REVISTA DO IBRAC

São Paulo

Número 2- 2023

ISSN 1517-1957

IBRAC | INSTITUTO BRASILEIRO DE ESTUDOS DE CONCORRÊNCIA, CONSUMO E COMÉRCIO INTERNACIONAL

AGGREGATED SEGREGATION AND THE MINORITY CONSUMER WELFARE

Segregação agregada e o bem-estar do consumidor minoritário

Roberto Domingos Taufick[1]

Resumo: Aprende-se que o progresso científico é inerentemente bom, que melhorou as condições de vida de todos os seres humanos e que a revolução digital está progressivamente ajudando a nivelar as condições de competir para todos. Mas as evidências empíricas contam outra história, quando o assunto são os efeitos das rupturas tecnológicas sobre as condições de vida das minorias. As mudanças tecnológicas sempre tiveram como inspiração um determinado perfil de consumidor, identificado como o cidadão padrão. Como consequência do viés, quanto mais distante alguém se encontrar do perfil do cidadão padrão, menos se sente contemplado por decisões empresariais, ou por políticas públicas que não a/o tiveram como público-alvo. Trazendo estudos de casos que relatam como o passado, o presente e o futuro foram, ou estão sendo projetados para perpetuar o hiato que separa as minorias do cidadão padrão, este artigo coloca em evidência como a política antitruste também foi vítima de uma interpretação enviesada do consumidor e de como esse erro tem levado a uma política antitruste regressiva. Finalmente, a partir desses achados, propõe as adaptações necessárias para corrigir a abordagem enviesada do consumidor e para criar tomadas de decisão inclusivas na seara concorrencial.

Palavras-chaves: Antitruste; Minorias; Bem-Estar do Consumidor; Viés; Diversidade.

Abstract: We learn that scientific progress is inherently good, that it has improved the living conditions of all humans, and that the digital revolution is progressively helping level the playing field for all. But empirical evidence related to the effects of technological disruptions on the living conditions of minorities tells another story. Technological changes have always prioritized the welfare of a certain profile of consumer, identified in this article as the 'non-minority standard model citizen'. Because of bias, the more distant one

[1] Bacharel em Direito (Largo de S. Francisco, USP). Mestre em Direito, Ciência e Tecnologia (Stanford University). 2015 Gregory Terrill Cox Summer Research Fellow, John Olin Program in L&E (Stanford University). Doutor em Direito com distinção e louvor e sugestão de publicação (Largo de S. Francisco, USP). Finalista do Antitrust Writing Awards (2022). Vencedor do Prêmio Ibrac-TIM (2019). 2º e 3º lugares, respectivamente, nos prêmios Sefel (2018) e Secap (2019) de monografias do Ministério da Fazenda. Autor de Nova Lei Antitruste Brasileira e diversos artigos publicados nacional e internacionalmente.

falls from the tree of that non-minority standard model citizen, the less one feels contemplated by corporate decisions and public policies. Bringing compelling case studies showing that technologies and public policies have been designed in a way that perpetuates the minority gap, this article shows how antitrust has been affected by a biased understanding of the consumer and how that mistake has led to a regressive antitrust policy. Finally, I suggest adaptations that might help correct the biased approach towards the definition of consumer and create inclusive decision-making in antitrust.

Keywords: Antitrust; Minorities; Consumer Welfare; Bias; Diversity.

Summary: 1. Introduction. 2. Case studies. 2.1. Professional regulation, gender, and race. 2.2. Non-compete and non-solicitation agreements and minorities; 2.3. United States v Brown University and black students. 2.4. The Kroton-Estácio merger and minorities. 2.5. Mergers of male and female sports associations and the gender gap. 2.6. Soccer monopolization and the gender gap. 2.7. National Collegiate Athletic Association and black student-athletes. 2.8. ‘Talkies’ and deaf people. 2.9. Movies distribution and the black community. 2.10. Local businesses and black communities. 3. Conclusion: improving the definition of consumer.

1. Introduction

Over the last few years, we have observed the surge of theories looking at antitrust law and practice as too narrow in scope and too indulgent with mergers and behaviors that affect the functioning of markets. In contrast, several papers have also been published confronting that view, explaining why an antitrust that is broader in scope would become too subjective and harder to replicate across the borders. None of these papers addressed a fundamental flaw in antitrust foundations, though: That antitrust practice is regressive because cases are prioritized, markets are defined, and consumers are protected according to biased decisions. Because consumers are treated as a uniform, aggregated mass of interests, authorities have ignored nuances of perceptions that can be particularly relevant to the socioeconomic segregation of minorities – an effect we call ‘aggregated segregation’.

The Organization for Economic Cooperation and Development[2] was the first globally relevant entity with substantial soft power to underline the importance of using the disaggregation of consumers to protect minorities. In 2018, it proposed that economic interventions should only happen after a careful analysis of their impact on women, including the anti-competitive effects of explicit or implicit restrictions on female entrepreneurs. On top of that, the OECD argued against discriminatory regulations that would prevent or discourage efficient female entrepreneurs from competing against less efficient males. A critical view of antitrust was also introduced at the US Federal Trade Commission (FTC) by Commissioner Rebecca Slaughter, when she was still the agency's acting chairperson. Slaughter (2020) argued that antitrust decisions should be awarded having in mind their effects on non-white minorities. Critical antitrust also influenced the Supreme Court (SCOTUS) decision in *NCAA v Alston* (2021), which revisited *NCAA v Board of Regents* (1984) to calibrate its effects on black minorities.

Both actions have in common their understanding that antitrust is neither immune to bias nor neutral and that a non-interventionist or *laissez-faire* approach would be regressive and detrimental to minority citizens also when they are acting in their consumer capacities. In the first place, bias in antitrust is, like anywhere else, a consequence of values that public agents – people – intendedly or inadvertently, express in whatever they do. But – which is particularly important to us – it is also the result of market decisions, product/service design, rules or policymaking that have as a starting point the interest, the worldview or the values of non-minority target consumers and entrepreneurs. As a result, even when these decisions, designs, rules or policies become useful to minorities, they are primarily and ultimately destined to represent in fuller strength only the interest of non-minority citizens (NAGEL, 2013[3]), leading to outcomes that are more suitable and likely to offer better results to the non-minority standard model citizen.

---

[2] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). What's gender got to do with competition policy? Paris: OECD, March 2018. Available on <https://oecdonthelevel.com/2018/03/02/whats-gender-got-to-do-with-competition-policy/>.

[3] NAGEL, Thomas. Como é ser um morcego?. Revista da Abordagem Gestáltica: Phenomenological Studies, v.19, n. 1, pp. 109-115, 2013 (originally published in 1974).

This paper will revisit selected Brazilian and foreign case law to explain how product and policy biases have contaminated antitrust analysis.

2 Case Studies

In this section, we refer to practical cases or to agreements to offer solid examples of how public enforcement and advocacy far too often have been inoculated by the bias that exists in the market strategy they relied on when deciding which consumer to protect and what measures to use. We have become familiar with a long list of case studies and policymaking showing how resource allocation, industry ingenuity and policymaking have been put together to serve primarily a particular kind of costumer: The best bidder, not by accident the non-minority standard model citizen.

