

# ALL YOU CAN EAT: WHAT JBS' CASE CAN TELL US ABOUT INDUSTRIAL POLICY AND COMPETITION LAW?

## ABSTRACT

JBS presents a compelling example of a Brazilian local firm that, through heavy government-based investments, achieved global market presence, becoming the biggest meat packer in the world. Yet, this narrative is twofold. Alongside its thriving growth, a series of scandals since 2009 unveiled JBS' far-reaching environmental damage, complicity in human rights violations and engagement in corruption – issues that were deeply rooted in its market power. This paper undertakes an exploration of how an exclusive reliance on the market dimensions of market power within industrial policy and competition law has yielded adverse outcomes in JBS' case. The paper delves into the paradox that while JBS' economic growth is undeniable, its ethical and social lapses have also been magnified. These failures underline the limitations of a narrow market-centric viewpoint. Moreover, this study advocates for an expansion of the narrative, urging an incorporation of intricate non-market dimensions. It asserts that a more comprehensive approach—one that accounts for the complex interplay of non-market constituencies—will offer a more insightful lens through which to view and address the complexities inherent in cases like JBS'.

## INTRODUCTION

Undeniably JBS represents a successful story of a thriving company, from a small facility with a capacity of five-head of cattle in 1953 to the world's largest meat producer.<sup>1</sup> The meat empire created by José Batista Sobrinho (and later managed by its sons José Batista Filho, Joesley Batista and Wesley Batista) has also diversified its business over the years through J&F Investimentos (Batista family's holding company) with new branches in mining, banking and finance, power, communications and pulp and paper industries.<sup>2</sup>

Following JBS' remarkable expansion, an increasing range of controversies about the company's activities and management have also gained attention in the past two decades. Since the late 2000s, JBS has been a target of severe criticism from environment and human rights advocacy non-governmental organizations (NGOs). In the 2010s, Joesley and Wesley Batista also found themselves entangled in big corruption scandals involving several instances of the Brazilian government.

All these different controversies share, however, a common feature: the company's undisputed power as a meat titan. In this context, this study seeks to discuss how JBS' case could provide some perspectives on non-market dimensions and effects of market power and their implications for industrial policy<sup>3</sup> and competition law design, as two of the major state-related drivers of JBS' rapid consolidation in the meat segment.

The first section of this study discusses how JBS became the leading global meat producer, as well as the role performed by the Brazilian government in boosting the company's aggressive M&A strategy. The second section describes how, in parallel with its economic success, a growing number of major corruption scandals, and environmental and human rights violations are arguably directly related to JBS' market power consolidation through its inorganic expansion. Finally, the last section argues how, as shown by JBS' case, a broader approach to market power could have led to different institutional choices in public policy design (especially concerning industrial policy and competition law) and how we may start to frame more complex non-market dimensions in this regard.

## I. “WE FEED THE WORLD WITH THE BEST”:<sup>4</sup> THE RISE OF A MEAT GIANT

It would not be an overstatement to label JBS as a behemoth of the global meat market.<sup>5</sup> By far the largest meat producer in the world, in 2021 the company slaughtered around 26.78 million cattle, 46.73 million pork and

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<sup>1</sup> For more data on JBS' history, see the company's own information on the topic, see: *History*, JBS, <https://ri.jbs.com.br/en/jbs/history/#:~:text=The%20history%20of%20JBS%20goes,Go%C3%A1s%20in%20West%20Central%20Brazil>. For an independent review of JBS' history, including its late corruption scandals, see generally: RAQUEL LANDIM, WHY NOT (2019).

<sup>2</sup> *Nossas Empresas*, J&F, <https://www.jfinvest.com.br/negocios/>.

<sup>3</sup> For the purpose of this study, I understand industrial policy as a series of tools that could be used by State to sponsor economic growth and development within a market economy. See: Chalmers Johnson, *The Developmental State: Odyssey of a Concept*, in THE DEVELOPMENTAL STATE 32, 48 (Meredith Cumings ed., 1999). (“[i]ndustrial policy is not an alternative to the market but what the state does when it intentionally alters incentives within markets in order to influence the behavior of civilian producers, consumers and investors”); Dani Rodrik, *Industrial Policy: Don't ask why, ask how*, 1 MIDDLE EAST DEV. J. 1, 3 (2008) (“[a] word about the meaning of ‘industrial policy’. I will use the term to denote policies that stimulate specific economic activities and promote structural change”); Tilman Altenburg & Dani Rodrik, *Green Industrial Policy: Accelerating Structural Change towards Wealthy Green Economies*, in *Green Industrial Policy: concept, policies, country experiences* 1, 2 (Tilman Altenburg & Claudia Assmann, eds., 2017) (“[i]ndustrial policy refers to government actions to alter the structure of an economy, encouraging resources to move into particular sectors that are perceived as desirable for future development”); see also generally ARKEBE OQUBAY ET AL. (eds.), THE OXFORD HANDBOOK OF INDUSTRIAL POLICY (2020).

<sup>4</sup> JBS' official slogan. See: <https://jbs.com.br/en/>.

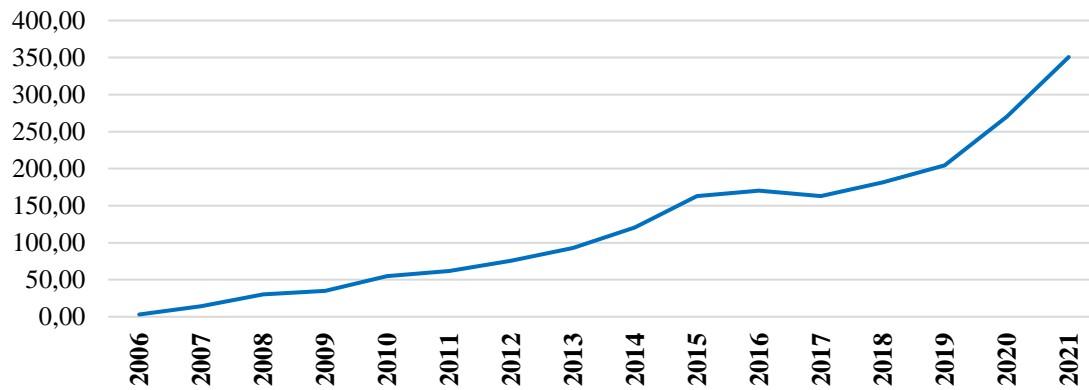
<sup>5</sup> HEINRICH BÖLL STIFTUNG ET AL., MEAT ATLAS 2021: FACTS AND FIGURES ABOUT THE ANIMALS WE EAT 26 (2021).

4,885.20 million poultry.<sup>6</sup> Arguably, JBS also is either the leader or the second major player in each of these three segments, by sales values.<sup>7</sup> In the same year, the company achieved a net revenue of R\$ 350.7 billion, while its net income reached R\$ 20.49 billion.<sup>8</sup>

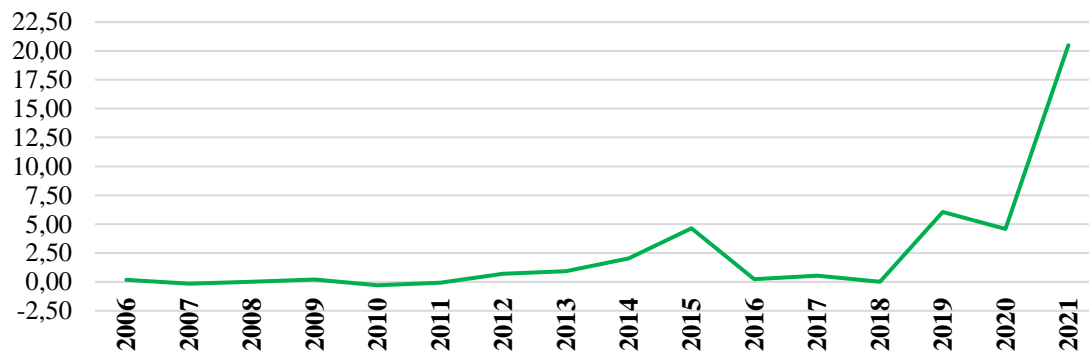
However, back in the 2000s this picture was drastically different. By 2007, when JBS went public on the São Paulo stock exchange (Bovespa, later renamed as B3) and entered the U.S. market, its net revenue was only R\$ 14.1 billion, which already represented a 256.4% increase from 2006 (R\$ 3.9 billion). By that time, the meat player's major activity was restricted to the cattle segment, with a modest number of 3.62 million heads production in 2007.<sup>9</sup>

Since then, JBS has been a booming firm, as seen on the Figures 1 and 2 below about the evolution of the company's net revenue and income, year after year:

**Figure 1. JBS' annual net revenue in R\$ billion (2006-2021)<sup>10</sup>**



**Figure 2. JBS' annual net income in R\$ billion (2006-2021)<sup>11</sup>**



An undeniable catalyst of the company's success was its acquisitions frenzy, which took place in the early 2000s. Although the first reported acquisition by JBS goes back to 1968 the meat giant has continued its expansion by buying out its main rivals in U.S., Europe, Australia, Brazil, Mexico, Argentina and Uruguay over the last twenty years.<sup>12</sup>

<sup>6</sup> These aggregate figures are based on the IATP's estimations over JBS' diary production in 2021. See: *The great climate greenwash: Global meat giant JBS' emissions leap by 51% in five years*, Institute for Agriculture & Trade Policy (IATP) (April 20, 2022), <https://www.iatp.org/jbs-emissions-rising-despite-net-zero-pledge>; *Note on the methodology for estimating JBS emissions in 2018 and April 2022 publications*, IATP (October 27, 2022), <https://www.iatp.org/documents/note-methodology-estimating-jbs-emissions-2018-and-april-2022-publications>.

