de Serviços de Infraestrutura do Senado Federal*.
[68] Ibid, p. 5.

has been applying lower fines to corporations and their administrators after the enactment of the Antitrust Act 2011.[69]

A newspaper reported that the approval of the Dornelles' amendment regarding the fines was a procedural mistake made in the Chamber of Deputies (that is, most deputies intended to reject, but a formal mistake was made, leading to its approval).[70] But, on the other hand, another newspaper reported that the party leaders in the Chamber of Deputy actually ended up agreeing with Dornelles.[71] In any event, the fact is that the Chamber of Deputy approved Dornelles' amendment on this matter, which ended up shaping the final text.

It should be noted that, by contrast, those who do not exercise business activity had their fine increased. The fine for non-businessmen individuals and non-business legal entities was increased from a minimum of R$ 18 thousand and a maximum of R$ 18 million, to a minimum of R$ 50 thousand and a maximum of R$ 2 billion. We can assume that corporations did not lobby this matter, since they would lack legitimacy (and perhaps interest) to do so.

3.2. The corporate donations

The softening of the current antitrust legislation coincides with a change in the law that regulates campaign finance and party funding. The Antitrust Act 1994 was passed by politicians elected without corporate funding because it was prohibited by law at the time.[72] In sharp contrast, the Act of 2011 was passed by politicians who did receive corporate donations — actually, these politicians were elected in an electoral environment in which corporate donations overwhelmingly dominated the funding of Brazilian political parties and candidates.[73]

Corporate donations may increase the effectiveness of business lobbying because of at least three reasons. Firstly, corporate donations may give business lobbyists more access to politicians. Secondly, some politicians may feel dependent and/or grateful of corporate donations and, thus, more inclined to succumb to business demands. Thirdly, corporations donate to politicians who are ideologically aligned with their interests — thus, these politicians may have more money to try to win votes in elections.

It is intriguing that, in our case study, key congressmen, who proposed amendments that shaped the legislation to turn it less interventionist, were heavily funded by

[69] See footnote 54. See also SANTOS, 2014, p. 160. CADE's case law on this matter has been based on the opinion of commissioner Ana Frazão's in the Processo Administrativo n° 08012.009834/2006-5, Rel Cons Ricardo Ruiz, fls 734–738. As pointed out by Mrs Frazão, although the legislation changed the base calculation from "revenue of the company" to the "revenue of the company, group or conglomerate", this change was merely rhetorical, since the Brazilian case law and academic scholarship have established that corporate groups must be considered as one company, even if it is composed of several distinct legal entities. Moreover, although the previous legislation considered the fine based on the gross sales after tax and the new one establishes the fine based on the pretax gross revenue (which partially increases the base calculation), this increase is marginal and has little impact on the fine vis-à-vis the changes on the percentages and the major aspect of the base calculation (i.e., the change from the "total revenue of the company" to just the "field of the business activity in which the infringement occurred").

[70] *O Estado de São Paulo*, 8 October 2011.

[71] *Folha de São Paulo*, 31 May 2013.

[72] Some may argue that congressmen who passed the Antitrust Act 1994 might have received off-book donations from companies. However, until evidence arises, we can never know it for sure and investigate what role corporate money has played in the legislative process.

[73] See, e.g., MANCUSO, 2015, p. 156.

corporations that had been a defendant in an antitrust case.[74] In the campaign that elected him to the Senate, Dornelles received 95.40%[75] of his campaign fund[76] from corporations that had been a defendant in an antitrust case.[77]

Similarly, Senator Agripino Maia, from the conservative Democrats Party (DEM former PFL), received 80.01% of his campaign fund from corporations that had been a defendant in an antitrust case.[78] His participation in the bill was surgical but effective. Agripino Maia proposed an amendment to exclude exclusive-dealing agreements from the list of examples of anticompetitive practices (article 36, paragraph 3, item XIX, of the bill). He argued that exclusive-dealing agreements bring the following benefits: they incentivise companies to invest, result in more employment, give companies better conditions to negotiate, and enhance consumer welfare.[79] Therefore, his amendment turned the bill less interventionist because he was concerned about excessive punishment. Agripino Maia's amendment ended up being accepted by the party leaders and, thus, shaped the Antitrust Act 2011.

