





# AMANDAATHAYDE

PhD Professor on Business Law, Antitrust Law, International Trade Law and Compliance at the University of Brasilia (UnB)

Undersecretary of Trade Remedies and Public Interest of the Secretariat of Foreign Trade of the Ministry of Economy (SDCOM/SECEX/ME)

Former Advisor of the Public Prosecution Office at Cade (MPF/CADE)

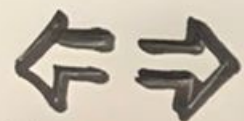
Former Head of the Leniency Unity at CADE (GAB/SG/CADE)



*Views expressed are my own and do not reflect the opinions of the institutions I work or worked.*

[amandaathayde.com.br](http://amandaathayde.com.br)

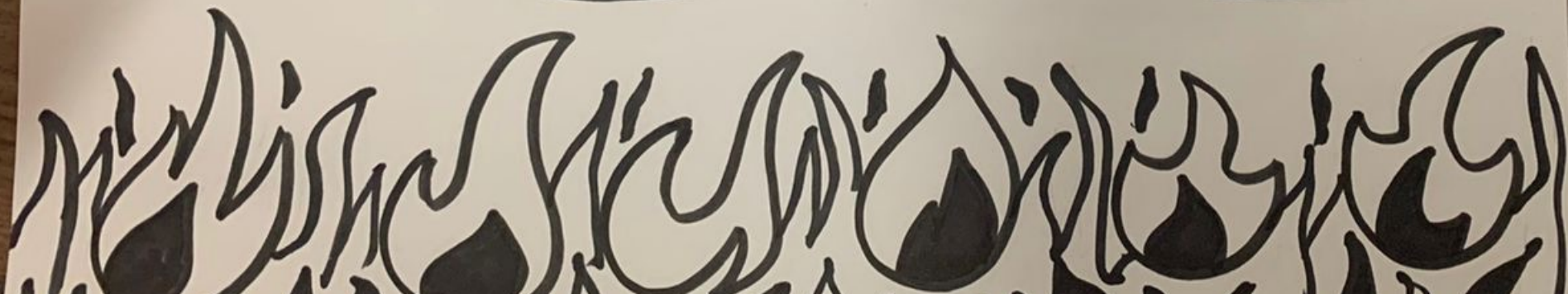
# ANTITRUST & LABOR



Unlikely...



Inevitable!





← **Unlikely** →

antitrust and labor law interconnection was restricted to the **concentration of market power** within the employees' unions.

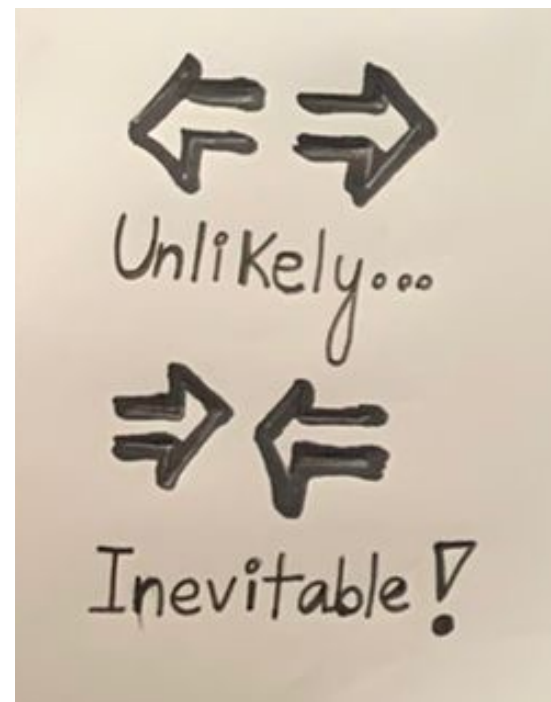
50's and 60's

70's

antitrust and labor law were considered to have **opposite objectives**.

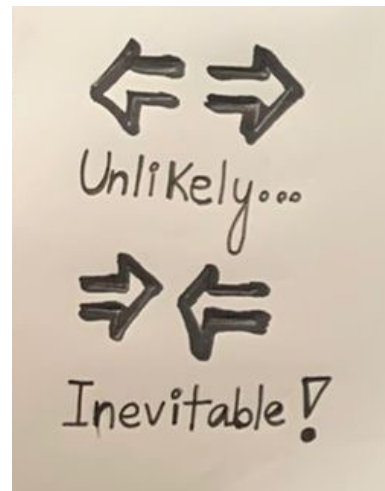
trade openness, and antitrust considered **nonpriority matters** related to employee mobility or collusion between firms to lower wages or contract terms. US precedents

90's



Economists' premise: **labor markets are competitive**.





**Inevitable**

2016 (May): **US White House**. Non-compete Agreements  
2016 (Oct): **US DOJ/FTC** Antitrust Guidance for HR Professionals

**2017**

2017: **KRUEGER, Alan B.; ASHENFELTER, Orley**. Theory and evidence on employer collusion in the franchise sector.  
2017: **AZAR, José A.; MARINESCU, Ioana; STEINBAUM, Marshall I.** Labor Market Concentration.