2.1. Professional regulation, gender and race

By the nature of their activity, antitrust agencies are *a priori* against the imposition of barriers to entry in any market. A well-known way of imposing barriers to entry into the labor market is the regulation of professions. Antitrust authorities around the world frequently advocate against regulations that impose conditions for the entry of competitors, not rarely as consequence of OECD recommendations.

If, in Brazil, the advocacy unit at the Ministry of Finance performed this function until very recently, in the USA this function is performed, in general, by the Federal Trade Commission (FTC). In this capacity, since 1970 the FTC has been dedicated to presenting *amicus curiae* briefs in processes related to the regulation of professions[4].

Traditionally, cost-benefit analysis carried out by said agencies evaluates safety, health and even standardization regulations as beneficial, while the rest, particularly when they involve increased remuneration, is treated negatively, and associated with rent-seeking. It turns out that, in parallel with the most ordinary cases, there are regulations that can mitigate the

[4] VAHEESAN, Sandeep. Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages. Maryland Law Review, v. 78, pp. 766-827, 2019.

effects of race and gender bias in some markets as they increase information symmetry about minority candidates[5]. In these cases, it is possible that the professional regulation not only generates net social benefits, but also ultimately yields net pro-competitive effects, given that, by bringing more qualitative information about minority candidates and reducing or eliminating bias against minorities, the norm has the power to increase the number of relevant competitors in the labor market.

By regarding any professional regulation *per se* illegal, competition advocacy bodies such as the FTC and the advocacy unit at the Ministry of Finance are failing to analyze nuances and therefore harming not only minorities, but also the competitive process itself [6]. The effect of information asymmetry on the qualitative analysis of the profile of minority candidates was explained by Blair and Chung[7], who concluded that in the absence of a sufficiently strong predictor of skill, employers tend to rely on observable characteristics such as race or gender to infer worker productivity, although these inferences are inaccurate. Likewise, they suggested that, in the absence of information, employers overestimate the likelihood of a criminal record among Afro-American men[8].

[5] VAHEESAN, Sandeep. Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages. Maryland Law Review, v. 78, pp. 766-827, 2019.

[6] VAHEESAN, Sandeep. Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages. Maryland Law Review, v. 78, pp. 766-827, 2019.

[7] BLAIR, Peter; CHUNG, Bobby (June 2018 version). Job Market Signaling through Occupational Licensing. Working Papers 2017-50R. Chicago, Illinois: Human Capital and Economic Opportunity Working Paper Series, June 2017, reviewed on June 2018. Available on http://humcap.uchicago.edu/RePEc/hka/wpaper/Blair_Chung_2017_licensing_gender_racial_wage_gaps_r2.pdf.

[8] BLAIR, Peter; CHUNG, Bobby (June 2018 version). Job Market Signaling through Occupational Licensing. Working Papers 2017-50R. Chicago, Illinois: Human Capital and Economic Opportunity Working Paper Series, June 2017, reviewed on June 2018. Available on http://humcap.uchicago.edu/RePEc/hka/wpaper/Blair_Chung_2017_licensing_gender_racial_wage_gaps_r2.pdf.

2.2. *Non-compete and non-solicitation agreements and minorities*

The relevance of non-compete/non-solicitation clauses continues to be largely neglected by competition bodies[9], even though restrictions on the mobility of employees have a disproportionate effect on certain identities, particularly on the wages of minorities[10]. These agreements are associated with the exacerbation of multiple symptoms that affect particularly minorities, including[11]: (1) a stagnant gender and racial wage gap; (2) the mobility constraints affecting minorities; (3) risk aversion behaviors and negotiation patterns that vary across identities. In general, as they are subject to greater bias, minorities are more risk averse and tend to negotiate less the terms of the contracts; (4) the social network deficit of certain groups, which can only be corrected with richer professional networks; (5) a variation in the preferences for non-monetary factors within a work environment – for example, variations in the importance [for that minority] of a voice-giving work environment, a diverse work environment, and a work environment whose corporate cultures are not hostile; (6) the role of contractual sanctions and mobility bias, which vary according to the identity. In the case of women, contractual restrictions add to others resulting from the double shift of work, geographic family ties (the family tends to move according to the professional needs of the main provider, who is usually the man in a society with a relevant wage gap) and the usually unpaid leave from the labor during and in the aftermath of pregnancy.

In labor markets, discovering someone's value depends on how often one is exposed to information about the price of her or his work. However, non-compete clauses reduce the minority employees' exposure to offers and as consequence demand for their work and their market value. Studies on labor market concentration have found that when outside options are limited, discrimination inside the corporation is more pronounced. And this

[9] SHAPIRO, Carl. Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets. The Journal of Economic Perspectives, v. 33, n. 3, pp. 69-93, Summer 2019.
[10] LOBEL, Orly. Gentlemen prefer bonds: how employers fix the talent market. Santa Clara Law Review, v. 59, pp. 663-700, 2020.
[11] LOBEL, Orly. Gentlemen prefer bonds: how employers fix the talent market. Santa Clara Law Review, v. 59, pp. 663-700, 2020.

is only the top of the iceberg: There is growing evidence on the pernicious effects of impaired professional mobility on racial inequality. The logic is quite simple: removing restrictions on mobility can improve the ability of workers to move from biased to non-biased firms and thus reduce discrimination[12].

In addition to being a corporate design that reinforces violence against minorities, non-solicitation clauses have potentially harmful effects on innovation. When the turnover in workforce is accompanied by greater diversity among top officers – which, in America, happens more often at the Silicon Valley, in California -, there is exponentially more innovation (PAGE, 2007[13]). In fact, the state of California attributes to the prohibition of non-competition clauses by article 16600 of the California Business & Professions Code the technological leap that the region has in comparison to the other American states. This argument was revisited by Mark Lemley and James Pooley in 2008.

Finally, the FTC has recently proposed a rule to ban noncompete clauses precisely because they hurt workers by suppressing their wages[14]. The ban could also apply to other types of employment restrictions, if they function as non-competes. As recalled by Commissioners Slaughter and Bedoya, non-competes "are often imposed on workers with no ability to bargain as a condition of employment"[15].

[12] LOBEL, Orly. Gentlemen prefer bonds: how employers fix the talent market. Santa Clara Law Review, v. 59, pp. 663-700, 2020.
[13] PAGE, Scott E..The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies. Prince University Press, 2007.
[14] FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition | Federal Trade Commission. Available on https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.
[15] Statement of Commissioners Slaughter and Bedoya on the Notice of Proposed Rulemaking on NonCompete Clauses (ftc.gov). Available on https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-commissioners-slaughter-and-bedoya-on-proposed-rulemaking-noncompete.pdf.

2.3. *United States v Brown University and black students*

United States v Brown University (1993) is known as a price-fixing cartel between Ivy League universities and the Massachusetts Institute of Technology (MIT) in the United States. The case, filed in 1991 by the DoJ, involved, for the first time, the application of antitrust to the decision-making process of non-profit entities and had as object an agreement executed in the 1950s to coordinate the amounts of scholarships paid to students who were financially underprivileged. This coordination process was called the 'Overlap'[16].

