ORDER, ECONOMICS AND REGULATORY PROCESS

ORDEN, ECONOMÍA Y PROCESO REGULATORIO

ORDEM, ECONOMIA E PROCESSO REGULATÓRIO

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Recibido: 28/I/2025
Aceptado: 18/V/2025

Abstract

This article discusses free enterprise and its status as a fundamental right in the Brazilian legal system, as well as the different market regulation mechanisms and their consequences (economic freedom). The Economic Freedom Law (Law 13.874/2019 – LLE) represents the first recent attempt to promote free enterprise through a declaration of fundamental economic rights. It emphasizes that economic freedoms guarantee innovation, which in turn is related to economic development.

Keywords: Economic freedom; Free enterprise; Fundamental economic rights; Economic freedom; Law; Economics

Resumen

Este artículo discute la libre empresa y su carácter de derecho fundamental en el ordenamiento jurídico brasileño, así como los diferentes mecanismos de regulación del mercado y sus consecuencias (libertad económica). La Ley de Libertad Económica (Ley 13.874/2019 – LLE) representa el primer intento reciente de promover la libre empresa a través de una declaración de derechos económicos fundamentales. Se insiste en que las libertades económicas garantizan la innovación, la cual a su vez está relacionada con el desarrollo económico.

Palabras clave: Libertad económica; Libre empresa; Derechos económicos fundamentales; Derecho; Economía

Resumo

Este artigo discute a livre iniciativa e seu status como direito fundamental no ordenamento jurídico brasileiro, bem como os diferentes mecanismos de regulação do mercado e suas consequências (liberdade econômica). A Lei da Liberdade Econômica (Lei 13.874/2019 – LLE) representa a primeira tentativa recente de promover a livre iniciativa por meio de uma declaração de direitos econômicos fundamentais. Ela enfatiza que as liberdades econômicas garantem a inovação, que por sua vez está relacionada ao desenvolvimento econômico.

Palavras–chave: Liberdade econômica; Livre iniciativa; Direitos econômicos fundamentais; Liberdade econômica; Direito; Economia

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Suggested citation format: Timm, Luciano Benetti; França, María Carolina França y Patrícia Medeiros. 2025. "Order, Economics and Regulatory Process". Revista de Estudios Jurídicos Cálamo, núm. 23: 112-123. DOI: https://doi.org/10.61243/calamo.23.464

INTRODUCTION

Among other things, the LLE establishes limits to state regulation through the adoption of Regulatory Impact Analysis (RIA) and the control of regulatory abuse[1] to prevent government failures (Baldwin et al 2011). State interference in the economy –Economic Regulation– is justified when it allows market agents to fully enjoy the principle of economic freedom when it corrects market failures (Acemoglu and Robinson 2012, Nóbrega 2005). However, given that economic regulation is capable of generating various incentives and disincentives for public and private agents to capture and *rent seek* (among other government failures), its impacts must be assessed and its abuses curbed so that any limitations on market action do not, in reality, increase transaction costs, economic concentration, create barriers to entry and, therefore, harm economic freedom (free enterprise).[2] All these points will be addressed in this article.

ECONOMIC FREEDOM AND FREE ENTERPRISE

Initially, economic freedom (free enterprise) is a fundamental right because it is umbilically linked to the right to freedom in a broad sense (and more specifically to economic freedoms). It represents the preponderant value and principle in the constitutional order because it represents the essence of a market economy, the effectiveness of which it guarantees. For example: if political freedom guarantees the right to vote and to be voted for, economic freedom guarantees entry to and exit from the public space of the market.

Economic freedom (free enterprise) guarantees economic agents, *a priori*, freedom to act in the market, and to buy and sell goods and services without interference from the government. But what does the market mean? And what is its connection with the constitutionally guaranteed economic freedom?

In Coase's words, the market "is the institution that exists to facilitate the exchange of goods and services, that is, it exists to reduce the costs of carrying out exchange operations" (1988, 7). By serving as a public space for exchange, it guarantees a benchmark of behavior for economic agents (those who participate in the game of supply and demand), the result of which is a situation of equilibrium (positive or negative). If the market didn't exist, how could we explain the fact that, following a super soybean harvest (and therefore a large supply on the market), its price tends to fall?