2018 (Feb): **NAIDU, Suresh; POSNER, Eric A.; WEYL, E. Glen**. Antitrust Remedies for Labor Market Power.  
2018: **JTCF, Japan**, Report of Study Group on Human Resources and Competition Policy.  
2018: **Hong Kong, Competition Commission Advisory Bulletin** - Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment.

**2018**

2019: **MARINESCU, Ioana; POSNER, Eric**. Why Has Antitrust Law Failed Workers?  
2019: **SHAPIRO, Carl**. Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets. 2019-2020: **OECD Roundtables** - Competition Issues on Labour Markets.

**2019**

2020: **POSNER, Eric; VOLPIN, Cristina**. Labor monopsony and European competition law.  
2020: **DÉCHAMPS, Pascale; DESCAMPS, Ambroise; ARDUINI, Francesca; BAYE, Célia; DAMSTRA, Lola**. Labour markets: a blind spot for competition authorities?

**2020**

**2021**

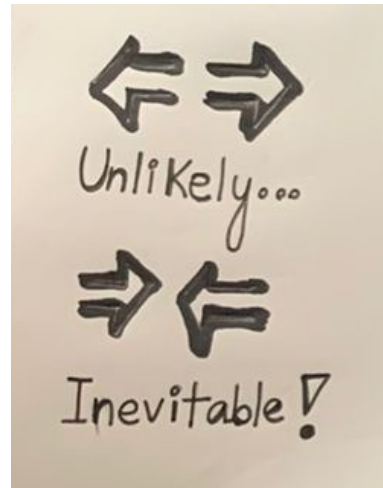
2021 **US Biden's Executive Order**: focus on labor markets  
2021: **Portugal** - Report and Best Practices Guide

???

**2022 and on...**



← **Unlikely** →

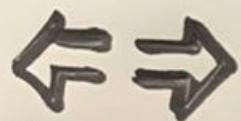


→ **Inevitable** ←





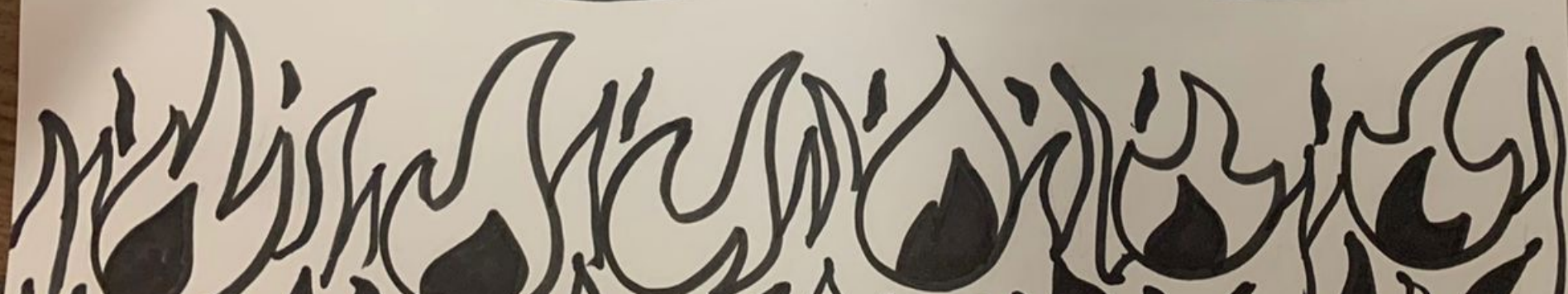
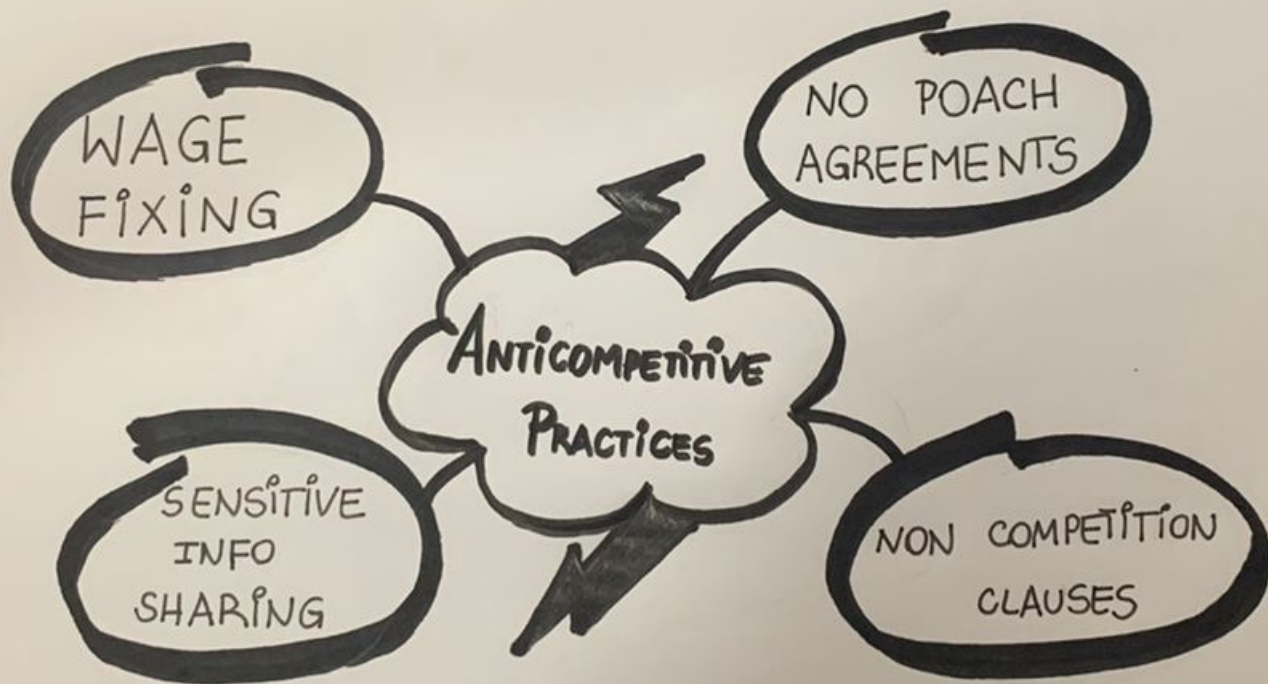
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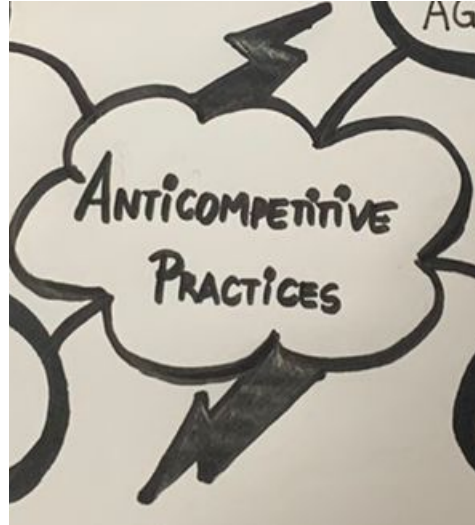