As the lawsuit unfolded, all schools, except for the MIT, signed consent decrees agreeing to discontinue the agreement. Although the MIT was condemned by the lower court, the appellate court remanded the case as it understood that even in the case of price fixing the court should evaluate the social goals of college policy. According to the rule of reason analysis, the Ovelap increased consumer choice, making it possible for capable but underprivileged students who would have never otherwise attended the MIT to be admitted. The special nature of college education and the pro-competitive and pro-consumer characteristics of the Overlap convinced the court of appeals that the rule of reason would be adequate[17]

The Justice Department still had the option to prove in court that the Overlap was not the least restrictive alternative to competition necessary to achieve the same result. The Third Circuit decision was, however, very favorable to MIT's policy: The court made it clear that equal access to education and a more diverse college environment was socially desirable. As consequence, the Ivy League universities and the MIT signed an agreement

[16] ROBERTSON, Elbert L.. Antitrust as Anti-Civil Rights? Reflections on Judge Higginbotham's Perspective on the "Strange" Case of United States v. Brown University. Yale Law & Policy Review, v. 20, 2002. Available on https://digitalcommons.law.yale.edu/ylpr/vol20/iss2/11.
[17] ROBERTSON, Elbert L.. Antitrust as Anti-Civil Rights? Reflections on Judge Higginbotham's Perspective on the "Strange" Case of United States v. Brown University. Yale Law & Policy Review, v. 20, 2002. Available on https://digitalcommons.law.yale.edu/ylpr/vol20/iss2/11.

with the Department of Justice which sustained the original agreement but forbade collective discussions about individual scholarships[18].

Brown University showed that the 'true meaning' of antitrust must consider an almost universal range of conflicts of values that can be the source of legitimate antitrust litigation. Estimates show that the increase in black students' admissions due to the Overlap were statistically significant: between 1984 and 1990 they leapfrogged from 3 to 5% 19. Ten years later, however (2023), in SFFA v. Harvard and SFFA v. UNC, the SCOTUS ruled against a holistic practice of considering race among the factors in admitting students to universities.

2.4. The Kroton-Estácio merger and minorities

In June 2017, CADE rendered its decision on the merger between two of the largest education groups in Brazil: Estácio and Kroton. Commissioner Schmidt, who delivered the opinion of the administrative court, asserted that the merger happened in the context of the consolidation of the education sector in Brazil, which reached its peak between 2011 and 2013, with 67 operations reviewed by the antitrust agency since 2001, 12 between 2007 and 2008 alone (11 of them having Estácio as the acquirer). The consolidation of the education sector was well analyzed by the 2013 opinion of Commissioner Octaviani in the Anhanguera-Anchieta case, when he called attention to the financialization of the education sector led by investment funds.

According to the detailed analysis offered by Commissioner Schmidt, in 2015 76% of college students were enrolled in private institutions, 44% of them being receiving some type of funding or scholarship. Over 49% of those students depended on the Student Financing Fund (Fies),

[18] ROBERTSON, Elbert L.. Antitrust as Anti-Civil Rights? Reflections on Judge Higginbotham's Perspective on the "Strange" Case of United States v. Brown University. Yale Law & Policy Review, v. 20, 2002. Available on https://digitalcommons.law.yale.edu/ylpr/vol20/iss2/11.
[19] ROBERTSON, Elbert L.. Antitrust as Anti-Civil Rights? Reflections on Judge Higginbotham's Perspective on the "Strange" Case of United States v. Brown University. Yale Law & Policy Review, v. 20, 2002. Available on https://digitalcommons.law.yale.edu/ylpr/vol20/iss2/11.

while 18% relied on the Program College Education for All (Prouni) – both from the Ministry of Education – and approximately 33% on other sources.

Prouni offered scholarships based on merit plus (low) family income as well as for students with disabilities. Candidates had to prove a gross monthly family income *per capita* of up to one and a half minimum wage to apply for full scholarships and of up to three minimum wages *per capita* for partial scholarships, with approximately 95% of students coming from public schools. Non-white young not-working males were more likely to receive a scholarship[20]. In its turn, 75% of students who benefitted from Fies belonged to classes C, D, or E (monthly family income of up to four and a half minimum wages), 52% worked and 77% came from public schools (ABMES, 2018). Dark skinned students represented, in 2015, approximately 54% of the scholarships, leapfrogging to over 60% in 2017[21].

Even though mergers involving the education sector in Brazil have a clear impact on minorities, CADE never measured the effect of the operation on the programs that subsidized higher education, particularly on the number of scholarships granted by Prouni and on the amount of funding within the scope of Fies.

2.5. Mergers of male and female sports associations and the gender gap

The merger between the Women's Cricket Association (WCA) and the England and Wales Cricket Board (ECB) is a case full of symbolism, as it involved a unification involving the women's and men's cricket organiza-

[20] BECKER, Kalinca Léia; MENDONÇA, Mário Jorge. Avaliação de impacto do Prouni sobre a *performance* acadêmica dos estudantes. Texto para discussão/Instituto de Pesquisa Econômica Aplicada. Brasília e Rio de Janeiro: Ipea, 2019

[21] BRAZIL. Secretaria de Acompanhamento Econômico (Ministério da Fazenda). Avaliação do Fundo de Financiamento Estudantil – Fies. Brasília: Brazil's Ministry of Finance, January 2018. Available on https://www.gov.br/economia/pt-br/acesso-a-informacao/participacao-social/conselhos-e-orgaos-colegiados/cmap/publicacoes/subsidios-da-uniao/avaliacao-tcu/avaliacao_fies_jan2018_coef.pdf.

tions. It followed a global trend, including the merger between the International Women's Cricket Council (IWCC) and the [Men's] International Cricket Council (ICC) in 2005[22].

Before the merger, women had held decision-making positions and set agendas, as well as did most of the team coaching. Although the women that coached were not remunerated, they ensured the same qualification as the male coaches, so that their technical capacity was not questioned. That all changed after the merger. Velija, Ratna and Flintoff [23] claimed that women felt that they should not be too demanding, or frank, as they recognized (and accepted) their position as weaker partners in the game. And by not engaging in the conflict, women endorsed the working conditions, according to which women were inferior to men.

The effect of the gender gap in the command of merged entities has been previously portrayed with similar results in Australia. Women involved in the game felt they had lost power over the management of their teams, in terms of their position of authority, meaning that they had little power, as women, to set an agenda for changes that could benefit other female cricketers.