<sup>7</sup> HEINRICH BÖLL STIFTUNG ET AL., *supra* note 5, at 26. For alternative data, but also confirming JBS' leadership in U.S. meat market, see also: *America's Concentration Crisis: An Open Markets Institute Report*, Open Markets Institute (June, 2019), <http://concentrationcrisis.openmarketsinstitute.org/industry/meat-processing/>.

<sup>8</sup> JBS S.A., Earning Release (4Q21) (March 21, 2022), <https://api.mziq.com/mzfilemanager/v2/d/043a77e1-0127-4502-bc5b-21427b991b22/4f1cea70-d5e9-eca1-679b-37825880fb73?origin=1>.

<sup>9</sup> JBS S.A., Earning Release (4Q07) (March 28, 2008), <https://api.mziq.com/mzfilemanager/d/043a77e1-0127-4502-bc5b-21427b991b22/bef2f933-bf7f-48e0-8822-ca82dc56082d?origin=1>.

<sup>10</sup> Data retrieved from JBS' Results Center, 4Q Financial Statements during the period. See: *Results Center*, JBS, <https://ri.jbs.com.br/en/financial-information/results-center/>.

<sup>11</sup> Data retrieved from JBS' Results Center, 4Q Financial Statements during the period. *Results Center*, JBS, <https://ri.jbs.com.br/en/financial-information/results-center/>.

<sup>12</sup> *History*, JBS, <https://ri.jbs.com.br/en/jbs/history/>. From 2001 to 2006, JBS acquired 21 plants in Brazil and five in Argentina, through a local major player (Swift Armour) buyout in 2005. The company's entry in the U.S. and Australian cattle, pork and lamb markets was driven

However, what makes JBS' case peculiar within the meat sector is not only an aggressive M&A strategy on a global scale, but also that this strategy was boosted by the Brazilian government. Especially through massive investments from the state-owned Brazilian *Banco Nacional de Desenvolvimento Econômico e Social* (BNDES) and little or no checks regarding competition issues by the *Conselho Administrativo de Defesa Econômica* (CADE) in cases involving JBS, the Brazilian government set the stage for the robust growth of the company.

As a first major feature of the Brazilian government's role in promoting JBS' expansion plans, from 2003 to 2017, BNDES has injected over R\$17.6 billion (nominal value) in investments in the company.<sup>13</sup> Almost half of these amounts served to fund, through low-interest loans, six major acquisitions – namely Swift Armour, Swift Foods, Smithfield Beef, Pilgrim's Pride, Bertin, and National Beef (attempted acquisition during 2008 and 2009, but not concluded due to antitrust issues).<sup>14</sup> Half of such investments was made by means of direct credit, while the other half was delivered through several JBS' outstanding shares subscriptions to BNDES. Until the present date, despite the divestment of part of its shares,<sup>15</sup> the state-owned Brazilian bank still holds a 20,81% stake over the company, being the most relevant shareholder, after its controller, the Batista family, with a 48,83% interest.<sup>16</sup>

Moreover, the absence of significant enforcement by CADE regarding competition issues in the meat industry increasing concentration, as a second major feature of the Brazilian government's role in boosting the company's accelerated growth, was fundamental to enable JBS' M&A activity – although not by a so direct and active influence as per BNDES' investments. By 2009, the Brazilian competition authority for the first time assessed one of the company's acquisitions, the slaughterhouse Bertin,<sup>17</sup> and, since then, more than 21 other JBS' acquisitions in the meat segment were submitted to the Brazilian competition authority.<sup>18</sup> Only in one case<sup>19</sup> CADE imposed structural remedies to the transaction, even though it did not prohibit the merger.<sup>20</sup>

Despite CADE's importance in enabling mergers with effects within the Brazilian territory, other competition authorities assessed part of those mergers. The European Commission assessed four mergers involving the company, all of them submitted under the simplified merger procedure and cleared by the authority.<sup>21</sup> Even with also holding an approach to the meat market consolidation, the U.S. Department of Justice (DoJ) challenged JBS' attempt to acquire National Beef Packing, which resulted on the termination of the deal by both companies.<sup>22</sup> Notwithstanding, other transactions were not disputed by the U.S. government.<sup>23</sup>

## II. JBS' SCANDALS: WHEN THE LEVIATHAN CLAIMED ITS PLACE

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by Swift Foods' acquisition in 2007. By the year of 2008, JBS had also acquired Tasman Group in Australia, Smithfield Beef and Five Rivers Cattle Feeding. In 2009, the company entered in the poultry market in U.S., through an acquisition of a 67.27% stake on Pilgrim's Pride's, besides further expanding its activities in Brazil by acquiring the second-largest meat player in the country, Bertin. During the 2010s and 2020s, other major acquisitions of rivals took place within JBS' global growth strategy, as: Tatiara Meats and Rockdale Beef's assets, in Australia (2010); Toledo Group, in Belgium (2010); McElhanev Cattle (2010); Seara, in Brazil (2013); Zenda, with activities in Uruguay, Mexico Argentina, Germany and South Africa (2013); Tyson Foods' poultry activities in Brazil and Mexico (2014); Primo Smallgoods Group, with processed food products operations in Australia and New Zealand (2014); Moy Park, one of the major meat processors in Europe (2015); Cargill's pork business (2015); GNP Company (2016); Plumrose USA (2017); Tulip, in U.K. (2019); Marba, in Brazil (2019); and Empire Packing Company (2020).

<sup>13</sup> *O BNDES E A JBS*, BNDES (February 16, 2022), <https://aberto.bndes.gov.br/aberto/caso/jbs/>. Based on Brazil's Central Bank's monetary index, BNDES invested R\$ 31.3 billion in updated values in JBS during the period. See: <https://www3.bcb.gov.br/CALCIDADA0/publico/exibirFormCorrecaoValores.do?method=exibirFormCorrecaoValores>.

<sup>14</sup> *O BNDES e a investigação independente da JBS*, BNDES (December, 2019), <https://aberto.bndes.gov.br/aberto/caso/investigacao/>.

<sup>15</sup> *Brazil's BNDES raises \$370 mln in meatpacker JBS shares sale, says executive*, REUTERS (February 16, 2022), <https://www.reuters.com/business/brazils-bndes-raises-370-mln-meatpacker-jbs-shares-sale-says-executive-2022-02-16/>.

<sup>16</sup> *Ownership and Corporate*, JBS (January 10, 2023), <https://ri.jbs.com.br/en/esg-investors/corporate-governance/ownership-and-corporate/>. The Batista family's stake on the company (held by J&F Investimentos S.A. e Fundo de Investimento em Participações Multiestratégia Formosa) is not on free float, while the rest of shares is pulverized among several shareholders.

<sup>17</sup> Merger Filing No. 08012.008074/2009-11.

<sup>18</sup> Merger Filings No. 08700.005422/2019-12, No. 08700.002292/2019-58, No. 08700.006284/2016-38, No. 08700.011342/2015-64, No. 08700.011001/2015-99, No. 08700.005069/2015-39, No. 08700.010549/2014-30, No. 08700.008009/2014-97, No. 08700.006457/2014-56, No. 08700.010688/2013-83, No. 08700.004988/2014-04, No. 08700.002097/2014-13, No. 08700.006153/2013-08, No. 08700.004337/2013-33, No. 08700.000538/2013-61, No. 08700.004230/2012-12, no. 08700.004226/2012-46, no. 08012.003367/2012-08, no. 08012.002148/2012-01, No. 08012.002149/2012-48, No. 08012.008074/2009-11 and No. 08012.005963/2012-14. Several other mergers involving related segments (for example dairy and leather industries) or other J&F Investimentos' branches were also assessed and approved by CADE.

<sup>19</sup> Merger Filing No. 08700.010688/2013-83, regarding leasing agreements between JBS and slaughterhouses in Brazil.

<sup>20</sup> In Merger Filings No. 08700.004230/2012-12, No. 08700.004226/2012-46, No. 08012.003367/2012-08, No. 08012.002148/2012-01, No. 08012.002149/2012-48, and No. 08012.008074/2009-11, CADE has fined JBS for failing to timely notify the transactions, although without any kind of restriction to such mergers.

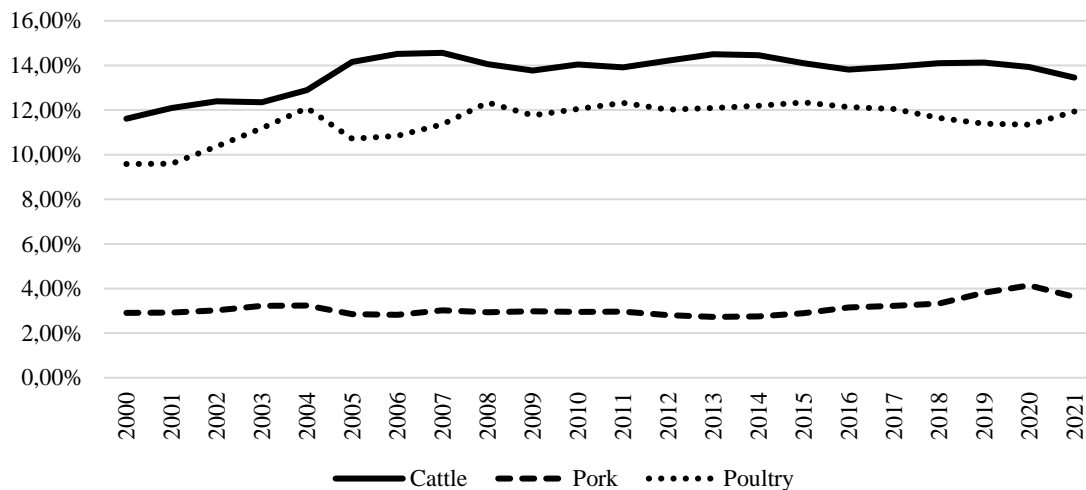
<sup>21</sup> Cases No. M.5027 (JBS/Cremonini/Inalca, ruled on 02/25/2008), No. M.5704 (JBS/Bertin, ruled on 12/09/2009), No. M.7012 (JBS/Seara/Zenda, ruled on 09/20/2013) and No. M.7732 (JBS/Moy Park. Ruled on 09/21/2015).

