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The Use of Structural Presumptions in Antitrust – Note by Brazil

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Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08.

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*Brazil*¹

1. Introduction

1. This contribution aims to explore and develop the concept of structural presumptions and their general application and recent uses within the scope of Brazilian antitrust enforcement. It begins with a review of the concept, followed by an analysis of how Brazilian competition law and merger guidelines address the subject. The contribution concludes by highlighting recent decisions by the Brazilian competition authority (Cade), illustrating the debate and application of structural/relative presumptions across various markets and contexts.

2. Before analyzing the concept through Cade's decisions, a brief digression is warranted to provide a preliminary effort in outlining, systematizing, and presenting the concept we examine here.

2. Definition and Evolution of the Concept

3. The doctrine of structural presumptions is a widely used tool in antitrust analysis of both horizontal and vertical mergers, serving to simplify and structure their evaluation.

4. In general, structural presumptions are based on the idea that market architecture – characterized by elements such as the number of firms and the level of concentration – has a direct relationship with the likelihood of engaging in anticompetitive practices, especially when a transaction results in the formation of a dominant entity that exceeds certain pre-established thresholds or when such a consolidation process leads to the creation of a highly concentrated market, increasing the potential for coordinated behavior (Hovenkamp & Shapiro, 2018; Sullivan, 2016; Baker, 2019; Kwoka, 2020).

5. Its origin is linked to the development of the merger analysis and control process from a structuralist perspective during the 1950s, heavily influenced by the works of authors such as Bain (1956); Bok (1960); Markham (1957); Kaysen & Turner (1959); and Stigler (1955). For instance, the latter, in a 1955 article, seeks to systematize a set of general rules for evaluating horizontal mergers, emphasizing the relevance of structural assumptions and explicitly highlighting that market shares above 20% could be considered a relative indication of competitive concerns.

6. Stigler's rule of thumb aimed to systematize central aspects of the amendment and reform process to Section 7 of the Clayton Act through the Cellar-Kefauver Antimerger Act of 1950, which structured the control of asset acquisitions – and, therefore, the control of market structures as we know it today – as part of the competencies of the U.S. antitrust system.

7. As Oliveira & Krein (2024) points out, this dynamic, in turn, consolidated into a doctrine through a series of U.S. Supreme Court decisions during the 1960s and 1970s,

¹ This article was written by Diogo Thomson de Andrade and Paulo Henrique de Oliveira, respectively Commissioner at Cade's Administrative Tribunal and Chief of Staff to the aforementioned Commissioner. The text also benefited from contributions by Luiza Camilo de Souza and Gabriela Wilxenski Rodrigues, technical assistant and intern at the Commissioner's office, respectively.

with particular emphasis on cases like *Brown Shoe Co., Inc. v. United States* (1962)² and *United States v. Philadelphia Nat'l Bank* (1963)³, where the court cited the dominant economic theory of the time as the basis for structuring a set of presumptions in which (i) market share percentages are understood as a proxy for measuring market power; (ii) predefined thresholds are established as indicators of competitive harm; and, as Salop (2015) points out, (iii) determining the competitive effects of a merger becomes a matter of "probabilities, not certainties," referencing the Clayton Act's focus on the concept that a merger should be challenged if it "may substantially lessen competition."

8. The central characteristics of structural presumptions involve the shifting of the burden of proof and reliance on pre-established structural thresholds. The shifting of the burden of proof implies that it is up to the firms involved in the transaction to demonstrate that the merger will bring benefits or that the market is, in fact, more competitive than it appears (Kobayashi & Muris, 2023).

9. Moreover, specific concentration limits, such as the use of the Herfindahl-Hirschman Index (HHI), serve to measure the likelihood of anticompetitive harm. For example, mergers that increase the HHI in an already concentrated market by more than 200 points – as in the case of the 2010 U.S. Merger Guidelines, for example – are often considered presumptively harmful, requiring substantial justifications to be approved (Lafontaine & Slade, 2021).

10. In practice, these presumptions guide antitrust authorities to pay special attention to mergers that exceed certain predefined concentration thresholds. This facilitates the allocation of regulatory resources to examine transactions that, at first glance, present substantial risks. However, firms can challenge this presumption with specific arguments. They may claim that the relevant market was defined too narrowly, which unfairly amplifies the potential impact of the merger (Lancieri & Valletti, 2024).

