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REWRITING CADE: A PROPOSAL FOR THE “FEMINIST JUDGEMENTS” AGENDA IN BRAZILIAN COMPETITION LAW

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Resumo: O artigo busca analisar o potencial da metodologia de reescrita feminista para o direito concorrencial brasileiro. Inicialmente, apresentamos um panorama geral da metodologia de reescrita feminista e das questões envolvendo gênero e direito concorrencial. Depois, a partir de uma revisão bibliográfica e de análise das decisões do CADE, investigamos três questões jurídicas recorrentemente enfrentadas pelo CADE, buscando identificar o potencial da reescrita feminista no direito concorrencial brasileiro: (i) aplicação de sanções concorrenciais a não-diretores; (ii) remédios e impacto de composição de conselhos de administração nas condutas anticoncorrenciais; e (iii) impacto dos laços familiares nos julgamentos. Concluímos que a metodologia de reescrita no direito concorrencial permitiria tanto iluminar padrões e vieses ocultos em decisões que não se referem, imediatamente, a questões de gênero, quanto demonstrar que teorias feministas podem ser aplicadas efetivamente em matéria concorrencial. Espera-se dar início a uma agenda que incorpore perspectivas feministas como tema amplo no direito concorrencial, não necessariamente restrita a questões feministas clássicas.

Palavras-chave: Julgamentos feministas; Reescritas Feministas; Antitruste e gênero; Direito Concorrencial Brasileiro; Ilícitos Empresariais.

Abstract: The article seeks to analyze the potential of the “feminist rewritings” methodology in Brazilian competition law. Initially, we present an overview of the feminist rewriting methodology and of the gender debates in competition law. Subsequently, based on the literature review and analysis of CADE's past decisions, we investigate three legal issues in CADE's recent case law in order to identify the potential of the feminist rewriting method in Brazilian competition law: (i) imposition of antitrust sanctions to individuals

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in non-managerial positions; (ii) impact of board diversity on anti-competitive conduct; and (iii) impact of family ties in antitrust enforcement. We conclude that the feminist rewriting methodology in competition law could illuminate hidden patterns and biases in decisions that do not immediately refer to gender issues and could also demonstrate that feminist theories can be effectively applied in competition cases. We hope to initiate an agenda that incorporates a feminist perspective as a broader issue in competition law, not necessarily restricted to classic feminist themes.

Keywords: Feminist Judgments; Feminist Rewriting; Gender and Antitrust; Brazilian Competition Law; Corporate Crime.

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1. A brief overview of feminist rewritings

This paper is the first attempt at applying the rising “feminist rewritings” or “feminist judgment” research agenda and methodology to antitrust law in international academic literature. We present a proposal that can guide authorities and practitioners in considering gender and feminist theory to enforcement and sanctioning decisions, starting from current debates within the case law of Brazil’s competition authority (CADE).

Legal feminist rewriting refers to a methodology that seeks to analyze and reinterpret court decisions from a feminist standpoint. Given the widespread diagnosis of gender imbalances within the judicial system and among public authorities across the world, the project departs from the – rather simple – question: how would a woman have decided this case?³In

³ “The woman question asks about the gender implications of a social practice or rule: have women been left out of consideration? If so, in what way; how might that omission be corrected? What difference would it make to do so? In law, asking the woman question means examining how the law fails to take into account the experience and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only nonneutral in a general sense, but also “male” in a specific sense. The purpose of the woman

order to provide a well-established answer, distancing from cliché statements and commonplaces, scholars have developed a set of methods that consists of applying the law available at the moment of the rewritten decision to consider different standpoints and provide (potentially) distinct outcomes. Through a rigorous methodological approach, feminist rewriting projects avoid simply questioning historic accounts through a contemporary lens, which could unwantedly lead to overly simple historical revisionism or merely wishful thinking.

The rewriting approach focuses on the legal reasoning and on the arguments (both legal, but often social and political) used in the decision. Thus, the project does not necessarily aim at reaching different decisions, nor at altering precedents and case law, but rather reconstructing its core basis. The practical aspect is key to the relevance of this method; as feminist theories and methods have always been labeled as utopic or far-fetched, feminist rewriting seeks to address those criticisms and show how practical, realistic, and achievable they can be⁴.

In that sense, feminist rewriting methods include intersectional perspectives and wider contextualization of issues, avoiding gender and race stereotypes, and advocating for the integration of feminist research and studies in case law. In summary, feminist rewriting projects encourage the consideration of gender issues and the concrete effects of judgments on socially vulnerable groups and communities.

The first structured projects were conducted by Canadian researchers in the Women's Court of Canada Project⁵, which later inspired scholars

question is to expose those features and how they operate, and to suggest how they might be corrected". In: BARTLETT, Katharine T. *Feminist Legal Methods*. *Harvard Law Review*, v. 103, n. 4, p. 837, fev. 1990

⁴ HUNTER, Rosemary. The Feminist Judgments Project: legal fiction as critique and praxis. *International critical thought*, v. 5, n. 4, p. 501-508, 2015.