By contrast, when the bill returned to the Chamber of Deputies, the rapporteur was deputy Pedro Eugênio, from the centre-left Workers' Party (PT). He was responsible for reviewing all amendments that came from the Senate. Eugênio received only

[74] I assume that not all companies would be concerned about an antitrust bill's potential excessive intervention and would lobby to avoid that. It seems reasonable to assume that the corporations that would be more inclined to concern about the potential excessive intervention of an antitrust bill would be the ones that have faced an antitrust case at CADE, as defendants. Of course, there might be exceptions — for example, a cartelist company that was never caught would also be concerned about the fine for cartel. But this is hard to control and consider. And it is unclear if this hypothetical company would actually lobby because this could raise questions about the company's motivation for the lobbying and risk the hidden ongoing cartel.

[75] From the total of R$ 1,415,080.45 traced donations received, R$ 1,350,000 came from corporations that had been a defendant in an antitrust case: Fratelli Vita Bebidas S.A. (Ambev), Construtora Barbosa Mello SA, Itau Unibanco S.A., Gerdau Acos Longos S.A., Edmundo Safdie (Helibras), Caemi Mineração e Metarlugia S/A, Aracruz Celulose SA, Unibanco-União de Bancos Brasileiros, and Golden Cross Assistencia Internacional de Saúde Ltda.

[76] To establish who were the congressmen's donors, I used the data on campaign finance published by the think tank Transparência Brasil, who collected and organised official data from the Superior Electoral Tribunal. Às Claras — Quem financia quem nas eleições. *Transparência Brasil*. Available at: <http://www.asclaras.org.br/@index.php> accessed: 9 June 2021. Subsequently, I searched CADE's data through their institutional online search engine, looking for proceedings in which the corporate donors were defendants — Pesquisa Processual. *CADE*. Available at: <http://www.cade.gov.br/assuntos/processos-1> accessed 22 July 2018. If the search resulted negative, I looked at the company's website or at websites that publish data on corporate ownership (such as the S&P Global Market Intelligence, which is published by Bloomberg) to check if the donor is part of a corporate group who faced an antitrust case. Brazil lacks an official online platform gathering corporate structures. The official data on the Brazilian corporate structures is dispersed among the state commercial registries and is difficult to access (CARAZZA, 2018, p. 49). I considered any antitrust case faced by the corporation, or by its group, before the amendment was proposed.

[77] I consider as a donation from the "economic group/corporation" not only the donations made strictly by the corporation itself as a legal entity, but also the donations made by the individuals who are shareholders that control de company, by the individuals who are part of the board of the company, or are top executives (starting from a director of the company to the top of the hierarchical structure). I considered only the corporations who donated in the campaign for the mandate in which the congressmen proposed the amendment. For instance, if the amendment was proposed in 2008 by a congressman elected in 2006, I looked for the donors who donated during that campaign. It was impractical to analyse the campaigns right after the politicians finished their mandate. Dornelles did not dispute another federal election — he ran for vice-governor of the state of Rio de Janeiro, therefore, he was involved in other dynamics of interests. And when Agripino Maia ran for Senate in 2018, corporate donations were already banned in the Brazilian political finance legal framework.

[78] From the R$ 745.740,22 traced donations received, R$ 596,634.79 came from corporations that had been a defendant in an antitrust case: Itau Unibanco S.A., Ticket Servicos S.A., Banco Credito Real de Minas Gerais (Bradesco), Cimento Poty S/A (Votorantim), Nitrocarbono S/A, Klabin S.A., Usina Estivas S/A (Louis Dreyfus), Cia de Tecidos Norte de Minas, and Camanor Produtos Marinhos Ltda (Aquatec).

[79] Diário do Senado Federal, 2 de dezembro de 2010, pp. 54817–54818.

28.42%[80] of his campaign fund from companies that had been a defendant in an antitrust case — i.e., much less than Dornelles and Agripino Maia. And, when analysing the amendments, he had a very different pattern vis-à-vis the pattern of Dornelles and Agripino Maia. Deputy Eugênio was predominantly concerned about insufficient punishment in cartel and abuse of dominance cases, as well as insufficient merger control.