<sup>22</sup> *U.S. and Plaintiff States v. JBS S.A. and National Beef Packing Company, LLC*, Case No.: 1:08-cv-05992.

<sup>23</sup> It should be noticed, in any case, that other farmers, consumers and other groups have vocally demanded for investigations over some of those mergers, as JBS-Cargill Pork, arguing that they could consolidate JBS' buyer and consumer power. See: *Farm, Consumer and Competition Groups Oppose JBS-Cargill Pork Merger Deal Would Concentrate Buyer and Seller Power in Pork Industry*, American Antitrust Institute (July 30, 2015), <https://www.antitrustinstitute.org/work-product/farm-consumer-and-competition-groups-oppose-jbs-cargill-pork-merger-deal-would-concentrate-buyer-and-seller-power-in-pork-industry/>.

The JBS case could be a simple story of a company that went from a small slaughterhouse to the world's largest meat producer, in a broader national champions agenda promoted by the Brazilian government, driven essentially through its development banks. As a result of such policies, in 2020, JBS overcame the state-owned oil company Petrobras' 22-year reign as the company with the biggest revenue in Brazil<sup>24</sup> and employed approximately 150 thousand workers in Brazil and 100 thousand abroad (arguably the country's biggest employer).<sup>25</sup> By its turn, BNDES has also profited more than R\$ 20.7 billion with its investments in the meat company.<sup>26</sup> As a matter of fact, even the Brazilian share over global meat production (especially cattle and pork) has raised since the early 2000s (Figure 3), potentially as a major outcome of direct governmental investments in the segment.

**Figure 3. Brazil's share of global meat production (2000-2021)<sup>27</sup>**



This story is, however, twofold. A much more infamous story ran side by side to the prosperous growth and general enthusiasm over JBS' consolidation as the national champion in the meat market. By the end of the 2000s, the company would become the stage for a rising number of scandals over environmental damages, human rights violations and corruption.

#### A. Environmental damage

Since 2009, there is an increasing concern regarding JBS' activities impacts on the environment. In that year, Greenpeace released *Slaughtering the Amazon*, a report on a three-year investigation that concluded the major role of JBS' in fomenting deforestation in Brazil, through its large supply chain in cattle ranching. The investigation found that several of the company's cattle suppliers were directly involved in deforestation or related practices (such as the invasion of environmental and indigenous protected areas and land grabbing). Meanwhile JBS has failed to implement sufficient monitoring mechanisms and neglected accusations regarding its supply chain,<sup>28</sup> linking illegal cattle ranches to global meat retail markets.<sup>29</sup> Still in 2009, JBS, among other three major meat companies, signed a commitment on minimum criteria for industrial scale cattle operations in the Brazilian Amazon biome with Greenpeace.<sup>30</sup> However, its terms were systematically violated by JBS over the years. In

<sup>24</sup> By the 2Q20, Petrobras' net revenue was R\$ 50.9 billion, while JBS reached R\$ 67.6 billion in net revenues. See: *Petróleo Brasileiro S.A., Earnings Release in R\$ (2Q20)* (July 21, 2020) [https://s3.amazonaws.com/mz-filemanager/25fdf098-34f5-4608-b7fa-17d60b2de47d/6e7034e7-751f-4402-8649-fbef18848c8b\\_relatorio\\_producao\\_ing\\_v4.pdf](https://s3.amazonaws.com/mz-filemanager/25fdf098-34f5-4608-b7fa-17d60b2de47d/6e7034e7-751f-4402-8649-fbef18848c8b_relatorio_producao_ing_v4.pdf); *JBS S.A., Earnings Release (2Q20)* (August 13, 2020), [https://s3.amazonaws.com/mz-filemanager/043a77e1-0127-4502-bc5b-21427b991b22/498c3745-2ea5-4cc0-a225-cb0558cfab81\\_2q20%20-%20earnings%20release%20vf.pdf](https://s3.amazonaws.com/mz-filemanager/043a77e1-0127-4502-bc5b-21427b991b22/498c3745-2ea5-4cc0-a225-cb0558cfab81_2q20%20-%20earnings%20release%20vf.pdf).

<sup>25</sup> *JBS consolidates its position as brazil's largest employer*, JBS (January 31, 2021), <https://jbs.com.br/en/jbs-news-en/jbs-consolidates-its-position-as-brazils-largest-employer/>.

<sup>26</sup> *O BNDES E A JBS*, BNDES (February 16, 2022), <https://aberto.bndes.gov.br/aberto/caso/jbs/>.

<sup>27</sup> Data retrieved from Food and Agriculture Organization of the United Nations (FAO). See: *Crops and livestock products*, FAOSTAT (December 23, 2022), <https://www.fao.org/faostat/en/#data/QCL>.

<sup>28</sup> GREENPEACE, *SLAUGHTERING THE AMAZON* iii (2009).

<sup>29</sup> *Id.*, at. 26.

<sup>30</sup> *Minimum Criteria for Industrial Scale Cattle Operations in the Brazilian Amazon Biome*, Greenpeace (September 23, 2009), <https://www.greenpeace.org/usa/wp-content/uploads/legacy/Global/usa/report/2010/1/minimum-criteria-for-i.pdf>. The commitment consisted in major undertakings of removal of cattle suppliers engaged on illegal activities as: (i) deforestation; (ii) invasion of indigenous lands or protected areas; (iii) slavery; and (iv) land grabbing and land conflicts. Moreover, the commitment provided that meat companies should both create a monitorable, verifiable and reportable tracking system of their obligations and inform the commitment's terms and sanctions to their suppliers.

2020, a new Greenpeace report would indicate that, eleven years after its initial investigation, the company's activities were still linked to illegal deforestation.<sup>31</sup>

When it comes to greenhouse gases emissions JBS again outstands its rivals. By 2021, data from the Institute for Agriculture & Trade Policy (IATP), indicated that the world's 15 major meat and dairy corporations overweighted the total methane footprints of several countries such as Russia, Australia, Canada, France and Germany.<sup>32</sup> JBS alone was responsible for the biggest share of the group's total greenhouse gases emissions (approximately 37.5%), followed by Tyson Foods (approximately 12.3%).<sup>33</sup> Past data from 2016 was also consistent with those conclusions, when JBS and Tyson Foods respectively accounted for 31.0% and 13.1% of the top 20 meat and dairy companies' emissions.<sup>34</sup> Overall, this evidence disputes JBS' pledges to reach net zero emissions by 2040,<sup>35</sup> considering that during the period the company's emissions have increased by 51%.<sup>36</sup>

## B. *Human rights violations*

JBS has found itself involved in a growing number of human rights violations over the years. As a first major group of these infractions, since the publishing of Greenpeace's 2009 report, it has been disclosed that JBS' operations were linked to severe abuses, through the employment of slave labour by the company's cattle suppliers. By that time, the company, like other major beef exporters, had acquired cattle from suppliers that were listed in the Brazilian Ministry of Labour's Employers Cadastre, also known as the "Dirty List" for employers that held workers under slave-like conditions. Several failures to duly monitor violations in this sense were found.<sup>37</sup> Eleven years later, Greenpeace has also found evidence that JBS' operations were still involved in forced labour,<sup>38</sup> as the company did not sufficiently improve its oversight mechanisms over its supply chain.<sup>39</sup> In fact, several allegations of low standards of work safety and health were reported over the years. Some of those violations have been investigated and fined by U.S. Occupational Safety and Health Administration (OSHA), as

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<sup>31</sup> GREENPEACE, *HOW JBS IS STILL SLAUGHTERING THE AMAZON 2* (2020), ("[e]leven years on, JBS is still slaughtering the Amazon. It and its network of subsidiaries have been repeatedly linked to suppliers found to be engaging in illegal deforestation in the region<sup>18</sup> and operating illegally on protected Indigenous lands"); *see also*: GLOBAL WITNESS, *BEEF, BANKS AND THE BRAZILIAN AMAZON: HOW BRAZILIAN BEEF COMPANIES AND THEIR INTERNATIONAL FINANCIERS GREENWASH THEIR LINKS TO AMAZON DEFORESTATION 5* (2020) ("[b]etween 2017 and 2019, JBS bought cattle from at least 327 ranches in which deforestation occurred, Marfrig from 89 and Minerva from 16. Brazilian government satellite data shows a forested area of over 20,000 football fields was cleared in these ranches,<sup>32</sup> all of it illegal"); GLOBAL WITNESS, *CASH COW HOW BEEF GIANT JBS'S LINKS TO AMAZON DEFORESTATION AND HUMAN RIGHTS ABUSES IS AIDED BY UK, EU AND US FINANCIERS, IMPORTERS AND SUPERMARKETS 3* (2022) ("[t]his investigation now finds that in the wake of the above international pledges, JBS continued buying from 144 of the same ranches in the Amazon state of Pará that were exposed in our previous report, once again failing to comply with its legal agreements with the prosecutors. (JBS denied these claims.) It also failed to monitor an additional 470 ranches further up its supply chain, containing an estimated 40,000 football pitches of illegal Amazon clearance – also contrary to its obligations").