⁵ MAJURY, Diana. Introducing the Women's Court of Canada. *Can. J. Women & L.*, v. 18, p. 1-26, 2006. For a discussion of the impact of the "Women's Court of Canada", see: KOSHAN, Jennifer. Impact of the Feminist Judgment Writing Projects: The Case of the Women's Court of Canada. *Oñati Socio-Legal Series*, v. 8, n. 9, 2018.

in the US⁶, the UK⁷, Australia⁸, Mexico⁹, Pakistan¹⁰, among other jurisdictions. In recent years, legal scholarship has been witnessing an array of projects aiming to rewrite leading decisions within a vast diversity of fields. As a notable example, the Cambridge University Press has released a series of books with rewritten decisions on topics that span from immigration law, criminal law, constitutional law, health law, family law, reproductive justice, and tax law, as well as collections on torts, property law, and corporate law.¹¹

In Brazil, this topic is still blooming, but there are remarkable initiatives: the Gender and Law Center at FGV-SP has been conducting the project “Rewriting decisions from a feminist perspective” since 2020;¹² and USP’s Ribeirão Preto Law School (FDRP) and the Institute for Advanced Studies (IEA) hosts the “Feminist Judgements Project – Brazil”, which has recently resulted in a book, which features almost 30 rewritten judicial and

⁶ STANCHI, Kathryn M.; BERGER, Linda L.; CRAWFORD, Bridget J. (ed.). *Feminist judgments: rewritten opinions of the United States Supreme Court*. Cambridge University Press, 2016.

⁷ HUNTER, Rosemary; MCGLYNN, Clare; RACKLEY, Erika (ed.). *Feminist judgments: From theory to practice*. Bloomsbury Publishing, 2010.

⁸ DOUGLAS, Heather *et al.* (ed.). *Australian feminist judgments: Righting and rewriting law*. Bloomsbury Publishing, 2014.

⁹ HERNANDEZ, Geraldina G. de La Vega; RAMOS, Isabel Montoya (coord.). *Sentencias feministas: reescribiendo la justicia con perspectiva de género - Proyecto México*. Querétaro. Instituto de Estudios Constitucionales del Estado de Querétaro, 2022.

¹⁰ CHANDRA, Aparna; SEN, Jhuma; CHAUDHARY, Rachna. Righting Together: An Introduction to the Indian Feminist Judgments Project. *VRÜ - Verfassung und Recht in Übersee*, v. 56, n. 1, p. 5-16, 2023.

¹¹ See the “Feminist Judgment Series: Rewritten Judicial Opinion”. In: CAMBRIDGE UNIVERSITY PRESS, Feminist Judgment Series: Rewritten Judicial Opinions. *Cambridge University Press*, 2023. Available at: <https://www.cambridge.org/core/series/feminist-judgment-series-rewritten-judicial-opinions/8710B47B2AAA8168DE73247F7987CCAA>. Last access: 9 sept. 2023.

¹² See information available at: FGV DIREITO SP. “Rewriting decisions from a feminist perspective”. *Gender and Law Center*. 2023. Available at: <https://direitosp.fgv.br/en/research-project/rewriting-decisions-feminist-perspective>. Last access: 9 sept. 2023.

administrative decisions¹³ dealing with domestic violence, LGBTQIAP+ rights, housing, public education, labor rights, administrative law, amnesty laws, among others¹⁴.

As the existent research shows, there are areas of law that have outstanding impacts on women's lives: criminal law, constitutional law, family law, labor law, etc. However, we believe that restricting the methodology to those commonly "gender-sensitive" fields of law limits and ignores its far-reaching transformative potential. Our paper provides a "next step" towards expanding that research agenda and evidence that it has wider applications, especially in fields of law which seldom receive a "feminist lens".

At first glance, antitrust and other fields of economic, commercial, and private law may seem distant and somewhat alien to the Feminist Judgments methodology and overall project. But, this apparent misfit has already been addressed in the international literature: the "Rewriting Corporate Law" leg of the Cambridge University Press project noted that corporations are "at the center of various forms of inequality in our society" and that "the ubiquity of corporate influence makes corporate law a prime standing point for an intersectional analysis that considers the struggles and injuries corporations impose on under-resourced or marginalized populations, including people whose gender expression is non-male, people who are members of racial and ethnic minority groups and people who are working class and poor."¹⁵ This is widely applicable to Brazilian law and is consistent with a greatly developed progressive scholarship on business, corporate, and economic law, which largely translates to antitrust law as well.

¹³ See for instance: FIDELES, Sirlene M.; FERREIRA, Carolina C. A violência contra a mulher em universidades brasileiras: a perspectiva de gênero em um Processo Administrativo Disciplinar. In: SEVERI, Fabiana Cristina Severi (org.). *Reescrevendo decisões judiciais em perspectivas feministas: a experiência brasileira*. Ribeirão Preto (SP): IEA/FDRP-USP, 2023, p. 786-814.

¹⁴ SEVERI, Fabiana Cristina Severi (org.). *Reescrevendo decisões judiciais em perspectivas feministas: a experiência brasileira*. Ribeirão Preto (SP): IEA/FDRP-USP, 2023.

¹⁵ CHOIKE, Anne; RODRIGUES, Usha R.; WILLIAMS, Kelli Alces (orgs.), *Feminist judgments: corporate law rewritten*, New York: Cambridge University Press, 2022, p. 3.