11. Alternatively, they may present evidence of a significant likelihood of new competitors entering the market, which could offset the anticompetitive effects. Additionally, they may argue that the transaction will generate substantial efficiencies, such as cost reductions and product improvements, thereby benefiting end consumers (Hovenkamp & Shapiro, 2018; Slade, 2021).

12. Accordingly, structural presumptions play a crucial role in promoting efficiency in merger and acquisition analyses, reducing the need for detailed investigations in situations where market concentration is not significantly high, allowing antitrust authorities to focus on transactions with greater potential for harm. This not only simplifies the regulatory process but also increases predictability for firms, enabling them to anticipate the criteria used by authorities when reviewing mergers and acquisitions (Kobayashi & Muris, 2023). This approach facilitates the identification and challenge of potentially harmful mergers, while also allowing adjustments as new evidence and economic theories develop, ensuring that antitrust rules remain up-to-date and effective (Sullivan, 2016; Kwoka, 2020).

13. In a more strictly economic sense, as stated by Hovenkamp & Shapiro (2018), two premises are fundamental: (i) the loss of a significant competitor in an already concentrated

² *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962). Available at: <https://bit.ly/400Pyfd>.

³ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963). Available at: <https://bit.ly/46vR8bw>.

market tends to increase market power, and (ii) highly concentrated markets typically present significant barriers to the entry of new competitors.⁴

14. In summary, it is understood that a transaction reaching certain levels of concentration has a high probability of generating anticompetitive effects and is therefore assessed as illegal until proven otherwise. Thus, as previously mentioned, this context establishes a presumption of illegality concerning the transaction, which can be challenged during the analysis by, to some extent, reversing the burden of proof. This reversal requires the parties involved to demonstrate the positive effects of the merger.

15. Structural presumptions, therefore, serve a dual function: they uphold the notion that highly concentrated mergers are not necessarily anticompetitive, avoiding their treatment as *per se* illegal while ensuring that potentially problematic mergers receive greater scrutiny due to the shifting of the burden of proof. By establishing clear thresholds, these presumptions also make the review process more efficient, reducing the number of cases to be investigated based on clearer criteria, thereby simplifying antitrust analysis for regulatory agencies and/or courts (Oliveira & Krein, 2024 *apud* Kaplow, 2022).

3. The Brazilian Context and General Applications

16. In the Brazilian context, it is worth noting that the debate around the adoption of structural presumptions has developed distinctly, influenced by the evolution of Brazil's legal framework and antitrust jurisprudence. In this regard, it is important to highlight that both precedents and sub-legal mechanisms, guidelines, and even legislation tend to treat structural thresholds as instruments of relative presumption focused on procedural determination. This creates distinct types of analysis and investigative processes beyond a certain concentration level, primarily emphasizing procedural economy.

17. Thus, relative presumptions have been, to some extent, present since the enactment of the former Competition Law – Law No. 8,884/1994 – where the criterion for submitting mergers to Cade included a 20% market share threshold in the relevant market, as provided in Article 54, §3, as amended by Law No. 10,149/2000. This percentage indicated the need for Cade's review if a company or group of companies reached such a share in the relevant market. Additionally, Article 20, §3, as amended by Law No. 9,069/1995, presumed a dominant position when a company or group held 20% of the relevant market, allowing Cade to adjust this percentage for specific sectors of the economy.

18. This dynamic is established in the current Competition Defense Law – Law 12.529/2011 –, in which Article 36, § 2 presents the 20% market share threshold as a baseline for analysis of dominant position, again as a form of relative presumption for defining the analysis process, drawing from the foundation of previous legislation.

19. Moving beyond legislative frameworks and into sub-legal measures, the adoption dynamics of relative controls recur, as the Articles 6 and 8, Section III, of Cade Resolution No. 33/2022 – the resolution that regulates the process of notifying mergers to Cade –, utilize structural/relative presumptions to differentiate the procedural rules for the analysis of merger operations. Those with low market shares – horizontal or vertical overlaps of less than 20% or 30%, respectively – may proceed via a summary procedure. When the parties

⁴ Hovenkamp & Shapiro (2018) refer to "structural presumptions" as the legal frameworks that impose specific burdens on economic agents in cases of concentrations, especially in concentrated markets or those with high entry barriers. In this context, the very idea that horizontal mergers raise greater concerns beyond a certain level of market concentration serves as an example of a structural presumption.

have market power exceeding these thresholds, they will need to go through the ordinary procedure. Once again, we observe the use of presumption tools as classifiers of procedures based on the structural context of a given segment.