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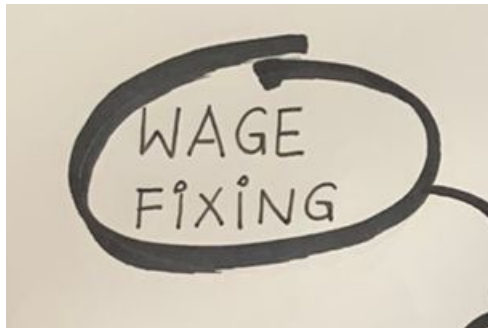


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# Wage Fixing Cartels

Agreements between employers about **employee's wages ranges**

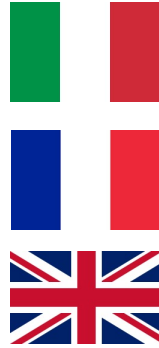


USA

*U.S. v. Debes Corp (1992);  
U.S. v. Utah Society Healthcare (1994);  
U.S. v. Council of Fashion Designers of America (1995);  
Arizona Hospital and Healthcare Association (2007)*

agreement among 15  
hospitals related to job  
terms for  
anesthesiologists and  
assistants (2010)

Netherlands



UK, France  
and Italy

agreement about fashion  
models wages  
(2016-2017)

recommendation for the  
Soccer Federation not to  
impose a limit to the  
wages of the female  
league (2020)

Portugal

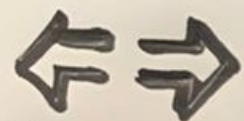


México

conviction of 17 teams and the Soccer  
Federation for imposing maximum  
wages for the female players, which  
reinforced the wage disparity  
between the male and the female  
leagues (2021)



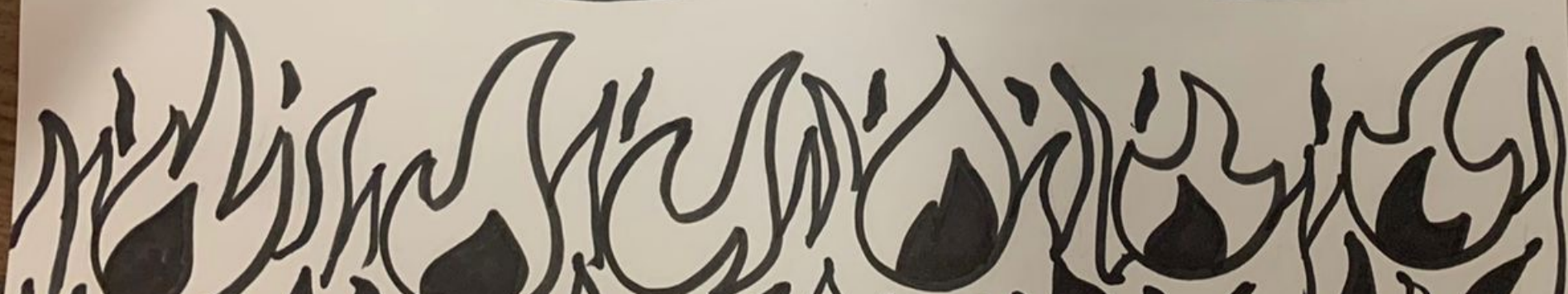
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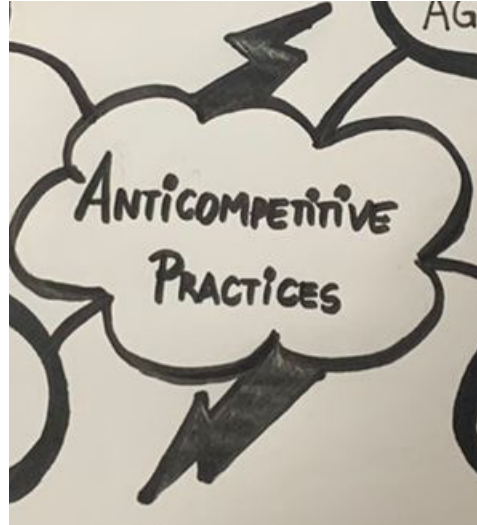
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# No Poach Agreements