We can therefore see that the market is not separate from society; on the contrary, it is an integral part of it. In this sense, like any social fact, it can be regulated by legal rules (with greater or lesser social and economic effectiveness). Thus, it cannot be said that the market is something artificially guaranteed by the legal system, as some would have it, who attack the spontaneous nature of market forces. What can be said is that the more developed the institutions, the more favorable the environment is for their natural development (North 1990, Williamsom 2005).

It is therefore essential to understand that economic freedom is not opposed to the concept of social order. On the contrary, the concepts complement each other, since there is a market economy in full force. The market and society are practical phenomena that are always interrelated. Society perishes without the market, and the market is doomed to end without society.

In line with the concept and realization of the market in the economic freedom (free enterprise), means the

1 In fact, from a historical point of view, the first initiatives to promote economic freedom related to the constitution of guarantees and the opening of companies without state authorization can be attributed to the first republican government, during the administration of Ruy Barbosa (Caldeira 2017).
2 It is a law that has had repercussions on other laws dealing with the economic freedom, namely those that make up the so–called "regulatory tripod" of the digital economy: consumer, competition, and data. This topic should be addressed in an upcoming article.

freedom to act and participate in the market: producing, selling, or acquiring goods and services or even selling your workforce. In other words, it is a principle that establishes, *a priori*, economic freedom, which precedes its regulation by the state. Economic freedom is therefore inherent in a capitalist system. This is because if the economy is planned and if the state owns the means of production, setting prices in the market, there is no room for this principle. This is why it represents the essence of capitalism and is the condition for the material realization of other principles set out in Article 170 of the Federal Constitution.

Because it is an extension of economic freedom, free enterprise is a fundamental right. In fact, in a market economy, there can be no human dignity without economic freedom. If in a democratic regime, freedom is manifested in the citizen's participation through voting, in the capitalist system it is their access to the market that will guarantee them dignity and other fundamental rights, such as work and their freedom of choice. It is shown that economic freedom is an expression of individual freedom, guaranteeing the effective functioning of the market, where initiatives for the economic and financial development of the individual and, consequently, of society converge. It is with this fundamental right in mind that the Constitution included economic freedom (economic freedom (free enterprise)) in the text of the Federal Constitution. The fundamental right to economic freedom (free enterprise) is so important in the Brazilian legal system that it was written into three parts of the 1988 Constitution. See the content of articles 1°, item IV and 5, item XIII, together with the sole paragraph of art. 170, *in verbs*:

> Art.1–The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities and the Federal District, is a Democratic State governed by the rule of law and has as its foundations: [...]
> IV–The social values of work and economic freedom (free enterprise) [...]
> Art. 5.
> XIII–The exercise of any work, trade, or profession is free, subject to the professional qualifications established by law. [...]
> Art. 170. The legal economic order, based on the valorization of human work and economic freedom (free enterprise,) aims to ensure a dignified existence for all, by the dictates of social justice, subject to the following principles: [...]
> Sole paragraph–Everyone is guaranteed the free exercise of any economic activity, regardless of authorization from public bodies, except in the cases provided for by law.

It can therefore be seen that economic freedom (free enterprise), described in this way, is a fundamental right against the state, a substantive right to abstain vis-à-vis the government. Like any right or even principle, economic freedom (free enterprise) is not an absolute principle and finds limitations in other rights and principles; for example, the public interest in strategic areas such as public health, the environment, etc. In Brazil, there is no tradition of praising this fundamental right among jurists, much less in infra–constitutional regulations. For all these reasons, the rightness of the LLE should be recognized, and it should be warmly welcomed by the legal and business community.

Of course, it won't solve all the problems of our market, but it signals the right direction, reversing decades of (un)eloquent silence on economic regulation and generating relevant impacts by recognizing government failures and not just market failures, as will be seen below.

ECONOMIC REGULATION IN THE LLE: SELF–REGULATION, CORRELATION AND STATE REGULATION

Economic regulation, as an issue intrinsically linked to the state's position of interference –or non–interference– in the economy, is one of the main factors encouraging or discouraging business. The LLE governs economic regulation in Brazil, together with the Law on Agencies, establishing parameters and limits for

this state activity. Let's see, in regulatory terms, what lies behind the LLE's normativity as a prerequisite for understanding it.