Brazilian antitrust law is a great case study for the application of the “feminist rewriting” methodology, for several reasons. First, Brazil’s competition policy is recognizably at the forefront of developing countries’ antitrust agenda and has witnessed enhanced enforcement levels, especially on merger review and cartel investigations over the last decade. Second, the greatest exponents of the critical approach to business law are also among the most relevant antitrust scholars in the country.¹⁶ This combination makes Brazil a great benchmark for this interdisciplinary debate. Therefore, our proposal is also coherent with the accumulated tradition in legal scholarship and does not result in an absolute departure from what is already being researched and discussed within the field. Third, as we explore below, the debate on gender sensitivity to antitrust enforcement (and vice-versa) is a fairly developed (despite novel) topic in the specialized literature.

With all of this in mind, we see antitrust enforcement, centered around the decisional practice of the country’s antitrust authority – CADE – as a great case for an attempt to expand the feminist judgement agenda in Brazil. This paper aims to shed light on the issue: while it does not present a concrete rewriting project (i.e., it does not depart from a concrete decision and it does not seek to rewrite one at this point¹⁷), we highlight three topics – all relevant, current, and recurring in CADE’s case law – that could be interpreted through a feminist lens; and seek to begin to explore our methodological approach.

In addition to this brief introduction, the article develops as follows: Section 2 provides an overview of the gender & antitrust debate and shows why antitrust should be on the radar of the “feminist rewriting”

¹⁶ We highlight the works of Paula Forgioni, Ana Frazão and Calixto Salomão Filho - all business and commercial law scholars who are leading voices in Brazilian antitrust and competition policy.

¹⁷ Our approach is consistent with the literature that has sought to provide a methodological framework for feminist rewriting projects before rewriting. See, for instance: CHANDRA, Aparna; SEN, Jhuma; CHAUDHARY, Rachna. Righting Together: An Introduction to the Indian Feminist Judgments Project. *VRÜ-Verfassung und Recht in Übersee*, v. 56, n. 1, p. 5-16, 2023.

method. Section 3 describes the three tendencies in Brazilian antitrust enforcement that would make fruitful rewriting cases. Section 4 concludes and presents a way forward.

2. A glimpse of the “gender and antitrust” debate

The gender and competition policy debate is wide and diverse. Since 2018, the OECD has been advocating for this agenda and it has recently launched a project to stimulate the development of evidence (e.g., empirical, statistical, etc.) on gender-inclusive competition policies, which has resulted in the recently launched “Gender Inclusive Competition Toolkit”.¹⁸ Among the work sponsored by the OECD’s Agenda, recent studies have supported a widely held conclusion that the interconnections between gender and antitrust policy are greater than first envisioned¹⁹.

Commentators have been describing this agenda as a “polyhedral phenomenon” with multiple elements and outcomes²⁰, touching on subjects such as gender-influenced market structures, market failures, and relevant market definitions; impacts of gender diversity in competition in labor markets; as well as institutional possibilities of top-down stimuli for increased

¹⁸ OECD. *Gender Inclusive Competition Toolkit*, Paris: OECD Publishing, 2023. Available at: <https://www.oecd.org/competition/gender-inclusive-competition-toolkit-0d789043-en.htm>. Last access: 9 sept. 2023.

¹⁹ OECD. *Gender Inclusive Competition Toolkit*, Paris: OECD Publishing, 2023. Available at: <https://www.oecd.org/competition/gender-inclusive-competition-toolkit-0d789043-en.htm>. Last access: 9 sept. 2023.

²⁰ Among the different profiles surrounding the topic, are included “(a) market power and gender ('gender through the social profile'); (b) women's positions in companies ('gender through the supply profile'); (c) women and conduct control ('gender through the profile of anticompetitive conduct'); (d) women as a group of consumers ('gender through the purchasing profile'); (e) women and structural control ('gender through the relevant market definition profile'); and (f) women's representation in antitrust ('gender through the representation profile').” See: ATHAYDE, Amanda; CAVALCANTI, Mariana Piccoli L. Gênero e antitruste: O fenômeno poliédrico da discriminação por gênero e seus impactos na defesa da concorrência. *Elas no Jota*. **Jota**, 25 feb 2021. Available at: <https://www.jota.info/opiniao-e-analise/colunas/elas-no-jota/genero-antitruste-25022021>. Last access: 7 sept. 2023.

gender diversity lead by antitrust authorities (e.g., through behavioral remedies in merger review cases)²¹. Agency prioritization and greater intervention in markets that particularly affect women, demand-side market definition according to better-designed consumer data, restrictions and discrimination in labor markets, entry barriers for women entrepreneurship and gender-based higher transaction costs, market effects of unpaid work and informal economies, price discrimination, collection of personal data and data-driven women-targeted services, are all among those potential elements and outcomes.²² Such an array of choices can affect different aspects of an antitrust agency's activities: conduct investigation, enforcement, and compliance; advocacy (both structured and *ad hoc*) and market studies; as well as merger review.

Indeed, competition policy affects a diverse set of individuals and is experienced differently by each of them,²³ and that can unfold into different and varied impacts in the “traditional” antitrust assessment and enforcement guidelines. Taking gender into consideration leads to decisions that are reality-adherent and better reflect social foundations that are constitutive of markets and market relations.