The integration had the opposite effect as expected, making even clearer the different treatment given to women in sports, as evidenced by the peripheral position of women's leagues on the associations' websites and the flagrant attempts to dissociate the *women's game* (*women*'s cricket, for instance) from the *sport* practiced by men (cricket, alone, being used only when referring to the men's league). Paradoxically, the unification between women's and men's associations – despite the centralization of sport command in the hands of men – has been presented as evidence of gender equality, insofar as more resources have flowed to female leagues[24]. But,

[22] VELIJA, Philippa; RATNA, Aarti; FLINTOFF, Anne. Exclusionary power in sports organisations: The merger between the Women's Cricket Association and the England and Wales Cricket Board. International Review for the Sociology of Sport, v. 49, n. 2, pp. 211-226, 2014.
[23] VELIJA, Philippa; RATNA, Aarti; FLINTOFF, Anne. Exclusionary power in sports organisations: The merger between the Women's Cricket Association and the England and Wales Cricket Board. International Review for the Sociology of Sport, v. 49, n. 2, pp. 211-226, 2014.
[24] VELIJA, Philippa; RATNA, Aarti; FLINTOFF, Anne. Exclusionary power in sports organisations: The merger between the Women's Cricket Association and the England and Wales Cricket Board. International Review for the Sociology of Sport, v. 49, n. 2, pp. 211-226, 2014.

although the mergers have improved the financial resources allocated to manage the female leagues, it is also true that women have been alienated from all the decision-making power, putting in the hands of men the decisions that will impact women's sports, even if the decision is not what women would have chosen if they had decision power.

2.6. Soccer monopolization and the gender gap

Since 1983, the Brazilian Soccer Confederation (CBF) has been assigned the management of women's soccer at the national level. However, especially (but not only) until 1991, when it eventually took over the women's national team[25], the CBF used its monopoly power to weaken women's soccer and place only one product on the market -- men's soccer. That decision alone was detrimental to consumers – as there were fewer options available on the market -, but also to the development of a new market that would benefit the training of female players.

That was not all. The women's team had only had male managers[26] [27] and even the uniform was designed for men[28]. Compared to the situation of women's cricket presented above, the situation of women in Brazil was twice inferior: Not only did they not have the power to decide how to organize themselves; they were also deprived of sponsorship, as exemplified by the Brazilian participation in the 1988 Women's Invitational Tournament

[25] KESTELMAN, Amanda; BARLEM, Cintia; TARRISSE, Ana. A história do futebol feminino no Brasil, 2019. Available on https://interativos.globoesporte.globo.com/futebol/selecao-brasileira/especial/historia-do-futebol-feminino.

[26] CELIO, Amanda. Por que a estrutura do futebol feminino ainda é ocupada por homens no Brasil, 5 de julho de 2019. Available on https://www.hypeness.com.br/2019/07/por-que-a-estrutura-do-futebol-feminino-ainda-e-ocupada-por-homens-no-brasil/.

[27] BATISTA, Daniel; VITOR, Raul. Mulheres assumem o comando do futebol feminino no Brasil, 1º de outubro de 2020. Available on https://www.estadao.com.br/infograficos/esportes,mulheres-assumem-o-comando-do-futebol-feminino-no-brasil,1124127.

[28] RÍMOLI, Comes. Empoderamento. Mulheres se livram das estrelas masculinas a seleção: demonstrando dignidade, a seleção feminina do Brasil abdica de vez das cinco estrelas no distintivo. Elas foram conquistadas pelos homens, November 27, 2020. Available on https://esportes.r7.com/prisma/cosme-rimoli/empoderamento-mulheres-se-livram-das-estrelas-masculinas-na-selecao-27112020.

which took place in China, when women athletes used the uniforms made for the male athletes who participated in the World Cup that same year[29].

The case also involves intersectionality: in addition to representing a gender issue, the abuse of monopoly power involved racial and economic issues. If soccer was an invention of the male elite, originally practiced by the male elite and even attended by women from the Brazilian elite, the female precursors of the sport in Brazil were poor and, in effect, predominantly non-white[30].

2.7. National Collegiate Athletic Association and black student-athletes

NCAA v. Board of Regents (1984) is well known for establishing the application of a rule of reason for horizontal agreements when horizontal restrictions on competition are essential to make the product available at all on the market[31].The case involved a platform market where the NCAA had agreements with colleges on one side and television networks on the other. The object of the agreement was the rights to broadcast American football games. The scope of the agreement included restrictions on the number of games to be broadcast, how many times each team could have its games broadcast (a floor and a ceiling) and the price for each game.

The agreement was challenged in court by two universities, which sued the NCAA on the grounds of illegal restrictions of trade and price fixing. SCOTUS agreed with both universities on those claims but rejected the

[29] KESTELMAN, Amanda; BARLEM, Cintia; TARRISSE, Ana. A história do futebol feminino no Brasil, 2019. Available on https://interativos.globoesporte.globo.com/futebol/selecao-brasileira/especial/historia-do-futebol-feminino.
[30] BRUHNS, Heloisa T. Futebol, Carnaval e Cap oeira: Entre as gingas do corpo brasileiro. Campinas: Papirus, 2000.
[31] SULLIVAN, E. Thomas; HARRISON, Jeffrey L.. Understanding Antitrust and its Economic Implications. Newark, São Francisco and Charlottesvile: LexisNexis, 2003.

use of the *per se* rule[32]. As a result, schools and broadcasters started to negotiate the conditions for broadcasting their games without the intermediation of the NCAA[33].

The last paragraph of the opinion of the Court delivered by Justice Stevens (*at* 120) stated, however, that the success of NCAA's promotion of college games depended on a wide margin of discretion, which contributed to the interpretation by the lower courts in the following cases that the association still held the authority to determine other sensitive variables such as how much each student-athlete should be paid[34].

But in 2014 the developments of two lawsuits around the interpretation of the last paragraph of the decision in *Board of Regents* and the claim that it was *obiter dictum* offered the grounds for a change into how broadcasting rights but also the rights over name, image and likeness should be shared with student-athletes. First, in *O'Bannon v. NCAA* (2015) the District Court found that the ban on student-athletes being paid while the NCAA profited from the use of their names and images violated the Sherman Act[35]. Those findings were affirmed in part by the Ninth Circuit. Second, a case with a narrower scope – *NCAA v. Alston* (2021) – but equally devastating to the NCAA was filed to demand that colleges be allowed to offer academic

[32] SULLIVAN, E. Thomas; HARRISON, Jeffrey L.. Understanding Antitrust and its Economic Implications. Newark, São Francisco and Charlottesvile: LexisNexis, 2003.

[33] MAESE, Rick. O'Bannon v. NCAA ruling could set up larger arguments over college sports, experts say. The Washington Post, August 9, 2014. Available on https://www.washingtonpost.com/sports/colleges/obannon-v-ncaa-ruling-could-set-up-larger-arguments-over-college-sports-experts-say/2014/08/09/5338ae4c-1fe2-11e4-9b6c-12e30cbe86a3_story.html?itid=lk_inline_manual_9.

[34] MAESE, Rick. O'Bannon v. NCAA ruling could set up larger arguments over college sports, experts say. The Washington Post, August 9, 2014. Available on https://www.washingtonpost.com/sports/colleges/obannon-v-ncaa-ruling-could-set-up-larger-arguments-over-college-sports-experts-say/2014/08/09/5338ae4c-1fe2-11e4-9b6c-12e30cbe86a3_story.html?itid=lk_inline_manual_9.