20. Finally, it is worth noting the case of the Horizontal Merger Guidelines – H Guide – (Cade, 2016), which aims to establish a structural analysis model based on more clearly defined criteria and, in parallel, introduces stronger concepts of structural presumptions tied not only to market share metrics but also to indices such as the HHI. In this new context, operations in markets resulting in an HHI above 2,500 points and involving a change in the index greater than 200 points ($\Delta\text{HHI} > 200$) presumptively generate an increase in market power.⁵

4. Review of Cases Analyzed and Judged by CADE

21. The application of this set of guidelines related to presumption dynamics is also evident in recent cases analyzed by Cade, where, based on the specific characteristics and boundary conditions of markets, revisited discussions concerning the assessment of relative/structural presumptions. This reconsideration is driven either by economic factors specific to the merger or market segment or by concerns focused on procedural economy.

22. An example is Merger Case No. 08700.006185/2016-56, a notable case in Brazil's private higher education sector, involving Kroton Educacional S.A. and Estácio Participações S.A. In this transaction, the largest company in the sector sought to acquire one of its main competitors, creating horizontal overlaps in the markets for higher education and non-degree courses.

23. Given the substantial number of relevant markets affected — 969 in total — Cade's General Superintendence, first instance of reviewing operations by Cade, followed by the lead vote in Cade's Tribunal (last instance), adopted an analytical filter to ensure procedural efficiency. The focus was on the markets for on-campus undergraduate, distance learning undergraduate, on-campus graduate, and distance learning graduate programs, similar to the approach in Merger Case No. 08700.005447/2013-12, involving the merger of Kroton and Anhanguera, where there were horizontal overlaps in 393 relevant markets.

24. In this case, more conservative criteria were used, although aligned with the aforementioned precedent: (i) in on-campus undergraduate, on-campus graduate, and distance learning graduate markets, a threshold of 30% combined market share was set; (ii) in the distance-learning undergraduate market, in addition to the 30% threshold, a causality criterion was adopted, requiring that the market share increase from the smaller player be at least 5%; and (iii) the Herfindahl-Hirschman Index (HHI) calculation was applied only in markets where there were doubts about the causality between the transaction and the creation or reinforcement of a dominant position.

25. With these assumptions, the General Superintendence highlighted 69 on-campus undergraduate markets, 16 distance-learning undergraduate markets nationally, or 527 on

⁵ It is worth noting that the adoption of such metrics in the Brazilian context is closely linked to emulating aspects of the discussions around the concepts found in the US 2010 Horizontal Merger Guidelines, where thresholds are based on the variation and level of HHI indices. In this model, markets with an HHI above 2,500 points are deemed highly concentrated, with concerns for variations between 100 and 200 points. For variations exceeding 200 points, the Guide establishes a structural presumption that can be rebutted.

the municipal level, 12 on-campus graduate markets, 2 distance learning graduate markets, and 2 preparatory course markets.

26. In the car rental sector, a prominent case was the acquisition of Companhia de Locação das Américas by Localiza Rent a Car S.A., analyzed in Merger Case No. 08700.000149/2021-46. This transaction involved two of the largest players in the market, resulting in horizontal overlap in the rental car (RAC) market, fleet management and outsourcing (GTF), and wholesale and retail used car sales. Additionally, two vertical integrations were identified: (i) between the upstream RAC market and the downstream wholesale and retail used car sales markets, and (ii) between the upstream GTF market and the downstream commercial light used car sales markets, both in wholesale and retail.

27. In the analysis of horizontal overlaps, a 20% market share reference was used, as provided in Article 36, §2, of Law No. 12,529/2011 and by the H Guide, in addition to an HHI variation of more than 200 points as a filter. For vertical integrations, the parameter was to verify that the applicants or their economic groups held proven control of more than 30% of any of the vertically integrated markets, in accordance with Resolution No. 2/2012 in effect at the time.

28. The Carrefour/Big case (Merger Case No. 08700.003959/2022-35) involves Carrefour Group's (comprising 489 units) acquisition of the entire share capital of Grupo BIG (comprising 386 units), the third and first largest players in the self-service retail market, respectively. The transaction required an evaluation of the dynamics among the 876 self-service retail units, leading to a series of horizontal overlaps. In 2020, the Brazilian supermarket sector's revenue reached R\$554 billion — representing 7.5% of the national Gross Domestic Product (GDP). This significant market demanded an organization of previous heterogeneous jurisprudence to establish new guidelines.

