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About Law, Economics and Argumentation: The forgotten case of labor concerns in Brazilian competition Policy and Why it still matters

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Introduction

Optimists would say the Brazilian competition policy has been a successful case of antitrust revolution in Latin America.[3] In the 1990s, the Administrative Council for Economic Defense (CADE or the Council) was granted autonomy within the Federal Administration thus becoming an independent agency with powers not only to adjudicate cases of antitrust violation but also review potentially anti-competitive mergers.[4] Further developments in following decades included a leniency program to detect cartels, improvements in investigative tools against antitrust violators, and a

3. Competition, or antitrust, policy can be broadly understood as the government action and respective legal regime aimed to promote competition in the markets, to the extent possible, by regulating practices that enhance market power. For competition law purposes, market power is defined, in turn, as the ability to increase prices profitably by restricting the industry output. *See* PHILLIP AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, V. IIIB 109 (3 ed. 2007). *But see* MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 30 (2004). (proposing a more specific concept to competition policy as "the set of policies and laws which ensure that competition in the marketplace is not restricted in such a way as to reduce economic welfare."). I mention "antitrust revolution," as an obvious reference to the book by Kwoka and White, to illustrate the introduction of economic theory as an analytical tool in the enforcement of competition law in Brazil. *Cf.* THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY, (John E. Kwoka & Lawrence J. White eds., 6 ed. 2013).; and A REVOLUÇÃO DO ANTITRUSTE NO BRASIL 2: A TEORIA ECONÔMICA APLICADA A CASOS CONCRETOS, (César Costa A. de Mattos ed., 2 ed. 2008). *See* Francisco Ribeiro Todorov & Marcelo Maciel Torres Filho, *History of Competition Policy in Brazil: 1930-2010*, 57 ANTITRUST BULL. 207–257, 254 (2012). The success of the Brazilian competition policy is in fact internationally recognized. In this respect, it is worth mentioning that CADE has already received two Global Competition Review Awards (Antitrust Agency of the Year for the Americas in 2010 and 2014). *See* Conselho Administrativo De Defesa Econômico (CADE), CADE, CADE RECEBE TÍTULO DE AGÊNCIA ANTITRUSTE DAS AMÉRICAS EM 2014 (2015), http://www.cade.gov.br/Default.aspx?1629f90fe63cd052a491a2b181c9 (last visited Apr 23, 2015).

4. *See* Decreto No. 8.884, de 11 de Junho de 1994, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.6.1994 (Braz.) [hereinafter 1994 Statute]. To be sure, the first Brazilian antitrust agency was created in the early 1960s as an administrative body of the Federal Government competent to adjudicate antitrust cases concerning collusion and abuses of market power. However, the first antitrust statute in Brazil did not formally establish a mandatory regime of merger control. *See* Decreto No. 4.137, de 10 de Setembro de 1962, DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 12.11.1962 (Braz.). *See also* PAULA A. FORGIONI, OS FUNDAMENTOS DO ANTITRUSTE 162 (5 ed. 2012). (affirming that the industrial policy under the military government had hindered the enforcement of the first antitrust statute in Brazil).

pre-merger notification regime finally introduced by a new competi-competition statute in 2011.[5]

This recent legislative reform, before anything else, has significantly strengthened CADE's institutional capacities as it provided the expansion of technical staff and a new configuration for the antitrust enforcement system which concentrates both adjudicatory and investigatory powers in a single administrative agency.[6] However, the perceived success of Brazilian competition policy vis-a-vis peer jurisdictions in Latin America hides inconsistencies in CADE's administrative practice regarding an unusual topic: the interplay between merger control and labor market regulation.

That policy interplay could well be seen as an old miscarriage of "antitrust justice" in developing countries without practical relevance in Brazil nowadays.[7] It may not be the case, though. Past intersections of different regulatory domains and the lack of accountability as to the reasons for eventually abandoning labor concerns can still affect the legitimacy of competition policy.[8] Most importantly, such failures in policymaking also create potential conflicts between CADE and government bodies responsible for enforcing labor laws in Brazil.[9]

5. *See* Decreto No. 10.149, de 21 de Dezembro de 2000, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 22.12.2000 (Braz.); Decreto 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 1.12.2011 (Braz.). [hereinafter 2011 Statute].

6. INTL ANTITRUST LAW AND POLICY: FORDHAM COMPETITION LAW 2014 533 (Barry E. Hawk ed., Juris Publishing 2015) (Under the 1994 Statute, antitrust investigations in Brazil were mainly carried out by the Secretariat of Economic Defense (SDE), a former department of the Ministry of Justice. The Brazilian antitrust enforcement system comprised then CADE, SDE and a department of the Ministry of Finance, the Secretariat for Economic Monitoring (SEAE). With the enactment of the 2011 Statute, SDE was extinguished and SEAE's competence has been almost completely restricted to competition advocacy).

7. *See* William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. CIN. L. REV. 1075, 1104 (1997). The interplay between merger control and labor market regulation can still be seen in countries such as South Africa and Namibia. *Cf.* Patrick Smith & Andrew Swan, *Public Interest Factors in African Competition Policy*, 2014 THE AFRICAN AND MIDDLE EASTERN ANTITRUST REVIEW 1–6 (2014).

8. In any case, foreign legal practitioners seem to be well aware of these antitrust issues in Brazilian competition law. *Cf.* ABA, MODEL ASSET PURCHASE AGREEMENT: WITH COMMENTARY 25 (2001).

9. *See* Kovacic, *supra* note 7, at 1104.

In view of those possible hurdles to antitrust implementation, this paper takes a normative stance on the question of how CADE could justify what appears to be a definitive shift in competition policy away from labor market regulation. My analysis will be centered on the idea of *policy justifications*, i.e., instances of legal argumentation meant to support implementing decisions by agencies and other public authorities. Accordingly, antitrust decision-making is framed within the argumentative discourse of competition law, understood as a product of practical reasoning informed by legal rules and economic knowledge.[10]

That said, the present work is rather limited in scope. I do not offer a positive answer as to whether and how CADE should justify its decision to break the interplay between merger control and labor market regulation. Instead, my claim is only that, in defense of such implementation choice, justifications grounded on economic theory may become an informal fallacy.[11] This paper thus contributes to the literature by identifying logical flaws in at least one legal argument that could justify a policy decision so far implicit in Brazilian competition law. This hypothetical argument, which I propose to both construct and refute alongside this paper, is called the Inefficiency Thesis.

Additionally, this paper offers contributions at a more theoretical level. Because it is such an unusual topic in antitrust policy, the broken interplay between merger control and labor market regulation in Brazil permits the exploration of the impact of economic

10. *Cf.* Kaarlo Tuori, *Two Challenges to Normative Legal Scholarship*, 53 SCANDINAVIAN STUDIES IN LAW 177–202, 182 (2008). ("Legal discourse consists of speech acts which take a position on legal norms and their interpretation and application, and which, thus, contribute to the ongoing discussion on the contents of the legal order in force."). *See* Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. LJ 2071, 2137 (1995). ("[E]conomics can assist the policymaker by supplying her with accurate predictions [. . .] the need to predict consequences is fundamental to most of the various formulations of practical reason.").

11. My reference to fallacies as "informal" indicates that the concept is more comprehensive than the standard definition of an invalid argument that merely appeals to be valid. From this broad perspective, which emerges in the literature of informal logics and dialectical argumentation, "a fallacy is regarded as a deficient move in an argumentative discourse or text." FRANS H. VAN EEMEREN & ROB GROOTENDORST, A SYSTEMATIC THEORY OF ARGUMENTATION THE PRAGMA-DIALECTICAL APPROACH 158 (2003). About the criteria to identify a fallacious argumentative move, *see infra* Section IV.A.

indeterminacy on legal discourse.[12] While acknowledging the importance of policy insights offered by economists, I demonstrate there are *some* scientific disagreements among them that can reduce the plausibility of legal arguments based on economic theory. The forgotten case of labor concerns in Brazilian antitrust policy becomes relevant, then, as an illustration of how the epistemological limitations of economics may lead to unsound argumentation in competition law.[13]

Because my claim relates economic theory to legal argumentation and frames somewhat odd recommendations against uses of economics in antitrust decision-making, a short methodological detour seems helpful from the outset. For the sake of clarity, my assumptions about law, legal scholarship and legal reasoning must now be disclosed and explained. First, as subject matter, law is understood here as an argumentative social practice in which legal scholars,

12. A bout the implications of the economic indeterminacy to competition law, *See, e.g.*, Alan J. Devlin & Michael S. Jacobs, *Antitrust Divergence and the Limits of Economics*, 104 NORTHWESTERN UNIVERSITY LAW REVIEW 253–291, 256 (2010). (footnote omitted) ("[P]rice theory and econometric analysis cannot always generate such [unequivocal] conclusions, which leaves pressing questions of competition policy that economic theory is incapable of answering in useful and coherent terms."), and Eleanor M. Fox, *Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The US/EU Divide*, 2006 UTAH L. REV. 725–740, 728 (2006). (footnote omitted) ("'Sound economics' does not ineluctably produce a unitary rule. There are different and equally credible ways to design rules of antitrust with a view to serving consumers and producing competitive firms and robust markets."), About the economic indeterminacy regarding the antitrust and innovation, *see, e.g.*, Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST LAW JOURNAL 1–21, 5 (2012). (footnote omitted) ("The simple fact is that economics does not yet provide a useful understanding of the relationships among market structure, competition, and innovation.") *and* Joshua D. Wright, *Antitrust, Multi-Dimensional Competition, and Innovation: Do We Have an Antitrust-Relevant Theory of Competition Now?*, *in* COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY , 239 (Geoffrey A. Manne & Joshua D. Wright eds., 2010). (footnote omitted) ("Many scholars have recognized that our empirical knowledge of the relationship between market structure and innovation, as well between market structure and consumer welfare, is limited relative to our understanding of static price effects in conventional product markets.").

13. *See* Devlin and Jacobs, *supra* note 12 at 256. *See also*, *Cf.* Péter Cserne, *Consequence-based Arguments in Legal Reasoning: A Jurisprudential Preface to Law and Economics*, *in* EFFICIENCY, SUSTAINABILITY, AND JUSTICE TO FUTURE GENERATIONS 31–54, 33 (Klaus Mathis ed., 2012). ("If economic arguments can be recast as prudential [consequence-based] arguments then the relevance of economic analysis for legal reasoning will depend on the acceptability of those kinds of arguments.").

along with courts, agencies, and lawyers, participate and contribute to its development.[14]

Second, legal scholarship is considered a kind of practical discourse that provides guidance to deliberations about the course of action to be taken to achieve a desired goal.[15] In producing legal scholarship, academics formulate normative prescriptions that, explicitly or implicitly, seek to influence the practical reasoning of decision-makers, recommending how to create, interpret, and enforce legal rules. In the final analysis, normative prescriptions are meant to influence how legal decision-makers argue about the law.[16] As for the method of legal scholarship, I assume that such academic research is conducted via a dialectical argumentation of some sort.[17] It means legal scholars produce a practical knowledge through argumentative discussions between rational arguers who put forward justifications, or refutations, in support, or rejection, to a given standpoint.[18]

The point of view disputed in such dialogical procedures corresponds to a proposition about law, what can be called *legal thesis*.[19] I

14. *See generally,* Stefano Bertea, *Legal Argumentation Theory and the Concept of Law*, *in* ANYONE WHO HAS A VIEW 213–226, 225 (Frans H. Van Eemeren et al. eds., 2003). ("[T]he thesis that argumentation is central in the legal domain entails the need to construct the law as the outcome of deliberative reasoning, as an argumentative practice which differs remarkably from mere following the rules posited by the authority. This is to say that law is a dynamic interplay of reasons, a set of reconstructive activities by which theorists and practitioners jointly determine contents and applicative scope of norms."). *See also* Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747–793, 748 (1988).

15. *Cf.* John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV 1–13, 1 (1990). ("Legal reasoning is, broadly speaking, practical reasoning. Practical reasoning moves from reasons for action to choices (and actions) guided by those reasons.").

16. *See* Edward L. Rubin, *Law and the Methodology of Law*, WIS. L. REV. 521, 522 (1997); Edward L. Rubin, *The Evaluation of Prescriptive Scholarship*, 10 TEL AVIV U. STUD. L. 101–114, 101 (1990).

17. *See* RALPH H. JOHNSON, THE RISE OF INFORMAL LOGIC: ESSAYS ON ARGUMENTATION, CRITICAL THINKING, REASONING AND POLITICS 86 (1996).

18. *Cf.* AULIS AARNIO, ESSAYS ON THE DOCTRINAL STUDY OF LAW 28 (2011). ("[T]he central methodology of [legal scholarship] is not inductive or deductive but rational discursive. The method is legal argumentation, which produces a coherent network of reasons to support recommendations."). *See also* Aleksander Peczenik, *A Theory of Legal Doctrine*, 14 RATIO JURIS 75–105 (2001).; JOSÉ REINALDO DE L. LOPES ET AL., O QUE É PESQUISA EM DIREITO? 84 (2005).

19. While those propositions would traditionally refer to doctrinal issues regarding the interpretation and systematization of rules and principles, legal knowledge as considered here is not confined to these subjects. From a broader perspective, legal theses also cover the decision-making process of institutional actors (e.g. legislators, courts,

also assume that lawyers in general, including legal decision-makers, engage in the same kind of dialectical argumentation when practicing law.[20] In this way, legal reasoning can be understood as the dialectical "process of devising, reflecting on, or giving reasons for legal acts and decisions or justifications for speculative opinions about the meaning of law and its relevance to action."[21] Because lawyers are rational arguers engaged in continuous debates about legal theses, the argumentative moves performed by them must conform to certain pre-determined rules of dialogue. These requirements of form and procedure, which regulate the exchange of arguments and counter-arguments, can be understood as a code of conduct or, more generally, a dialectical protocol.[22]

As my final assumption, I consider that the code of conduct for argumentative discussions among lawyers allows resorting to theoretical knowledge produced outside legal discourse, as a rational means to support their discussion moves.[23] It means that findings from the social sciences are instrumentally relevant to the plausibility of normative prescriptions, produced by legal scholars, and justifications for legal decisions, offered by decision-makers.[24] Likewise, I assume that Economic Analysis of Law (EAL), at least as a form of conse-

and agencies), the goals and values promoted by them, and the theory of public morality on which their decisions are grounded. *Cf.* Aleksander Peczenik & Jaap Hage, *Legal Knowledge about What?*, 13 RATIO JURIS 326–345, 334 (2000). (affirming that legal scholarship is also concerned with the evaluations of law in order to harmonize its normative background "in the form of morality and (political) philosophy.").

20. *See* GIOVANNI SARTOR, LEGAL REASONING: A COGNITIVE APPROACH TO THE LAW 80 (2005).

21. Neil MacCormick, LEGAL REASONING AND INTERPRETATION ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (Edward Craig ed., 1998).

22. *Cf.* Giovanni Sartor, *A Teleological Approach to Legal Dialogues*, *in* LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY , 249 (George Pavlakos ed., 2007). (referring to the idea of a dialectical protocol for legal reasoning, such as the one offered by Alexy's theory of legal argumentation).

23. Tuori, *supra* note 10 at 181. (from the perspective of the Speech Act Theory, I borrow the concept of legal discourse defined as "a series or network of mutually linked legal speech acts.").