[35] MAESE, Rick. O'Bannon v. NCAA ruling could set up larger arguments over college sports, experts say. The Washington Post, August 9, 2014. Available on https://www.washingtonpost.com/sports/colleges/obannon-v-ncaa-ruling-could-set-up-larger-arguments-over-college-sports-experts-say/2014/08/09/5338ae4c-1fe2-11e4-9b6c-12e30cbe86a3_story.html?itid=lk_inline_manual_9.

advantages to Division I football and basketball players, including scholarships to graduate programs, graduate internships, computers and other types of equipment used for educational purposes[36].

Under the Biden administration, the Department of Justice joined on the side of the student-athletes, perhaps as a show of discontent with the fact that the NCAA, conferences, universities, and coaches were enriched by the work of student-athletes, who received grants that covered costs only. The case gained important proportions that escaped the relationship of justice for student-athletes, also symbolizing how much businessmen and coaches, most of them white, profited at the expense of the work and talent of minority black students, who are usually the main attractions of the most profitable leagues – both the basketball and the American football leagues. While college basketball and football players generated billions in annual revenues for their colleges and universities and some elite members of college coaching groups earned millions of dollars living on the performance of those very disproportionately black poor student-athletes, the student-athletes themselves, including star players, earned about $40,000 annually, which hardly covered their costs to play[37].

Numbers can help quantify the outrage. In 2019, 56% of male divisional basketball student-athletes were black and only 23% were white[38]. At the same time, about 70% percent of the coaches were white. In Division I football, 49% of student-athletes were black and 37% were white, while 82% of the coaches were white. Finally, the revenue of sports where black student-athletes predominated also financed other less lucrative sports practiced by predominantly white student-athletes – as is the case of men's tennis

[36] MAESE, Rick. O'Bannon v. NCAA ruling could set up larger arguments over college sports, experts say. The Washington Post, August 9, 2014. Available on https://www.washingtonpost.com/sports/colleges/obannon-v-ncaa-ruling-could-set-up-larger-arguments-over-college-sports-experts-say/2014/08/09/5338ae4c-1fe2-11e4-9b6c-12e30cbe86a3_story.html?itid=lk_inline_manual_9.

[37] VAHEESAN, Sandeep. How antitrust perpetuates structural racism. The Appeal, September 16, 2020. Available on https://theappeal.org/how-antitrust-perpetuates-structural-racism.

[38] DAVIS, Joshua P.; CRAMER, Eric L.; STREATER, Reginald L.; SUTER, Mark R.. Antitrust As Antiracism: Antitrust as a Partial Cure for Systemic Racism (and Other Systemic 'ISMS'). University of San Francisco Law Research Paper nº 2021-01, 30 de março de 2021. Available on https://ssrn.com/abstract=3816202.

(48% are white and 12% are black), men's water polo (82% white) and women's rowing (75% white)[39].

It is worth having in mind that only a small percentage of student-athletes manage to become professionals, either due to the small number of teams and the existence of a single division between professionals, or due to injury or abandonment because of the social conditions to which they are still subject while students: very often, poor athletes and their families still live in crime-ridden neighborhoods.

In the decision delivered in the *Alston* case (2021) and particularly in Justice Kavanaugh's concurring opinion, SCOTUS agreed with the *amicus curiae* filed by the American Black Antitrust Lawyers and affirmed that revenues earned from the games were flowing everywhere except to the student-athletes, most of them poor Afro-Americans. The Court decided, though, that the colleges have a broad margin to decide which benefits associated with the studies will be paid to the student-athletes, which in practice consisted in a hindrance to pay student-athletes what they effectively bring to the revenues that flow to the university.

2.8. 'Talkies' and deaf people

According to Hess, the arrival of talked movies ('talkies') was the result of a series of agreements for the standardization of soundtrack. By the summer of 1928, all major Hollywood studios had some license to operate soundtracks. Between 1927-1929, studios invested four times the market value of the entire motion picture industry in sound conversion alone. Not surprisingly, much of the funding came from JP Morgan and Rockefeller, who controlled General Electric and RCA[40].

At no point during this process, which lasted from two to three years and involved agreements between competitors with market power,

[39] DAVIS, Joshua P.; CRAMER, Eric L.; STREATER, Reginald L.; SUTER, Mark R.. Antitrust As Antiracism: Antitrust as a Partial Cure for Systemic Racism (and Other Systemic 'ISMS'). University of San Francisco Law Research Paper nº 2021-01, 30 de março de 2021. Available on https://ssrn.com/abstract=3816202.

[40] HESS, John P. The history of Sound at the Movies (August 10, 2014). Production: John P. Hess. Publishes by Filmmaker IQ. Available on https://www.youtube.com/watch?v=Ot5IryUt9SM..

were people with disabilities consulted about the discontinuation of silent films[41]. Although the motion picture industry has been the subject of numerous antitrust lawsuits by the Department of Justice since the 1910s[42], no antitrust scrutiny has been taken to ensure that those agreements would not harm people with disabilities.

2.9. Movies distribution and the black community

The film distribution industry in the United States is not subject to any sector regulator, being free from virtually all anti-discrimination rules. On the other hand, sector information on revenue receives a lot of publicity. The industry was quickly consolidated at the beginning of the twentieth century, when movie companies verticalized production, distribution and exhibition activities[43].

But from the 1910s until the mid-twentieth century, intense work by the DoJ helped disintegrate the market. The disintegration did not have any anti-discriminatory effect, though, and it did not lead to an increase in roles that could be played by minorities, either – possibly because antitrust measures can only have a positive impact on bias if there are members of minority groups ready to capitalize on market inefficiencies. Absent that, the market structure went through a process of reconsolidation from the end of the 1950s onwards which leapfrogged during the Reagan administration, when verticalization increased steadily[44].

When the reconsolidation of the market and its re-verticalization happened, films that reported the experience of women or other minorities were still exceptions and faced a small distribution. The lack of interest in distributing movies that assigned lead roles to minorities was justified by

---

[41] REID, Blake Ellis. Copyright and Disability. California Law Review, vol. 109, pp. 2173-2225, (2021).

[42] HARVEY, Hosea H.. Race, Markets, and Hollywood's Perpetual Antitrust Dilemma. Michigan Journal of Race and Law, vol. 18, pp. 1-61, 2012.

[43] HARVEY, Hosea H.. Race, Markets, and Hollywood's Perpetual Antitrust Dilemma. Michigan Journal of Race and Law, vol. 18, pp. 1-61, 2012.

[44] HARVEY, Hosea H.. Race, Markets, and Hollywood's Perpetual Antitrust Dilemma. Michigan Journal of Race and Law, vol. 18, pp. 1-61, 2012.

the sunk costs involved in investing in independent productions in a verticalized and foreclosed market, therefore subject to anti-competitive protective measures. In short, the *modus operandi* designed at the inception of the modern Hollywood era created a path dependency that fed back an anti-competitive and racially segregated market[45].