In theory, various regulatory techniques can be adopted by the legislator, including the more recent ones of self–regulation and co–regulation, as well as the well–known state regulation; all of which are allowed and regulated in the LLE. Among other legal provisions, article 2, item III of the Economic Freedom Law states that one of its guiding principles is "subsidiary and exceptional state intervention in the exercise of economic activities", as discussed below.

Regulation

Economic regulation is a form of external regulation of companies' economic activity, characterizing an intervention in the relationships established by contracts in market environments. Traditionally, regulation has been a typical state activity, with regulatory agencies being the most obvious example. According to Márcio Iorio Aranha:

> Regulation, in short, is the presence of rules and administrative action (*law and government*) of a cyclical nature supported by the assumption of daily reconfiguration of the rules of conduct and the relevant administrative acts to constantly redirect the behavior of the activities subject to scrutiny. (2019, 243)

The theory of regulation based on the "public interest" generally understands that markets fail and that governments can correct these failures through regulation (Shleifer 2005). Thus, regulation takes place in the face of market failures, with abuse of market power and informational asymmetry being the most common situations discussed on the subject.

In the regulatory sphere, it is essential to start from the premise that the state should regulate market dysfunction. For example: regulation will be the conductor in markets where competitors –or the lack of them– exceed their economic freedoms and harm consumers' freedom of choice. This is because, so that the orchestra can follow the appropriate sonnet and the listeners can enjoy the melody, the conductor adapts the instruments so that, together, they complement each other. Compared to the orchestra, regulation is the possibility for the state to provide guidelines so that market *players* in that sector can fully enjoy the principle of economic freedom. However, how can an instrument of standardization and, essentially, limitation foster competition? This is the great dilemma of regulation.

In essence, regulation is identified as a limitation to the exercise of competition in the aspect that Friedman addressed (2015). However, to encourage new *players* and mitigate the risks of monopolization or cartelization of markets, regulation is identified as the guarantor of the right to economic freedom only when the market requires such a state position due to the presence of flaws that do not allow economic agents to compete freely and increase consumer welfare.

If, on the one hand, regulation indicates limitations, on the other, it should provide incentives for competition. In other words, regulation should be structured and designed according to the economic and product peculiarities of each market. This means that to properly approach regulatory standards, the economic aspects must be the main elements to be analyzed. The regulatory challenge is enormous, and, for this reason, new models have been brought forward and listed above, reflecting the possible regulatory options.

After the 1990s and the privatization of state–owned companies, classic regulation began to develop in Brazil. The main sectors in which it is present are those involved in infrastructure, such as intercity and interstate transportation, basic sanitation, and electricity, among others. In addition, the challenge of regulation goes beyond the market structure barrier and moves on to the need to monitor the new reality with the direct interference of new technologies and digital platforms.

State regulation also has flaws, known as government flaws, the most well–known of which is capture (Stigler 1971). This recognition underlies LLE. Faced with the inefficiency of state regulation, new forms of regulation have been created, among which co–regulation or regulated (or supervised) regulation and self–regulation

are the best–known types, as will be seen below. In these cases:

> the private individual is an actor in the regulatory environment, sharing responsibility with the state for achieving the public interest. The citizen of the regulatory state is an essential cog in the wheel and a necessary driving force for the implementation of the public interest, through co–participation in the provision of socially relevant activities. (Aranha 2019, 31)

Self–regulation

Self–regulation is the regulation carried out by a group of actors or economic agents to control the behavior of their members in market environments. These actors can be, for example, professional bodies, trade associations, public interest groups, business partners, consumers, or even corporations.

To delve deeper into the subject, we draw on the fundamental teachings of Robert Bladwin, Martin Cave, and Martin Lodge, in *Understanding Regulation: Theory, Strategy, and Practice*, highlighting here some characteristics of self–regulation (Baldwin et al 2011). There are three important variables for self–regulation: (i) whether it is strictly private or mixed with government interests (for example, in response to a public policy that delegates tasks to private entities), (ii) the role played by self–regulators, and (iii) the binding force of self–regulatory rules.