24. *Cf.* EVELINE T. FETERIS, FUNDAMENTALS OF LEGAL ARGUMENTATION: A SURVEY OF THEORIES ON THE JUSTIFICATION OF JUDICIAL DECISIONS 114 (2013). (explaining, according to Alexy's argumentation theory, that theoretical knowledge about facts might be required to construct arguments that provide an external justification to legal decisions). *See also* Aulis Aarnio, Robert Alexy & Aleksander Peczenik, *The Foundation of Legal Reasoning*, 12 RECHTSTHEORIE 257–279, 277 (1981).

quentialist argumentation, is an acceptable way to justify or refute legal theses and stands in accordance with the dialectical protocol.[25]

Following the Introduction, the remainder of this paper is divided into five parts. Part I introduces the interplay between merger control and labor market regulation in Brazil during the 1990s. In this part, I explain the inconsistency in CADE's decisions regarding the labor concerns of competition policy, pointing out the consequences of this problem in terms of legitimacy and implementation. Part II frames possible solutions to that regulatory shortcoming as a matter of policy justification. In this second part, I give a short account of Brazilian antitrust law so that I can identify which legal argument could justify the Council's decision to abandon labor concerns.

Part III presents the normative framework employed to evaluate logical flaws in legal argumentation. In this third part, I analyze the kind of argumentation produced by EAL and define it as a mix of consequentialist arguments and arguments from authority. This normative framework allows me then to determine the conditions of plausibility for legal arguments based on economic theory. In Part IV, I continue my logical analysis of the hypothetical argument formulated in the previous sections. In doing so, I demonstrate how disagreements between economists may turn a policy justification in competition law into an informal fallacy. Part V concludes the paper.

I. Merger Control and Labor Market Regulation

A. Regulatory Inconsistency in Brazilian Antitrust Law

In the 1990s, CADE's official statements expressed concerns with the possible impact of mergers on the employment level of the economy as cost-cutting transactions could allow the discharge of

25. About EAL and consequentialist argumentation in Brazil, *see generally* Mariana Pargendler & Bruno Salama, *Law and Economics in the Civil Law World: The Case of Brazilian Courts*, TULANE LAW REVIEW (2016).; and Mariana Pargendler & Bruno Salama, *Direito e Consequência no Brasil: Em Busca de um Discurso sobre o Método*, 262 REVISTA DE DIREITO ADMINISTRATIVO 95–144 (2013). *See also* EJAN MACKAAY, LAW AND ECONOMICS FOR CIVIL LAW SYSTEMS 6 (2014). (explaining the basics of EAL as a method to determine the effects of legal rules and their respective economic incentives).

workers made redundant after employing firms merge.[26] CADE's Annual Report for 1996, for instance, declared that competition policy in Brazil promotes social welfare by minimizing both private and social costs, suggesting that the merger review process should include a more comprehensive analysis of the outcomes of transactions under review.[27]

According to the 1996 Annual Report, the relevant social costs to be considered in merger control include negative externalities of mergers between firms operating in certain labor markets, such as the frictional unemployment of low-skilled workers.[28] Such externality would be considered a social cost because, despite being only a short-run by-product of these transactions, it could eventually cause structural unemployment as well.[29] In view of risks of unemployment in the long run, the Annual Report suggested that measures (i.e. legal remedies) applied by CADE via merger control could neutralize macroeconomic inefficiencies resulted from transactions deemed efficient in a microeconomic sense.[30]

To that end, CADE and the Brazilian Ministry of Labor entered into a cooperation agreement to jointly formulate and monitor job-training programs, which would be implemented by merging firms as a condition for antitrust clearance of mergers.[31] The legal basis for

26. CADE, RELATÓRIO ANUAL 1996 37–38 (1997), http://www.cade.gov.br/Default.aspx?e142c24dd332f257e950.

27. *Id.* at 37.

28. In short, frictional unemployment results from job search costs, which make it difficult from workers to find job vacancies available in labor markets. Structural unemployment, on the other hand, results from an actual mismatch between workers' skills and the skill requirements for job vacancies. For a comprehensive review of different types of unemployment, see Stephen A. Woodbury, *Unemployment*, *in* LABOR AND EMPLOYMENT LAW AND ECONOMICS (Kenneth G. Dau-Schmidt, Seth D. Harris, & Lobel Orly eds., 2009).

29. For a general view of remedies employed in competition law, see Massimo Motta, Michele Polo & Helder Vasconcelos, *Merger Remedies in the European Union: An Overview*, 52 ANTITRUST BULLETIN 603, 606 (2007). About merger remedies in Brazil, *see* José Marcelo M. Proença, *Termos de Compromisso de Desempenho enquanto Solução Imposta pelo CADE*, *in* CONCENTRAÇÃO DE EMPRESAS NO DIREITO ANTITRUSTE BRASILEIRO , 270–271 (André M. Gilberto, Censo F. Campilongo, & Juliana G. Vilela eds., 2011).

30. *See* CADE, *supra* note 26 at 39.

31. *See Id.* at 37.
See also Extrato do Protocolo de Intenções celebrado entre União/Ministério do Trabalho e Emprego – MTE e o Conselho Administrativo de Defesa Econômica – CADE, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de14.04.2000, and Extrato do Protocolo

mandated job training programs, as stated in the Annual Report, were provisions in Brazilian antitrust statutes determining that variations in employment level are taken into account when designing merger remedies to anticompetitive transactions.[32] Allegedly, the enforcement of competition law in Brazil could thus conform to constitutional clauses that establish the promotion of full employment as a guiding principle for economic regulation.[33]

My analysis of CADE decisions revealed that antitrust remedies were applied to minimize possible harm to workers' welfare, which would supposedly result from a merger between employing firms. Two types of "employment measures" were identified, both of which designed to cope with eventual plant-closings and mass layoffs: (i) temporary maintenance of current employment level at firms' plants and facilities; and (ii) implementation of job training programs for workers dismissed due to the internal reorganization of the merged firm. These cases are indicated in the table below:

de Intenção de Reestruturação Produtiva e Requalificação, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 31 mar. 1997.

32. *See* 1994 Stature, art. 58, §1°: "Performance commitments [legal instruments for antitrust remedies] will take into consideration the extent of international competition in a certain industry and their effect on employment levels, among other relevant circumstances."

33. *See* Brazilian Constitution, art. 170, IV.

Year	Merger Decision	Parties	Employment Policy Measures
1995	AC 19/1994	Oriento Indústria e Comércio S.A. and Ajinomoto Co. Inc.	Employment level maintenance
1996	AC 24/1995	Grace Produtos Químicos e Plásticos Ltda. and Crown Química S.A.	Job training program
1996	AC 25/1995	Santista Alimentos S.A. and CARFEPE S.A. Administradora e Participadora	Job training program
1996	AC 27/1995	Kolynos do Brasil Ltda., Colgate-Palmolive Company and K&S Aquisições Ltda.	Job training program
1996	AC 14/1996	Siderúrgica Laisa S.A. and Cia. Siderúrgica Pains	Job training program
1997	AC 79/1996	Panex S.A. Indústria e Comércio and Alcan Alumínio do Brasil S.A.	Job training program
2000	AC 08012.005846/ 1999-12	Fundação Antônio and Helena Zerrenner – Instituição Nacional de Beneficência et al.	Employment level maintenance and job training program

Source: elaborated by the author.[34]

Nonetheless, as Brazilian competition policy develops after 2000, these employment measures seem to be tacitly excluded from

34. The sample of cases reported above was collected from the entire universe of merger decisions from 1994 to 2014, as published in CADE's website (www.cade.gov.br).

CADE's repertoire of merger remedies.[35] This fact could mean that, for the last fifteen years, the Council has adopted a different reading of the antitrust statutes and the constitutional provisions that set the basis for economic regulation in Brazil.[36] Such a departure from the early decisional patterns in merger cases, however, was not followed by any further notice or explicit account of CADE's new administrative practice.

B. Legitimacy Problems and Policy Implementation

With the discontinuation of employment measures, the enforcement of Brazilian antitrust law becomes uncertain in respect to possible interactions with other regulatory fields. This problem remains unresolved as a legal matter, as the policy reasons behind such a change in CADE's administrative practice have not been disclosed.[37] Unsurprisingly, the absence of explicit grounds to support regulatory action raises concerns with transparency and accountability of policy-making[38] in the Brazilian regulatory state. Let us see now why the broken interplay between merger control and labor market regulation could impact the current competition policy in Brazil.

35. To be sure, legal remedies determining the maintenance of employment levels in merging firms were applied after 2000 as a kind of preliminary measure, in order to assure the effectiveness of CADE's final decisions. In these merger cases, however, the remedy purpose does not seem to be the promotion of full employment or the protection of competition in labor markets.

36. *Cf.* Ciro Gomes, PARECER DA COMISSÃO ESPECIAL DE DEFESA DA CONCORRÊNCIA AO PROJETO DE LEI N. 3.937, DE 2004 40 (2007), http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=569577&filename=PRL+1+PL393704+%3D%3E+PL+3937/2004 (last visited Oct 17, 2015). (explaining that the legislative proposal for the new antitrust statute (Projeto de Lei No. 3937/2004) would constrain CADE's discretion in order to avoid the imposition of clearance conditions unrelated to competition); *See* CALIXTO SALOMÃO FILHO, DIREITO CONCORRENCIAL 119 (2013).; and Christopher Townley & Cardinali, Adriana, *A utilização dos precedentes da União Europeia no direito concorrencial brasileiro*, *in* DIREITO ECONÔMICO E SOCIAL - ATUALIDADES E REFLEXÕES SOBRE DIREITO CONCORRENCIAL, DO CONSUMIDOR, DO TRABALHO E TRIBUTÁRIO 127, 160 (João G. Rodas ed., 2012).

37. *Cf.* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM LAW REVIEW 2543–2574, 2545 (2012). (pointing out the relevance of the *due process* for the administrative enforcement of antitrust laws).

38. *Cf.* R. A. A. Khan & Gareth T. Davies, *Merger Control and the Rule of Law*, 2 ERASMUS LAW REVIEW 25–57, 53 (2009). (discussing the lack of transparency and accountability problems related to antitrust remedies). *See* Giandomenico Majone, *The rise of the regulatory state in Europe*, 17 WEST EUROPEAN POLITICS 77–101 (1994).

Political analyses addressing the function of independent administrative bodies – which also include antitrust agencies −, focus generally on issues of democratic legitimacy of non-majoritarian institutions.[39] Following this line of reasoning, the lack of justification for abandoning employment measures could mean that the Council has failed to meet the "reason-giving requirement" for policy-making. That is, the requirement meant to ensure the legitimacy of regulation in a procedural dimension, via judicial review and public participation.[40] To the extent that such regulatory shift has yet to be justified, CADE's decisions in merger cases remain somehow contradictory. Such an internal contradiction would reduce the legitimacy of Brazilian antitrust policy also in a substantial dimension, related to the social expectations surrounding consistency in decision-making and regulator's technical expertise.[41]

However, while legitimation problems become relevant in a context of diverging regulatory decisions, these concerns do not tackle specific consequences of inconsistent decision-making to the very process of policy implementation. To explain my point, I build on a conceptual framework for implementation analysis that is already traditional in policy studies.[42] Under this approach, the regulatory output of agencies can be understood to involve, along with adjudicatory decisions and regulations, some "general transitive goals," which include both statutory objectives and declared intentions of agency officials about the policy pursued.[43]

39. *See* Giandomenico Majone, *Problems of the Regulatory State*, *in* REGULATING EUROPE , 292 (Giandomenico Majone ed., 1996).

40. Giandomenico Majone, *The regulatory state and its legitimacy problems*, 22 WEST EUR. POLIT. 1–24, 14 (1999).

41. *Cf.* Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 JOURNAL OF PUBLIC POLICY 139–167, 191 (1997). (defining procedural and substantial legitimacy as categories for a general analysis of regulatory policy-making).

42. *See generally* Paul Sabatier & Daniel Mazmanian, *The Implementation of Public Policy: A Framework of Analysis*, 8 POLICY STUDIES JOURNAL 538–560 (1980).

43. *See* WILLIAM ESKRIDGE JR ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 973 (5 ed. 2014) (for a discussion of the implementation of regulator goals via informal administrative tools, such as policy statements and other public communications, as a usual practice in U.S. agencies); *See also* Paul A. Sabatier, *Regulatory Policy-making: Toward a Framework of Analysis*, 17 NAT. RESOURCES J. 415, 420 (1977).

The same analytical framework considers that a successful implementation of regulatory policies depends on supportive public institutions–called the regulator's "sovereigns" in the policy jargon–that control legal and financial resources provided to implementing agencies.[44] Considering only the provision of legal resources, we see that non-supportive attitudes by sovereign institutions (e.g. legislatures, chief executives, and courts) could impair policy implementation, creating conflicts about the specific goals that agencies are meant to carry out. Courts in particular, when opposing statutory policy objectives, can restrict the implementation process by adjudicating cases according to adverse interpretations of relevant statutes.[45]

Let us now return to Brazilian competition law. The sudden interruption in the use of employment measures in 2001 seems to yield some ambiguity to regulatory outputs, as CADE had previously declared that employment levels are also to be considered in the merger review process. This inconsistency in decision-making aggravates the institutional risk that policies outside the scope of the antitrust statute will impact the implementation of regulatory goals pursued by the Council.[46] The ambiguous antitrust practice in Brazil, regarding the role of merger control in the regulation of labor markets, could allow labor policies to impair the current implementation of competition law.

There is room for two examples here. In the case *Gol/Webjet*, CADE reviewed in 2012 a merger between two airline companies.[47] Despite the expected economic efficiencies, the Council found that this transaction would harm the competition in several markets, so that the merger clearance was dependent on remedies to protect consumers from the market power held by the merged firm. Following

44. Sabatier and Mazmanian, *supra* note 42 at 551.

45. *See* Paul Sabatier & Daniel Mazmanian, *The Conditions of Effective Implementation: A Guide to Accomplishing Policy Objectives*, 5 POLICY ANALYSIS 481–504, 499 (1979).

46. *Cf.* Sabatier and Mazmanian, *supra* note 42 at 552.
(explaining that the implementation of statutory provisions by agencies is frequently affected by other policy goals).

47. Ricardo Ruiz, *Gol Linhas Aéreas S/A e Webjet Linhas Aéreas S/A Ato de Concentração* [Gol Airlines and Webjet Airtlines Act of Concentration], CADE (Dec. 11, 2012),
https://www.senado.gov.br/comissoes/cas/ap/AP20121211_RicardoMachadoRuiz.pdf.

the merger review, after the transaction had been completed in compliance with CADE's approval conditions, the acquired firm had 50% of its employees discharged.[48]

In response, the Labor Prosecution Service has brought a civil action against the merging firms, claiming that the layoff amounted to unlawful discharge in violation to labor laws. After a first trial decision and appeal proceedings, the reviewing court of the Brazilian Labor Judiciary eventually found the layoff to be illegal. The appellate court also declared − though not as the primary ground for its ruling − that the protection of workers against mass layoffs is an implicit condition to antitrust clearance of mergers.[49] Regardless of the merger remedies designed by CADE, the labor courts' reading of the antitrust legislation would somehow extend the reach of the competition policy to labor markets as well.

A second example, *Fisher/Citrovita,* is a merger case involving two large orange processing companies, reviewed by CADE in 2011.[50] Because the transaction was found to have anticompetitive effects on the demand-side of markets for raw fruit, the conditions for merger clearance were remedies meant to control the market power held by the merged firm, so as to protect orange farmers and, indirectly, consumers. After the merger review, a plant was shut down due to an internal reorganization of the processing companies and 173 employees were discharged.[51]

This time, the Labor Prosecution Service responded by initiating an administrative proceeding to investigate whether CADE could be held liable for mass layoffs resulting from mergers approved by the antitrust agency.[52] Under allegations that the Council had not coop-

48. *See* G1, GOL ANUNCIA FIM DA WEBJET E DESLIGAMENTO DE 850 FUNCIONÁRIOS (2012), http://g1.globo.com/economia/negocios/noticia/2012/11/gol-anuncia-fim-da-webjet-e-desligamento-de-850-funcionarios.html (last visited Oct 14, 2015).