<sup>32</sup> IATP, *EMISSIONS IMPOSSIBLE: HOW EMISSIONS FROM BIG MEAT AND DAIRY ARE HEATING UP THE PLANET 16* (2022).

<sup>33</sup> *Id.*, at 48.

<sup>34</sup> GRAIN *et al.*, *Big meat and dairy's supersized climate footprint*, GRAIN (November 7, 2017), <https://grain.org/article/entries/5825-big-meat-and-dairy-s-supersized-climate-%09footprint>.

<sup>35</sup> *JBS is committing to be Net Zero by 2040*, JBS (March 31, 2021), <https://jbs.com.br/netzero/en/>.

<sup>36</sup> *The great climate greenwash: Global meat giant JBS' emissions leap by 51% in five years*, Institute for Agriculture & Trade Policy (IATP) (April 20, 2022), <https://www.iatp.org/jbs-emissions-rising-despite-net-zero-pledge>

<sup>37</sup> GREENPEACE, *supra* note 28, at 16 ("[i]n the process of investigating illegal deforestation, Greenpeace has found that four of the top five beef exporters - Bertin, independência, JBS and marfrig – have acquired cattle from ranchers linked to forced labour").

<sup>38</sup> GREENPEACE, *supra* note 31, at 42 ("[i]n 2017, it emerged that between 2013 and 2016 JBS had previously bought cattle from a farm in Pará state that was under investigation for keeping workers in conditions of modern slavery" [...] "JBS claimed that it had immediately stopped sourcing from the farm when it became aware of the raids, and excused its failure to police its own supply chain by saying that the farm had not been included in the government's Dirty List. Nevertheless, the incident led to Waitrose removing its own-brand corned beef from its shelves due to its containing beef supplied by JBS").

<sup>39</sup> *Id.*, at 41 ("[f]ailure by JBS to map out its entire cattle supply chain, including indirect suppliers, exposes it to serious risk of trade from suppliers linked to human rights violations from land grabbing to slavery, and there is considerable evidence that it has actually bought cattle from or originating with such suppliers").

ammonia spills in JBS' facilities.<sup>40</sup> The same ammonia leaks were also reported in Brazilian facilities in the last years.<sup>41</sup>

Other major group of human rights infractions refers to JBS' discriminatory practices. In 2010, U.S. Equal Employment Opportunity Commission (EEOC) filed a lawsuit charging the company for discriminating Muslim, Somali, and black employees for religious and racial motivations, violating the Title VII of the Civil Rights Act of 1964. The case was settled, as the company agreed to pay up to \$ 5.5 million to approximately 300 employees, besides adapting its facilities based on workers' religious observances and adopting actions to prevent further violations.<sup>42</sup> More recently, by the COVID-19 outbreak, further racial discrimination allegations were reported. In the U.S., the company, alongside other major meat producers, has been accused of failing to take protective measures for its workers by not following Centres for Disease Control and Prevention guidelines at its facilities, which had discriminatory effects especially over racial minorities as black, Latino and Asian workers.<sup>43 44</sup> In Brazil, during the pandemic, JBS fired 40 employees from a Kaingang tribe, after two other individuals (who did not work for the company) became infected with COVID-19. The company was sued the by labour prosecutor's office in 2020 and, by the end of the following year, a Brazilian labour court ruled the case against the company, holding JBS liable for individual and collective damages to its former workers and providing their immediate reinstatement to the company's facilities.<sup>45</sup>

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<sup>40</sup> Back on January 15, 2008, three workers on a JBS' facility were hospitalized with chemical burns after the exposure to an ammonia leak. U.S. OSHA has issued three citations and entered into a settlement with the company. Another major anhydrous ammonia release took place at a Pilgrim's Pride's facility on March 30, 2016, followed by the issue of two repeat citations and a \$122,500 fine by U.S. OSHA. More recently, on January 19, 2022, U.S. OSHA conducted a workplace safety investigation over a Pilgrim's Pride's facility, after an ammonia spill that led to the hospitalization of two employees and to the evacuation of 50 other workers. "[N]ine serious citations for inadequately implementing and maintaining the process safety management program for controlling anhydrous ammonia hazards in industrial refrigeration systems" and a \$110,630 were issued to the JBS group's company. See: *Inspection Detail Inspection: 311765077 - Jbs Swift & Company*, U.S. OSHA (January 18, 2008), [https://www.osha.gov/ords/imis/establishment.inspection\\_detail?id=311765077](https://www.osha.gov/ords/imis/establishment.inspection_detail?id=311765077); *OSHA fines nation's largest chicken producer \$122K for failures in dangerous ammonia release at Waco plant*, U.S. OSHA (March 30, 2016), <https://www.osha.gov/news/newsreleases/region6/03302016>; *US Department of Labor cites Pilgrim's Pride Corp. after ammonia leak hospitalized workers, led to evacuation of Canton poultry processing plant*, U.S. OSHA (August 1, 2022), <https://www.osha.gov/news/newsreleases/region4/08012022>. Other JBS' major safety violations were also prosecuted and fined by U.S. OSHA, as fatal and serious injuries by unguarded machines and general violations of workplace standards over the years. See: *Inspection Detail Inspection: 311765077 - Jbs Swift & Company*, U.S. OSHA (February 6, 2009), <https://www.osha.gov/news/newsreleases/region8/06042013>; *Worker fatally injured in Greeley, Colorado, after being caught in unguarded conveyor system*, U.S. OSHA (December 11, 2014), <https://www.osha.gov/news/newsreleases/region8/12112014>; *U.S. Department of Labor Cites Green Bay Meat Packer After Employee Injury*, U.S. OSHA (September 27, 2018), <https://www.osha.gov/news/newsreleases/region5/09272018>.

<sup>41</sup> The Brazilian Justice Ministry has started an investigation in 2021, for ammonia spills that had hit a JBS facility by February of that year, preceded by similar cases in 2017. Nevertheless, new ammonia leaks in Brazil have been reported on October 10, 2022, on other company's facilities. See: Ricardo Bitto & Luciano Costa, *Brazil's Justice Ministry investigates JBS for toxic gas leak- statement*, REUTERS (June 4, 2021), <https://www.nasdaq.com/articles/brazils-justice-ministry-investigates-jbs-for-toxic-gas-leak-statement-2021-06-04>; Marcos Hermanson Pomar, *JBS ignorou relatos de intoxicação que terminou com 25 funcionários no hospital em SC*, THE INTERCEPT BRASIL (April 8, 2021), <https://theintercept.com/2021/04/08/jbs-ignorou-intoxicacao-santa-catarina/>; Daniel Giovanaz, *JBS mantém trabalhadores expostos ao risco de intoxicação por amônia; relembre casos*, BRASIL DE FATO (November 24, 2020) <https://www.brasildefato.com.br/2020/11/24/jbs-mantem-trabalhadores-expostos-ao-risco-de-intoxicacao-por-amonia-relembre-casos>; Alex Rodrigues, *JBS mantém trabalhadores expostos ao risco de intoxicação por amônia; relembre casos*, AGÊNCIA BRASIL (December 10, 2022), <https://agenciabrasil.ebc.com.br/geral/noticia/2022-10/funcionarios-de-frigorifico-passam-mal-apos-vazamento-de-amonia-em-go>.

<sup>42</sup> As reported by the U.S. EEOC, "JBS denied religious accommodations to Muslim employees at its Greeley plant", while such workers were also "harassed when they tried to pray during scheduled breaks or even on bathroom breaks". Other misconducts were reported. During Ramadan in 2008, "JBS shut off water fountains at the facility or tagged them to stop employees from using them, which prevented Muslim employees from getting a drink of water after fasting all day and from washing before prayers". Also, the company's managers and other employees "threw meat or bones at Black and Somali employees and that JBS employees regularly called Somali employees offensive names because of their race, national origin, and religion". See: *JBS Swift to Pay up to \$5.5 Million to Settle EEOC Race and Religious Discrimination Claim at Greeley Plant*, U.S. EEOC (June 9, 2021) <https://www.eeoc.gov/newsroom/jbs-swift-pay-55-million-settle-eeoc-race-and-religious-discrimination-claim-greeley-plant>; see also: *Equal Employment Opportunity Commission, et al. v. JBS USA, LLC d/b/a JBS Swift & Company*, Case No.10-cv-2103-PAB-KLM.

<sup>43</sup> Laura Reiley, *As coronavirus ravaged meatpackers, minorities bore the brunt. Now worker groups say Tyson and JBS violated the Civil Rights Act*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/business/2020/07/13/coronavirus-meat-tyson-jbs-racial-discrimination/>. Based on these accusations, a coalition of NGOs filed an administrative civil rights complaint before the U.S. Department of Agriculture on July 8, 2020. See: <https://food.publicjustice.net/wp-content/uploads/sites/3/2020/07/2020.07.08-Food-Chain-Workers-v-Tyson-Foods-Title-VI-complaint-FINAL.pdf>. U.S. OSHA has also fined JBS for failing to provide due protection measures for employees in one of its facilities. See: *U.S. Department of Labor Cites JBS Foods Inc. for Failing To Protect Employees from Exposure to the Coronavirus*, U.S. OSHA (September 11, 2020), <https://www.osha.gov/news/newsreleases/region8/09112020>.