In terms of its nature, self–regulation can be purely private when, for example, an association aims to achieve the private objectives of its members (Baldwin et al 2011). In other words, the authors are the very recipients of the regulation. In addition, self–regulation can be the result of government imposition, when, for example, the government establishes rules for the self–regulation process, oversight of government agencies, procedures for public *enforcement of* self–regulation rules, or participation or *accountability* mechanisms (Ibid.). In this case, the absence of self–regulation can lead to repressive government action or even state regulation in its original form.

In Brazil, some regulatory agencies are using this procedure, with experiments already being carried out by BACEN[3]by Anatel[4] and by Senacon itself.[5] The role played by self–regulators is to draw up self–regulation rules, apply them, and monitor the whole process. In Brazil, the oldest and best–known example of self–regulation is CONAR.[6] When it comes to self–regulation created by the government, a public agency can apply and monitor it–although some prefer to call this process regulated self–regulation (Baldwin et al 2011).

Finally, concerning the binding force of self–regulatory rules, it should be noted that self–regulation can either operate in an informal, non–binding, and voluntary manner or involve binding rules that can be applied by the judiciary (Ibid.). When they have been incorporated into legislation (for example, article 113 of the Civil Code recognizes commercial uses and customs and the judiciary often applies the rules of the International Chamber of Commerce's INCOTERMS as international trade rules, even though strictly speaking they are *soft law*).

The expertise of self–regulatory entities and the efficiency –in terms of cost–benefit– of this form of regulation are the main advantages of self–regulation, since these entities "usually have more relevant expertise and

3 Self–regulation of the Portability of Credit Operations carried out by Natural Persons "allows consumers the possibility of transferring their credit operation to another institution that offers more attractive conditions, reducing the cost of their debt". https://portal.febraban.org.br/pagina/3282/52/pt–br/autorregulacao–portabilidade–credito

4 The Telecommunications Self–Regulation System (START) is an "initiative of the main providers with the aim of presenting codes of conduct to improve consumer relations". https://www.gov.br/anatel/pt–br/assuntos/noticias/anatel–ouvira–sociedade–na–revisao–do–regulamento–de–direitos–do–consumidor–de–telecomunicacoes

5 Sistema de Autorregulação de Operações de Empréstimo Pessoal e Cartão de Crédito com Pagamento Mediante Consignação (Consigned Credit Self–Regulation System) is an initiative that is voluntarily adhered to by banks and "is accompanied by commitments aimed at improving the supply of the product". https://portal.febraban.org.br/noticia/3395/pt–br/

6 The National Advertising Self–Regulation Council (CONAR) is a non–governmental organization, made up of advertisers and other professionals. Created because of threats to prior censorship of advertising in the 1970s, it opted for self–regulation, summarized in the Brazilian Advertising Self–Regulation Code, "which would have the function of watching over freedom of commercial expression and defending the interests of the parties involved in the advertising market". http://www.conar.org.br/

technical knowledge than the independent regulator" (Ibid.) and know what will be considered reasonable in terms of regulatory obligations by the regulated parties. The specific and intrinsic knowledge of the market sector allows self–regulators to make acceptable demands of the economic agents affected, which produces higher levels of voluntary *compliance* compared to regulatory rules external to the entity. According to the Organization for Economic Co–operation and Development (OECD), in self–regulation, companies and/or groups of professionals in the same sector voluntarily choose good market practices, based on rules and principles that are experienced and practiced in a unified and integrated manner.[7]

Self–regulation also has the potential to produce efficient controls. Self–regulators have less informal asymmetry in relation to the market and, as a result, have lower costs in acquiring the information needed to formulate and establish parameters, given the constant and easily accessible contact with their members. Therefore, they have low monitoring and *enforcement* costs and can generate changes without causing major negative impacts (Ibid.).

On the other hand, the disadvantages of self–regulation refer to: (i) *mandates*, (ii) *accountability*, and (iii) *fairness of procedure*. About the first disadvantage, it should be noted that, in addition to the difficulties of determining the content of self–regulation and its objectives, they are generally established by institutions without democratic legitimacy to do so, for example, members of private associations. This becomes even more problematic when self–regulation affects parties outside the entity, or when the public interest supposedly protected by self–regulation is questioned.