49. *See* Maria Aparecida Magalhães, *Id.*

50. Carlos Ragazzo, *Fisher S.A. Comércio, Indústria e Agricultura and Citrovita Agro Industrial Ltda.* [Fisher Trade, Industry and Agriculture and Citrovita Agro Industrial Ltda.], CADE (Dec. 14, 2011), http://associtrus.com.br/citrosuco_citrovita.pdf. *d.*

51. *See* Gustavo Porto, *Citrovita fecha unidade de Matão, interior de São Paulo* [Citrovita closes unit in Matão, interior of São Paulo], ECONOMIA (Feb. 29, 2012), http://economia.estadao.com.br/noticias/negocios,citrovita-fecha-unidade-de-matao-interior-de-sao-paulo,104529e.

52. *See* Livia Scocuglia, *MPT processa Cade por não entregar docomentos em inquérito* [MPT sues Cade for failing to deliver documents on legal consultant inquiry],

erated with the investigations, the public prosecutor in charge brought a legal action in 2013 requesting a court order to access confidential records of merger cases.[53] If the investigative proceedings are still ongoing, the very authority of CADE's merger decisions could eventually be challenged before labor courts.

It is worth noting that both cases above do not correspond to the typical judicial review situation, i.e., courts judging the legality of policy outputs of administrative agencies. The jurisdiction of the Labor Judiciary in Brazil covers disputes related to employment relations and collective bargaining, and these courts have no power to review the lawfulness of decisions by the antitrust agency.[54] Nevertheless, it seems that the potential conflict between CADE, labor courts, and public prosecutors, if it finally emerges, would impact the antitrust implementation much like a shortage of legal resources created by unsupportive sovereigns of the agency.

Considering the analysis above, we now understand the implications of the broken interplay between merger control and labor market regulation in Brazil. As a solution to that problem, I formulate in the next section one possible justification for CADE's decision to interrupt the use of employment measures. Such policy justification will be devised as an instance of legal argumentation based on economic theory.

II. Policy justification in Antitrust Practice

A. Merger Control and Antitrust Remedies in Brazil

At this point, a short review of the antitrust rules regulating business transactions under Brazilian jurisdiction will follow. Because the 1994 Statute employment measures were applied in merger cases, it is important to analyze the differences in relevant disposi-

CONSULTOR JURÍDICO (Oct. 8, 2013), http://www.conjur.com.br/2013-out-08/mpt-processa-cade-negar-documentos-apuracao-dispensa-massa.

53. Livia Scocuglia, MPT PROCESSA CADE POR NÃO ENTREGAR DOCUMENTOS EM INQUÉRITO CONSULTOR JURÍDICO (2013), http://www.conjur.com.br/2013-out-08/mpt-processa-cade-negar-documentos-apuracao-dispensa-massa (last visited Mar 14, 2015).

54. *See, e.g.*, AMAURI MASCARO NASCIMENTO, CURSO DE DIREITO PROCESSUAL DO TRABALHO [Course of Labor Law] (28th ed. 2013) (about the competence of labor courts in Brazil). *See also*, CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 114 (Braz.); CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T] art 643 (Braz.).

tions of the earlier Statute and those provided by the legislation currently in force, the 2011 Statute. This doctrinal analysis will compare the legal standards relevant to design general antitrust remedies and particular employment measures.

In the Brazilian merger regime, transactions are presumed to be anticompetitive, and thus subject to review by CADE if each of the merging firms meets a statutory threshold of annual turnover.[55] Mergers covered by the mandatory notification rule are reviewed in specific administrative proceedings, under which legal conditions for antitrust clearance are verified in a fourfold test.[56] As a general rule, transactions that eliminate competition in a substantial part of relevant markets, enhance dominant position, or lead to market dominance are forbidden. However, if three specific statutory justifications are cumulatively observed, anticompetitive transactions can be granted a conditional approval by the council.

In sum, antitrust clearance in Brazilian competition law depends on whether the merger under review: (i) does not substantially restrain and if it is likely to do so there must be, (ii) specific compensatory efficiencies, (iii) that will not be obtained by less restrictive means, and (iv) which can, at some extent, be passed on to consumers. The legislative reform of 2011, despite establishing a pre-merger notification regime in Brazil, has not changed the basic criteria for antitrust analysis already provided by the 1994 Statute.

Compliance with the requirements above, in turn, can be achieved through legal measures applied to merging firms−consensual or unilaterally determined by CADE−which would mitigate likely harms to competition and allow a conditional approval to the transaction.[57] The 2011 Statute, however, does not provide substantive rules about the remedies that can be negotiated between the Council and the parties to merger review process.[58] In the same

55. *See* Lei No. 12.529, de 30 de Novembro de 2011, art. 88 I and II (Braz.) (the notification threshold is based on the annual turnover of the entire corporate group to which the merging belongs). *See also* Portaria Interministerial [MJ/MF], 20 de maio de 2012, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.) (the updated figures for the turnover threshold are provided by a governmental decree jointly issued by the Ministry of Justice and the Ministry Finance).

56. *See* Lei No. 12.529, de 30 de Novembro de 2011, art. 88, §6° (Braz.).

57. *See* Proença, *supra* note 29 at 274.

58. DIÁRIO OFICIAL DA UNIÃO**,** Article 125 (May 31, 2012) (discussing the original bill that had specific dispositions about the content of merger control agreements, i.e., the

way, the 1994 Statute also lacked specifics on merger remedy design, as it provided only broad guidelines, determining that these antitrust measures should encompass quantitative or qualitative goals to be pursued by the merged firm.[59]

As we saw in Section I.A, the 1994 Statute did make reference to variations in employment level as a relevant criterion to design merger remedies. However, even while the 1994 Statute was in force, there was a scarcity of legal material needed to identify CADE's reading of the employment level provisions. Besides the statements presented in the Annual Report for 1996, which take those dispositions as basis for implementing job training programs, there seems to be only one antitrust decision addressing the relation between labor concerns and the general requirements for merger clearance. [60]

In *Ultrafértil v. Fosfértil*, a merger case from 1997, the Council stated that the statutory provisions about variations in the employment level should be cautiously interpreted in order to conform to the goals of competition policy.[61] Accordingly, concerns that anticompetitive transactions might affect the employment level in labor markets would have only two implications for the design of merger remedies. First, CADE should avoid imposing remedies that may produce unemployment. Second, if the merger under review is likely to yield reductions in the workforce of the merged firm, layoffs should be duly justified as resulting from efficiencies derived from the transaction.[62]

Additionally, the Council in *Ultrafértil v. Fosfértil* affirmed that the implementation of job training programs by the merging parties cannot be considered a sufficient condition for the approval of anti-

legal instrument that formalizes the remedies negotiated between CADE and the merging parties. However, these provisions were vetoed by the President of the Republic because they would reduce the opportunities to consensual resolution of merger cases, as the statute wording prevented that firms propose remedies in later stages of the review process. This statutory gap was partially filled by CADE Internal Regulations, which establishes the procedure for submitting agreement proposals. These rules, however, do not provide criteria for evaluating the content of remedies applied in merger control).

59. DIÁRIO OFICIAL DA UNIÃO, *supra,* note 4, at Art. 58.

60. Aarnio, *supra* note 18.

61. CADE, Ato de Concentração No. 2/1994 (Ultrafértil S.A. Indústria e Comércio de Fertilizantes and Fertilizantes Fosfatados - Fosfértil), Relator: Cons. Antonio Fonseca, j. 28.07.1997.

62. *Id.* at 24.

competitive transactions.[63] Those programs should thus be imposed only as a measure subsidiary to remedies aimed at accomplishing the general requirements for antitrust clearance.[64] It also means, as a further implication, that regardless of any employment impact that a merger might have, these effects cannot themselves account for the remedies applied by CADE. In other words, while consumer welfare seems to be the primary concern in Brazilian competition law, worker welfare would never be an independent criterion in merger analysis.

Of course, to fill the gaps in both antitrust statutes, a decisional standard to design merger remedies has been developed in CADE's administrative practice.[65] As in other jurisdictions, conditional approval in Brazilian merger control, as a response to anticompetitive transactions, is preferred to blocking decisions.[66] In *Fischer v. Citrovita,* a case under the 1994 Statute, the Council stated that before reproving a merger under review, it is required to determine whether the expected harms to competition can be mitigated by antitrust remedies.[67] CADE's preference for conditional clearance over simply blocking mergers is justified because the latter measure, despite preserving competition in the marketplace, completely impedes the realization of efficiencies that may arise even from anticompetitive transactions.[68]

Also under the 1994 Statute, the Council affirmed in *Sadia v. Perdigão* that the remedies applied to anticompetitive transactions should produce maximum social benefits with minimum harm, which would correspond to the very purpose of the merger regime in Brazil.[69] Thus, conditions for merger clearance have to be chosen in accordance to a decisional standard that assures that remedies eventual-

63. *Id.*
64. *Id.* at 25.
65. *Id.*
66. JORGE FAGUNDES & MARIA M. DA ROCHA, CONCENTRAÇÃO DE EMPRESAS NO DIREITO ANTITRUSTE BRASILEIRO: *Remédios em Fusões,* 221-224 (Jorge Fagundes & Maria M. da Rocha, *Remédios em Fusões*, *in* CONCENTRAÇÃO DE EMPRESAS NO DIREITO ANTITRUSTE BRASILEIRO , 224 (André M. Gilberto, Censo F. Campilongo, & Juliana G. Vilela eds., 2011). (commenting on Brazilian merger review process in comparison to merger guidelines from foreign jurisdictions).
67. Ato de Concentração, *supra*, note 51.
68. *Id.* at 58-9. *See also* CADE, Ato de Concentração No. 08012.004423/2009-18 (Perdigão S.A. and Sadia S.A.), Relator: Cons. Carlos Ragazzo, j. 06.08.2011 at 356.
69. *Id.*

ly adopted are optimal antitrust measures. Such standard, also adopted in *Rumo v. ALL*, a recent case under the 2011 Statute, takes the form of a *principle of proportionality*, developed in CADE's decisions as a doctrine requiring remedies to be appropriate, necessary, and effective to the merger under review.[70]

The rationale for a proportionality principle governing merger control is that remedies should be designed to reduce, to the extent possible, any economic burden imposed on the merging firms and society as a whole. Cost concerns are especially relevant in concrete cases because, when designing antitrust remedies, CADE has to decide whether behavioral remedies, structural remedies, or a combination of both are better able to mitigate the effects of anticompetitive transactions.[71] Thus, in CADE's administrative practice, the principle of proportionality becomes a legal test meant to minimize the social cost of merger remedies and avoid decisions for conditional clearance that eventually reduce the overall efficiency in the markets.[72]

Having reviewed the statutory requirements and the remedial standard for antitrust clearance, we can now understand the legal framework in which the interplay between merger control and labor market regulation took place. Because my concern is the lack of policy grounds for the current implementation of Brazilian antitrust law,

70. CADE, Ato de Concentração No. 08700.005719/2014-65 (Rumo Logística Operadora Multimodal S/A and ALL – América Latina Logística S.A.), Relator: Cons. Gilvandro Coelho de Araujo, j. 02.11.2015; Opinion by Cons. Ragazzo, AC 08012.004423/2009-18, at 356; Erling Hjelmeng, *Competition Law Remedies: Striving for Coherence or Finding New Ways?*, 50 COMMON MARKET LAW REVIEW 1007–1037, 1009 (2013). (explaining that the principle of proportionality governs antitrust remedies in European Union law). AC 08700.005719/2014-65 at 59-60. *See also,* CADE, Ato de Concentração No. 08700.004065/2012-91 (Qualicorp Administradora de Benefícios S.A. and others), Relator: Cons. Ana Frazão, j. 02.04.2014 at 133; CADE, Ato de Concentração No. 08700.005447/2013-12 (Kroton Educacional S.A. and Anhanguera Educacional Participações S.A.), Relator: Cons. Ana Frazão, j. 05.14.2014 at 363 and 366.

71. *Cf.* AC 08700.005447/2013-12 at 362-3 (discussing "proportionality" and "low social cost," as relevant criteria for the design of merger remedies). *See* Fagundes and Rocha, *supra* note 66 at 223.

72. William H. Page, *Optimal Antitrust Remedies: A Synthesis*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS , 255 (Roger D. Blair & D. Daniel Sokol eds., 2015). ("[B]oth courts and commentators have recognized that, even if private conduct reduces efficiency in a relevant sense, antitrust law should intervene to provide a remedy only if (and to the extent) doing so would improve efficiency.").

this paper has to face the question of how CADE could *justify* the discontinuation of employment measures in merger control. In this regard, although economic and doctrinal analyses are really helpful, they are unable to completely answer the question posed above.

While those two approaches can offer substantial criteria to evaluate a shift in Brazilian antitrust policy regarding the design of merger remedies, such analyses cannot determine how legal decisions based on economics are correctly *argued*. For that reason, what I propose in this paper is a normative analysis of arguments that could support the decision to interrupt the use of employment measures. Policy justifications for that change in CADE's administrative practice are thus considered instances of legal argumentation.

In any case, legal disputes about the purpose and meaning of antitrust law must be settled at least for the present work. To that end, I assume that competition policy in Brazil pursues a set of general economic goals including efficiency, consumer welfare, and innovation.[73] I also assume that, at first sight, provisions of the antitrust statutes confer authority on CADE to use employment measures as a merger remedy specifically designed to regulate labor markets. Indeed, it is not an unlikely interpretation of Brazilian competition legislation, for, as we already saw in Section I.A, the 1994 Statute explicitly mentioned "employment level" as a relevant criterion for designing merger remedies.[74]

Of course, legal rules construed in such a way are certainly not indisputable. For my purposes, however, suffice it to say that those are possible readings of the antitrust statutes within the Brazilian le-

73. *See, e.g.,* AC 08012.004423/2009-18 at 356. *See also* Portaria Conjunta SEAE/SDE No. 50, de 1° de agosto de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.08.2001 (issuing Brazilian Horizontal Merger Review Guidelines), which is still adopted by CADE in merger review in even after the reform of the competition legislation.

74. Christopher Townley & Adriana Cardinali, *A utilização dos precedentes da União Europeia no direito concorrencial brasileiro*, DIREITO ECONÔMICO E SOCIAL - ATUALIDADES E REFLEXÕES SOBRE DIREITO CONCORRENCIAL, DO CONSUMIDOR, DO TRABALHO E TRIBUTÁRIO 127, 160 (João G. Rodas ed., 2012) (in addition to "black-letter" approaches to legal interpretation, techniques based on the internal coherence of law allow that gaps in statutory texts are filled by constitutional clauses underlying a particular legal regime. It means that, despite the lack of provisions in the 2011 Statute about the content of merger remedies, open-textured principles derived from the Brazilian Constitution, such as the promotion of full employment (art. 170, IV), could become the legal basis for the implementation of employment measures in merger control).

gal community. As stated in the Introduction, I claim that if CADE is to justify its implementation choice to abandon employment measures in competition law, it should be aware of potential logical flaws in arguments based on economic theory. Accordingly, I explain below which form of legal argumentation may become fallacious as a policy justification for interrupting the interplay between merger control and labor market regulation.

B. Employment Measures and the Inefficiency Thesis

Assuming employment measures as a specific kind of merger remedy, a necessary implication is that their use will be subjected to the same requirements governing merger clearance in Brazilian competition law. In other words, considering that employment measures were adopted to neutralize the anticompetitive impact of transactions on labor markets, the general criteria to design antitrust remedies must be then equally applied.