One of the key insights reached by the first step of the OECD project is that gender is an additional feature that influences decision-making and should be regarded by competition. That means that gender should not be the primary or priority aspect of competition assessment, but one additional market feature that should be taken into consideration.²⁴ In fact, when

²¹ LONG, Sarah. Gender Inequality, Market Distortion and Consumer Welfare: A Call to Action for Competition Authorities. *Journal of European Competition Law & Practice*, v. 10, n. 5, p. 267-268, 2019.

²² SANTACREU-VASUT, Estefania; PIKE, Chris. Competition policy and gender. *Revue des Droits de la Concurrence - Concurrences*, n. 4, p.1-10, 2019.

²³ BINOTTO, Anna; CONTRI, Camila Leite *et al.* A (Crescente) Relevância do Gênero na Política Antitruste. In: ATHAYDE, Amanda, et al. (coord.). *Mulheres no Antitruste*. v. 5 São Paulo: Singular, 2023, p. 28-37.

²⁴ OECD. “Key Insights”, *Gender Inclusive Competition Toolkit*, Paris: OECD Publishing, 2023. Available at: <https://www.oecd.org/competition/gender-inclusive-competition-toolkit-0d789043-en.htm>. Last access: 9 sept. 2023.

confronted with scenarios of crisis, antitrust policy is often required to reinvent itself, in order to avoid its intervention capacity and become a low-intensity policy.²⁵

With the increasing social pressure against gender inequality, competition authorities are yet to provide definitive answers on how to tackle gender inequality within their own ranks and, in general, on the role gender plays in antitrust enforcement.

3. Rewriting CADE: a proposal for the incorporation of feminist judgments in Brazilian competition law

CADE is no exception to the historical lack of female decision-makers within Brazil's public administration and judicial system. Since its creation in 1964, with over 80 members in its history, CADE has had only 12 female members in its Administrative Tribunal, who have spent most of their term as the sole female representative – the notable exceptions were the years of 2018 and 2019 when 3 female Commissioners were concurrently seated at the Tribunal²⁶.

Not surprisingly, gender issues have been widely overlooked by (if not completely absent in) CADE's decisional practice. That is despite the fact that the Brazilian authority has discussed in some specific cases

²⁵ DE CARVALHO, Vinicius Marques. Antitruste under pressure: crises econômicas e impactos nas estratégias de intervenção, *Revista Direito Público*, v. 18, n. 98, p. 825-878, 2021.

²⁶ DE CARVALHO, Vinicius Marques; RAGAZZO, Carlos Emmanuel Joppert. *Defesa da concorrência no Brasil: 50 anos*. Brasília: Conselho Administrativo de Defesa Econômica – CADE, 2013. Available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/livro-50-anos/livro-defesa-da-concorrenca-no-brasil-50-anos.pdf>. Last Access: 8 sept. 2023.

issues that are not “strictly antitrust related” (in its narrowest formulation), having discussed the competitive effects of labor issues²⁷ and worker²⁸ coordination, sustainability standards²⁹, tax policy³⁰, industrial policy³¹, etc. over the years. As mentioned before, that generally derives from the Brazilian constitutional roots of the protection of competition, which subjects antitrust law and policy to the principles that guide the economic and financial

²⁷ For example, Administrative Proceeding no. 08700.004548/2019-61. See also ATHAYDE, Amanda; DOMINGUES, Juliana Oliveira e SILVA E SOUZA, Nayara Mendonça. O improvável encontro do direito trabalhista com o direito antitruste. *Revista do IBRAC*, v. 24, n. 2, p. 65-93, 2018. LOBO, Catarina, PICCOLI, Júlia. Acordos de não-aliciamento de trabalhadores e suas implicações antitruste. *Jota*. 2021.

²⁸ For example, Administrative Proceeding no. Processo Administrativo 08012.005135/2005-57. Opinion by Commissioner Ana Frazão. See also, more recently, FRAZÃO, Ana. Dilema antitruste: o Uber forma um cartel de motoristas? Por definir preço de corrida, aplicativo também influenciaria adoção de conduta uniforme? *Jota*, 2016. FRAZÃO, Ana. Plataformas digitais e repercussões concorrenciais: É possível a negociação coletiva diante dos gigantes da internet? *Jota*, 2017. MACEDO, Alexandre Cordeiro. O Caso Uber e as Possíveis Práticas Restritivas à Concorrência: Colusão ou Conduta Unilateral?, 2018.

²⁹ For example, Merger Case no. 08700.009905/2022-83. See also, MELO, Lilian Cintra de. A relação entre antitruste e sustentabilidade. *Conjur*, 2021; KUHN, Tilman; CARVALHO, Vinicius Marques. Sustentabilidade no enforcement antitruste do Brasil e da União Europeia. *Jota*. 28.01.2021; CRIVELARI, Aline. *O papel do antitruste brasileiro na consecução do desenvolvimento sustentável: a abordagem da questão ambiental na análise antitruste*. 2018. 258 f. Dissertação (Mestrado em Direito)—Universidade de Brasília, Brasília, 2018.

³⁰ For example, Proceeding no. 08700.002532/2018-33. See also, FREIRE, Rodrigo Veiga Freire. *Livre concorrência tributária: limites legais e institucionais do CADE para prevenir e reprimir condutas anticompetitivas baseadas nos efeitos das normas tributárias*. 2017. 110 f. Dissertação (Mestrado em Direito) — Escola de Direito de São Paulo da Fundação Getulio Vargas, São Paulo, 2017.