<sup>44</sup> JBS was also convicted in Brazil by failing to take such protective measures to workers. The Brazilian court also ruled that JBS should pay R\$ 1 million in damages and adopt the due COVID-19 safety protocols within its facilities. See: Case No. 0020513-04.2020.5.04.0405; see also: *Brazil: Complaints reveal JBS' failure to take measures to protect workers from COVID-19; court condemns the company to pay a R\$ 1 million fine*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE (June 7, 2020), <https://www.business-humanrights.org/en/latest-news/brazil-complaints-reveal-jbs-failure-to-take-measures-to-protect-workers-from-covid-19-court-condemns-the-company-to-pay-a-r-1-million-fine/>.

<sup>45</sup> Ana Mano, *JBS sued over alleged violation of Brazil indigenous rights during pandemic*, REUTERS (June 2, 2020), <https://www.reuters.com/article/us-health-coronavirus-jbs-idUSKBN2392RS>; Ana Mano, *Court confirms Brazil's JBS must reinstate indigenous workers, pay damages*, REUTERS (October 6, 2021), <https://www.reuters.com/business/sustainable-business/court-confirms-brazils-jbs-must-reinstate-indigenous-workers-pay-damages-2021-10-06/>.

A final group of human rights violations by JBS is related to attacks on indigenous territories and people. Although there is no evidence of the company's direct involvement in these breaches, the advance of illegal cattle ranching over Amazon promoted by JBS' suppliers is linked to native populations' abuse and genocide. As protected indigenous areas are increasingly invaded by ranchers, serious threats and attacks to native populations have been recorded.<sup>46</sup> Also, illegal land grabbing also represents a major focus of risks to indigenous people's safety.<sup>47</sup>

### C. Corruption

JBS and the Batista family have been facing several allegations and convictions for corruption and bribery, since 2017. By that time, JBS' controllers and directors, the brothers Joesley and Wesley Batista, were involved in three major corruption investigations initiated by the Brazilian Public Prosecution Office, *Ministério Público Federal* (MPF): *Operação Lava Jato* (Car Wash Operation),<sup>48</sup> *Operação Carne Fraca* (Weak Flesh Operation),<sup>49</sup> and *Operação Bullish* (Bullish Operation). Although each investigation has its specific motivations, all of them involved, as recognized by Joesley brothers in their plea-bargain agreements, the corruption, bribery and/or undue influence by the company over Brazilian government top rank officials to obtain illegal advantages, for example, in food regulation, public investment and procurement, congressmen activities, among others.<sup>50</sup>

In fact, even BNDES and CADE's officials were accused of being targets of JBS' bribery acts or political influence. Bullish Operation was entirely dedicated to investigating alleged JBS' favouritism and the bribery of the Brazilian Ministry of Finance and BNDES' top officials by the Batista brothers in the investments made by the state-owned bank into the company.<sup>51</sup> Moreover, telephone calls between Joesley Batista and the federal representative Ciro Nogueira were intercepted by Brazilian Federal Police within Car Wash Operation, indicating that the congressman was deeply involved in bribery misconducts. In these calls CADE's current President

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<sup>46</sup> *Brazilian meat giants linked to farmer charged with Amazon massacre*, EARTHSIGHT (March 20, 2020), <https://www.earthsight.org.uk/news/idm/brazil-meat-giants-linked-farmed-charged-amazon-massacre> ("Repórter Brasil has revealed that farmer Valdelir João de Souza, a fugitive charged with nine murders during a brutal April 2017 massacre in the Amazon, has since indirectly supplied cattle to top Brazilian meatpackers JBS and Marfrig. The Brazilian environmental news outlet found that throughout 2018 de Souza sold cattle to other farmers that went on to provide cattle to JBS, the world's largest beef producer, and Marfrig, one of Brazil's top three meat producers"); *Brazil: Cattle illegally grazed in the Amazon found in supply chain of leading meat-packer JBS*, AMNESTY INTERNATIONAL (October 7, 2020), <https://www.amnesty.org/en/latest/press-release/2020/07/brazil-cattle-illegally-grazed-in-the-amazon-found-in-supply-chain-of-leading-meat-packer-jbs/> ("[i]n January 2019, another group of Uru-Eu-Wau-Wau people recalled encountering around 40 armed invaders – likely *grileiros*, who clear forested areas to create cow pasture – deep inside Uru-Eu-Wau-Wau territory, just two kilometres from an Indigenous village. Others previously described hearing gunshots ring out at night or receiving death threats against their children"); Nikki Bayat, *Brazil's indigenous warn against Amazon deforestation*, GENOCIDE WATCH (September 3, 2022), <https://www.genocidewatch.com/single-post/brazil-s-indigenous-warn-against-record-levels-of-deforestation-in-the-amazon> ("Adriano explains that recently many indigenous people have been murdered by invaders seeking to take the land, likely due to Brazil's increasingly lax arms policies, and says these murders have failed to reach justice. Adriano's statements regarding murder in the Amazon comes after the global outcry in June 2022 when British journalist, Dom Phillips, and Brazilian indigenist, Bruno Pereira, were murdered while journeying through the Amazon gathering information for a piece on illegal deforestation. Although suspects were charged with the murder, the story has raised many questions within the public regarding "the truth" Phillips and Pereira were aiming to uncover prior to his tragic death"). For an historical perspective and the colonial roots of deforestation violence against indigenous people, see: Danilo Urzedo & Pratchi Chatterjee, *The Colonial Reproduction of Deforestation in the Brazilian Amazon: Violence Against Indigenous Peoples for Land Development*, 23 J. GENOCIDE RES. 302 (2021).

<sup>47</sup> Salomé Gómez-Upegui, *The Amazon rainforest's most dogged defenders are in peril*, VOX (September 1, 2021), <https://www.vox.com/down-to-earth/22641038/indigenous-forest-guardians-brazil-guajajara> (discussing how protected areas for indigenous people "are frequently invaded by ranchers, loggers, and land grabbers — known as *grileiros* — who work for the sophisticated unlawful groups that extract resources such as timber and gold and violently defend their interests. Around half of the deforestation in the Brazilian Amazon is rooted in such illegal land grabbing").

<sup>48</sup> Car Wash Operation was originally a money laundering investigation which was expanded to prosecute alleged big corruption practices at Petrobras. See: Jonathan Watts, *Operation Car Wash: Is this the biggest corruption scandal in history?*, THE GUARDIAN (June 1, 2017), <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history>; Will Connors & Luciana Magalhaes, *How Brazil's 'Nine Horsemen' Cracked a Bribery Scandal*, WALL ST. J. (April 6, 2015), <https://www.wsj.com/articles/how-brazils-nine-horsemen-cracked-petrobras-bribery-scandal-1428334221>.

<sup>49</sup> Weak Flesh Operation investigated a major corruption conspiracy in the Brazilian Ministry of Agriculture, where companies, as JBS, would allegedly bribe government officials aiming to issue sanitary reports and licenses without due inspections, enabling sales of expired and adulterated meat. See: Alberto Alerigi, & Thais Freitas, *'Operation Weak Flesh' takes bite out of Brazil's meat exports*, REUTERS (March 24, 2017), <https://www.reuters.com/article/us-brazil-corruption-food-exports-idUSKBN16V281>; Edgard Matsuki, *Seven questions and answers about Operation Weak Flesh*, AGÊNCIA BRASIL (March 25, 2017), <https://agenciabrasil.etc.com.br/en/geral/noticia/2017-03/seven-questions-and-answers-about-operation-weak-flesh>.

<sup>50</sup> Luciana Magalhaes & Paul Kiernan, *JBS Parent to Pay \$3.2 Billion to Settle Corruption Investigations in Brazil*, WALL ST. J. (May 31, 2017), <https://www.wsj.com/articles/jbs-parent-to-pay-3-16-billion-to-settle-corruption-charges-in-brazil-1496232139>.

<sup>51</sup> See: Jeffrey T. Lewis & Luciana Magalhaes, *Meatpacker JBS Probed by Brazilian Police Over Loans From BNDES*, WALL ST. J. (May 12, 2017), <https://www.wsj.com/articles/jbs-said-to-be-target-of-brazil-police-investigation-1494603810>. It is important to highlight that, although Joesley brothers have confessed such violations, until the present moment, no Brazilian officials were convicted within the Bullish Operation. In fact, BNDES has hired an independent internal investigation that found no evidence on corruption, bribery or undue influence in the eight biggest investments made by the state-owned bank on JBS. Those transactions represented roughly 60% of the company's total funding by BNDES (R\$ 11.3 billion in nominal value). See: *O BNDES e a investigação independente da JBS*, BNDES (December, 2019), <https://aberto.bndes.gov.br/aberto/caso/investigacao/>.

Alexandre Cordeiro was described by Nogueira as “his boy” and part of “our group”, arguing that he had “placed him there” and that they “could not lose CADE’s majority of votes”, by “placing our people there”. Since 2015, Cordeiro has been nominated to several leading positions mandates in CADE’s bodies as Commissioner (2015-2017), General-Superintendent (2017-2021) and President (2021-2025), playing a major influence over the institution.<sup>52</sup>

JBS’ corruption, bribery and undue influence over the Brazilian Ministry of Finance and BNDES and has also resulted on charges from the U.S. Securities and Exchange Commission (SEC), under U.S. Foreign Corrupt Practices Act (FCPA), specifically regarding the facilitation of Pilgrim’s Pride’s shares acquisition by the company.<sup>53</sup> J&F Investimentos S.A. has pleaded guilty and settled the case with a \$256 million criminal penalty.<sup>54</sup>

#### D. JBS’ market power: beyond market dimensions

JBS’ twofold story could be reunited by its central feature: its inorganic State-sponsored consolidation as the leading player in the meat market. None of the spheres of scandals described above can be truly dissociated from the company’s growing financial and market power over the years.