As seen in Section II.A, CADE's recent decisions have adopted a proportionality principle as the remedial standard in merger control. If this decisional standard is framed in efficiency terms, however, arguments that justify remedy use can be reconstructed with recourse to economic theory. Drawing an analogy with the economic methods of policy analysis, the remedial standard in Brazil can be understood as a sort of informal cost-benefit (or perhaps cost-effectiveness) test meant to minimize the social costs incurred to promote the ultimate goals of competition law.[75] Such a cost calculus would include not only welfare losses resulting from remedies with inefficient design, but also administrative costs associated with monitoring the compliance by firms and possible litigation against CADE's merger decisions.[76]

75. LUCIA HELENA SALGADO & EDUARDO BIZZO DE P. BORGES, ANÁLISE DE IMPACTO REGULATÓRIO: UMA ABORDAGEM EXPLORATÓRIA (TEXTO PARA DISCUSSÃO N. 1463) 12 (2010), http://repositorio.ipea.gov.br/handle/11058/2669 (last visited Sep 24, 2015).; STEPHEN DAVIES & BRUCE LYONS, MERGERS AND MERGER REMEDIES IN THE EU: ASSESSING THE CONSEQUENCES FOR COMPETITION 11–12 (2008).; E. Thomas Sullivan, *Antitrust Remedies in the US and EU: Advancing a Standard of Proportionality*, 48 ANTITRUST BULL. 377, 378 and 394-395 (2003).

76. Joseph Farrell, *Negotiation and Merger Remedies: Some Problems*, *in* MERGER REMEDIES IN AMERICAN AND EUROPEAN UNION COMPETITION LAW 95 (François Levéque & Howard Shelanski eds., 2004). *See* Howard A. Shelanski & J. Gregory

That said, let us focus now on welfare losses, which seem to be a more appealing policy justification.[77] Accordingly, one possible justificatory reason for abandoning employment measures in 2001 is that these remedies fail the legally required cost-benefit test.[78] Elaborating on that argument, it could be said that these employment measures fail that legal test because of their over-inclusive design. To put it briefly, this would mean that those antitrust measures are excessively broad in scope, seeking to correct market failures even in absence of significant market power.

Following this line of reasoning, employment measures are considered unreasonable remedies because labor markets would be sufficiently competitive. A merger between employing firms is unlikely to create market power at the demand-side of the industry, i.e., monopsony power over workers.[79] In this context, clearance conditions imposed by CADE only distort economic incentives and increase the productive costs of the merged firm, affecting the markets as sort of indirect tax.[80] With that argument, one could allege that CADE should not apply employment measures, as they would lead to welfare losses, viz., inefficient outcomes in the labor markets in which

Sidak, *Antitrust Divestiture in Network Industries*, 68 THE UNIVERSITY OF CHICAGO LAW REVIEW 1–99, 5 and 19 (2001).

77. CADE, Ato de Concentração No. 08700.009198/2013-34 (Estácio Participações S.A. e TCA Investimento em Participações Ltda.), Relator: Cons. Ana Frazão, j. 14.05.2014; and AC 08700.005447/2013-12. *Cf.* MOTTA, *supra* note 3 at 296. (of course, we one could also say employment measures entail such high administrative costs that these measures would fail que cost-effectiveness test regardless of concrete welfare losses resulted from their design. However, even though monitoring employment measures is expensive, as it would be for any behavioral remedy, recent mergers cases have demonstrated that CADE is, to some extent, willing to incur such administrative costs. More generally, about the increasing use of behavioral remedies). *See* John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 THE ANTITRUST BULLETIN 979–1011, 980 (2012). ("Behavioral remedies are now endorsed more widely for vertical mergers, where current policy is commendably more active than in the past. Moreover, their potential use would not seem to be restricted to vertical cases.").

78. Kwoka and Moss, *supra* note 77 at 980..

79. *See* ROGER D BLAIR & JEFFREY L HARRISON, MONOPSONY IN LAW AND ECONOMICS 41 (2010).

80. Willem Boshoff et al., *The Economics of Public Interest Provisions in South African Competition Policy*, *in* 6TH ANNUAL CONFERENCE ON COMPETITION LAW, ECONOMICS AND POLICY , 16 (2012), http://www.compcom.co.za/sixth-annual-competition-conference/ (last visited May 24, 2015).

the merged firm operates.[81] This particular policy justification is called here the Inefficiency Thesis.

Framing the proportionality principle in merger control as a remedial standard based on economic concepts is helpful because the Inefficiency Thesis can then be analyzed as an argument produced by EAL. In fact, as we saw in the Introduction, the Inefficiency Thesis presented above is the hypothetical argument that I claim to be fallacious, and which is going to be refuted by the end of this paper. Before proceeding, there are still some caveats to be made.

Because my paper covers topics in antitrust policy, it incorporates some economic concepts from the theories of imperfect competition and market power. However, even though economic analysis of competition law is crucial, I am interested in EAL; not as a research method for applied microeconomics, but as a form legal argumentation based on theoretical insights derived from economic models.[82] EAL is taken as a technique to construct consequentialist arguments supported by prognoses about behavioral reactions to legal decisions that change economic incentives.[83]

This kind of consequentialist argumentation based on economic theory[84] ("EAL argumentation") is somewhat similar to the traditional purposive or teleological approaches to statutory interpretation, commonly utilized for legal analysis in both civil and common law

81. *Cf.* Page*, supra* Page, *supra* note 72 at 266.. ("Injunctions [antitrust remedies] are costly to implement, both in the direct costs of administration and the indirect *costs of deterring efficient conduct*.") (emphasis added).

82. *Cf.* Christian Courtis, *El Juego de los Juristas: Ensayo de Caracterización de la Investigación Dogmática*, *in* OBSERVAR LA LEY : ENSAYOS SOBRE METODOLOGÍA DE LA INVESTIGACIÓN JURÍDICA 105–156 (Christian Courtis ed., 2006). (referring to EAL as an empirical-consequentialist method in doctrinal analysis). *Cf.* Sartor, *supra* note 22 at 249. (referring to the idea of a dialectical protocol for legal reasoning, such as the one offered by Alexy's theory of legal argumentation).

83. *Cf.* Péter Cserne, *Courts and Expertise: Consequence-Based Arguments in Judicial Reasoning*, *in* NATIONAL LEGAL SYSTEMS AND GLOBALIZATION 89–109, 95 (Pierre Larouche & Péter Cserne eds., 2013). ("An efficiency-based argument, i.e. a judicial reference to improvements in efficiency or welfare the decision is supposed to bring about is an argument based on behavioural consequences.").

84. *Cf.* Pargendler and Salama, *supra* note 25., at 446 ("Economic insights illuminate legal interpretation not only when the law implicates economic concepts . . . but also when the legal principles or rules in question call for a forecast of the likely consequences of certain events or legal regimes."). *See* Cserne, *supra* note 13, at 38.

jurisdictions.[85] EAL argumentation, however, is more rigorous than general legal arguments in regards to alleged causalities between law and economic outcomes. [86] In fact, the possibility of introducing economic knowledge into legal reasoning, as propositions derived from empirically-tested models, represents EAL's best contribution to legal scholarship.[87]

Yet, as we will see, the Inefficiency Thesis cannot be considered a sound EAL argument as it does not survive a critical testing under a model of dialectical argumentation. My claim challenges the inefficiency thesis only within the argumentative realm of legal discourse. What I do not claim is that employment measures are economically inefficient as matter of fact, let alone that this paper can demonstrate or empirically quantify any loss in social welfare.

III. Law, Economics and Argumentation

A. Evaluative Framework: Pragma-dialectics

To determine the conditions of plausibility for EAL argumentation and to defend my claim against the inefficiency thesis, I adopt as evaluative framework a general theory of argumentation: the pragma-dialectics of van Eemeren and Grootendorst.[88] The advantage of the pragma-dialectical theory is that it offers a normative model of critical discussions that accounts for the empirical aspects of argu-

85. *Cf.* Eveline T. Feteris, *A Pragma-Dialectical Approach of the Analysis and Evaluation of Pragmatic Argumentation in a Legal Context*, 16 ARGUMENTATION 349–367, 357 (2002). ("In a legal context pragmatic argumentation is often used to defend a *teleological* interpretation, an interpretation that establishes the meaning of a legal rule by determining the *goal* of the rule.") (emphasis in original).

86. *Cf.* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 3 (6 ed. 2012). ("Economics generally provides a behavioral theory to predict how people respond to laws."). *See also* Bruno Salama, *O que é Pesquisa em Direito e Economia?*, 22 CADERNOS DIREITO GV, 14 (2008), http://bibliotecadigital.fgv.br/dspace/handle/10438/2811 (last visited May 23, 2015).

87. *See* Christian Kirchner, *The Difficult Reception of Law and Economics in Germany*, 11 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 277–292, 287 (1991).

88. *See* FRANS H. VAN EEMEREN & ROB GROOTENDORST, A SYSTEMATIC THEORY OF ARGUMENTATION THE PRAGMA-DIALECTICAL APPROACH (2003), for an introduction to pragma-dialectical theory; *See generally* Eveline T. Feteris, *A Dialogical Theory of Legal Discussions: Pragma-dialectical Analysis and Evaluation of Legal Argumentation*, 8 ARTIFICIAL INTELLIGENCE AND LAW 115–135 (2000).

mentation also as a linguistic phenomenon.[89] Under this approach, discussants' argumentative moves are characterized as speech acts in a communicative practice, which are subjected to rationality requirements derived from dialectics.[90] Thus argumentation is a "verbal, social, and rational activity aimed at convincing a reasonable critic of the acceptability of a standpoint by putting forward a constellation of propositions justifying or refuting the proposition expressed in the standpoint."[91] While argumentation as communicative activity corresponds to a complex speech act, an *argument* is a set of propositions forwarded as reasons to support or oppose the standpoint under dispute.[92]

The model proposed by the pragma-dialectics is divided into four analytical stages of critical discussion: confrontation, opening, argumentation and conclusion. These stages are instrumental to the general purpose of argumentation: the resolution of a dispute on the merits.[93] Each stage is governed by rules that determine the procedure for an exchange of views between two rational arguers – actual or hypothetical.[94] The most basic pragma-dialectical rules assure, for instance, that the difference of opinion between discussants is clearly

89. *See* FRANS H. VAN EEMEREN & ROB GROOTENDORST, SPEECH ACTS IN ARGUMENTATIVE DISCUSSIONS: A THEORETICAL MODEL FOR THE ANALYSIS OF DISCUSSIONS DIRECTED TOWARDS SOLVING CONFLICTS OF OPINION (2010)., for an extensive exposition of the theoretical basis on which pragma-dialectics is built.

90. *See* FRANS H. VAN EEMEREN & ROB GROOTENDORST, ARGUMENTATION, COMMUNICATION, AND FALLACIES: A PRAGMA-DIALECTICAL PERSPECTIVE 9 (1992).

91. EEMEREN AND GROOTENDORST, *supra* note 11 at 1. *Cf.* Erik C. W. Krabbe, *Book Review*, 21 ARGUMENTATION 101–113, 101 (2007). (reviewing JAMES B. FREEMAN, ACCEPTABLE PREMISES: AN EPISTEMIC APPROACH TO AN INFORMAL LOGIC PROBLEM (2005)) ("[T]he acceptability question, i.e., the question whether there is a presumption for this premise and how we may ascertain its presumptive character, is of paramount importance when the argument is to be evaluated according to standards of informal . . . logic.").

92. *See* EEMEREN AND GROOTENDORST, *supra* note 90 at 13.106*Id.* at 106.relevance of informal logics as a complement to the pragma-dialectical theory of fallacies); *See, e.g.*, DOUGLAS N. WALTON, INFORMAL LOGIC: A PRAGMATIC APPROACH (2 ed. 2008).; DOUGLAS N. WALTON, FUNDAMENTALS OF CRITICAL ARGUMENTATION (2006).

93. *See* EEMEREN AND GROOTENDORST, *supra* note 90 at 35.

94. *Cf.* EEMEREN AND GROOTENDORST, *supra* note 11 at 59. (affirming that a monologue can be dialectically analyzed as a critical discussion between a protagonist and an implicit antagonist).

determined and that both of them share common starting points needed to carry out the debate.[95]

In respect to the argumentation stage, the model for critical discussions includes evaluative criteria to assess the sufficiency and success of argumentative moves that defend or attack a standpoint.[96] To evaluate whether arguments advanced in critical discussions are sound, the pragma-dialectical framework offers two analytical tools: argumentation schemes and critical questions. An argumentation scheme expresses a "more or less conventionalized way of representing the relation between what is stated in the argument in what is stated in the standpoint."[97] As a concept, argumentation schemes are abstract frames based on particular ways of linking up propositions. Such recognized argumentative forms warrant that the acceptability of the premises of an argument is transferred to its conclusion, so that the standpoint under dispute also becomes acceptable to the discussants.[98]

There are three main argumentative schemes in the pragma-dialectical theory: causal, symptomatic, and comparison argumentation.[99] The first scheme justifies the acceptability of a standpoint by relying on a sense of instrumentality between premises and conclusion of the argument. That is to say, the causal scheme expresses a relation of means and ends in which the propositions advanced as premises are the cause for the effect indicated in the proposition referred to as a standpoint defended by the arguer.[100]

In the scheme of symptomatic argumentation, there is a relation of concomitance between the propositions, what allows the acceptability of the arguments to be transferred to the standpoint. This means the premises of an argument express a sign or a characteristic pertinent to the conclusion so that the discussants accept this proposition.[101] Finally, in comparison argumentation, the scheme relies on a relation of analogy between arguments and standpoint so that the

95. *Cf.* EEMEREN AND GROOTENDORST, *supra* note 17 at 151 (presenting a detailed description of the code of conduct for rational discussants).
96. *See Id.* at 162.
97. EEMEREN AND GROOTENDORST, *supra* note 90 at 96.
98. *See* EEMEREN AND GROOTENDORST, *supra* note 11 at 4.
99. *See Id.* at 4.
100. *See* EEMEREN AND GROOTENDORST, *supra* note 90 at 97.
101. *See Id.* at 97.

similarity of premises and conclusion accounts for the acceptability of the proposition under dispute.[102]

Each of the general schemes carries a specific dialectical test corresponding to questions that arguers are committed to answer when using those argumentation forms in a rational debate.[103] Thus, the model for critical discussions requires not only that argumentation schemes are appropriately chosen, but also correctly employed, so that doubts and criticism by the respondent are really faced by the proponent of an argument.[104] Most importantly, the violation of the pragma-dialectical rules at the argumentation stage – or any other discussion stage – may constitute a fallacy. Fallacies in pragma-dialects are understood as incorrect argumentative moves that threat the resolution of a dispute on the merits.[105]

Nonetheless, although the purpose of critical discussions is always to resolve disputes over the acceptability of a standpoint, the conflicts to be handled via argumentation include, besides differences of opinion, also practical problems or unproven theoretical hypotheses.[106] In fact, the diversity of goals, and respective conventions observed in concrete communicative practices, become contextual elements that are essential to evaluate whether discussion moves conform to the dialectical protocol.[107]

Along with argumentation schemes and respective critical questions, the identification of fallacies also depends on the particular context of each kind of argumentative discussion.[108] In this respect, I believe the concept of *argumentative activity type* as a descriptive category in pragma-dialectics becomes rather similar to the typology

102. *See Id.* at 97.
103. *See* FRANS H. VAN EEMEREN, BART GARSSEN & BERT MEUFFELS, FALLACIES AND JUDGMENTS OF REASONABLENESS 167 (2009).
104. *See* EEMEREN AND GROOTENDORST, *supra* note 90 at 158 and 162.
105. *Id.* at 102.
106. *Cf.* Douglas N. Walton, *What is Reasoning? What Is an Argument?*, 87 THE JOURNAL OF PHILOSOPHY 399–419, 411 (1990). (explaining how different conflicts may originate specific kinds of argumentation).
107. *See* Frans van Eemeren et al., *Contextual Considerations in the Evaluation of Argumentation*, *in* DIALECTICS, DIALOGUE AND ARGUMENTATION: AN EXAMINATION OF DOUGLAS WALTON'S THEORIES OF REASONING 115, 129 (Chris Reed & Christopher W. Tindale eds., 2010).
108. *Cf.* Frans H. van Eemeren, *In Context*, 25 ARGUMENTATION 141–161, 155 (2011).

of dialogue models formulated by Walton.[109] For that reason, my evaluative framework also includes contextual elements related to dialogues of persuasion (about differences in opinion), deliberation (about practical problems), inquiry (about theoretical hypothesis) and even information-seeking (to exchange knowledge).[110]

In real-life argumentative discourses, disputes about a given standpoint usually evolve to several new sub-disputes over acceptability of other relevant propositions.[111] Thus, framing disputes and sub-disputes in dialogue types becomes useful to identify fallacious moves within the critical discussion model.[112] Walton dialogues would allow us to describe, even in general manner, some kinds of dialectical interaction between discussants and their specific goals in an argumentative discussion.[113] Argumentation in traditional doctri-

109. It is true that Walton's approach to *dialogue types*, as different normative models of dialectical argumentation, has been criticized as theoretically flawed and incompatible with pragma-dialectics, see Frans H. van Eemeren & Peter Houtlosser, *The Contextuality of Fallacies*, 27 INFORMAL LOGIC 59–68 (2007). However, even adopting the pragma-dialectical theory in this paper, I believe the analytical insights derived from dialogue types are helpful if interpreted as contextual criteria equivalent to those offered by concept of *argumentative activity type* proposed by Eemeren. *Cf.* Eemeren et al., *supra* note 90 at 131 ("[T]he incorporation of contextual factors at the activity type level in the pragma-dialectical method for analyzing and evaluating argumentative discourse always involves [. . .] a set of contextual criteria to relate the phenomena that are examined with the theoretical framework."). In fact, despite the critique from Eemeren and others, Walton seems to consider the critical discussion model as the basis for his own analyses, incorporating both the discussion rules and stages from the pragma-dialectics literature. *See* Christopher W. Tindale, *Fallacies, Blunders, and Dialogue Shifts: Walton's Contributions to the Fallacy Debate*, 11 ARGUMENTATION 341–354, 334 (1997).