³¹ For example, Merger Case no. 08700.003896/2019-11. See also, COSTA, Carolina Saito da. *Defesa da concorrência, política industrial e desenvolvimento tecnológico: a operação Totvs-Datasul*. 2017. Dissertação (Mestrado em Direito) - Programa de Estudos Pós-Graduados em Direito da Pontifícia Universidade Católica de São Paulo, São Paulo, 2017; CARVALHO, Vinicius Marques. A Política de Defesa da Concorrência quatro anos depois: ainda em busca de melhores práticas? In: *A Lei 12.529/2011 e a Nova Política de Defesa da Concorrência*, 2015; FUJIMOTO, M. T. . JBS e Atos De Concentração: Neutralidade Concorrencial ou Alinhamento Com A Política Dos Campeões Nacionais?. In: Agnes Macedo de Jesus; Amanda Athayde; Isabela Maiolino; Juliana Oliveira Domingues; Leonor Cordovil; Mylena Augusto de Matos. (Org.). *Mulheres no antitruste*. 1ed.São Paulo: Singular, 2018, v. 1, p. 258-272.

order (the appreciation of the value of human labor and on free enterprise, the ensuring of dignified existence to all citizens, according to the imperative of social justice).

In a recent round of interviews, leading scholars and practitioners of the Brazilian antitrust scene have highlighted the relevance of gender issues in antitrust and the challenges ahead in overcoming them.³² In that context, we seek to investigate in which ways to apply the methodology of feminist rewriting of CADE decisions. We also hope our work serves as an additional step to put gender on top of the antitrust agenda. In line with feminist rewriting methodology, we argue that a feminist approach could apply in any case regardless of the facts, the context, or the applicable antitrust rules. However, such an extensive feminist approach demands methodological rigor and a clear roadmap for application, which we seek to develop in this article.

For our discussions, we depart from the conception that enforcement systems jog incentives for subjects to comply with the law and control undesirable conduct, creating positive externalities in firm-level behavior. Therefore, we find that our suggestions may unfold into positive signaling to market players, regardless of concrete decisions or the creation of precedents within CADE's enforcement. This proposition is one of the first concrete formulations to bring gender and antitrust into effective policy proposals and agendas in Brazil.

For this proposal, we selected three issues that have (a) been consistently discussed in the specialized literature and/or CADE's case law (rather than specific cases or issues); and (b) cross-sectoral impact (rather than cases that apply to certain specific markets). These are: (i) the prosecution and sanctioning of individuals in non-managerial positions; (ii) the effects of board composition on anticompetitive behavior and board diversity as an

³² SANTOS, Flávia Chiquito (org.). *10 anos da lei de defesa da concorrência*, São Paulo: IBRAC, 2022 (interviews with Amanda Athayde, Carlos Magalhães, Diogo Coutinho, Leonor Cordovil, Mauro Grinberg, Patrícia Agra and Sonia Dobler all mention the issues of the interface between gender and antitrust).

antitrust remedy; and (iii) the assessment of family ties within merger review and anticompetitive behavior. They are greatly related to what Amanda Athayde and Mariana Piccoli have described as a profile of “gender through the profile of anticompetitive conduct”, which seeks to diagnose the impact of gender in conviction rates, reporting to compliance officers and authorities (e.g., in leniency programs) and investigations.³³ There is particularly growing literature on gender biases in antitrust infringements, both at investigation and sanctioning levels and this is an area where studies have shown a specific connection between gender diversity and antitrust enforcement³⁴. Thus, we view those topics as good starting points to test the Feminist Judgements methodology.

3.1. *Sanctions and fines to individuals and non-managers*

A current “hot topic” in antitrust enforcement in Brazil is the discussion on how CADE should deal with individuals while investigating anticompetitive conduct. Indeed, Law no. 12,529/2011 allows CADE to investigate and sanction both companies and individuals for all the practices provided thereof. Prosecution of individuals seldom happens in investigations of unilateral conduct and abuse of dominance cases but is very common in cartel cases.

Some scholars are critical of the inclusion of individuals in CADE’s investigations in the first place, and while we could not satisfactorily reconstruct their arguments, we could summarize them by recognizing that it is difficult, time-consuming, and costly to prosecute individuals (especially foreigners) in accordance with due process principles and that criminal law could serve as an adequate means of dissuasion for wrongdoings

³³THAYDE, Amanda; CAVALCANTI, Mariana Piccoli L. Gênero e antitruste: O fenômeno poliédrico da discriminação por gênero e seus impactos na defesa da concorrência. *Elas no Jota*. *Jota*, 25.02.2021. Available at: <https://www.jota.info/opiniao-e-analise/colunas/elas-no-jota/genero-antitruste-25022021>. Last access: 7 sept. 2023.

³⁴ BORRELL, Joan-Ramon *et al*, *Gender bias in cartel engagement: the role of gender in management boards and how to take the role of gender into account when designing competition law enforcement*, [s.l.]: OECD, 2021.

(at least for cartels) on an individual level.³⁵ On that backdrop, authorities and practitioners have long discussed the best sanctioning designs for individuals, especially the calculation of applicable fines.