First, JBS’ consolidation in the meat market, through massive meat production within large global supply chains, is directly related to the company’s environmental footprint. The company’s case seems to confirm previous general evidence on the negative correlation between competition and environmental degradation.<sup>55</sup> As highlighted by NGOs, JBS’ major impact on deforestation<sup>56</sup> and greenhouse gases emissions<sup>57</sup> is inherently associated with its leading position and massive production. Also some evidence highlights that competition may be a driver to a firm go “green”, which could also relate to JBS’ lack of incentives, in a meat oligopoly, for pursuing better practices.<sup>58</sup>

Similarly, the company’s systematically human rights violations can hardly be detached from its market power. As discussed above, despite JBS’ growing dominance over meat markets and rising earnings, the company has constantly failed to monitor cattle suppliers and has even neglected human rights violations involving those players. It is worth noticing that Greenpeace held that cattle suppliers’ activities were “subsidised” by forced labour as well as by other illegal activities (such as land grabbing),<sup>59</sup> indicating that such practices may result from JBS’s exercise of its market power over pulverized cattle suppliers, resulting in greater pressure for cost reductions.<sup>60</sup> In fact, the general worsening of labour conditions through JBS’ supply chain (as per the borderline case of slavery) or even the company’s facilities can also relate with a growing evidence of negative effects of market consolidation over labour markets.<sup>61</sup>

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<sup>52</sup> Vinicius Valfré et al., *Inquérito mostra que Ciro Nogueira tratava chefe do Cade de ‘meu menino’*, ESTADÃO (April 14, 2022), <https://www.estadao.com.br/politica/inquerito-mostra-que-ciro-nogueira-tratava-chefe-do-cade-de-meu-menino/>; Hugo Marques et al., *EXCLUSIVO: Em áudio, Joesley promete repassar dinheiro para Ciro Nogueira*, VEJA (October 6, 2017), <https://veja.abril.com.br/politica/em-audio-joesley-promete-repassar-dinheiro-para-ciro-nogueira/>. No further investigation on the issue was made public.

<sup>53</sup> *SEC Charges Brazilian Meat Producers With FCPA Violations*, U.S. SEC (October 14, 2020), <https://www.sec.gov/news/press-release/2020-254>.

<sup>54</sup> *Id.*; Luciana Magalhaes & Paul Kiernan, *JBS Parent to Pay \$3.2 Billion to Settle Corruption Investigations in Brazil*, WALL ST. J. (May 31, 2017), <https://www.wsj.com/articles/jbs-parent-to-pay-3-16-billion-to-settle-corruption-charges-in-brazil-1496232139>.

<sup>55</sup> JBS’ case is also consistent with other general evidence of environmental footprint concentration on few firms. *See*: CPD, *THE CARBON MAJORS DATABASE 8* (2017) (indicating that only 100 firms are responsible for 71% greenhouse gases emissions around the world); UNEP, *UNIVERSAL OWNERSHIP: WHY ENVIRONMENTAL EXTERNALITIES MATTER TO INSTITUTIONAL INVESTORS 24* (2011) (indicating that “[t]he largest 3,000 listed companies by market capitalisation in Trucost’s database were responsible for 35% of total global environmental costs analysed in 2008”).

<sup>56</sup> GREENPEACE, *supra* note 31, at 52 (“[a]ttempts to define the industrial meat sector largely focus on specific methods of production – often those associated with the intensive animal agriculture methods commonly known as factory farming. However, in order to capture a full picture of its impact on people and nature, a broader interpretation is required. Accordingly, the industrial meat economy can be characterised in terms of its scale, long supply chains, consolidation and concentration of land ownership, and extractive and exploitative nature”); *see also*: GLOBAL WITNESS (2020), *supra* note 31, at 5.

<sup>57</sup> IATP, *supra* note 32.

<sup>58</sup> Caroline Flammer, *Does product market competition foster corporate social responsibility? Evidence from trade liberalization*, 36 STRATEG. MANAG. J. 1469 (2014).

<sup>59</sup> GREENPEACE, *supra* note 28, at 16.

<sup>60</sup> Some evidence indicates that meat packers’ consolidation in Brazil negatively impacted cattle suppliers’ surplus in beef sales from 2000 to 2010. Antônio José Maristrello Porto & Rafaela Nogueira, *Whose Beef are our Workers Subsidizing?*, 3 EALR, 323, 336 (2012), <https://portalrevistas.ucb.br/index.php/EALR/article/view/3%20EALR%20323>.

<sup>61</sup> JAN ECKHOUT, *THE PROFIT PARADOX: HOW THRIVING FIRMS THREATEN THE FUTURE OF WORK* (2021); Gregor Schubert & Anna Stansbury, *Antitrust Should Be Used as a Targeted Response to Employer Concentration, But Antitrust Should Be Used as a Targeted Response to Employer Concentration, But It Can’t Do Everything*, PROMARKET (December 8, 2021), <https://www.promarket.org/2021/12/08/antitrust-employer-concentration-labor-market-power/>; MARHSALL STEINBAUM ET AL., *POWERLESS: HOW LAX ANTITRUST AND CONCENTRATED MARKET POWER RIG THE ECONOMY AGAINST AMERICAN WORKERS, CONSUMERS, AND COMMUNITIES* (2018).



Finally, JBS's corruption scandals also seem to be intrinsically related to the company's bigness. Consistent with evidence in the interplay between market consolidation and corruption recurrence,<sup>62</sup> JBS' consolidation and increasing profits from a less competitive meat market were allegedly directed at illegally facilitating the Brazilian government's funding and sponsorship over further acquisitions, as Pilgrim's Pride in 2009. Moreover, JBS' profit maximization within an oligopolistic meat market structure could arguably fund its illegal activity, especially considering Batista family's direct control over the company's corporate structure and management. Through JBS, the Batista brothers have paid more than \$150 million in bribes to Brazilian politicians, besides J&F Investimentos' fines to settle charges in Brazil (R\$10.3 billion) and in U.S. (\$256 million).<sup>63</sup> Another good example of how market power was exercised in this regard was a fourth investigation carried by MPF on Batista brothers: *Operação Tendão de Aquiles* (Achilles Tendon Operation), which investigated the use of privileged information by the Batista brothers to conclude several transactions on B3 and foreign exchange market before the publicization of their plea-bargain agreements, when the Brazilian stock market recorded a 9% downfall, considering the deep political implications of their confessions and JBS' relevance.<sup>64</sup>

What the infamous side of JBS' story shows us is that the rising of a Brazilian meat giant had its costs. Even facing serious investigations and convictions, in Brazil and abroad, JBS and the Batista family could still be described as the "Brazilian butchers who took over the world",<sup>65</sup> due to the company's almost unattainable domain over the meat sector. Although one could doubt JBS' ability in retaining its position as the leading firm in the meat market,<sup>66</sup> as a matter of fact, those major scandals and their reputational impacts were almost not felt by the company. Since the unveiling of major scandals in 2017, JBS' stock value has been all way up – as described below in Figure 4 – and the company's revenue and income numbers report a steady and continuous growth – as described in Figures 1 and 2 above. The Brazilian meat Leviathan has finally claimed his place.<sup>67</sup>

**Figure 4. JBS' stocks, adjusted closing value (03/30/2007-12/30/2021)<sup>68</sup>**



### III. INDUSTRIAL POLICY, COMPETITION LAW AND THE NARROW APPROACH TO MARKET POWER: BLIND SPOTS AND THE LESSONS FROM JBS' CASE

The JBS' case is a good example on how a narrow approach to market power, neglecting or undermining its non-market aspects, may have directly shaped public policy choice, perverting its intent. Although the

<sup>62</sup> Narek Sahakyan & Kyle W. Stiegert, *Corruption and Firm Performance*, 50 EAST. EUR. ECON. 5 (2014); Patrick M. Emerson, *Corruption, competition and democracy Author links open overlay panel*, 81 J. DEV. ECON. 193 (2006), and Harry G. Broadman & Francesca Recanatini, *Seeds of Corruption – Do Market Institutions Matter?*, 11 MOCT-MOST 359 (2001).

<sup>63</sup> Luciana Magalhaes & Paul Kiernan, *JBS Parent to Pay \$3.2 Billion to Settle Corruption Investigations in Brazil*, WALL ST. J. (May 31, 2017), <https://www.wsj.com/articles/jbs-parent-to-pay-3-16-billion-to-settle-corruption-charges-in-brazil-1496232139>.

<sup>64</sup> Fernanda Cruz, *Brazil police arrest JBS CEO Wesley Batista*, AGÊNCIA BRASIL (September 13, 2017), <https://agenciabrasil.ebc.com.br/en/politica/noticia/2017-09/brazil-police-arrest-jbs-ceo-wesley-batista>; Dom Phillips, *The swashbuckling meat tycoons who nearly brought down a government*, THE GUARDIAN (July 2, 2019), <https://www.theguardian.com/environment/2019/jul/02/swashbuckling-meat-tycoons-nearly-brought-down-a-government-brazil>; Gerson Freitas Jr & Vinicius Andrade, *JBS Is Market Darling Again After Scandal That Haunts Brazil*, BLOOMBERG (May 17, 2019), <https://www.bloomberg.com/news/articles/2019-05-17/on-joesley-day-jbs-is-stronger-but-brazil-continues-to-hurt?leadSource=uverify%20wall>; Andrew Wasley et al., *JBS: The Brazilian butchers who took over the world*, TBIJ (July 2, 2019), <https://www.thebureauinvestigates.com/stories/2019-07-02/jbs-brazilian-butchers-took-over-the-world>.