110. *Cf.* Douglas Walton & Giovanni Sartor, *Teleological Justification of Argumentation Schemes*, 27 ARGUMENTATION 111–142, 128 (2013). (summarizing the seven dialogue types formulated by Walton and others). The advantage of partially including the dialogue types in my framework is that it allows me to utilized important analyses of the legal argumentative practice which are based on that particular dialogical approach. *See, e.g.*, Fabrizio Macagno, Douglas Walton & Giovanni Sartor, *Argumentation Schemes for Statutory Interpretation*, *in* LEGAL KNOWLEDGE AND INFORMATION SYSTEMS: JURIX 2014 (R. Hoekstra ed., 2014). For an example of argumentative analysis that also combines Walton's contributions with pragma-dialectics, see Jean H. M. Wagemans, *The Assessment of Argumentation from Expert Opinion*, 25 ARGUMENTATION 329–339, 337 (2011).

111. *See* EEMEREN AND GROOTENDORST, *supra* note 90 at 42.

112. *Cf.* Tindale, *supra* note 109 at 344. ("In identifying a wider range of dialogues in which argumentation occurs, Walton widens the scope for the occurrence and treatment of fallacies.").

113. *See* Walton, *supra* note 106 at 413.

nal scholarship, for instance, despite initially characterized as an inquiry dialogue, can shift to a persuasion dialogue, as legal scholars, instead of arguing only to produce practical knowledge, also strive to achieve a common view regarding propositions about law.[114]

When it comes to EAL argumentation, it seems that argumentative discourse always shifts, at some point, from dialogues of inquiry or persuasion to an information-seeking dialogue about the economic consequences of legal decisions. It happens because, while arguing to convince each other about the acceptability of propositions, legal discussants can always rely on an implicit dialogue with authoritative sources of knowledge. In the next section, I employ argumentation schemes and appropriate dialogue types to evaluate uses of economics in legal reasoning. Such a pragma-dialectical approach will reveal how to avoid fallacious discussion moves based on the authority of economic science.

B. Pragma-dialectical Approach to EAL Argumentation

From a pragma-dialectical perspective, the discourse of EAL argumentation can be represented as a long argumentative chain,[115] which has, as basic constitutive elements, both consequentialist and authority arguments. These two forms of argumentation, in turn, are identified with the logical structures of causal and symptomatic schemes, respectively.[116] Let us begin by examining the consequentialist argument and then move on to the authority argument. Following this analysis, we will be able to understand why such authority element becomes key to the plausibility of the chain of legal arguments produced by EAL.

Consequentialist arguments themselves have a complex logical structure. Among their premises there are at least (i) one practical-evaluative proposition stating the (in)desirability of some state of affairs, which is to be achieved by a given course of action; and (ii) one

114. *Cf., e.g.*, Sartor, *supra* note 22. ("In practical inquiry [about law], defining what counts as winning or losing depends on the purposes of each participant, [. . .] on whether they want to achieve an agreement, or rather to increase their individual knowledge or [. . .] collective practical knowledge.").

115. *Cf.* WALTON, *supra* note 92 at 24. ("[C]hains of argumentation are made up of smaller arguments that are connected together. The conclusion of one inference [argument] becomes a premise in another one.").

116. *See* EEMEREN AND GROOTENDORST, *supra* note 90 at 160.

theoretical-descriptive, or theoretical-predictive, proposition about a causal link between the course of action and factual consequences that constitute the desired state of affairs. The conclusion of the argument is a practical-normative proposition suggesting that certain decision should (or should not) be made because the course of action would promote the (in)desirable state of affairs.[117]

According to Feteris, consequentialist arguments in law, as discussion moves meant to support of a given reading of legal texts, can be analyzed within the following logical structure:

Premise 1: The consequence Y is (un)desirable.

Premise 2: The enforcement of the provision X under the interpretation X' leads to the consequence Y.

Conclusion: The enforcement of the provision X under the interpretation X' is (un)desirable.[118]

In critical discussions about legal theses, the soundness of a consequentialist argument bears on how the arguer answers critical questions regarding the desirability of a given state of affairs in terms of values and goals to be promoted by the law. Additionally, the soundness of that argument depends also on the response to questions challenging the causal link, e.g., as a matter of probabilistic inference, that always underlies the consequentialist argumentation. While the first kind of critical question can be answered with recourse to doctrines and interpretive arguments, typical forms of legal argumentation would not provide reasons to justify the causality between social facts.[119] And that is when EAL plays a major role in legal reasoning.[120]

117. *See* Eveline T. Feteris, *The Rational Reconstruction of Argumentation Referring to Consequences and Purposes in the Application of Legal Rules: A Pragma-Dialectical Perspective*, 19 ARGUMENTATION 459–470, 463 (2006). About the distinction between practical (evaluative or normative) statements and theoretical (descriptive or predictive) statements, my classification was partially build on ALEKSANDER PECZENIK, ON LAW AND REASON 34 (2009).

118. *Cf.* Feteris, *supra* note 117 at 462.

119. According to Feteris, such legal arguments "consists of symptomatic argumentation justifying the desirability of consequence Y by referring to the fact that it is compatible with goal Z which is objectively prescribed by the valid legal order." Eveline T. Feteris, *The Pragma-dialectical Reconstruction of Teleological-evaluative Argumentation in Complex Structures of Legal Justification*, *in* DISSENSUS AND THE SEARCH FOR COMMON GROUND: OSSA 2007 , 3 (H.V. Hansen et al. eds., 2007).

120. *Cf.* COOTER AND ULEN, *supra* note 86 at 3. ("Economics provided a scientific theory to predict the effects of legal sanctions on behavior.").

According to mainstream (neoclassical) economics, the scientific method would allow economists to build theoretical models with fairly accurate predictive power.[121] Actually, the possibility that these models yield predictions about the behavior of economic actors seems to be the fundamental criterion of validity in positive economics.[122] When it comes to economic effects of law, however, EAL can go astray in consequentialist arguments if the propositions put forward, describing or predicting the consequences of legal decisions, are considered false or, at least, disputable. If the causal relation between economic facts, as stated by those propositions, is a belief that cannot be derived from the corpus of knowledge produced by the academic community, EAL argumentation becomes flawed.

In that case, once the arguer advances propositions that might not be considered true, the appeal to the authority of economics becomes an unreasonable recourse to theoretical knowledge in critical discussions. Because such discussion move violates the pragma-dialectical rules, that argument from authority turns out to become an informal fallacy known as *argumentum ad verecundiam.*[123] Moreover, as one element in a chain of legal arguments, fallacious appeals to economic knowledge could undermine the entire EAL argumentation. That said, there can be, of course, sound appeals to the expert opinion of economists, which are acceptable argumentative moves in a debate about legal theses.

Let us see now the basic structure of a plausible argument from authority. It comprises three theoretical premises stating that (i) the source consulted is an expert in a relevant field of knowledge; (ii) the source of expert knowledge asserts that a given proposition is true (or

121. *Cf.* Daniel M. Hausman, *Economic Methodology in a Nutshell*, THE JOURNAL OF ECONOMIC PERSPECTIVES 115–127, 121 (1989). (recognizing that Milton Friedman's approach, as the standard methodology for neoclassical economics, is representative of Popper's model of positivist science).

122. *Cf.* MILTON FRIEDMAN, ESSAYS IN POSITIVE ECONOMICS 8–9 (1953). ("[T]heory is to be judged by its predictive power for the class of phenomena which it is intended to 'explain'[. . .] the only relevant test of the validity of a hypothesis is comparison of its predictions with experience. The hypothesis is rejected if its predictions are contradicted.").

123. *Cf.* Donald N. McCloskey, *Rhetoric of Law and Economics, The*, 86 MICH. L. REV. 752–767, 766 (1987). (suggesting that *ad verecundiam* arguments occur in economic analysis of law); and Donald N. McCloskey, *The Rhetoric of Economics*, JOURNAL OF ECONOMIC LITERATURE 481–517, 500 (1983). (suggesting that economists employ *ad verecundiam* arguments).

false); and (iii) the proposition asserted in the expert opinion belongs to the area of expertise of the source. The conclusion of the argument is yet another theoretical proposition, which states that the proposition asserted in the expert opinion may plausibly be accepted as true (or false).[124] Because arguments from authority are based on the general symptomatic scheme, the fact that the expert consulted is an authoritative source of knowledge is taken as a sign that her advice can be considered correct and acceptable.

Following Walton, arguments from authority, or appeals to appeals to expert opinion − as they are also known in the literature − can be analyzed within the logical structure below:[125]

Premise 1: The source X is an expert in the field of knowledge Y.

Premise 2: The source X asserts that the proposition Z is known to be true (false).

Premise 3: The proposition Z is within area of knowledge Y.

Conclusion: The proposition Z may (plausibly) be taken to be true (false).

To explain the conditions of plausibility for the argument from authority, I move back to the dialogue typology mentioned above in Section III.A. According to Walton, the dialectical interaction with a source of authority in argumentative discussions should be understood as a mix of persuasion and information-seeking dialogues.[126] This kind interaction involves a dialogue between lay discussants, who resort to an expert opinion to justify a standpoint, and another secondary dialogue that allows an exchange of information between a layperson and the authoritative source of knowledge.[127]

The information exchange does not really need to take place, though, and it is often only assumed as a pre-condition for adopting an expert opinion in a debate between rational arguers. Nonetheless, actual or presumed, the information-seeking dialogue allows us to identify the conditions for a plausible appeal to the authority of science.[128] Because a layperson, as a participant in the information-

124. *See* Wagemans, *supra* note 110 at 335.
125. *See* DOUGLAS N. WALTON, APPEAL TO EXPERT OPINION: ARGUMENTS FROM AUTHORITY 258 (1997).
126. *See Id.* at 121.
127. *See Id.* at 121.
128. *See Id.* at 122.

seeking dialogue, cannot assess the content of an expert opinion, the evaluation of arguments from authority requires logical criteria not related to the relevant field of knowledge. The critical testing of propositions advanced by experts inevitably relies on questions that refer only indirectly to the opinion asserted.[129]

Accordingly, to evaluate arguments from authority, Walton proposes critical questions about personal aspects of the expert, such as her credibility and reliability, the relevance of her expertise, and the accuracy of her advice.[130] These questions can be summarized in the following six topics:

1. Expertise: How credible is X as a source of expert knowledge?

2. Field: Is X a source in the field of expert knowledge that the proposition Z is in?

3. Opinion: What did the source X assert that implies the proposition Z?

4. Trustworthiness: Is the source X personally reliable as an expert in the field Y?

5. Consistency: Is the proposition Z consistent with what other experts in the field Y assert?

6. Backup Evidence: Is the proposition Z based on evidence?

The critical questions above can also be understood as referring to unexpressed premises of the argument from authority, which allows us to expend its basic logical structure.[131] If an arguer fails to properly answer one of those questions, it means that assumptions on which the appeal to expert opinion is based were violated. Lacking some of those premises, an argument from authority loses plausibly and may become an *ad verecundiam* fallacy.[132]

129. *See* Wagemans, *supra* note 110 at 338.

130. *See* WALTON, *supra* note 125 at 223.

131. *See* Douglas Walton & Chris Reed, *Diagramming, Argumentation Schemes and Critical Questions*, *in* ANYONE WHO HAS A VIEW , 210 (Frans H. van Eemeren et al. eds., 2003).

132. *See* WALTON, *supra* note 125 at 258–259. It is worth noting that, because even experts cannot be always right in their judgements, the basis for a sound appeal to authority is, in most situations, not deductive or inductive, but merely presumptive reasoning. In other words, the acceptability of a standpoint supported by presumptive arguments can always be defeated in view of new evidence, which, in turn, can be provided by the answers to critical questions. *See* Douglas Walton, *Argumentation Schemes: The Basis of Conditional Relevance*, L. REV. MSU-DCL 1205, 1207 (2003).

Walton's questions are useful not only to analyze scientific evidence, such as the expert testimony of economists, but also to evaluate general uses of economic knowledge in legal reasoning.[133] That is because sources of authority, as defined in argumentation theory, are not limited to individual experts. Actually, those sources include also documents, machines and even an entire field of knowledge represented by a relevant academic community.[134] Moreover, appeals to authority in written argumentation are equivalent to oral examinations of individual experts in trial, in that both dialectical procedures constitute or, at least assume, some kind of information-seeking dialogue.[135]

Since theoretical propositions in EAL arguments are usually derived from documental material (e.g. reports, technical opinions, scientific papers), a plausible appeal to the authority of economics requires a dialectical interaction with those same sources of knowledge.[136] That is, an exchange of information through a presumed dialogue between a legal decision-maker, engaged in EAL argumentation, and an economist, who is considered an ideal representative of the academic community.[137] In this case, the expert

133. *See* John L. Solow & Daniel Fletcher, *Doing Good Economics in the Courtroom: Thoughts on Daubert and Expert Testimony in Antitrust*, 31 J. CORP. L. 489, 489 (2005). As a matter of fact, the critical questions for arguments from authority are somewhat similar to the legal criteria employed in courts, such as the *Daubert* test for admissibility of scientific evidence in U.S. law. *See* David M. Godden & Douglas Walton, *Argument from Expert Opinion as Legal Evidence: Critical Questions and Admissibility Criteria of Expert Testimony in the American Legal System*, 19 RATIO JURIS 261–286, 281 (2006).

134. *See* Catherine Hundleby, *The Authority of the Fallacies Approach to Argument Evaluation*, 20 INFORMAL LOGIC 279–308, 298 (2010). *See also* EEMEREN AND GROOTENDORST, *supra* note 74 at 161 ("The authority appealed need not always be a person. It may also be a book [. . .] Another body of authority is the number of people who believe something. . .").