29. The General Superintendence suggested a 40% market share threshold for the Big/Carrefour case, based on the precedent in the Globex/Casa Bahia case, in which case-by-case analysis by Commissioner Eduardo Pontual concluded that the rivalry among other players was sufficient to prevent market foreclosure, approving the transaction despite the players collectively having a 40% market share.

30. However, Commissioner Luiz Hoffmann saw the need to reassess this threshold, emphasizing the analysis filter as a resource-saving tool, enabling a focus on transactions with a greater potential for competitive harm. Nevertheless, for the transaction at hand, he opted for a progressive enforcement analysis, committing more effort to a detailed review.

31. Conservatively, he based his approach on the presumptions of the Horizontal Merger Analysis Guide (H Guide), proposing a filter composed of two criteria: (i) a combined share of 20% or more by the applicants (in checkout numbers) and (ii) an HHI increase of more than 200 points. This threshold change added 134 stores, reaching troublesome horizontal overlap levels, to the rivalry analysis.

32. Another relevant precedent is Merger Case No. 08700.003959/2022-35, involving Rede D'Or São Luiz S.A. and Sul América S.A. in the healthcare sector. This transaction involved the integration of a large hospital network and a nationwide health insurance operator, resulting in an extensive analysis of 17 relevant markets, covering horizontal overlaps and vertical integrations.

33. In the lead vote, no detailed analysis of horizontal overlaps was deemed necessary, as market shares were below 20%, with a delta HHI index below 200 points, in accordance with Article 36, §2, of Law No. 12,529/2011, the H Guide, and Articles 6 and 8, III, of Cade Resolution No. 33/2022. For vertical integrations, however, the analysis was more

in-depth due to market shares exceeding 30% in one link of the chain, following the parameters of Cade Resolution No. 33/2022.

34. In a subsequent decision in the same sector, involving the transaction between Hapvida Assistência Médica S.A., Esmale Assistência Internacional de Saúde Ltda., Mais Saúde Clínica Ltda., and Hospital João Paulo II Ltda. (Merger Case No. 08700.004046/2022-36), the same thresholds from Law No. 12,529/2011, the H Guide, and Cade Resolution No. 33/2022 were applied.

35. Finally, in the construction sector, specifically in the drywall market, Cade Tribunal recently ruled on a highly concentrated national context characterized by low rivalry. The transaction would reduce the number of players in the sector from four to three and was analyzed in Merger Case No. 08700.003985/2023-44, involving the total acquisition of Trevo Industrial de Acartonados S.A. by Knauf do Brasil Ltda.

36. To outline its analysis, the General Superintendence used a 20% share threshold—again following the guidance in the analysis guide—with an HHI index variation exceeding 200 points, a criterion adhered to in the lead vote. As a result, the analysis of horizontal overlaps was restricted to the drywall market without including the related markets in the production chain.

5. Final Remarks

37. In summary, the application of structural presumptions has proven to be a valuable tool in the assessment of mergers and acquisitions within antitrust law, simplifying complex analyses through predefined criteria that help identify competitive risks. These presumptions, by directing regulatory resources towards transactions with greater potential for harm, contribute to the efficiency of the process and enhance decision-making predictability for the companies involved. This reflects the need for a balanced approach that assesses not only market concentration but also the potential benefits a transaction may bring to the end consumer.

38. However, the application of these presumptions is not without challenges, particularly in a dynamic economic landscape where new business models and technological changes can quickly alter market structures. Additionally, applying standardized criteria may, in some cases, underestimate sector-specific characteristics and result in false positives or negatives. Thus, companies can rebut these presumptions through robust evidence, highlighting the importance of thorough analysis that considers specific variables of the relevant market and potential entry barriers.

39. Finally, although Brazilian doctrine presents entirely analogous ideas and concepts, it tends not to treat structural presumptions in the same way as other jurisdictions, considering such thresholds as forms of relative presumption and as a rule for establishing procedural types. This approach resembles the original concept but does not fully capture its entire dynamic.

40. Nonetheless, recent decisions and cases have shown an increased interest by the tribunal in applying elements of structural presumption doctrine as a rule for shifting the burden of proof and analytical focus, indicating an important process of conceptual evolution and incorporation in Brazil.

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