Agreements between employers for **not approaching employees from the other employer**



**Implementation process:** 1) no job offers; 2) monitoring and information exchange about job offers; 3) no presentation of counter job offers; 4) denying selection and recruitment of a competitor employee

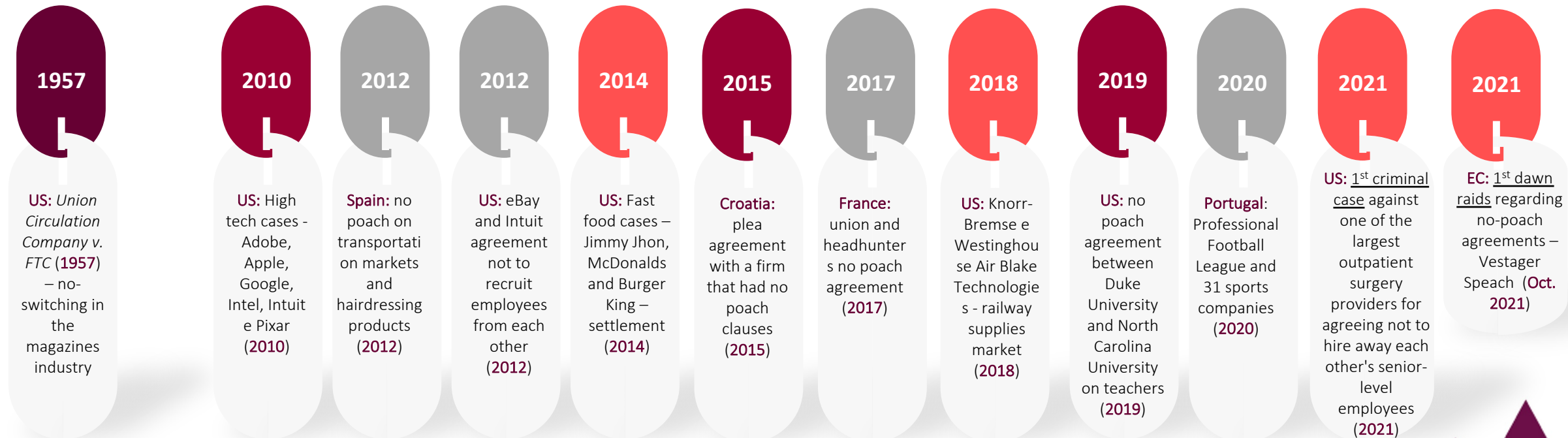
**Exceptions:** franchising, if the terms are considered reasonable



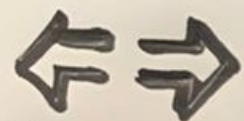


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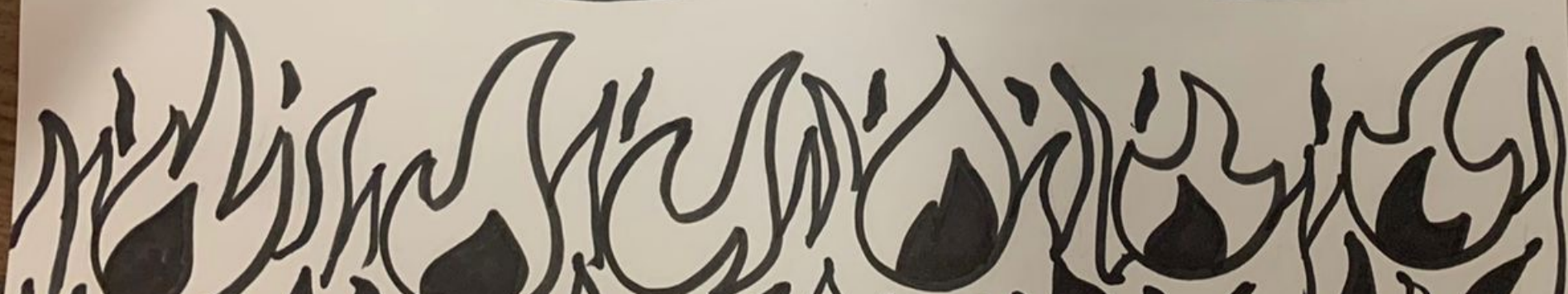
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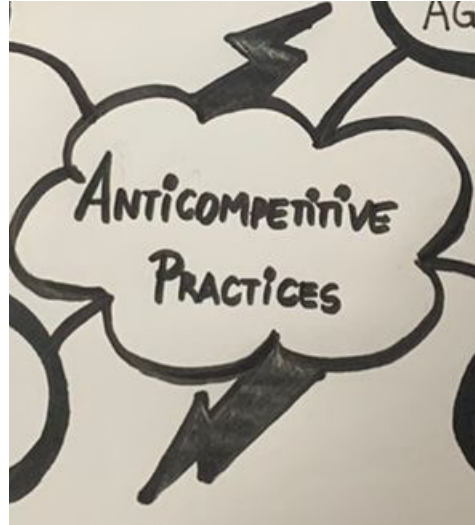
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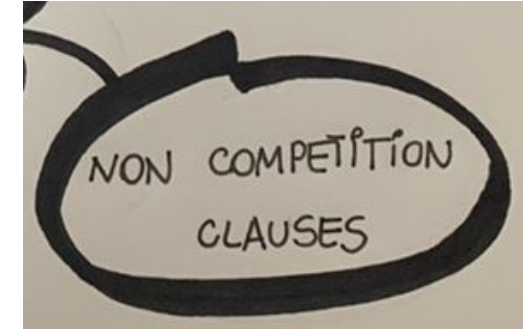