135. *See* Douglas Walton, *Examination Dialogue: An Argumentation Framework for Critically Questioning an Expert Opinion*, 38 JOURNAL OF PRAGMATICS 745–777, 755 (2006).

136. *Cf.* William H. Page & John E. Lopatka, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL LAW REVIEW 617–704, 619 (2005). (recognizing the authority of economics in law "a body of authoritative economic knowledge adopted by courts − directly or indirectly − from the scholarly literature.") (footnote omitted).

137. A similar situation would be the typical activity between scholars of writing about and commenting on each other's work. *Cf., e.g.,* Walton, *supra* note 135 at 765. (referring to a philosopher criticizing the writings of another as example of a dialectical interaction that includes presumed information-seeking and persuasion dialogues).

economist could be a scholar whose academic work is taken as reference to propositions put forward when the decision-maker argues about the economic consequences of legal decisions. And that is what happens, for instance, when judges and agencies interpret the competition legislation.[138]

The recourse to the overall authority of a field of knowledge, however, downplays critical questions that challenge personal characteristics of the expert, even though assessing these aspects is somewhat inevitable.[139] For that reason, the plausibility of EAL argumentation depends mainly on the backup evidence to be offered by economist and, most importantly, the consistency of her opinion within the economic community. As we will see in the next section, my claim against the Inefficiency Thesis builds on that second logical criterion, i.e., the consistency question for arguments from authority.

C. EAL Argumentation: Criticism and Developments

My analysis of EAL argumentation, as a chain of arguments supported by an element of authority, could be challenged in at least two ways. In this section, I will briefly respond to these points of criticism, in an attempt to show that they do not undermine my claim. The first of those critiques would contend that the logical criteria relevant to arguments from authority in courts cannot be employed to evaluate legal doctrines and statutory interpretation informed by economics. This critique assumes that economic knowledge provided by an expert witness is essentially different from the theoretical insights that EAL offers to legal analysis.[140] In this way, Walton's account of appeals to expert opinion in judicial settings would not be able to explain the conditions for plausible EAL arguments.

It is a weak criticism. Knowledge produced outside legal discourse is useful when judges engage in legal interpretation to decide

138. *See, e.g.*, Ioannis Lianos, *"Judging" Economists: Economic Expertise in Competition Law Litigation*, *in* THE REFORM OF EC COMPETITION LAW: NEW CHALLENGES , 237 (Ioannis Kokkoris & Ioannis Lianos eds., 2010).

139. *Cf.* EEMEREN AND GROOTENDORST, *supra* note 90 at 161. ("[B]ecause [. . .] a written source derives its status from its spiritual progenitor [. . .] here, too, authority is ultimately ascribed to a person.").

140. *Cf., e.g.*, Richard A. Posner, *The Law and Economics of the Economic Expert Witness*, 13 THE JOURNAL OF ECONOMIC PERSPECTIVES 91–99, 91 (1999).

on the content of law.[141] It is also useful when they argue to justify decisions about which facts of the case are considered proven.[142] It means that, whether legal decision-makers are called on to determine the admissibility and sufficiency of evidence, or the relevant law to the case, scientific knowledge is always incorporated into legal reasoning as propositions about the empirical world.

To understand my point, one must recognize that, even though legal reasoning is practical in nature, it has a particular theoretical dimension as well.[143] Let us consider the kind of argumentation that takes place in court. Indeed, we can find in judicial discourse both practical arguments, which are meant to justify a course of action[144] (e.g. a legal decision). We can also find judicial discourse in theoretical arguments, which are meant to justify beliefs[145] (e.g. about the facts of a case).

Outside the evidentiary realm of courts, those theoretical legal arguments mainly occur in what Atienza called "legislative argumentation."[146] Think of a parliamentary committee responsible for drafting reports on a legislative proposal. To do so, they could make use of scientific knowledge to argue that the bill, once enacted, would achieve a certain policy goal. The committee thus appeals to the ex-

141. *See* Pargendler and Salama, *supra* note 25 at 108–109.

142. *See* Neil MacCormick, *Legal Reasoning and Practical Reason*, 7 MIDWEST STUDIES IN PHILOSOPHY 271–286, 272 (1982). In this situation, legal evidence, and particularly scientific evidence, becomes a source of theoretical propositions in arguments meant to defend a possible description of empirical facts. This kind of reasoning, known as *inference to the best explanation,* allows different propositions to come together to support plausible explanatory hypotheses. *See* Amalia Amaya, *Inference to the Best Explanation*, *in* LEGAL EVIDENCE AND PROOF: STATISTICS, STORIES, LOGIC , 135 (Bart Verheij, Henry Prakken, & Hendrik Kaptein eds., 2013).

143. *Cf.* Burton, *supra* note 14 at 764. ("Law is an exercise in practical reason, to be grasped from the internal point of view of an actor."). *See also* Finnis, *supra* note 15 at 1.*See* MANUEL ATIENZA, LAS RAZONES DEL DERECHO: TEORÍAS DE LA ARGUMENTACIÓN JURÍDICA 23 (2005). *See also* Scott Brewer, *Logocratic Method and the Analysis of Arguments in Evidence*, 10 LAW, PROBABILITY AND RISK 175–202, 176 (2011). (explaining how some forms of theoretical argumentation in law, which he calls "evidentiary arguments," are utilized by judges and lawyers).

144. *See* NEIL MACCORMICK, PRACTICAL REASON IN LAW AND MORALITY 12 (2008).

145. *See* DOUGLAS N. WALTON, PRACTICAL REASONING: GOAL-DRIVEN, KNOWLEDGE-BASED, ACTION-GUIDING ARGUMENTATION 84 (1990).

146. *See* Manuel Atienza, *El Argumento de Autoridad en el Derecho*, EL CRONISTA DEL ESTADO SOCIAL Y DEMOCRÁTICO DE DERECHO 14–27, 25 (2012).

pert opinion of scientists, constructing a theoretical argument to support a conclusion about the likely effects of the new legislation.[147]

Theoretical arguments in legal discourse can be seen, however, in yet another situation, viz., when EAL is employ in legal analysis. Actually, the authority and consequentialist elements of EAL argumentation, as we saw in Section III.B, reveal the same theoretical aspects of legislative arguments based on expert knowledge.[148] For instance, when interpreting statutes, legal decision-makers can rely on the authority of economics to argue for the acceptability of propositions that predict causal relations between social facts relevant to the law. The same recourse to the authority of economic science could be seen in a legislative report on a bill that addresses some regulatory issue.[149]

Now we can compare the use of economic evidence and the role of EAL in legal reasoning. In the first case, regardless of the accuracy of the expert evidence, economic knowledge become premises in theoretical arguments meant to support conclusions about which facts – e.g., regarding market behavior –, were proven in court.[150] When it comes to EAL, similar economic propositions become premises in other theoretical arguments, meant, in turn, to support conclusions of practical arguments based on the consequences of legal decisions.[151]

147. *Cf. Id.* at 25. (mentioning the example of a smoking-ban law in Spain and the debate about whether scientific studies support that legislation).

148. Atienza considers that the use of expert evidence in courts and scientific studies in parliaments can be equally understood as theoretical arguments from authority. My point is that EAL argumentation is akin to legislative argumentation due to its pragmatic rationale, *see* ATIENZA, *supra* note 155 at 206. That is, both forms of legal argumentation are consequentialist and build on predictive propositions that estimate the general reaction of individuals towards a statute or judicial decision to be taken.

149. *Cf.* Godden and Walton, *supra* note 133 at 276. (affirming that, in legal argumentation, "the expert will be playing a role in trying to establish one or more of the premises being used in a persuasion dialogue.").

150. *See Id.* at 227. ("[E]ven in law, expert testimony cannot conclusively establish the acceptability of a proposition.").; *Cf., e.g.*, Lianos, *supra* note 138 at 317. (suggesting that economic evidence in antitrust cases is evaluated through a comparison between different and competing factual explanations about market behavior). *See also* Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW AND PHILOSOPHY 223–268, 242 (2008). ("[T]he strength of [the] inference [to the best explanation] will depend contextually on the other evidence, and the presence of other, contrary explanation.").

151. *Cf.* Giovanni Sartor, *Defeasibility in Legal Reasoning*, *in* INFORMATICS AND THE FOUNDATIONS OF LEGAL REASONING 73–97, 146 (Zenon Bankowski, Ian White, & Ulrike Hahn eds., 1995). (explaining that the premises underlying a legal decision, un-

The acceptability of those theoretical premises, i.e., propositions stating economic facts and relations, stems from appeals to the authority of economics in both cases above. That is why I believe arguments from authority, as a specific argumentative scheme, can be helpful to analyze any use of economic knowledge in legal reasoning, including expert evidence and EAL.

A second critique would point out that, once one links the plausibility of EAL argumentation to a consensus among experts, any use of economic knowledge in legal reasoning could become logically unacceptable at some point, as economists always disagree on how to describe or predict market functioning. An economic opinion can be inconsistent with other economists' views is so commonplace that almost every EAL argument could be deemed fallacious. Following this criticism, Walton's logical criteria to evaluate arguments from authority loses much of its analytical power.

However, while economists – and, for that matter, any academic community – have scientific disagreements, it does not mean that there is no common theoretical ground capable of informing legal decision-making and regulatory policy. Think of antitrust law, for instance, and the prevailing influence of neoclassical microeconomic theory. Concepts such as market power, barriers to entry and efficiency are known and equally employed by regulators, firms and courts in antitrust litigation.[152] I am not saying neoclassical economics has really contributed to the improvement of antitrust policy, but rather that such an economic approach has, to a considerable extent, shaped the discourse of competition law.[153]

Accordingly, Lianos points out that, despite divergent opinions of economists concerning several antitrust issues, economic knowledge has nonetheless been incorporated into legal decision-making in a fairly consistent manner. The so-called "Economic Laws" is a case in point, as "part of general experience and [that] can be accepted without the need to be established and explained by experts."[154] In any case, my approach to EAL argumentation does not

derstood here as conclusion of a practical argument, can include "statutory, judicial, doctrinal provisions, *factual assertions*.") (emphasis added).

152. *See* Lianos, *supra* note 138 at 243.

153. *See generally* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43–60 (2000).

154. Lianos, *supra* note 138.

suggest that any disagreement among economists yields an *ad verecundiam* fallacy. Rather, and this must be clear, my point is only that the logical criteria for uses of economic knowledge in law impose that such lack of consensus is revealed, what would allow a rational debate to be carried out.

The duty to acknowledge the inconsistency of an expert opinion derives from the pragma-dialectical rules, as any argumentative move that prevents the resolution of a conflict of opinions is considered a violation of the protocol for critical discussions.[155] Thus, the recourse to an economic opinion that is not consistent within the academic community requires the arguer to make explicit the disagreement among experts, so that possible critical reactions against the appeal to the authority of economics take place. If the proponent of an argument from authority refuses to answer critical questions posed to her, or deliberately seek to preclude any criticism by presenting the argument in a dogmatic fashion, then the appeal to expert opinion becomes fallacious.[156]

The latter situation is particularly relevant here, i.e., when the proponent uses the discussion tactic of "suppression of critical questioning by making the appeal to authority seem more absolute than it really is."[157] In this case, the arguer tries to evade the very burden of proof which, according to the chosen argumentation scheme, has to be satisfied in order to support her standpoint. Such evasion of the burden of proof in dialectical argumentation can only be accomplished, though, in concrete contexts, as a result of implicit language use by arguers.[158] At this point, it is helpful to remember what I said earlier about the critical questions: they also correspond to unexpressed premises of the argument from authority, which are merely assumed in an argumentative discourse.

When it comes to written argumentation − in which actual questioning between discussants cannot exist − critical questions become the criteria to evaluate the appeal to expert opinion as interpreted

155. *See supra* Section III.A.

156. *See* WALTON, *supra* note 125 at 226. In this case, the discussion move by the proponent violates the pragma-dialectical rules governing the use of argumentation schemes. *See also* EEMEREN AND GROOTENDORST, *supra* note 11 at 172.

157. WALTON, *supra* note 125 at 252.

158. *See* EEMEREN AND GROOTENDORST, *supra* note 11 at 181.

from the argumentative text.[159] In other words, these criteria determine whether the logical structure of that argument, reconstructed by the interpreter to include all relevant premises, renders the appeal to authority really plausible.[160] For that reason, the proponent of an EAL argument (e.g. a court) would only be able to avoid an *ad verecundiam* fallacy if she anticipates, in the argumentative text (e.g. a judicial opinion), the criticism that her respondent might have regarding the appeal to the authority of economics and, in particular, the consistency of the economic opinion.[161]

So far I have explained why, from a pragma-dialectical perspective, a legal decision-maker engaged in EAL argumentation must defend herself against possible contentions that an economic opinion is inconsistent with what other economists say. However, the consistency criteria applied to an EAL argument could be broken down into different critical sub-questions. First comes a question on whether the adopted opinion is generally accepted in the academic community, then, lacking that acceptance, comes a further question on whether there are reasons for the divergent opinion to be considered true.[162] Once a scientific disagreement is revealed and becomes part of an argumentative discussion, the arguer should also be able to explain that, despite adopting an inconsistent economic opinion, the appeal to the authority of economics is plausible.

To say that the proponent of an EAL argument should justify why one expert opinion is to be preferred over another, does not mean that the arguer has to judge the merits of different models from which economic propositions are derived. That is, if conflicting theories divide the economic community, legal decision-makers are, of course, not expected to conduct empirical research to cure problems of economic indeterminacy and expand the boundaries of scientific

159. *Cf.* Walton, *supra* note 150 at 773 (explain that one can utilized the "critical discussion [model] to the argumentation in [a] given text of discourse to probe for weaknesses in the structure of an argument and to ask the critical questions appropriate for a given type of argument.").

160. *See* Walton, *supra* note 150 at 773.

161. *Cf.* F. H. VAN EEMEREN, R. GROOTENDORST & FRANCISCA SNOECK HENKEMANS, ARGUMENTATION: ANALYSIS, EVALUATION, PRESENTATION 50 (2002). (affirming that, due to implicit language use, the proponent should be aware of the weakness of the unexpressed premises of her argument so that possible doubts or criticism from the respondent are anticipated in a critical discussion.).

162. *See* WALTON, *supra* note 125 at 222.

knowledge. Rather, it is to be done by economists, within a typical theoretical discourse that is essentially distinct from the discourse produced by lawyers.[163]

In a similar manner, legal decision-makers are not expected to solve the profound philosophical question of how a layperson can make an epistemologically sound choice between contradictory expert opinions. In fact, it seems that even the literature on Law and Philosophy has been unable to come up with one universal solution for that conundrum.[164] And this paper definitely does not purpose to contribute to that research agenda. Still, and without going into much detail, two things can be said, as a partial conclusion for that philosophical problem. First, a simple quantitative solution of "using the numbers," as Goldman would say, is not necessarily appropriate from an epistemological point of view.[165] Put differently, the fact that most experts in a relevant field of knowledge have the same views cannot always be taken as rational basis for believing on the majority opinion.[166]

Second, despite the absence of a definitive criterion that determines which conflicting expert opinion a layperson should defer to, an unsolvable conflict of expertise that leads to arbitrary decisions does not seem to emerge most of the time.[167] If it does, and the problem involves different opinions about the economic effects of a legal decision, my suggestion would be to retract the EAL argument, replacing it by another form of argumentation that does not rely on that

163. *See* Tuori, *supra* note 10 at 186.

164. For a recent review of that literature, *see* Gustavo A. Ribeiro, *No need to toss a coin: conflicting scientific expert testimonies and intellectual due process*, 12 LAW, PROBABILITY AND RISK 299–342, 4 (2013).