Although the capillarity of Hollywood film distribution was large from the 1990s on, the mega productions and the large amounts paid to the cast squeezed the profit margin of the major studios which was estimated at just 5%. The risks of the activity, evidenced by the complete inability of the studios to develop a metric to estimate the revenue of the movies were avoided by betting on a one-size-fits-all model, foreclosing the market to the competition and to a non-minority cast. Although independent studios accounted for 54% of the movies made each year in the late 1990s, access to distribution channels was hampered by the bottleneck that existed in the control of these channels and by the dominance of the integrated market by the major studios. In order to reduce the risks of a low box office, films portraying minorities sticked to stereotypes – tying both African American actors and directors to repetitive scripts[46].

It is only now, ten years after the publication of Harvey's article (2012) and over a hundred years after the movies industry started, that it is possible to identify deep changes in this reality due to the development of streaming platforms. Although maverick technology has been positive to open the market it is important to bear in mind how fragile this movement still is, with the possibility of major setbacks in the market through a simple change in management from Netflix, or its acquisition by a competitor. Hence the relevance of antitrust to ensure, at least, that eventual concentration acts do not bring setbacks. This fear gained a new component in 2022,

[45] HARVEY, Hosea H.. Race, Markets, and Hollywood's Perpetual Antitrust Dilemma. Michigan Journal of Race and Law, vol. 18, pp. 1-61, 2012.

[46] HARVEY, Hosea H.. Race, Markets, and Hollywood's Perpetual Antitrust Dilemma. Michigan Journal of Race and Law, vol. 18, pp. 1-61, 2012.

when Netflix registered the first customer churn in a quarterly balance sheet over a decade[47].

2.10. Local businesses and black communities

The literature also stresses a contrast between the 1960s, when judges used to decide on behalf of those who lost their jobs and their businesses even when the mergers could lead to lower prices with a new generation educated according to Bork's libertarian vision of antitrust which incorporated the mindset that the common good was defined exclusively by the lowest price to consumers[48].

After Bork, antitrust would look at large structures and see opportunities rather than potential abuses of power. As the Chicago School focused on the price effect of mergers, the larger the corporation, the greater the latitude to hypothetically cut costs due to its power to force the price down on suppliers and employees and pass the savings on to the consumer. This shift towards tolerance to concentration begun with groceries and other retailers, later expanding to banks and insurance companies, railroads, haulers, airlines – decades later culminating in the emergence of large technology companies ('big techs')[49].

The effect of this change on the black community was immediate and profound. Their civil rights owed much to black-owned businesses: The money that supported the fight had to come from somewhere; most of the time, it came from local black businesses. Black stores owners financed bus boycotts and walks on segregated beaches. And it was also they who withdrew money from white banks until 'whites only' signs were removed from water fountains and restrooms[50]. In other words, by underestimating the relevance of the non-price effects of mergers and other agreements on the welfare of consumers – minorities in particular -, the Chicago School helped

[47] G1 Tecnologia. Netflix registra queda no número de assinantes pela 1ª vez em uma década. G1 Tecnologia, 19 de abril de 2022. Available on https://g1.globo.com/tecnologia/noticia/2022/04/19/netflix-registra-queda-no-numero-de-assinantes-pela-1a-vez-em-uma-decada.ghtml.
[48] AKHTAR, Ayad. Homeland Elegies: a novel. Nova York: Little, Brown and Company, 2020.
[49] AKHTAR, Ayad. Homeland Elegies: a novel. Nova York: Little, Brown and Company, 2020.
[50] AKHTAR, Ayad. Homeland Elegies: a novel. Nova York: Little, Brown and Company, 2020.

concentrate markets in the hands of the non-minority standard model citizen, making it even harder to sponsor pro-minority rights.

It turns out that the atomization and diversification of the economy had benefits that went beyond the well-being of minorities as consumers and reached the role of supporting local companies in building more inclusive public policies[51]. Because they had the well-being of local communities in mind, these companies sponsored resistance against oppressive practices in America. The concentration of markets and the massification of business is, also in this context, a shameful contribution of the Chicago School to the suppression of civil liberties and to a less democratic society.

3. Conclusion: improving the definition of consumer

Minorities have been second-class users of industry products and services designed for a non-minority core consumer with different needs and perspectives in mind. They have also been underserved by public policies fashioned for the welfare of a non-minority standard model citizen and, in this context, it is also correct to say that public policies – antitrust included – framed to protect or to redress the harm and the abuses against the consumers in general have ultimately offered a selective protection to the non-minority core consumer to whom those products, services and policies have been designed to in the first place.

If products and services are offered having a non-minority standard model citizen in mind, it should be clear at this point that this very citizen also benefits more from protections and subsidies allegedly offered to consumers in general. And as bias influences public policies, it is the minorities, and those with intersectionalities, that become victims. And minorities are victimized twice. First, for being regarded as second-class citizens and consumers alike when it comes the priorities defined by the market and by public policies alike. Second, because minorities pay the same price –

[51] AKHTAR, Ayad. Homeland Elegies: a novel. Nova York: Little, Brown and Company, 2020.

sometimes even higher prices[52] – to get access to an inferior experience (as compared to the non-minority standard model citizen the products, services and policies have been design to).

Antitrust is contaminated by bias at different instances. First, at the personal level, having in mind that the decisions and the recommendations of staff and authorities cannot be severed from their personal experiences and cultural background[53]. Second, in the way that market decisions and strategies affect, contaminate, and even determine how antitrust authorities and experts see and define who is the citizen who should be protected as a consumer.

Central concepts in antitrust – the 'relevant market' included – depend fundamentally on how the players defined their market strategy, core consumers and active sales, branded their products and services or who they target as main competitors. And because those corporate decisions have also been predominantly taken by non-minority citizens, any step taken by antitrust authorities that internalize concepts and decisions taken on the market also internalize the bias that forged those market decisions.

Competition protection authorities and experts are prone to absorb the corporate and political biases that exist in the market strategies and political agendas defined according to the perception of the world of non-minority officers. And they incorporate bias into their analysis in at least two distinct occasions: during case selection (the so-called 'prioritization') and in the definition of the relevant market. 'Case selection bias' leads to the prioritization of agendas that are not relatively important to minorities[54], while 'market definition bias' leads to the exclusion of relevant impact of operations and behaviors on minorities[55].

---

[52] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). What's gender got to do with competition policy? Paris: OECD, March 2018. Available on <https://oecdonthelevel.com/2018/03/02/whats-gender-got-to-do-with-competition-policy/>.
[53] AKERLOF, George A.; KRANTON, Rachel E.. Identity economics: how our identities shape our work, wages, and well-being. New Jersey e Oxford: Princeton University Press, 2010.
[54] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). What's gender got to do with competition policy? Paris: OECD, March 2018. Available on <https://oecdonthelevel.com/2018/03/02/whats-gender-got-to-do-with-competition-policy/>.
[55] AKERLOF, George A.; KRANTON, Rachel E.. Identity economics: how our identities shape our work, wages, and well-being. New Jersey e Oxford: Princeton University Press, 2010.