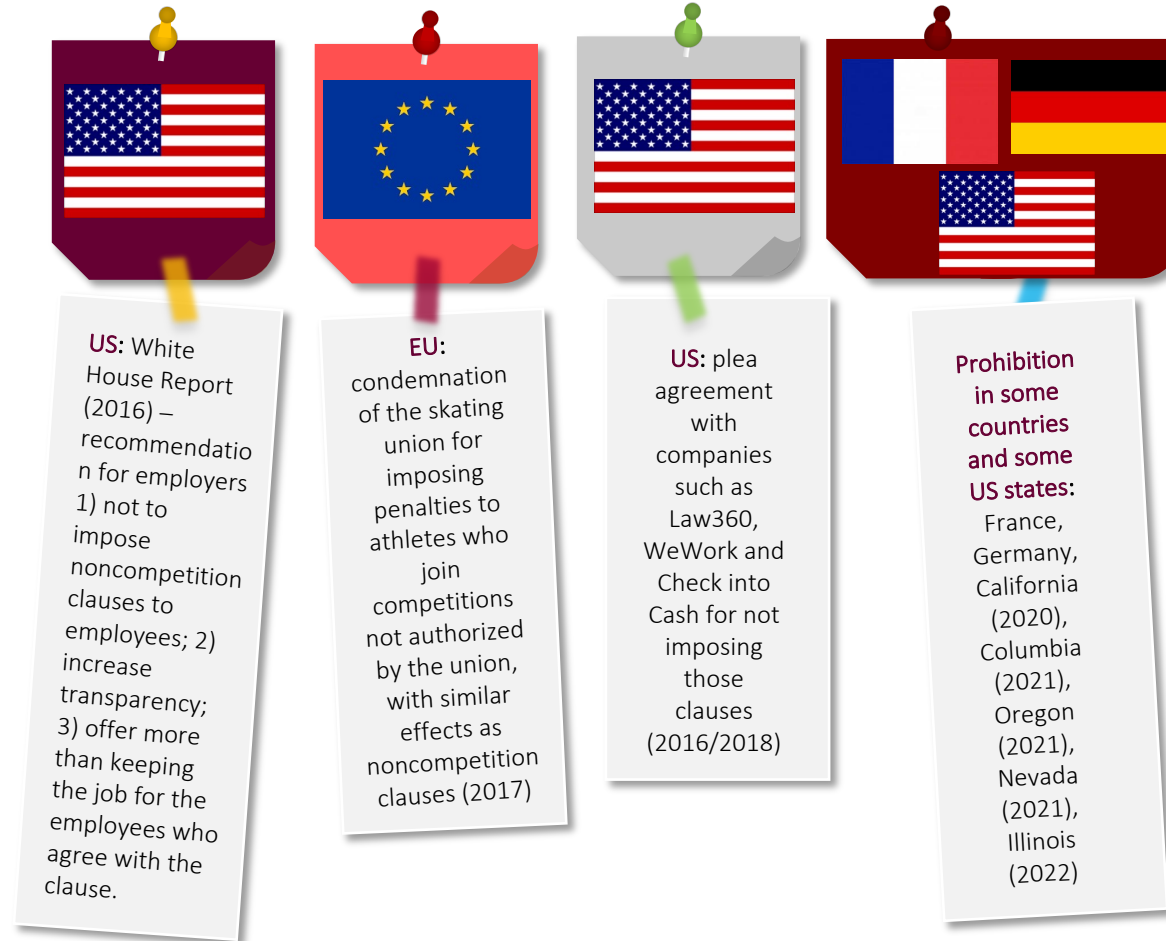


# Noncompetition clauses

Contractual clauses to **restraint the employee's mobility** in the labor market

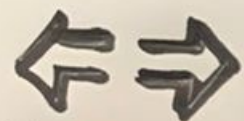


**Historically:**  
clauses may be