The second disadvantage, *accountability*, refers to the lack of consensus on the responsibility of self–regulatory bodies before the judiciary, for example. The *fairness of procedure* disadvantage, in turn, refers to the unfairness of those who are not members of the self–regulatory body being affected by regulatory decisions to which they had little or no access (Ibid).

There are already bills in Brazil on self–regulation, trying to address these alleged disadvantages.[8] But, despite the meritorious purpose, it is too early for legislative intervention in this process that is just beginning in Brazil. Given the advantages and disadvantages presented, they must be weighed up to see if the advantages outweigh the disadvantages, i.e. if expertise and efficiency outweigh the concerns (*mandates, accountability, and fairness of procedures*). However, we imagine that the area of technology and data is particularly conducive to this, given the companies' own greater knowledge of the limits of their operations, what exactly they do, and the recent structuring of the ANPD itself.

Certainly, self–regulation is technically superior to the absence of regulation when there are big players in the market, as in the case of *big techs*. Thus, it can be concluded that self–regulation is an excellent tool and, when combined with traditional regulation, can generate greater competition and, consequently, an increase in consumer welfare, which is a regulatory practice recognized by the LLE and even presupposed by the LLE.

Co–regulation

Another option for regulatory techniques is co–regulation, in which there is a division of duties between the private sector and the public sector. In other words, to avoid traditional, unilateral regulation by the state, companies agree to limit their market practices so that they can jointly define good practices of their own.

But what is the distinction between this perspective and self–regulation? In co–regulation, the state expressly authorizes the creation of its own rules by the productive

7 Organization for Economic Cooperation and Development. 2025. "Industry Self–Regulation: role and use in supporting consumer interests", DSTI/CP (2014)4/FINAL Report. https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2014)4/FINAL&docLanguage=En

8 a) Bill No. 6212 of 2019 amends Law No. 13,709 of August 14, 2018 (General Data Protection Law) to provide for co–regulation. According to the bill authored by Senator Antonio Anastasia, "co–regulation can overcome the problems and shortcomings of pure self–regulation, such as the deficit of democratic legitimacy, the low coercion of negative externalities and, especially, the low coerciveness". https://legis.senado.leg.br/sdleg–getter/documento?dm=8049526&ts=1576151977899&disposition=inline

b) Bill No. 2630 of 2020 (Fake News Law), initiated by Senator Alessandro Vieira, provides, in article 30, for regulated self–regulation.

sector, as well as demanding that good market practices be monitored and demanded by companies, creating informal supervision between the *players* involved or possibly even formal supervision through the regulator. Thus, the state will have to monitor and supervise market movements, acting in times of abuse.[9]

In a recent initiative, for example, the National Consumer Secretariat (SENACON) adopted the Coregulation Guide for the Payroll Credit Market, using this approach.[10] Self–regulation and co–regulation undoubtedly offer advantageous regulatory techniques for the market and, above all, for consumers. This is because they provide greater adaptability, lower administrative and *enforcement* costs, and, above all, encourage mechanisms for resolving conflicts practically and rapidly with the user.

REGULATORY IMPACT ANALYSIS AND ABUSE OF REGULATORY POWER

At the specific level of economic regulation and state intervention in the economy, the LLE sets limits both by adopting Regulatory Impact Analysis (RIA) and by controlling regulatory abuse by FIARC/SEAE of the Ministry of Economy. In doing so, it also establishes some positive duties for the state (including the Public Prosecutor's Office and the Judiciary) to defend economic freedom (free enterprise).

The observation that gave rise to this legislative change in the LLE is that the state can also be a producer of market failures, especially when it acts as a regulator of the economy –when so– called "government failures" are identified. In a consequentialist way, this legislative change aims to establish objective and judicious parameters for the regulator, to the extent that it is obliged to base and legitimize its decisions on pragmatic and empirical studies of the consequences of the regulation it intends to carry out. Another important point of the LLE is that it aims to review the excesses of regulatory stock–i.e. laws, decrees, and other normative acts that provide market rules–that hinder competition and the exercise of economic freedom (free enterprise).