On the one hand, sanctioning should be bound to contributive capacity and overall taxpaying ability, which could mean that individuals should not be sanctioned to excessively high fines. On the other hand, low fines generally lead to a lower deterrent effect and a lax compliance culture. On top of that, the authorities are required to establish the precise contribution of each individual in the coordinated conduct. While one could think that this would mean heavier burdens of proof, in fact, we see a tendency of flexibilization, with an appeal to indirect evidence and *indicia* to convict individuals. That creates a winding road for enforcers.

It is widely recognized that competitive strategies and antitrust infringements are mostly related to senior management representation, rather than lower-level employees. A recent debate within CADE's Administrative Tribunal brought the issue back to the limelight, in discussing parameters to determine fines for individuals who did not hold management positions within their respective firms at the time of the conduct. In a dissenting opinion, Commissioner Sérgio Ravagnani has proposed that Article 37 of Law no. 12,521/2011 only applies to companies and their officers (i.e., presumably those with power to influence and decide the conduction of the business), releasing non-manager individuals from sanctions.³⁶ This line of thought was followed by other Commissioners but ultimately stands as a minority view among the Tribunal.³⁷

We understand that exempting non-managers from being sanctioned by antitrust violations - especially cartels - is coherent with a feminist interpretation of the law. Here is why: literature confirms that women are

³⁵ See for example: MARTINEZ, Ana Paula. Challenges Ahead of Leniency Programmes: The Brazilian Experience. *Journal of European Competition Law & Practice*, v. 6, n. 4, 2015, p. 267.

³⁶ Administrative Proceeding no. 08700.000066/2016-90. Opinion by Commissioner Sérgio Ravagnani.

³⁷ For example, Administrative Proceeding no. 08700.003396/2016-37. Opinion by Commissioner Lenisa Prado.

more prone to taking orders from male superiors. In male-dominated environments, women are not encouraged to speak up or to question commands. Conversely, they are widely demanded in day-to-day undertakings and are more likely to multitask and take on other people's assignments.³⁸ That means that women are exposed, while not calling the shots. This is an issue in a regime of strict (i.e., non-fault-based) liability, which exempts CADE from proving intention (or negligence, for example).

Consider a case in which a mid-level female employee is brought into multiple meetings between her male director boss and several other executives; she is also copied in most of their email exchanges; and is called to sit in and take notes in conference calls. Imagine the company – through its director – is engaging in a cartel. Like many other authorities, CADE would gather a diverse body of evidence to establish the illegal agreement. It will probably rely on indirect evidence: prove that people attended certain in-person meetings; prove that there were commercial exchanges of information between the parties; proof that “prices” were discussed in a certain conference call as per the notes retrieved. That has sufficed to sanction individuals in Brazil before and would probably be enough to have the employee in question charged, even though she had no agency in influencing or directing the illegal behavior.

We concede that there are alternative explanations (i.e., low number of boards with women majorities and possible confirmation biases) and that specific empirical findings may be relevant to support our arguments but suspect it will probably be aligned with the research already published abroad. We obviously do not contend that women be exempted or treated differently from their male colleagues (i.e., CADE takes into consideration that they did not have the same ability to avoid the illegal practice), but only that the potential that this interpretation of the law further oppresses women in their workplace should be taken into consideration when cases are decided. Therefore, we find that rewriting cartel conviction decisions from a

³⁸ HARVARD BUSINESS REVIEW. *Women in the Workplace: A Research Roundup*. September 2013. Available at: <https://hbr.org/2013/09/women-in-the-workplace-a-research-roundup>. Last access: 5 sept. 2023.

feminist perspective is coherent and aligned with the proposal to exempt non-managers from strict liability for anticompetitive conduct.

3.2. Remedies targeting board composition

Remedies are a key factor in designing a gender-inclusive competition policy. Perhaps more than fining agents, remedies represent the greatest exercise of authority by an antitrust watchdog, because they ultimately allow the State to effectively intervene in the market and modulate business strategies, private relationships, and market dynamics. Remedies should be tailored in order to target imbalances that constrain the competitive process, thus “more effective consumer remedies are a result of a better understanding of who is harmed”³⁹. Indeed, the OECD precisely points out that “remedies that factor in gender considerations may not only improve competition outcomes, but they can also help address gender inequality in markets”.⁴⁰

In this section we suggest one possible remedy to be considered by antitrust authorities in sanctioning anticompetitive conduct (i.e., a non-monetary sanction or negotiated obligation included in cease-and-desist or leniency agreements) that is gender-sensitive, has positive societal and political spill-overs, is coherent with the current state of research, and is adherent to market realities in Brazil: mandated increased board diversity for firms involved in cartels.

Brazil has been witnessing an increased debate on board gender diversity over the past decade, following an equally intensified movement on corporate governance improvement. A growing movement of self-regulatory and industry lead initiatives (e.g., the Women on Board – WOB net-

³⁹ OECD, “Key Insights”, *Gender Inclusive Competition Toolkit*, Paris: OECD Publishing, 2023. Available at: <https://www.oecd.org/competition/gender-inclusive-competition-toolkit-0d789043-en.htm>. Last access: 9 sept. 2023.