<sup>65</sup> *Id.*

<sup>66</sup> *Can JBS remain the world's biggest food producer?*, ECONOMIST (August 18, 2022), <https://www.economist.com/business/2022/08/18/can-jbs-remain-the-worlds-biggest-food-producer>.

<sup>67</sup> The use of the term "Leviathan" dialogues other work that frame market power by industrial conglomerates as similar to the power held by the State itself. See: Zephyr Teachout & Lina Khan, *Market structure and political law: a taxonomy of power*, 9 DUKE J. CONST. L. & PUB. POL. 37 (2014).

<sup>68</sup> *Ações*, B3, [https://www.b3.com.br/pt\\_br/market-data-e-indices/servicos-de-dados/market-data/cotacoes/?tvwidgetsymbol=JBSS3](https://www.b3.com.br/pt_br/market-data-e-indices/servicos-de-dados/market-data/cotacoes/?tvwidgetsymbol=JBSS3). Data retrieved from B3's records on JBS' stock value.

consolidation of JBS' market power had two distinct major governmental drivers – BNDES' direct state funding of M&A activity and CADE's indirect lenient competition law enforcement –, both of them have maybe failed to frame market power through more realistic lens.

For industrial policy, a sympathetic approach to market power consolidation has influenced BNDES' decision, overstating its potential benefits in internationalization and global competitiveness strategies.<sup>69</sup> As a matter of fact, industrial policy debate has been deeply shaped in this sense by classical development economics, which strongly advocated for the centralization of investments over a small number of players (monopolies or trusts), aiming to maximize their increasing returns of scale.<sup>70</sup> This was quite the strategy adopted by BNDES regarding JBS. Not only the potential negative impact of market consolidation on domestic consumers and suppliers was underestimated, but also no further attention was given to the non-market effects of financing the company's monopolization strategy.

As per competition law, the assumption that the effects of market power are restricted to its impact on consumer welfare, narrowly taken in terms of prices or quality, has also led to an extremely lenient approach to the consolidation of market power by firms. Several JBS' transactions were cleared based on potential efficiencies to consumers resulting from increased economies of scale, especially considering the existing rivalry in meat markets from competitors such as Tyson Foods.<sup>71</sup> Although some evidence was reported on meat higher prices correlation with market consolidation,<sup>72</sup> little attention was given to non-market dimensions of JBS' market power concentration as described above.

The results of such policy choices, as discussed above, were ruinous. On one hand, BNDES found itself financing a company that is largely accountable for serious social damage, such as the advance of Amazon deforestation, the employment of forced labour, and even the alleged exercise of undue influence over several government bodies and top-rank officials. On the other hand, a toothless competition law enforcement failed to check the risks of JBS' market power consolidation in terms of both market and non-market effects.

Although some works seem to discuss a broader understanding of market power,<sup>73</sup> this still is an incipient research agenda for public policy. Some implications from specific cases, such as JBS one, may help shed light on current blind spots regarding current public policy debate when it comes to market power. In this sense, we discuss below some implications of a broader approach to non-market dimensions and effects on industrial policy and competition law.

#### A. Industrial policy

Assuming the relevance of non-market dimensions for industrial policy implies a double task. First, this indicates the necessity of better framing risks over non-market dimensions resulting from induced market consolidation of firms and industries.<sup>74</sup> Second, this also means the urge for comprehending how to structure competitive advantages through non-market dimensions. As a matter of fact, in a world where consumers become

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<sup>69</sup> Sergio G. Lazzarini et al., *What Do State-Owned Development Banks Do? Evidence from BNDES, 2002–09*, 66 *WORLD DEV.* 237 (2015).

<sup>70</sup> Paul Rosenstein-Rodan, *Problems of Industrialisation of Eastern and South-Eastern Europe*, 53 *THE ECONO. J.* 202, 204 (1943) (“[a]n institutional framework different from the present one is clearly necessary for the successful carrying out of industrialisation in international depressed areas. In what follows arguments are submitted tending to show why the whole of the industry to be created is to be treated and planned like one huge firm or trust”); Tibor Scitovsky, *Two Concepts of External Economies*, 62 *J. POLIT. ECON.* 143, 150 (1954) (“there is need either for centralized investment planning or for some additional communication system to supplement the pricing system as a signaling device”); Hollis B. Chenery, *The Interdependence of Investment Decisions*, in *THE ALLOCATION OF ECONOMIC RESOURCES* (Moses Abramovitz ed., 1959). Paul Krugman would later argue a major shortcoming of classical development economists was deeper understanding on the problem of market structure, which would only be developed by industrial organization economics in the 1970s. See: Paul Krugman, *Toward a counter-revolution in development theory*, 6 *WORLD BANK ECON. REV.* 15, 27 (1993) (“[t]he examples of the Big Push model and the linkage model show that models in the spirit of high development theory need not be very complicated. They must, however, somehow deal with the problem of market structure. This essentially means making some peculiar assumptions that allow one to exploit the bag of tricks that industrial organization theorists developed for thinking about such issues in the 1970s. In the 1950s, although the technical level of development economists was actually high enough to allow them to do the same thing, the bag of tricks wasn't there. So development theorists were placed in an awkward bind, with essentially sensible ideas that they could not quite express in fully worked-out models”).

<sup>71</sup> For more detailed discussions on such cases, see *supra* notes 18 and 21.

<sup>72</sup> *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, WHITE HOUSE (September 8, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/>; Peter S. Goodman, *Record Beef Prices, but Ranchers Aren't Cashing In*, N.Y. TIMES (December 27, 2021), <https://www.nytimes.com/2021/12/27/business/beef-prices-cattle-ranchers.html>; see also: Porto & Nogueira, *supra* note 60 (discussing some evidence over negative impacts of meat packing consolidation over cattle suppliers and beef consumers in Brazil, from 2000 to 2010).

<sup>73</sup> Teachout & Khan, *supra* note 67; Tim Wu, *After Consumer Welfare, Now What? The “Protection of Competition” Standard in Practice*, 1 *CPI* 1 (2018); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 138 (2018); LIANOS, Ioannis, *Polycentric Competition Law*. CLES WORKING PAPER SERIES (2018); CALIXTO SALOMÃO FILHO, *A LEGAL THEORY OF ECONOMIC POWER: R: IMPLICATIONS FOR SOCIAL AND ECONOMIC DEVELOPMENT* (2011)

<sup>74</sup> For some evidence of negative impacts of corruption over economic growth, for example, see: Paolo Mauro, *Corruption and Growth*, 110 *Q. J. ECON.* 681 (1995).

progressively aware of beyond-price aspects of production,<sup>75</sup> these features may play a major role in firms and industries' success, which can be sponsored by state funding. This means not only that governments should consider the risks of promoting negative non-market effects within industrial policy (as seen in JBS' case), but also that they might orient their investments choices toward such dimensions – for example, financing green industries as a competitive advantage, although the same could be said regarding governance in human rights safeguards and corruption prevention.<sup>76</sup>

### B. Competition law

Developing new theories of harm, considering the costs of non-market effects of consolidation, is one of the major tasks resulting from a broader perception of market power. Therefore, competition law enforcement could be improved through a deeper understanding of how market power consolidation can be manifested by non-market costs and how these costs interact. Another major task for the identification of how non-market competitive dimensions can unveil potential efficiencies, even if not signalled by market effects, for example in a reduction of prices to final consumers. Taking again the example of environmental concerns, it can be argued that, besides being a major field for addressing negative effects from market power, we could assess whether or not greener production practices represent gains of consumer welfare, even if implying higher prices. Also, it is important to say that considering these dimensions of competition does not necessarily imply a departure from the current enforcement structures, especially the consumer welfare standard. Of course, these issues pose relevant debates over competition law goals and might inspire more drastic institutional transformation, but incremental reforms are possible<sup>77</sup> and, above all, feasible.<sup>78</sup>

### C. The task of assuming non-market dimensions of market power

Based on the discussions above, two final remarks seem to be appropriate. The first refers to “all or nothing” approaches, both to industrial policy and competition law. A broader perception of market power beyond the strict limits of market dimensions and effects does not imply that industrial policy strategies should be *per se* abandoned by the risks of creating market tyrants nor that competition policy should be enforced as the main and major tool to address concerns not directly related to market dynamics functioning.

Regarding industrial policy, it is needless to say that there are several studies holding an active role for State in structuring markets and promoting economic growth and development.<sup>79</sup> This task, however, could be structured around different and more complex strategies rather than funding acquisitions, such as financing innovation or specific projects.<sup>80</sup> Even when sponsoring inorganic growth strategies by companies, as per JBS' case, a better institutional design could be applied aiming to avoid backfires. It is precisely in this sense, that broader perception of the dimensions and impact of market power consolidation in target firms or segments – not only in the terms above (environment protection, human rights safeguards and corruption prevention), but also considering its effects over other aspects of market dynamics, as innovation or labour markets, for example – may enhance its institutional framework.

As per competition law, this approach challenges authorities to further understand the underlying competition dimensions of markets that are not currently framed within traditional enforcement standards, in an even more precise picture of economic reality. If market power consolidation can have important non-market effects, the comprehension of these competitive dynamics is to understand how these non-market dimensions impact market dynamics, which remains at the core of competition law enforcement. Above all, this represents an

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<sup>75</sup> A recent PwC's research on global consumers preferences found that ESG concerns influenced roughly half of all consumers, especially regarding social and governance issues. See: *June 2022 Global Consumer Insights Pulse Survey*, PwC (June 14, 2022), <https://www.pwc.com/consumerinsights#esg-concerns>.