165. Alvin I. Goldman, *Experts: which ones should you trust?*, 63 PHIL. & PHENOMENOLOGICAL RES. 85–110, 98 and 103 (2001).

166. *See* Ribeiro, *supra* note 164 at 330. There are, of course, other criteria that could suffice to avoid, in a concrete argumentative context, epistemic arbitrariness. *See* Gárbor Kutrovátz, *Expert Authority and Ad Verecundiam Arguments*, *in* EXPLORING ARGUMENTATIVE CONTEXTS , 203 (Frans H. van Eemeren & Bart Garssen eds., 2012).

167. This point contrasts with Brewer's position that "a nonexpert judge or jury is, in a great many instances, not capable of performing in an epistemically nonarbitrary manner." Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1680 (1998). My view contrary to this skeptical position is grounded on the critiques by Ribeiro, *supra* note 164 at 341.; and Michael S. Pardo, *The Field of Evidence and the Field of Knowledge*, 24 L. & PHIL. 321–392, 372 (2005).

kind of expert knowledge.[168] From a pragma-dialectical perspective, EAL should be put aside in that case, so as to prevent an inevitable *argumentum ad verecundiam*. For all those reasons, I believe that, even though economists do disagree in many scientific issues, it does not weaken the logical analysis proposed here.

IV. Inefficiency Thesis and Argument from Authority

A. Inefficiency Thesis: Rational Reconstruction

As we saw above in Section III.C, the main condition of plausibility for EAL arguments is that the arguer complies with dialectical duties to acknowledge and justify an economic opinion that happens to be inconsistent within the academic community. Let us now return to the Brazilian merger regime and continue my analysis of the Inefficiency Thesis. To do so, we need to understand how that policy justification is logically structured, once it is taken as an instance of EAL argumentation.

First of all, the Inefficiency Thesis has the structure of an argumentative chain with consequentialist and authority elements, mutually related in a specific subordinate arrangement. The consequentialist argument would comprise a predictive proposition about the expected welfare losses produced by merger remedies applied to transactions between firms operating in relevant labor markets. Those propositions, in turn, would describe labor markets through models of perfect competition, reflecting the idea that mergers cannot create significant monopsony power and, therefore, that employment measures are necessarily inefficient remedies.

To visualize the logical structure of the Inefficiency Thesis, I provide a rational reconstruction of that kind of EAL argumentation, so that we can identify each proposition advanced along the argumentative chain. I adopt here the analytical technique and notation proposed by pragma-dialectics:[169]

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168. In fact, it seems that this retracting solution has been utilized by European judges in antitrust cases. *Cf.* Lianos, *supra* note 138 at 63. ("Absence of empirical evidence and consensus between economists may lead the judge to ignore economic expertise or base his choice of economic theory on extra-scientific grounds. . .").

169. About the schematic representation of arguments in pragma-dialectics, *see* EEMEREN, GROOTENDORST, AND SNOECK HENKEMANS, *supra* note 161 at 63. For a graphical scheme of the Inefficiency Thesis, *see* i*nfra* Appendix.

Level 1: consequentialist argument

1. The interpretation of the antitrust statute that precludes the use of merger remedies in transactions between firms operating in labor markets is desired.

1.1a The use of merger remedies in transactions between firms operating in labor markets reduces social welfare.

(1.1b') (The promotion of social welfare is a desired goal).

Level 2: argument based on comparison

1.1a The use of merger remedies in transactions between firms operating in labor markets reduces social welfare.

1.1a.1a Competitive product markets are similar to labor markets.

1.1a.1b The use of merger remedies in transactions between firms operating in competitive product markets reduces social welfare.

1.1a.1c Labor markets are generally competitive markets.

Level 3: arguments from authority

1.1a.1b The use of merger remedies in transactions between firms operating in competitive product markets reduces social welfare.

1.1a.1b.1a Economics is a source of expert knowledge about product markets.

1.1a.1b.1b Economics asserts that the use of merger remedies in a transaction between firms operating in competitive product markets reduces social welfare.

1.1a.1b.1c The proposition that the use of merger remedies in transactions between firms operating in competitive product markets reduces social welfare is within the domain of economics.

1.1a.1c Labor markets are generally competitive markets.

1.1a.1c.1a Economics is a source of expert knowledge about labor markets.

1.1a.1c.1b Economics asserts that labor markets are generally competitive markets.

1.1a.1c.1c The proposition that labor markets are generally competitive markets is within the domain of economics.

As we can see, the Inefficiency Thesis is comprised of three levels, each one conveying a different form of argumentation identified by specific argumentative schemes. In the first level, there is a consequentialist argument, which supports a normative conclusion stat-

ing that CADE should interpret the antitrust statutes so as to exclude employment measures from the repertoire of merger remedies. Under that reading of the legislation, the Council would avoid inefficient outcomes, promoting social welfare via merger control. In fact, Proposition 1, right at the beginning of the diagram, is the final conclusion of that entire EAL argumentation.

The consequentialist argument is made up of two premises: Proposition 1.1b' and Proposition 1.1a. The former merely states the assumption that social welfare is a goal to be pursued by the competition policy. As mentioned in Section II.A, the acceptability of that proposition is merely assumed here. The second premise, however, is a theoretical proposition predicting that the consequence of employment measures is a decrease in social welfare. The acceptability of Proposition 1.1a stems from the conclusion of another argument, which is included in the next level of the argumentative chain.

The argument based on comparison, in the second level, is an argumentation form whose conclusion is supported by an analogy between the degree of competition in product markets and labor markets. Among the premises of that analogical argument, there are two theoretical propositions about economic facts. Proposition 1.1a.1b predicts that remedies imposed on a merged firm that operates in competitive product markets leads to welfare losses. Proposition 1.1a.1c describes labor markets as generally having a high degree of competition. The acceptability of these two premises to the argument based on comparison, in turn, hinges on the plausibility of arguments from authority in the next level of the EAL argumentation.

We can see that, in the third level, there are two different arguments from authority. The first one is an appeal to the authority of economics whose conclusion, Proposition 1.1a.1b, expresses an expert opinion about the economic effects of merger remedies. But it is the other appeal to authority that is most relevant here. The conclusion of this second argument, Proposition 1.1a.1c, expresses an expert opinion stating that labor markets are, in general, competitive. This particular economic opinion is the backbone of the EAL argumentation meant to justify the discontinuation of employment measures. Indeed, my claim against the Inefficiency Thesis bears on the fact that the plausibility conditions of the second appeal to expert opinion might not be satisfied.

Of course, because the Inefficiency Thesis is a hypothetical, I cannot demonstrate that it is always an unsound argument. The identification of informal fallacies requires the examination of the context of concrete argumentative discussions, particularly the language utilized by discussants, and this paper indicates but one logical flaw from which the Inefficiency Thesis may suffer.[170] Therefore, I can only claim that such EAL argumentation *may* become, in practice, an *ad verecundiam* fallacy. It would happen if CADE, when proposing that argument, (i) does not acknowledge that Proposition 1.1a.1c is inconsistent with the views of some labor economists; and (ii) does not justify why that proposition should be nonetheless accepted.

In the next section, I conclude my analysis by calling into question the acceptability of Proposition 1.1a.1c. To do so, I show below that the economic opinion that "labor markets are generally competitive markets" is not indisputable within the academic community. Then my claim against the Inefficiency Thesis will be defended.

Section IV.
B. Imperfect Competition in Labor Markets

We already know that the fundamental premise of the Inefficiency Thesis is that "labor markets are generally competitive markets." But this proposition can only be accepted as true in a critical discussion if the appeal to the authority of economics is indeed a plausible argument. This mostly depends, in turn, on the consistency of the expert opinion with the views of other experts in economics. The soundness of the Inefficiency Thesis hinges on whether economists agree that labor markets are generally competitive. That said, I demonstrate now why such EAL argumentation is likely to become an *ad verecundiam* fallacy.

Despite an apparent consensus, the truth is that even neoclassical economists take issue with models of perfect competition as explana-

170. *See* Frans H. van Eemeren, *Fallacies as Derailments of Argumentative Discourse: Acceptance Based on Understanding and Critical Assessment*, 59 JOURNAL OF PRAGMATICS 141–152, 150 (2013).*Cf.* EEMEREN AND GROOTENDORST, *supra* note 103 at 184 ("One of the consequences of the frequent occurrence of implicit language use in argumentative discourse and texts is that the identification of a possible fallacy usually has a conditional character.").

tion of labor market outcomes.[171] The fact that the description of labor markets as perfectly competitive is not undisputable in the literature reveals a sort of economic indeterminacy about the existence of monopsony power. This epistemological limitation of the economic science is particularly relevant when it comes to determine the empirical validity of models of monopsony in labor markets.[172]

As we know from standard economic theory, a monopsonistic firm is not simply a price-taker, which only decides the volume of input purchased at the clearing market price. On the contrary, its buying decisions affect the very functioning of input markets and induce lower prices for these goods or services.[173] It occurs because, in the monopsony model, a firm faces an upward-sloping supply curve, i.e., a supply of input that is not perfectly elastic.[174] Accordingly, as an employer deciding on the quantity of labor to be purchased, a monopsonist firm ends up hiring fewer employees, and at lower wages, than it would in a competitive market.[175]

Of course, when one considers that actual labor markets might operate under imperfect competition, I do not have in mind the clas-

171. *Cf.* ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS 10 (2003). ("[G]eneral impression given by most textbooks is that employers have negligible market power over their workers or that this is, at best, a trivial side issue."). Indeed, the apparent consensus regarding the competition functioning of labor markets is reflect on Law and Economics literature as well. *See, e.g.*, Michael L. Wachter, *Labor Economics: Its Implications for Labor and Employment Law*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW , 24 (Michael L. Wachter & Cynthia L. Estlund eds., 2013). ("[T]here is little evidence of material monopsony power in U.S."); Christine Jolls, *Employment Law*, 2 *in* HANDBOOK OF LAW AND ECONOMICS , 1356 (A. Mitchell Polinsky & Steven Shavell eds., 2007). ("[M]onopsony-based market failure [. . .], while of theoretical interest, is generally believed to have limited practical importance."); Daniel J. Chepaitis, *The National Labor Relations Act, Non-Paralleled Competition, and Market Power*, 85 CALIFORNIA LAW REVIEW 769, 780–81 (1997). ("[M]ost economists and legal theorist accept that [. . .] the exercise of market power by employing firms is not a serious issue in contemporary America."); and RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 87 (1995). ("Employment markets are normally competitive, but they need not remain so if government is allowed to set terms with which all firms must comply.").

172. For a literature review of the static models of labor market monopsony, see William M. Boal & Michael R. Ransom, *Monopsony in the Labor Market*, JOURNAL OF ECONOMIC LITERATURE 86–112 (1997).

173. *See* BLAIR AND HARRISON, *supra* note 79 at 44.

174. *Cf.* Orley C. Ashenfelter, Henry Farber & Michael R. Ransom, *Labor Market Monopsony*, 28 JOURNAL OF LABOR ECONOMICS 203–210, 205 (2010).

175. *See* BLAIR AND HARRISON, *supra* note 79 at 44.

sical monopsony, modelled as a single firm employing the entire labor force. Rather, a more realistic account of labor markets would be given by models of oligopsony or monopsonistic competition, in which a few employers have some degree of market power over workers.[176] According to Bhaskar et al., these models would offer a better explanation for several empirical findings that cannot be properly understood within the paradigm of perfect competition. Among these economic phenomena, the referred authors include, e.g., wage dispersion across firms, market provision of general training to workers and even minimum wages laws with non-negative effects on employment.[177]

In any case, a conclusion about widespread monopsony power in labor markets, while somehow appealing, does not seem to be justified in view of the structure of most of these markets.[178] Early economic studies have already shown that labor markets are not in fact excessively concentrated.[179] There is, however, another theoretical perspective on that matter. For instance, one may consider that, regardless of market structure, labor markets can still be imperfectly competitive due to important market frictions, such as those which create mobility costs for workers when searching for new jobs (i.e. job search models). Following that same approach, monopsony power could also result from the heterogeneity of job positions available in the labor markets, regarding the required skills and the localization of employing firms (i.e. job differentiation models).[180]

Developing on those models, Manning introduces a theory of dynamic monopsony, in contrast to the classic static model in labor economics literature. His approach to modelling labor market monopsony is based on two key elements: recruiting activity and labor turnover. According to Manning, what limits the exercise of market power over employees is the effective possibility that they leave their

176. *See* Venkataraman Bhaskar, Alan Manning & Ted To, *Oligopsony and Monopsonistic Competition in Labor Markets*, 16 THE JOURNAL OF ECONOMIC PERSPECTIVES 155–174, 156 (2002).
177. *See Id.* at 165.
178. *See Id.* at 170.
179. *Cf.* Boal and Ransom, *supra* note 172 at 104. (acknowledging that "[t]he body of evidence from studies comparing concentration with wages fails to be convincing.").
180. *See* Alan Manning, *The Real Thin Theory: Monopsony in Modern Labour Markets*, 10 LABOUR ECONOMICS 105–131, 107 (2003).

current employer for jobs at another firm.[181] The competition in labor markets depends then on the potential mobility of employees across different employers.[182] From that perspective, and considering labor turnover, the proportion of recruited workers in a given firm who were previously employed becomes a rough, but useful, measure of the rivalry between employers in the market.[183]

Moreover, the monopsonist faces an upward-sloping supply curve also in the dynamic model, as labor cost continue to increase with the firm's employment level. In this case, increasing labor costs reflects, for the most part, diseconomies of scale in recruiting and training new workers.[184] The imperfect elasticity of labor supply denotes that workers cannot find alternative job positions, so as to avoid monopsonistic exploitation in form of wage cuts by employers with market power. According to Manning, the lack of job positions is not necessarily associated with market structure, i.e., with a small number of firms purchasing labor, as it would be expected in static monopsony models.[185] Instead, from a dynamic viewpoint, an employer's monopsony power emerges due to the existence of few vacancies at competing firms in the same labor market.[186]

What happens is that, because job positions are costly even before workers are recruited,[187] and firms believe to be unable to fill these positions offering wages below the competitive level, employers decide beforehand not to create new jobs.[188] The few actual vacancies in labor markets can only be understood as unavoidable "accidents," occurring when firms decide on the quantity of labor to purchase to maximize their profits at the chosen wage rate.[189] In the

181. *See* MANNING, *supra* note 171 at 44.
182. *See Id.* at 44.
183. *See Id.* at 49.
184. *See Id.* at 35. Indeed, the idea that monopsony power in labor markets is associated with diseconomies of scale in recruiting activities comes from job-searching models, such as the one proposed by Burnett and Mortensen. *See* Boal and Ransom, *supra* note 172 at 108. *See also* Kenneth Burdett & Dale T. Mortensen, *Wage Differentials, Employer Size, and Unemployment*, 39 INTERNATIONAL ECONOMIC REVIEW 257 (1998).
185. *See* Manning, *supra* note 180 at 106.
186. *See Id.* at 108.
187. *Cf.* MANNING, *supra* note 171 at 273. ("Typically, capital must be committed in advance of a worker being recruited: this might be in the form of an investment in machines or an investment in creating a market for the output.").
188. *See Id.* at 270.
189. *See Id.* at 279–280.

end, Manning concludes that regardless of the market structure "the fact that the majority of employers have no vacancy at a particular moment in time makes worker search for alternative jobs more difficult, contributing to the lack of competition in labor markets." [190]