By screening the merger analysis guidelines coauthored by the FTC and the DoJ, for instance, it is possible to realize that, despite a very technical language and a clear attempt to offer a neutral language, the guidelines show how targeted consumers (p. 12) and the way that industry members define the market both as a product (p. 8) and according to the geographic location of customers (pp. 13, 14, 15) usually are the basis for the definition of the relevant market. In practice, the so-called 4C documents demanded by the FTC for merger screening – also incorporated by its counterparts in other jurisdictions like Brazil's CADE – are but a declaration of corporate motivations and business plans.

In the European Commission, the Notice on the definition of relevant market for the purposes of Community competition law of 1997 is even more assertive when it comes to the influence of business decisions on the definition of the relevant market. The first evidence to define markets in product dimension are the "product characteristics and intended use" (par. 36). It also mentions the use of the views of "the main [core] customers" (par. 40) and consumer preferences (41), recurring to "market studies that companies have commissioned in the past and are used by companies in their own decision-making". And because the definition of the consumer is biased, the determination of the geographic market according to the views of customers (par. 47) and their pattern of purchase (par. 48) is also affected by bias.

A more refined economic literature can help explain why, even though offenses to minorities should be so obvious, we still choose to shield non-minority consumers and leave the minorities, especially those with intersectionalities, unprotected: according to Thaler and Sustein[56], imperfect information leads to pluralistic ignorance and to the normalization of bias. This means that, when almost everything that is written and almost the entire community of experts and respected professionals stand on the one side, divergent opinions tend to remain unspoken for the fear of being silenced, misinterpreted, or ridiculed.

---

[56] THALER, Richard H.; SUNSTEIN, Cass R.. Nudge: como tomar melhores decisões sobre saúde, dinheiro e felicidade. Rio de Janeiro: Objetiva, 2019.

To fix or attenuate bias, we propose that antitrust analyses disaggregate the citizens according to their different perceptions as consumers. We understand that disaggregation will increase access to goods and services by potential minority consumers because disaggregation is pro-competitive[57]. The disaggregation only means that when identifying the problem, creating screening protocols or designing solutions, every statistically relevant group of consumers should count.

The change we propose is consistent with both a more social orientation of antitrust that is concerned with the welfare of minorities and with a universal but possibly more conservative concern with a correct application of the definition of consumer and its implications, including on the protection of all the consumers as Bork himself believed in. It was Bork (1993) who said that consumer welfare is maximized when economic resources are allocated in such a way that consumers can satisfy their wants as far as technological constraints allow. Although he explicitly mentioned that antitrust had an innate preference for material prosperity, but nothing to say about the ways in which prosperity is distributed, or used, he was very emphatic in defending that consumer welfare, as the term was used in antitrust, should allow consumers, by defining their desired goals, to also define what they considered wealth.

If, in Western capitalist democracies, every person has the right to consume and be treated as a consumer, the law should also protect consumer preferences that are statistically relevant to safeguard a healthy and democratic economic environment. As mentioned before in this article, only disaggregation avoids that consumer be treated as a uniform, aggregated mass of interests, ignoring nuances of perceptions that can be particularly relevant to the socioeconomic segregation of minorities – an effect we called 'aggregated segregation'.

Because the disaggregation of consumers can show either that mergers or behaviors once vetoed would have been important for a statistically relevant minority and should have been cleared, or that a mergers or

[57] MIAZAD, Amelia. Prosocial antitruste. Hastings Law Journal, Califórnia, no prelo. Available on https://ssrn.com/abstract=3802194.

behaviors once cleared should have been vetoed, disaggregation does not take any side *a priori*. We expect, though, that once markets are reorganized to diversify the customers they satisfy, disaggregation will trigger a process of de-concentration and even atomization. If we are right and antitrust policies shift towards de-concentration, we should also expect that merger guidelines be revisited to lower the thresholds beyond which mergers would be regarded as anti-competitive.

An antitrust policy that revisits the narrow definition of consumer and disaggregates consumers according to differences in their set of preferences is inclusive by design and follows John Rawls' second principle of justice[58], insofar as social and economic inequalities resulting from today´s definition of consumer could only exist if they benefitted the least advantaged. That said, we believe that there are five ultimate consequences of our theory.

First, mergers that involve dominant firms – whether such mergers substantially increase or not their dominance -- can only be approved if as a result they improve the rights of the involved minorities and at the same time they are the least restrictive way to achieve their goals. *Second*, anti-competitive behaviors that are harmful to minorities shall lead to fines or imprisonment, which can only be prevented by means of agreements that make such minorities better-off. *Third*, past mergers and anti-competitive behaviors with large impact on minorities should be reviewed by antitrust authorities using a disaggregate analysis of the consumer. *Fourth*, because cutting edge algorithmic technology has been proved to be biased, the greenfield markets (antitrust immunity or) golden rule should be reversed. *Fifth*, competition authorities must be open to hire a more diverse technical body, to create a multidisciplinary division responsible for qualitative and quantitative analyses of the impact of mergers and anti-competitive practices on the minorities and to create a permanent dialogue with associations representing minorities.

[58] RAWLS, John. Uma teoria da justiça. São Paulo: Martins Fontes, 1997.

Not enough, we can start with a more subtle change. By incorporating consumer councils into antitrust agencies[59], Congress or the Executive branch can provide minorities associations with facilitated access to cases and authorities as well as with the power to track and overlook cases, file opinions, and propose priorities.

References

AKERLOF, George A.; KRANTON, Rachel E.. Identity economics: how our identities shape our work, wages, and well-being. New Jersey e Oxford: Princeton University Press, 2010.

AKHTAR, Ayad. Homeland Elegies: a novel. Nova York: Little, Brown and Company, 2020.

BATISTA, Daniel; VITOR, Raul. Mulheres assumem o comando do futebol feminino no Brasil, 1º de outubro de 2020. Available on https://www.estadao.com.br/infograficos/esportes,mulheres-assumem-o-comando-do-futebol-feminino-no-brasil,1124127.

BECKER, Kalinca Léia; MENDONÇA, Mário Jorge. Avaliação de impacto do Prouni sobre a *performance* acadêmica dos estudantes. Texto para discussão/Instituto de Pesquisa Econômica Aplicada. Brasília e Rio de Janeiro: Ipea, 2019.

BERTA, Ruben. Mudança polêmica em preservativos erou ganho de R$ 96 milhões para Precisa. UOL, Política, July 24, 2021. Available on https://noticias.uol.com.br/politica/ultimas-noticias/2021/07/24/mudanca-polemica-em-preservativos-gerou-ganhos-milionarios-para-a-precisa.htm.

[59] CARVALHO, Vinicius Marques de. 2022. Defesa da Concorrência: da crítica aos fundamentos teóricos à implementação como política pública no Brasil. Post-doctoral thesis (Commercial Law) – Law School, University of São Paulo, São Paulo, 2022.

BLAIR, Peter; CHUNG, Bobby (June 2018 version). Job Market Signaling through Occupational Licensing. Working Papers 2017-50R. Chicago, Illinois: Human Capital and Economic Opportunity Working Paper Series, June 2017, reviewed on June 2018. Available on http://humcap.uchicago.edu/RePEc/hka/wpaper/Blair_Chung_2017_licensing_gender_racial_wage_gaps_r2.pdf.