considered reasonable considering its scope and duration





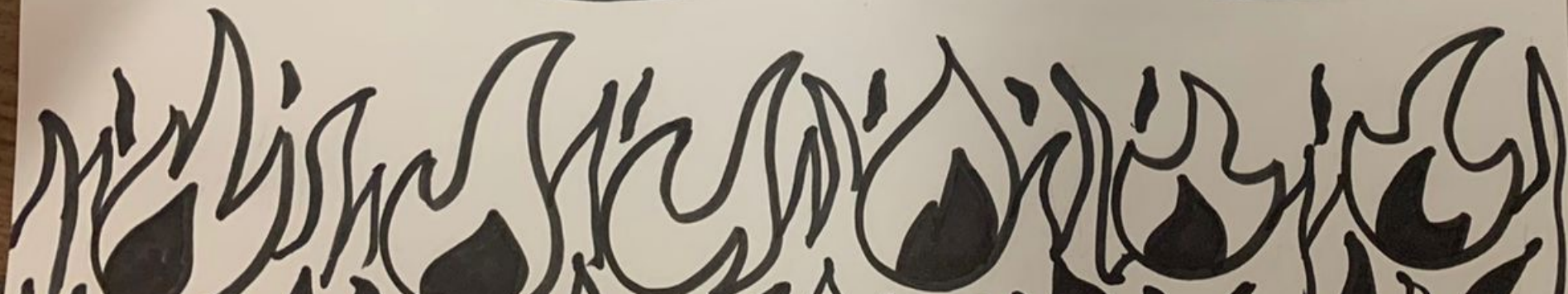
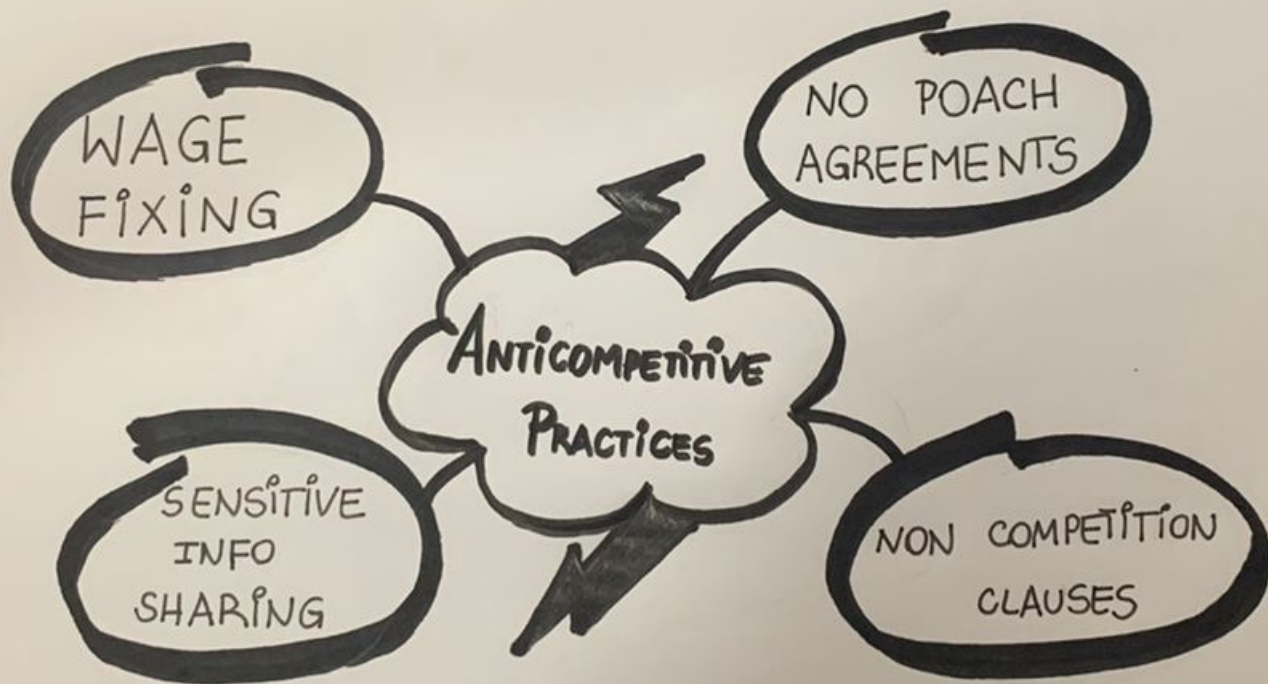
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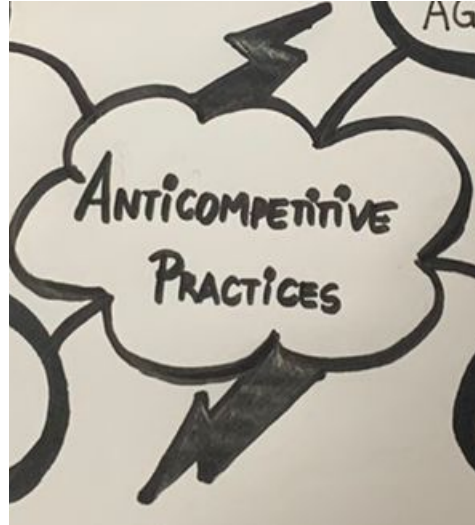