Although dynamic models do not link imperfect competition to market structure, the geographical distribution of vacancies still seems relevant to explain the extension of monopsony power. Imperfect competition in labor markets has to do with market "thinness," as a pre-condition for firms to exert market power over their employees.[191] Even if there are several potential employers, a labor market could still be considered "thin" from workers' point of view, because only limited job opportunities exist within the reach of prospective employees.[192] Indeed, the effects of thinness, as modelled in the dynamic monopsony, would be comparable to the "thinness" in the static monopsony sense, i.e., the existence of only a few employers in a concentrated labor market.[193]

Despite its contribution, the theory of dynamic monopsony offers more of an explanatory model than a framework for normative analyses of markets. As Manning himself acknowledges, one cannot derive from dynamic models precise policy recommendations to deal with welfare losses that may arise from firms' monopsony power.[194] Those models do suggest, however, that perfect competition in labor markets should not be fanatically assumed as the only possible description of real labor markets.[195] Accordingly, building on dynamic models, Manning was able to demonstrate at least that, once we take into account relevant market frictions, labor market regulation can really be welfare-enhancing.[196]

Thus, if one accepts that firms have a non-negligible degree of monopsony power, the seemingly inevitable trade-off between effi-

190. *Id.* at 280.
191. *See* Manning, *supra* note 180 at 124.
192. *See Id.* at 107.
193. *See Id.* at 125.
194. *See* MANNING, *supra* note 171 at 58.
195. *Cf. Id.* at 50. ("It is important to correct the impression that those who believe that employers have some market power over workers are extremists—the reality is that those who believe in perfect competition are the fanatics. . .").
196. *See* Alan Manning, *Monopsony and the Efficiency of Labour Market Interventions*, 11 LABOUR ECONOMICS 145–163, 147 (2004).

ciency and equality in labor market regulation disappears.[197] The case for an efficient regulation rests then on the empirical question as to the *optimal* level of policy intervention in labor markets.[198] And, besides the typical regulatory measures − viz. minimum wages and unionization −, even antitrust laws can be useful to induce a high elasticity of labor supplied to monopsonist firms.[199] Manning's point about labor market regulation is that dynamic models offer "theoretical arguments [that] can give some support to those whose approach to policy is more pragmatic than ideological."[200]

In addition to his theoretical work, Manning also attempted to verify the actual market power of employing firms. The author builds on the dynamic monopsony theory to estimate the elasticity of labor supply through an analysis of firms' recruiting and separation rates.[201] According to him, the labor supply curve to employers in the US and the UK does not seem to be perfectly elastic. Despite somewhat imprecise results, the Manning concludes that his "estimates imply that employers have sizeable amounts of monopsony power," so that paid wages could be 17% below in comparison to competition levels.[202] Of course, that was not the only study testing for the dynamic models. Now I move on to a brief review of other recent empirical papers on labor market monopsony.

Ransom and Sims examine evidence of monopsony power in labor markets for school teachers in the State of Missouri, USA.[203] They adopt Manning's approach to labor monopsony and try to infer the elasticity of labor supply to each school district, given the wage levels in the 1980s. According to the authors, even though there are several districts in Missouri, the elasticity of labor supply is rather low, mostly due to teachers' preferences regarding the location of their employer, which, consequently, reduces the mobility of those

197. *See* Alan Manning, *A Generalised Model of Monopsony*, 116 THE ECONOMIC JOURNAL 84–100, 84 (2006).
198. *See* Manning, *supra* note 196 at 159.
199. *Cf.* Ashenfelter, Farber, and Ransom, *supra* note 174 at 209.
200. Manning, *supra* note 196 at 159.
201. *See* MANNING, *supra* note 171 at 80.
202. *Id.* at 80.
203. Michael R. Ransom & David P. Sims, *Estimating the Firm's Labor Supply Curve in a "New monopsony" Framework: School teachers in Missouri*, 28 JOURNAL OF LABOR ECONOMICS 331–355 (2010).

workers across different schools.[204] The study concludes that "labor market frictions give employers enough power to reduce wages somewhere in the neighborhood of 27% when compared with a world of perfectly informed and mobile workers."[205]

In another paper, Staiger at al. analyze whether there is monopsony power in the labor market for registered nurses.[206] They make use of a legislated change in wages at hospitals of the U.S. Department of Veteran Affairs to calculate the elasticity of supply in nurse labor markets. According to them, "[o]ur analysis provides [. . .] evidence that suggest that hospitals have market power in the nurse labor market and have monopsony power in setting wages."[207] The market power of hospitals could be explained then, following the dynamic monopsony model, as consequence of nurses' preference for particular employers, which induces a segmentation of labor supply in these markets.[208]

Ransom and Oaxaca, studying a grocery retail chain at the southwestern U.S., analyze the labor supply elasticity for workers of both gender.[209] They find that "[t]he difference in the labor supply elasticities of men and women suggests a role for monopsony power in explaining male/female differences in pay."[210] According to the authors, the comparatively lower wage elasticity of labor supplied by female workers, and the potential market power of their employer, could help explain the sex difference in pay.[211] Indeed, even a limited exercise of monopsony power, due to institutional constraints (e.g. minimum wages and union activity), would contribute to such gender wage gap.[212]

204. *See Id.* at 350.
205. *Id.* at 352–3.
206. Douglas O. Staiger, Joanne Spetz & Ciaran S. Phibbs, *Is There Monopsony in the Labor Market? Evidence from a Natural Experiment*, 28 JOURNAL OF LABOR ECONOMICS 211–236 (2010).
207. *Id.* at 231.
208. *See Id.* at 232.
209. Michael R. Ransom & Ronald L. Oaxaca, *New Market Power Models and Sex Differences in Pay*, 28 J. LAB. ECON. 267 (2010).
210. Michael R. Ransom & Ronald L. Oaxaca, *New Market Power Models and Sex Differences in Pay*, 28 JOURNAL OF LABOR ECONOMICS 267–289, 287 (2010).
211. *See Id.* at 287.
212. *See Id.* at 285.

Hirsch et al.[213] also estimate the wage elasticity of men and women's labor supply at the firm level, as an attempt to determine whether differences in pay could be explained by the shape of supply curves for male and female workers. According to them, "[o]ne important general insight is that estimated labor supply elasticities are far from the conventional textbook case of being perfectly elastic,"[214] which would demonstrate that the empirical data do not reject the dynamic monopsony model. The study concludes that at least one-third of the sex difference in pay could be explained as due to the less wage-elastic supply of labor by women.[215]

On other hand, Hirsch et al. critically remark that the gender pay gap does not necessary result from the low wage-elasticity of labor supplied.[216] They assert that, besides the estimation of labor supply curves, the concrete exercise of market power by employing firms is another empirical issue to be tackled.[217] The same remark is made in Hirsch and Schumacher study about the impact of market concentration in the health sector.[218]In this paper, the authors test for both the static and dynamic models to analyze the monopsony power of hospitals over registered nurses. At first, testing for the dynamic monopsony, Hirsch and Schumacher do not find evidence of wage cuts, even though the labor supply curve is not perfectly elastic.[219] Then they test for the static monopsony, but only find evidence of low wages in the short-run, an effect which probably would disappear as labor markets evolve.[220]

Hirsch and Schumacher's point that "upward sloping labor supply is a necessary but not sufficient condition for monopolistic out-

213. Boris Hirsch, Thorsten Schank & Claus Schnabel, *Differences in Labor Supply to Monopsonistic Firms and the Gender Pay Gap: An Empirical Analysis Using Linked Employer-employee Data from Germany*, 28 JOURNAL OF LABOR ECONOMICS 291–330 (2010).
214. *Id.* at 314.
215. *See Id.* at 314.
216. Boris Hirsch, Thorsten Schank & Claus Schnabel, *Differences in Labor Supply to Monopsonistic Firms and the Gender Pay Gap: An Empirical Analysis Using Linked Employer-employee Data from Germany*, 28 J. LAB. ECON. 291 (2010).
217. *See* Hirsch, Schank, and Schnabel, *supra* note 213 at 315.
218. Barry T. Hirsch & Edward J. Schumacher, *Classic or New Monopsony? Searching for Evidence in Nursing Labor Markets*, 24 JOURNAL OF HEALTH ECONOMICS 969–989 (2005).
219. *See Id.* at 987.
220. *See Id.* at 987.

comes" contrasts with Manning's conclusion about the prevailing monopsony power in labor markets.[221] To some extent, issues about the existence of concrete, and observable, effects of market power are also present in Kuhn's criticism against the dynamic monopsony model.[222] According to him, Manning's work ignores what, in the industrial organization, is the method commonly adopted to determine market power, viz., the definition of relevant geographic markets and concentration ratios.[223]

In any case, at least one recent empirical study has included a spatial dimension in the analysis of monopsony power, which, as in the dynamic monopsony, is modelled as a result of market frictions reducing workers' inter-firm mobility. In their study, Muehlemann et al.[224] adopted a measure of time-travel distances to construct and analyze local labor markets in Switzerland.[225] These relevant markets are defined as the area surrounding town centers, so that the authors can capture aspects of the fewness of employers within that geographical space.[226] They conclude that their paper "contrasts to some earlier studies that found no effect for employer concentration on pay when controls are imposed for other locality-specific factors."[227]

Obviously, the short, and rather superficial, review above is not meant to cover the entire literature on labor market monopsony, let alone assess the theoretical coherence or the empirical validity of dynamic and static monopsony models. I leave that work to an economist.[228] In fact, this section purposes only to show that there is an ongoing debate over the right characterization of competition in labor markets. That is why, in a critical discussion, Proposition 1.1a.1c, introduced in Section IV.A, should not be taken as true at face value. In other words, since there is no understanding among economists on

221. *Id.* at 970.
222. *See* Peter Kuhn, *Is Monopsony the Right Way to Model Labor Markets? A Review of Alan Manning's Monopsony in Motion*, 11 INTERNATIONAL JOURNAL OF THE ECONOMICS OF BUSINESS 369–378 (2004).
223. *See Id.* at 376.
224. *Id.*
225. Samuel Muehlemann, Paul Ryan & Stefan C. Wolter, *Monopsony Power, Pay Structure, and Training*, 66 INDUSTRIAL & LABOR RELATIONS REVIEW 1097–1114 (2013).
226. *See Id.* at 1101.
227. *Id.* at 111.
228. For a comprehensive literature review on the topic, see Alan Manning, *Imperfect Competition in the Labor Market*, 4B *in* HANDBOOK OF LABOR ECONOMICS 973–1041 (Orley C. Ashenfelter & David Card eds., 2011).

whether labor markets are generally competitive, that proposition cannot be seen as derived from an authoritative opinion to which a discussant could rationally appeal.

This finding allows us to conclude that the plausibility of the Inefficiency Thesis, from a pragma-dialectic perspective, requires such disagreement among expert economists to be recognized and addressed by CADE. If an EAL argumentation is proposed in support to the implementation choice of discontinuing employment measures, the Council would produce a fallacy if the economic opinion adopted is deliberately presented as a consensual. To avoid an *argumentum ad verecundiam,* CADE should thus make explicit that Proposition 1.1a.1c, even if majoritarian, is not consistent with the views of some economists. Additionally, to maintain the plausibility the Inefficiency Thesis in a critical discussion, CADE has to be able to explain why that proposition should nonetheless be accepted as an accurate description of labor market functioning, at least within legal discourse.

Obviously, attempts to justify an inconsistent expert opinion would lead to sub-discussions in which EAL argumentation can also be employed. Let me briefly explain, before finishing this paper, which kind of argument could be utilized to justify the acceptability of an inconsistent expert opinion. We know that the competition law literature has already faced the problem of conflicting models for the economic analysis of anticompetitive practices.[229] For instance, Wright proposes that the choice between models should be grounded on the decision theory, taken as an economic tool meant reduce the risk of wrong decisions that may ban efficient market behavior.[230] To do so, one should consider the probabilities of false positives and false negatives in decision-making – or, at least, reasonable assump-

229. *Cf., e.g.*, Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST LAW JOURNAL 241–271, 253 (2012).

230. *Cf.* C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, ANTITRUST LAW JOURNAL 41–76, 41 (1999). ("Decision theory sets out a process for making factual determinations and decisions when information is costly and therefore imperfect.").*See* Wright, *supra* note 246 at 248 and 263. The decision theory, and concerns with false positives and false negative in antitrust decision-making, has integrated the competition law literature mainly since Easterbrook's error-cost analysis. *See* Frank H. Easterbrook, *Limits of Antitrust*, 63 TEX. L. REV. 1–40 (1984).

tions about them –, in order to analyze the cost of errors in antitrust implementation.[231]

Indeed, the use error-cost analysis in statutory interpretation could be thought of as an instance of EAL argumentation. That argument would also depend, however, on economic knowledge of how markets actually work. It means that, in trying to justify a non-consensual opinion about labor markets, CADE would once again appeal to an expert opinion, which might be considered equally inconsistent within the academic community. The *argumentum ad verecundiam* could become, in this case, almost inevitable. Moreover, as critics point out, the error-cost analysis seems to hinge on empirical assumptions that lead decision-makers to consistently oppose antitrust intervention.[232] If it is so, the use of error-cost analysis could turn out to be a fallacy because of that bias alone, as it may impede a critical discussion.[233]

In any case, the plausibility of legal argumentation based on error-cost analyses is an issue that cannot be further developed here. As we saw above in Section IV.C, this paper is not really concerned with finding solutions to the problem of how to choose between conflicting expert opinions, or, particularly, between different models for antitrust analysis. On the contrary, all I wanted to show here is that disagreements between experts, including economists, create logical flaws in arguments that rely on knowledge produced outside legal discourse.

231. *See* F. S. McChesney, *Easterbrook on Errors*, 6 JOURNAL OF COMPETITION LAW AND ECONOMICS 11–31, 29–30 (2010).

232. In fact, these empirical assumptions in error-cost analysis lead to a conclusion that false negative should be preferred over false positives. *Cf.* Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75–132, 97 (2010). ("[T]he preference for avoiding [false positives] rests in part on the premise that those errors are (a) more costly, and (b) irreversible. These premises may be mistaken, however, because neither has been subject to empirical testing.").*Cf.* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST LAW JOURNAL 1–38, 37 (2015). ("In applying decision theory, a neutral economic tool, to the analysis of antitrust rules, contemporary conservatives have made a series of erroneous assumptions, which collectively impart a non-interventionist bias to their conclusions.").

233. *See* Douglas N. Walton, *Bias, Critical Doubt and Fallacies*, 28 ARGUMENTATION AND ADVOCACY 1–22, 21 (1991).

V. Conclusion

The long line of thought developed in the previous sections leads us, in the end, to a straightforward conclusion: the Inefficiency Thesis may become an *argumentum ad verecundiam*. My claim is that such argument could be, in practice, an informal fallacy, corresponding to an unsound appeal to the authority of economics. It would only occur, however, if CADE conceals that the economic opinion asserting the perfect competition in most labor markets is not consensual among economists. Moreover, even if the lack of consensus is reveled, the Council would have to explain why, despite inconsistent within the economic community, that opinion should be accepted in a critical discussion about legal theses.

The logical analysis carried out in this paper allowed me to challenge policy justifications that, resorting only to economic theory, purpose to legitimize CADE's implementation choice to discontinue employment measures in competition law. More generally, my point was that epistemological limitations in economic science − understood as the disagreement among economist − create indeterminacy about how actual labor markets work. This, according to pragma-dialectical theory, affects the plausibility of EAL argumentation meant to justify the broken interplay between merger control and labor market regulation in Brazil.

Of course, my claim is about one hypothetical argument which CADE could *possibly* make use of. Anyhow, although not categorical in respect to the Inefficiency Thesis, my conclusions are still, and perhaps mostly, relevant at a more theoretical level. The analysis of EAL argumentation, from a pragma-dialectical perspective, made it possible to identity and delve into the conditions for a plausible use of economic knowledge in legal reasoning.

APPENDIX
INEFFICIENCY THESIS: GRAPHICAL SCHEME