⁴⁰ OECD, “Key Insights”. *Gender Inclusive Competition Toolkit*, Paris: OECD Publishing, 2023. Available at: <https://www.oecd.org/competition/gender-inclusive-competition-toolkit-0d789043-en.htm>. Last access: 9 sept. 2023.

work) is complemented by a new legislative bill presented before the Brazilian congress that intends to set a 30% quota for female board members in public-traded corporations over a period of four years (Bill no. 785/21).

The “gender and competition policy debate” is greatly intertwined with the board gender diversity discussion. There is particularly growing literature on gender biases in antitrust infringements, both at investigation and sanctioning levels. This is an area where studies have shown a specific connection between gender diversity and antitrust enforcement.⁴¹

Empirical studies have also shown a positive correlation between increased gender diversity within boards and reduced levels of corporate crime.⁴² A study that evaluated a sample of 660 public corporations to assess the impact of gender diversity on corporate obedience and compliance with the law shows that “every one percent increase in female representation on the board is associated with at least a four percent decrease in the probability that the corporation will be associated with a violation of the law.”⁴³ Another study assessing gendered markers for 83 corporate frauds involving

⁴¹ BORRELL, Joan-Ramon *et al*, *Gender bias in cartel engagement: the role of gender in management boards and how to take the role of gender into account when designing competition law enforcement*, [s.l.]: OECD, 2021.

⁴² MALERBA, Alexa. Gender Differences in White-Collar Crime and the Importance of Gender Diversity, *Sacred Heart University Academic Festival*, Event 21, 2020. Available at: <https://digitalcommons.sacredheart.edu/cgi/viewcontent.cgi?article=1533&context=acadfest>. Last access: 9 sept. 2023. “The much larger percentage of male involvement in white-collar crime can be attributed to the larger numbers of men in the business workforce, but also the strong masculine dynamic of the corporate workplace. With greater power to influence others, men can more easily influence other males and females, especially females of low ranking positions who easily adopt this behavior to fit in, to assist them or become involved in white-collar crimes.”

⁴³ BAUM, Ido; GAFNI, Dalit; LAZAR, Ruthy, Gender and Corporate Crime: Do Women on the Board of Directors Reduce Corporate Bad Behavior?, *Michigan Journal of Gender & Law*, n. 29.2, p. 291-350, 2022.

436 defendants concluded that “typically, women were not part of conspiracy groups. When women were involved, they had more minor roles and made less profit than their male co-conspirators.”⁴⁴

Those results are consistent with the findings of the “[g]ender bias in cartel engagement” project sponsored by the OECD, which investigated the hypothesis that “women in the company’s board of directors, senior management positions or director posts may have a significant effect in reducing the firm’s misbehavior, and correspondingly having women as board members may reduce cartel engagement.”⁴⁵

Given the widely supported correlation between gender diversity on the board level and antitrust deterrence, particularly for coordinated practices (e.g., cartels), we find that board diversity could be incorporated into CADE’s decisional practice. That could be done in multiple ways: assessing levels of gender diversity in leadership positions to modulate sanctions; conferring fine reductions for firms with adequate levels of board diversity; or including gender diversity and equality standards in evaluating compliance programs and requirements. A relevant aspect discussed in the aforementioned studies is that cartel busting can lead to board restructuring, which can be a relevant manner to promote gender diversity in board composition. We propose CADE internalizes this concern in modeling sanctions.

A recent empirical study shows that CADE has largely relied on monetary sanctions (i.e., fines) in cases of anticompetitive behavior. However, that paradigm may be at a crossroads, since researchers suggest that non-monetary sanctions can be a powerful instrument to balance over and

⁴⁴ STEFFENSMEIER, Darrel J. *et al*, Gender and Twenty-First-Century Corporate Crime: Female Involvement and the Gender Gap in Enron-Era Corporate Frauds. *American Sociological Review*. v. 78, n. 3, p. 448-476, 2013.

⁴⁵ BORRELL, Joan-Ramon *et al*, *Gender bias in cartel engagement: the role of gender in management boards and how to take the role of gender into account when designing competition law enforcement*, [s.l.]: OECD, 2021.

undeterrence concerns while addressing specific effects resulting from the conduct at hand.⁴⁶

Brazil has a statutory provision (art. 38, Law no. 12,529/2011) that lists several possible non-monetary sanctions for anticompetitive conduct, including the mandatory announcement of the conviction decision, ineligibility for public financing, prohibition to take part in public tenders, as well as structural firm-level measures such as mandatory selling of controlling stake and divestitures. More relevantly, the legislation expressly provides CADE with the power to take “any measures to eliminate harmful effects on the economic order” deriving from anticompetitive behavior (art. 38, VII, Law no. 12,529/2011), which could include a variety (and a combination) of structural and behavioral remedies. Recent empirical research shows that this wide sanctioning provision is overlooked by CADE, despite its great dissuading potentials.⁴⁷

We suggest that CADE is legally allowed to innovate and design new remedies for anticompetitive behavior and that this could include requiring sanctioned companies to adopt board diversity requirements. We find that to be consistent with the findings in the literature and policy proposals included, for example, the OECD Toolkit.