This pattern converges with the results of an article by Santos et al. (2015), which found a statistically significant association between corporate contributions and congressmen's cooperation in matters of the interest of CNI. The pattern found in this case study also converge with another finding of Santos et al. (2015) that the "rightmost the congressman is placed on the ideological spectrum, the more likely he will cooperate with the interests of the CNI in the nominal voting".[81]

But while it might be tempting to conclude that business lobbying and/or corporate donations did, in fact, shape antitrust legislation, we should try not to overclaim. It is difficult to isolate campaign finance money and lobbying from other causal factors and safely affirm that they were what caused a given political outcome.

4. CONCLUSIONS OF THE ARTICLE

The research for this article found that business organisations and their leaders have consistently monitored and tried to influence the outcome of antitrust bills and legislation — from the first Decree-Law nº 869 in 1938, to the current Antitrust Act 2011.

The pattern of business elites has been of lobbying for a less interventionist antitrust legislation or even the entire repeal of the antitrust legislation, with very rare exceptions.[82] The CNI, the largest and leading industrial representative organisation in Brazil,[83] have always lobbied against alleged excessive antitrust intervention. Other researchers have found a similar pattern — e.g., Cabral (2020) while analysing the Decree-Law nº 7666/45 and Loureiro (2012, p. 138) while analysing the legislative process of the Antitrust Act 1962.

The current Antitrust Act 2011 is less interventionist than the Act of 1994, particularly when it comes to anticompetitive practices by corporations and their administrators. In contrast with the Act 1994, the Act of 2011 was passed by politicians who received corporate donations — they were elected in an electoral environment in which corporate donations overwhelmingly dominated the funding of Brazilian political parties and candidates. The Act 2011 was turned less interventionist by amendments proposed Senators Francisco Dornelles and Agripino Maia, who were heavily funded by corporations that had been a defendant in antitrust cases. Senator Dornelles,

[80] From the R$ 862,004.64 traced donations received, R$ 245.000 came from corporations that had been a defendant in an antitrust case: Construções e Comercio Camargo Correa S/A, Gerdau Comercial de Acos S.A., Asa Industria e Comercio Ltda, Construtora OAS S.A., Egesa Engenharia S/A, Usina Sao Jose S/A (Grupo Petribu), and Ticket Servicos S.A.

[81] The authors analysed the behaviour of 1,171 congressmen, totalling 9,903 votes in the plenary. They tried to overcome part of the causation problem, by isolating money from ideology, as well as "background", that is, if the politician was a businessman before joining politics.

[82] The support of FIESP to the Law nº 8158 from 1991; the support of very few large businessmen from São Paulo to the Antitrust Act 1994 (although the hegemonic group in their representative body, the FIESP, was radically against the bill); and three statements from organisations of small and medium companies, and their leaders, in support of the Antitrust Act 1994 (but voiced after the enactment of the Act).

[83] Created in 1938, the CNI embraces 27 state industrial federations and the federal district, and about 1,300 industrial employers' unions (SANTOS, 2011, p. 42).

in particular, was intensely lobbied by the CNI and his amendments highly converged with the confederation's lobbying. Due to Dornelles' amendments, corporations and their administrators have, in fact, been receiving smaller fines for anticompetitive practices since the enactment of the Antitrust Act 2011.

While it is hard to establish causation in matters of lobbying and corporate donations, the evidence gathered in this article shows that, during the making of antitrust legislation, business elites have been extremely dominant in those key channels of political influence, in which they have predominantly worked to avoid regulation. This pattern is distinct from the pattern of manifestations of labour unions and other workers' organizations. The statements from labour unions and other workers' organizations were in a much smaller number, and always in favour of antitrust bills and legislation.

Brazil still lacks a lobbying regulation, which would provide more data about the practice — for instance, on meetings between lobbyists and politicians. Since lobbying is inevitable in a democratic country, regulating it is crucial to make it more transparent and improve our knowledge about how our legislation are made, in fact.

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