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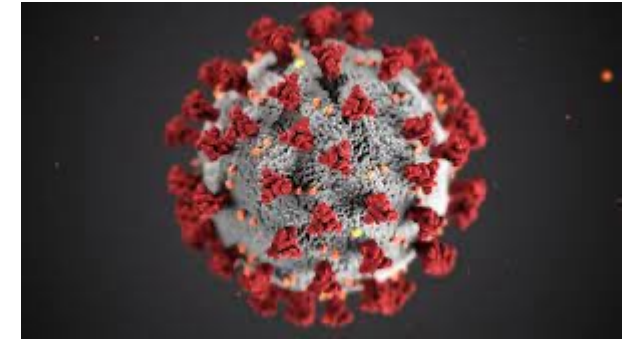




## Sensitive Information Sharing

Information sharing about **labor terms and conditions**

Communication on  
information sharing during the  
pandemic COVID-19 (2020)  
**DOJ/FTC, Brazil, EU**

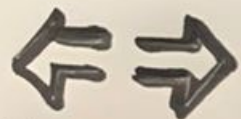


Parameters for information sharing as **an autonomous conduct**. Ex. Healthcare Guidelines DOJ – 1) third party 2) aggregated and anonymized information 3) number of firms in the market: at least 5, none with more than 25% market share; 4) old information: more than 3 months





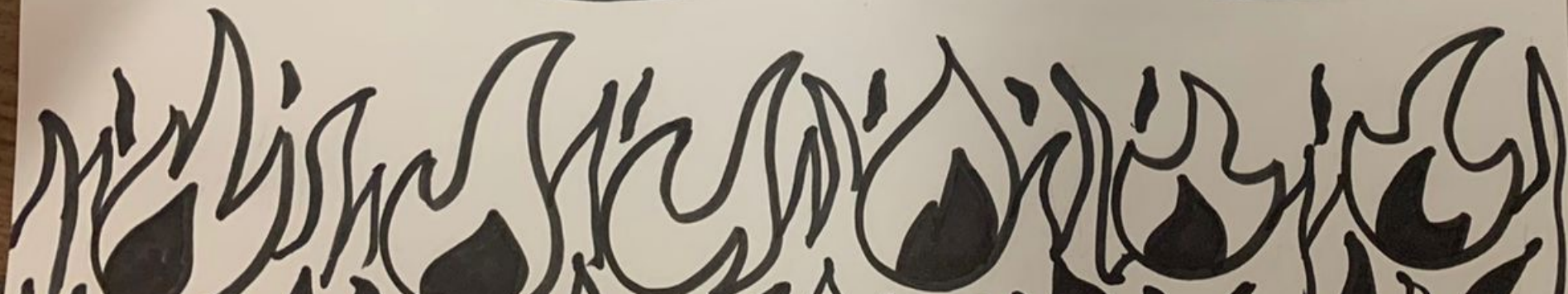
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# Hot topics for Brazil



**Brazil: 1st investigation directly related to HR:** information sharing and wage fixing\* (2020) on the health market in Sao Paulo. Investigation initiated by a leniency agreement.

**Legal framework:** art. 36, §3º, I and/or II of Law 12.529/2011 (wage fixing, no poach and information sharing) and art. 36, §3º, III, IV and/or V of Law 12.529/2011 (noncompetition clauses)

Importance of **Guidelines** on HR Practices (even though not binding)

Nuances for **benchmarking**?





# Hot topics for Brazil



In case of negotiation a Cease-and-Desist Agreement (**TCC**), would it be appropriate to require the implementation of a specific antitrust **compliance program** for labor issues?

In case of conviction of the companies and individuals involved, which would be the **most appropriate penalties**? Fines? Nonpecuniary penalties (art. 38 of Law 12.529/2011)?

Lack of precedents/guidelines may be argued as a **mitigating penalty factor**? (art. 45, II, Law 12.529/2011)

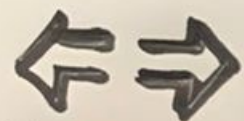
**Criminal cases** in Brazil? Federal Prosecution Office or Labor Prosecution Office?