BRAZIL. Secretaria de Acompanhamento Econômico (Ministério da Fazenda). Avaliação do Fundo de Financiamento Estudantil – Fies. Brasília: Brazil's Ministry of Finance, January 2018. Available on https://www.gov.br/economia/pt-br/acesso-a-informacao/participacao-social/conselhos-e-orgaos-colegiados/cmap/publicacoes/subsidios-da-uniao/avaliacao-tcu/avaliacao_fies_jan2018_coef.pdf.

BRAZIL. Superior Labor Court (Third Panel). Docket nº TST-RR-100353-02.2017.5.01.0066. Alias do Nascimento Santos v Uber do Brasil Tecnologia Ltda.. Justice Mauricio Godinho Delgado delivered the majority opinion. Pending trial, despite the existence of a majority.

BRUHNS, Heloisa T. Futebol, Carnaval e Cap oeira: Entre as gingas do corpo brasileiro. Campinas: Papirus, 2000.

CARVALHO, Vinicius Marques de. 2022. Defesa da Concorrência: da crítica aos fundamentos teóricos à implementação como política pública no Brasil. Post-doctoral thesis (Commercial Law) – Law School, University of São Paulo, São Paulo, 2022.

CELIO, Amanda. Por que a estrutura do futebol feminino ainda é ocupada por homens no Brasil, 5 de julho de 2019. Available on https://www.hypeness.com.br/2019/07/por-que-a-estrutura-do-futebol-feminino-ainda-e-ocupada-por-homens-no-brasil/.

DAVIS, Joshua P.; CRAMER, Eric L.; STREATER, Reginald L.; SUTER, Mark R.. Antitrust As Antiracism: Antitrust as a Partial Cure for Systemic Racism (and Other Systemic 'ISMS'). University of San Francisco Law Research Paper nº 2021-01, 30 de março de 2021. Available on https://ssrn.com/abstract=3816202.

FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition | Federal Trade Commission. Available on https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

G1 Tecnologia. Netflix registra queda no número de assinantes pela 1ª vez em uma década. G1 Tecnologia, 19 de abril de 2022. Available on https://g1.globo.com/tecnologia/noticia/2022/04/19/netflix-registra-queda-no-numero-de-assinantes-pela-1a-vez-em-uma-decada.ghtml.

HARVEY, Hosea H.. Race, Markets, and Hollywood's Perpetual Antitrust Dilemma. Michigan Journal of Race and Law, vol. 18, pp. 1-61, 2012.

HESS, John P. The history of Sound at the Movies (August 10, 2014). Production: John P. Hess. Publishes by Filmmaker IQ. Available on https://www.youtube.com/watch?v=Ot5IryUt9SM.

KESTELMAN, Amanda; BARLEM, Cintia; TARRISSE, Ana. A história do futebol feminino no Brasil, 2019. Available on https://interativos.globoesporte.globo.com/futebol/selecao-brasileira/especial/historia-do-futebol-feminino.

LEE, Dave. Uber and Lyft in driving seat to remake US labour laws. Financial Times, November 5, 2020. Available on https://www.ft.com/content/78e619f4-fabe-4077-a51a-491e24492263.

LOBEL, Orly. Gentlemen prefer bonds: how employers fix the talent market. Santa Clara Law Review, v. 59, pp. 663-700, 2020.

MAESE, Rick. O'Bannon v. NCAA ruling could set up larger arguments over college sports, experts say. The Washington Post, August 9, 2014. Available on https://www.washingtonpost.com/sports/colleges/obannon-v-ncaa-ruling-could-set-up-larger-arguments-over-college-sports-experts-say/2014/08/09/5338ae4c-1fe2-11e4-9b6c-12e30cbe86a3_story.html?itid=lk_inline_manual_9.

MIAZAD, Amelia. Prosocial antitruste. Hastings Law Journal, Califórnia, no prelo. Available on https://ssrn.com/abstract=3802194.

NAGEL, Thomas. Como é ser um morcego?. Revista da Abordagem Gestáltica: Phenomenological Studies, v.19, n. 1, pp. 109-115, 2013 (originally published in 1974).

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). What's gender got to do with competition policy? Paris: OECD, March 2018. Available on <https://oecdonthelevel.com/2018/03/02/whats-gender-got-to-do-with-competition-policy/>.

PAGE, Scott E..The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies. Prince University Press, 2007.

RAWLS, John. Uma teoria da justiça. São Paulo: Martins Fontes, 1997.

REID, Blake Ellis. Copyright and Disability. California Law Review, vol. 109, pp. 2173-2225, (2021).

RÍMOLI, Comes. Empoderamento. Mulheres se livram das estrelas masculinas a seleção: demonstrando dignidade, a seleção feminina do Brasil abdica de vez das cinco estrelas no distintivo. Elas foram conquistadas pelos homens, November 27, 2020. Available on https://esportes.r7.com/prisma/cosme-rimoli/empoderamento-mulheres-se-livram-das-estrelas-masculinas-na-selecao-27112020.

ROBERTSON, Elbert L.. Antitrust as Anti-Civil Rights? Reflections on Judge Higginbotham's Perspective on the "Strange" Case of United States v. Brown University. Yale Law & Policy Review, v. 20, 2002. Available on https://digitalcommons.law.yale.edu/ylpr/vol20/iss2/11.

SHAPIRO, Carl. Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets. The Journal of Economic Perspectives, v. 33, n. 3, pp. 69-93, Summer 2019.

Statement of Commissioners Slaughter and Bedoya on the Notice of Proposed Rulemaking on NonCompete Clauses (ftc.gov). Available on https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-commissioners-slaughter-and-bedoya-on-proposed-rulemaking-noncompete.pdf.

SULLIVAN, E. Thomas; HARRISON, Jeffrey L.. Understanding Antitrust and its Economic Implications. Newark, São Francisco and Charlottesvile: LexisNexis, 2003.

THALER, Richard H.; SUNSTEIN, Cass R.. Nudge: como tomar melhores decisões sobre saúde, dinheiro e felicidade. Rio de Janeiro: Objetiva, 2019.

VAHEESAN, Sandeep. Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages. Maryland Law Review, v. 78, pp. 766-827, 2019.

VAHEESAN, Sandeep. How antitrust perpetuates structural racism. The Appeal, September 16, 2020. Available on https://theappeal.org/how-antitrust-perpetuates-structural-racism.

VELIJA, Philippa; RATNA, Aarti; FLINTOFF, Anne. Exclusionary power in sports organisations: The merger between the Women's Cricket Association and the England and Wales Cricket Board. International Review for the Sociology of Sport, v. 49, n. 2, pp. 211-226, 2014.

VITORIO, Tamires. Ter motoristas CLT no Brasil tiraria US$ 10 bi em valor de mercado da Uber. CNN Brasil Business, March 5, 2021. Available on https://www.cnnbrasil.com.br/business/2021/03/05/ter-motoristas-clt-no-brasil-tiraria-us-10-bi-em-valor-de-mercado-da-uber.