Again, we contend that, in practice, several constraints may appear governance rules included in corporate statutes and shareholders’ agreements governing nominations for the board may pose challenges; compatibility with capital markets regulation (e.g., CVM) and self-regulation will need to be observed; specifics and historical aspects of the firm’s corporate governance may surface, etc. Those issues should be considered (and put into question) upon the rewriting of a cartel-sanctioning decision. However,

⁴⁶ ATHAYDE, Amanda; CRUVINEL, Renan. Non-Monetary Antitrust Sanctions: The Brazilian Experience between 2012 and 2022 and Some Additional Reflections for International Antitrust Practice, [S.l.] : SSRN. 2022. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4282215. Last Access: 9 sept. 2023.

⁴⁷BINOTTO, Anna; ATHAYDE, Amanda, Da pena não pecuniária de imposição de qualquer outro ato ou providência necessários para a eliminação dos efeitos nocivos à ordem econômica - inciso VII do Art. 38 da Lei nº 12.529/2011, In: ATHAYDE, Amanda *et al.* *Sanções não pecuniárias no antitruste*, São Paulo: Singular, 2022.

we suggest that this exercise, if successful, may push CADE to consider this possibility upon designing non-pecuniary sanctions for cartel cases, which may include board diversity and compliance measures. From an academic perspective, it may also push the boundaries of the debate of board diversity in competition law, including issues of race inequality, for instance.

3.3. *The assessment of family ties*

A recent study highlights how family ties are strong indicators of anticompetitive behavior and are often used as circumstantial evidence of collusion because they enable the exchange of information and strategic coordination among competing firms.⁴⁸ Indeed, CADE's case law includes decision in which the exchange of (competitively sensitive) information among individuals from the same family or with other "relationships of affinity" was presumed to have enabled and facilitated the structuring of the cartel. Family ties and affinity relationships among the individuals under investigation were considered strong evidence that they were colluding in the market.⁴⁹ Feminist rewritings of such features of decisions could, for example, attribute a mitigated relevance for such circumstantial evidence when information exchanges occur between spouses. They could also adopt different approaches adopted by foreign jurisdictions, such as invoking family connections to support the existence of a single economic unity and discharging allegations of collusive behavior between family members.⁵⁰

Family ties may also be significant when CADE decides to pierce the corporate veil and impute liability to individual partners. Studies show

⁴⁸ PARGENDLER, Mariana; SILVA, Mariana Luiza; VÍSPICO, Lucas. Family Ties and the Boundaries of the Firm in Antitrust Law. In: THÉPOT, Florence; TZANAKI, Anna (eds.). *Research Handbook on Competition and Corporate Law* (Forthcoming). Edward Elgar, 2023.

⁴⁹ See, for example, Administrative Proceeding no. 08700.007278/2015-17, Technical Note no. 32/2021/CGAA8/SGA2/SG/CADE and Vote by Commissioner Sérgio Costa Ravagnani. Administrative Proceeding no. 08700.000269/2018-48, Technical Note no. 8/2019/CGAA9/SGA2/SG/CADE.

⁵⁰ PARGENDLER, Mariana; SILVA, Mariana Luiza; VÍSPICO, Lucas. Family Ties and the Boundaries of the Firm in Antitrust Law. In: THÉPOT, Florence; TZANAKI, Anna (eds.). *Research Handbook on Competition and Corporate Law* (Forthcoming). Edward Elgar, 2023.

that the application disregard doctrine has incidental and procedural application, essentially limited to cases in which CADE cannot locate and/or summon corporations and decides to reach its partners instead.⁵¹ Feminist rewritings of CADE's decision could grasp the interpretation of family ties for cases where "relationships of affinity" implicate female spouses who are formally (but not actually) included in corporate charts to address the legal requirement of plurality of partners or shareholders to incorporate partnerships or corporations in Brazil.⁵² Cases of veil piercing in CADE's administrative proceedings should be sensitive to that scenario and, for example, target partners that hold managerial positions, releasing spouses of the burden to respond to a legal suit or investigative proceeding just because they were required by their husbands or family members to legally hold equity in a family-owned partnership.

4. Concluding remarks and forward-looking agenda

This article is a first step toward the inclusion of gender concerns in antitrust enforcement decisions. Within this ascending debate, our paper is one of the first concrete formulations to bring gender and antitrust into effective policy proposals and agendas in Brazil. Following up, the project "Rewriting CADE" will revise specific decisions in CADE's case law to show that our proposals can be incorporated into competition law and economics, with preciseness and objectiveness, without diverting from the "traditional" assessment by the antitrust authority.

With our paper and project, we also intend to draw attention to the potential developments of expanding the feminist judgements agenda and of applying its methodology to legal reasoning and decision-making outside

⁵¹ BARELLI, Amanda Fabbri. *A aplicação da teoria da desconsideração da personalidade jurídica no processo administrativo: uma análise sob a perspectiva do direito antitruste*. 2015. 153 f. Dissertação (Mestrado em Direito) — Universidade de São Paulo, São Paulo, 2015.

⁵² This was very common before the enactment of Law no. 13,874/2019, which altered the Brazilian Civil Code and included the possibility of incorporating limited liability individual companies.

of “strictly gendered issues”. In line with the international initiatives in re-writing tort law, property law, and commercial law, we find that there is great room for reflection and experimentation, all aligned with the overarching goal of promoting gender parity, equity, equality, and justice.

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