**Civil responsibility** in labor market cases?





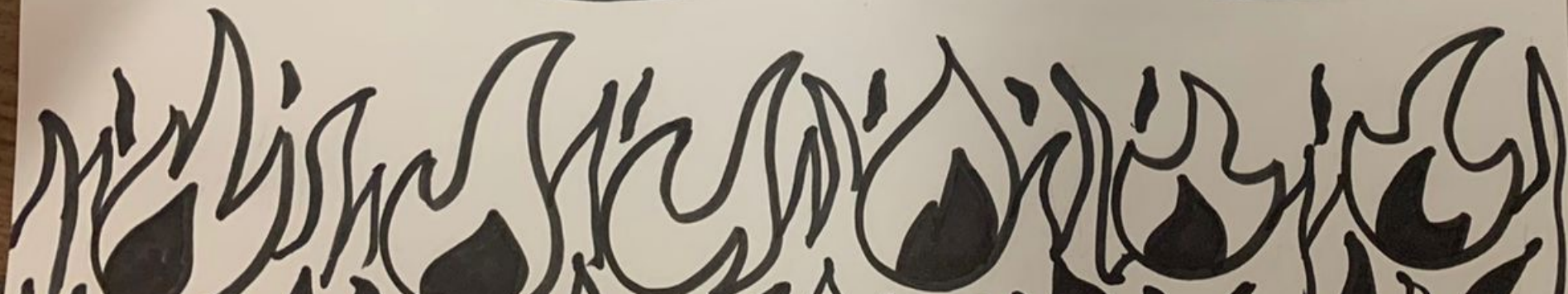
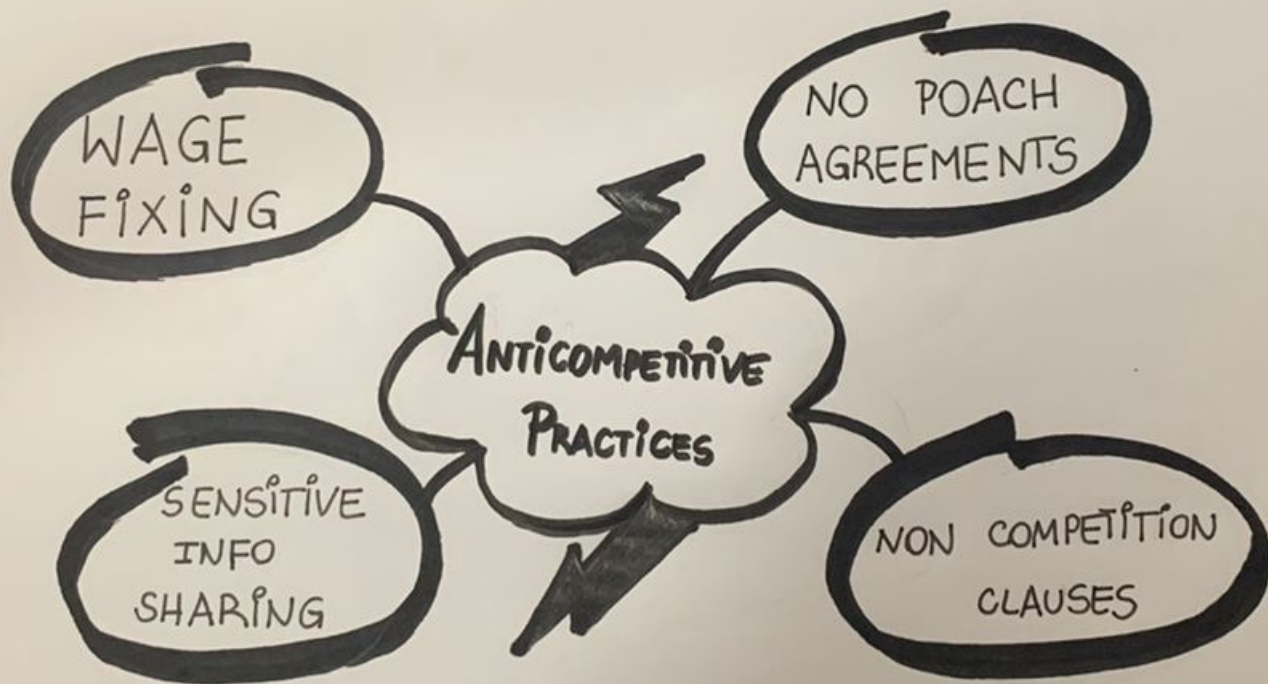
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**LANÇAMENTO**

**FORUM**  
CONHECIMENTO JURÍDICO

**MANUAL DE ACORDOS DE  
LENIÊNCIA NO BRASIL – 2ª ED**

*Amanda Athayde*

**DEFESA COMERCIAL  
E DIREITO SOCIETÁRIO**

*Amanda Athayde, Júlia Marssola,  
Maria Augusta Viegas, Victor Leite*



Apoio

  
**leitura**

*Pátio  
Galeria de arte*

**01/12/2021 | 18H ÀS 21H30**

Local: Pátio Galeria de Arte

Pátio Brasil Shopping – 3º Piso – Loja 401 B

Endereço: SCS Q.6 – Asa Sul – Brasília/DF





ATHAYDE, Amanda; DOMINGUES, Juliana. MENDONÇA, Nayara. **O improvável encontro do direito trabalhista com o direito antitruste**, Revista do Ibrac, 2018. Vencedor do 3o lugar no Prêmio Ibrac-TIM.

ATHAYDE, Amanda; DOMINGUES, Juliana. MENDONÇA, Nayara. **Da improvável à incontornável interface entre concorrência e trabalho**. 2021. *No prelo*.

MARTINO, Fernanda Dalla Valle. **Antitrust Enforcement in Labor Markets: developments from an international comparative perspective**. 2021. *No prelo*. In. ATHAYDE, Amanda; CINTRA DE MELO, Lílian (Orgs). Comércio Internacional e Concorrência: Desafios e Perspectivas Atuais - Volume IV. Brasília: Faculdade de Direito – UnB, 2022. *No prelo*.

MARTINS, Fernanda Lopes. **Acordos de não contratação e trocas de informações sensíveis sobre termos e condições de trabalho no Direito Antitruste brasileiro: uma análise a partir da abordagem estadunidense**. 2021. Dissertação de Mestrado, USP Ribeirão Preto.





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