<sup>76</sup> Flammer, *supra* note 58.

<sup>77</sup> Eleanor Fox, *Modernization of Antitrust: A New Equilibrium*. Cornell L. Rev., Ithaca, v. 66, n. 6, p. 1140-1192, 1981; Joe Kennedy, *Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy*, ITIF (October, 2018).

<sup>78</sup> For examples of the approaches adopted by the Greek, Dutch and British national competition authorities to address environmental issues within competition law, see: NETHERLANDS AUTHORITY FOR CONSUMERS AND MARKETS (ACM) AND THE HELLENIC COMPETITION COMMISSION (HCC), *TECHNICAL REPORT ON SUSTAINABILITY AND COMPETITION* (2021); *Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government*, COMPETITION & MARKETS AUTHORITY (March 14, 2022). Moreover, in U.S. Federal Trade Commission's (FTC) Chairwoman Lina Khan is arguing in favour of a broader approach of competition policy to labour markets, what could be extended in the terms discussed above in JBS's case. See: *Remarks of Chair Lina M. Khan at the Joint Workshop of the Federal Trade Commission and the Department of Justice*, U.S. FTC (December 6, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1598791/remarks\\_of\\_chair\\_lina\\_m\\_khan\\_at\\_the\\_joint\\_labor\\_workshop\\_fina\\_1\\_139pm.pdf](https://www.ftc.gov/system/files/documents/public_statements/1598791/remarks_of_chair_lina_m_khan_at_the_joint_labor_workshop_fina_1_139pm.pdf).

<sup>79</sup> HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* (2002); MARIANA MAZZUCATTO, *THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS* (2013); MARIANA MAZZUCATTO, *MISSION ECONOMY: A MOONSHOT GUIDE TO CHANGING CAPITALISM* (2021); Johnson *supra* note 3; Rodrik, *supra* note 3; Altenburg & Rodrik, *supra* note 3; Krugman, *supra* note 70.

<sup>80</sup> Mazzucatto (2013), *supra* note 79; and Mazzucatto (2021), *supra* note 79.

invitation for further participation and openness of competition law enforcement to different and less-heard stakeholders (as, for example, NGOs and workers) aiming to better frame market power effects over competition.<sup>81</sup>

The second remark refers to the need for institutional reform. Although there is space for incremental reforms within industrial policy and competition law current paradigms, the challenges posed by a broader comprehension of market power may imply major institutional transformations. Especially considering their deep political and social features, discussing non-market dimensions and effects of market power is in the end to be eager and open to rethink and transform the institutional reality, beyond false necessities rooted within specific policies.

For example, by considering such market features, a fundamental question that might be posed to industrial policy refers to the own nature of economic growth and development. As per industrial policy, broader issues regarding the own nature of desirable economic growth and development may arise from this perspective.<sup>82</sup> The same can be said of competition law. To reframe market power in a broader scope may imply in rediscussing competition law goals<sup>83</sup> and even if markets at large are the best mechanism to provide social wellbeing.<sup>84</sup>

## CONCLUSION

During times when both industrial policy and competition law are performing a major role in public debate,<sup>85</sup> <sup>86</sup> past cases may provide insights into the imposing nature of market power. JBS' case, in this sense, may shed some light on how narrow approaches by industrial policy and competition law to market power can produce unpredicted, and, above all, socially undesirable effects on non-market dimensions, especially the environment protection, human rights safeguards and corruption prevention. Although this study has focused on the Brazilian meat giant's story, other similar experiences around the world may reinforce the need of broadening our approaches in those fields to frame market power.<sup>87</sup>

<sup>81</sup> SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 112 (2017).

<sup>82</sup> See, for example, discussions on greening industrial policy as a reorientation of the ideal of development towards sustainable growth: Altenburg & Rodrik, *supra* note 3; see also: John A. Mathews, *Greening Industrial Policy*, in *THE OXFORD HANDBOOK OF INDUSTRIAL POLICY* 266 (Arkebe Oqubay et al. eds., 2020); Robert Pollin, *An Industrial Policy Framework to Advance a Global Green New Deal*, in *THE OXFORD HANDBOOK OF INDUSTRIAL POLICY* 394 (Arkebe Oqubay et al. eds., 2020).

<sup>83</sup> Marshall Steinbaum & Maurice Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. R. 595 (2020); Mark Glick, *How Chicago Economics Distorts "Consumer Welfare" in Antitrust*, 64 ANTITRUST BULL. 495 (2019); Mark Glick, *The unsound theory behind the consumer (and total) welfare goal in antitrust*, 63 ANTITRUST BULL. 455 (2018); Wu (2018), *supra* note 73; Lina Khan, *Amazon's antitrust paradox*. 126 THE YALE L. J 710 (2017).

<sup>84</sup> This is particularly true based on common pool-resources (CPR) debate, where it is argued that these goods (as, for example, the environment) could be better managed and explored under cooperative and bottom-up frameworks, in different governance and regulation systems. See: ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990). For some criticism on Elinor Ostrom's ideas on CPR, especially by considering their intrinsically political nature, see also: PIERRE DARDOT & CHRISTIAN LAVAL, *COMMON: ON REVOLUTION IN THE 21ST CENTURY* (2015).

<sup>85</sup> In 2019, the French and German governments signed *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*, aiming to discuss proposals for increasing Europe's global competitiveness. See: *Franco-German Manifesto for a European industrial policy fit for the 21st century*, ECOMMERCE EUROPE (March 11, 2019), <https://ecommerce-europe.eu/news-item/franco-german-manifesto-european-industrial-policy-fit-21st-century/#:~:text=France%20and%20Germany%20put%20together.help%20keep%20Europe%20competitive%20globally>. More recently,

the Biden-Harris administration have also promoted a revival on industrial policy debates, by aiming to boost U.S. domestic economy. See: Henry M. J. Tonks, *Biden is reviving a lost Democratic industrial policy playbook*, WASH. POST (November 7, 2022), <https://www.washingtonpost.com/made-by-history/2022/11/07/biden-atari-democrats-japan-china/>; *Joe Biden's industrial policy is big, bold and fraught with difficulty*, ECONOMIST (September 13, 2022), <https://www.economist.com/united-states/2022/09/13/joe-bidens-industrial-policy-is-big-bold-and-fraught-with-difficulty>; Zolan Kanno-Youngs, *Biden Signs Industrial Policy Bill Aimed at Bolstering Competition With China*, N.Y. TIMES (August 9, 2022), <https://www.nytimes.com/2022/08/09/us/politics/biden-semiconductor-chips-china.html>.

<sup>86</sup> On July 9, 2021, the Biden-Harris administration issued the Executive Order on Promoting Competition in the American Economy, signaling a major switch in U.S. competition law enforcement. See: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>; see also: *FTC Marks One-Year Anniversary of Government-Wide initiative to Promote Competition in the American Economy*, U.S. FTC (July 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-marks-one-year-anniversary-government-wide-initiative-promote-competition-american-economy>; Jim Tankersley & Cecilia Kang, *Biden's Antitrust Team Signals a Big Swing at Corporate Titans*, N.Y. TIMES (July 24, 2021), <https://www.nytimes.com/2021/07/24/business/biden-antitrust-amazon-google.html>; John Cassidy, *The Biden Antitrust Revolution*, THE NEW YORKER (July 21, 2021), <https://www.newyorker.com/news/our-columnists/the-biden-antitrust-revolution>. In Europe, Vice-President Vestager held that "competition policy remains a tool that serves the needs of European citizens – as consumers who benefit from lower prices, wider choice and higher quality; as workers who benefit from a vibrant labour market; and as business owners who benefit from innovative, diverse and reliable inputs, and a level playing field". See: *Remarks by Executive Vice-President Vestager on the Communication on a competition policy fit for new challenges*, EUROPEAN COMMISSION (November 18, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/speech\\_21\\_6115](https://ec.europa.eu/commission/presscorner/detail/en/speech_21_6115).

<sup>87</sup> *The chaebol that ate Korea*, ECONOMIST (November 12, 1998), [https://www.economist.com/business/1998/11/12/the-chaebol-that-ate-korea?utm\\_medium=cpc.adword.pd&utm\\_source=google&ppccampaignID=19495686130&ppcadID=&utm\\_campaign=a.22brand\\_pmax&utm\\_content=conversion.direct-response.anonymous&gclid=Cj0KCCQiAijSeBhCCARIsAHnAzT-Q-gONCgVv9zjqsy0rozomCAJr1j5mSG7uFBfEh4MYAojNDPH74xYaAvbAEALW\\_wcB&gclsrc=aw.ds](https://www.economist.com/business/1998/11/12/the-chaebol-that-ate-korea?utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=19495686130&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gclid=Cj0KCCQiAijSeBhCCARIsAHnAzT-Q-gONCgVv9zjqsy0rozomCAJr1j5mSG7uFBfEh4MYAojNDPH74xYaAvbAEALW_wcB&gclsrc=aw.ds); Yeareen Yun, *Politics, Family-Run Conglomerates, and Corruption in South Korea*, CORNELL POLICY REVIEW (May 9, 2017), <https://www.cornellpolicyreview.com/politics-family-run-conglomerates-and-corruption-in-south-korea/?pdf=3507>. For some evidence on the relation between national champions and

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corruption, *see*: Alberto Ades & Rafael Di Tella, *National Champions and Corruption: Some Unpleasant Interventionist Arithmetic*, 107 THE ECON. J. 1023 (1997).