As a result of the LLE, the Ministry of Economy took a major step forward with Normative Instruction No. 97 SEAE, of October 2, 2020, the content of which represents an important milestone for Economic Freedom Law. The IN is responsible for creating the Intensive Front for Regulatory and Competition Assessment (FIARC) program. It does not define what regulatory abuse is, but according to positions expressed by representatives of the ministry, abuse of regulatory power is conceptualized as follows: costs of regulation that exceed the benefits to the market *players* involved in the sector.[11] In the same vein, Mariana Oliveira de Melo Cavalcanti (2020) points out that, despite being an indeterminate legal concept, regulatory abuse is related to acts that distort competition and market freedom, accentuating the risk of agency capture and increasing transaction costs.

Article 1, IN SEAE 97 sets out the competencies of the Competition and Competitiveness Advocacy Secretariat, such as: reviewing laws, regulations, and other normative acts of the federal, state, and municipal administration (item I), monitoring the functioning of markets (item II), proposing measures to improve regulation and the business environment (item III), analyzing the regulatory impact of public policies (item IV), among others. Chapter II et seq. of IN SEAE 97 deals with important concepts taken from the Economic Freedom Law (art. 4), such as regulatory and competitive abuse, market reserves (art. 4, item I),

9 Organization for Economic Cooperation and Development. 2006. "Alternatives to Traditional Regulation". https://www.oecd.org/gov/regulatory–policy/42245468.pdf
10 https://www.eesc.europa.eu/sites/default/files/resources/docs/auto_coregulation_en–2.pdf
11 The event was promoted by the Getúlio Vargas Foundation (FGV), with the participation of Andrey Freitas. https://www.youtube.com/watch?v=BOhjNrjxDQE

anti–competitive statements (art. 4, item II), technical specifications that are not necessary for the intended purpose (art. 4, item III), among others.

Thus, FIARC acts as an entry channel for regulated agents in a wide range of economic sectors to submit requests to SEAE regarding specific regulatory rules that they believe are harmful to competition. These requests then go through a preliminary admissibility analysis, before being opened to a broader and more transparent discussion with interested parties, including through public hearings. In the end, SEAE produces an opinion which, in cases where the analysis concludes that there is a serious negative impact on competition, with non–compliance with legal precepts, will inform the Federal Attorney General's Office (AGU) to assess the pertinence of any measure against the illegality found.

According to a press release from the Camara Dos Diputados,[12] three new complaints of possible regulatory abuses were approved at the last FIARC meeting, held on May 12. The Brazilian Petroleum Institute (IBP) is questioning CMEN Ordinance 279/97 because the establishment of an annual quota for the import of lithium hydroxide unjustifiably restricts imports of this raw material to produce greases, creating barriers to entry for new suppliers and, as a result, creating a market reserve.

Another request that was also approved was from the company Contabilizei Contabilidade LTDA, which denounced the provisions of the Brazilian Accounting Standard (NBC PG 01/2019) related to the use of advertising. Finally, the Association of Port Users of Bahia (Usuport) submitted a request to investigate a possible contravention by Normative Resolution 34/2019 of the National Waterway Transportation Agency (Antaq) to the Economic Freedom Law. In this regard, Usuport argues that the rule in question, by authorising port operators to impose the Bonded Port Facilities – Segregation Fee on their competitors in the bonded storage market for import containers destined for other bonded areas, harms competition and increases transaction costs without providing evidence of corresponding benefits. This is a significant advance in conceptualization and, above all, in the possibility of repressing the abuse of state regulatory power. It is also important to emphasize that repression of regulatory abuse implies fostering competition and economic freedom. As a result, the FIARC program is already showing interesting signs of market acceptance, and although the processes are in their early stages, the program has a positive outlook for serving as a valuable tool against state regulatory abuse.

It should be noted that economic regulation does not represent a merely arbitrary exercise by the state in the service of the political ideology of the rulers (even if legitimately elected), but on the contrary, respects predetermined political–legal constitutional objectives, illuminating rational notions of economics –known as the economics of regulation– and the limits imposed by the law, especially the Economic Freedom Act. From this perspective, respect for the constitutional dictates promoting economic freedom (free enterprise) is consolidated in market practice as a fundamental right.

THE IMPACT OF THE EPL ON OTHER FIELDS OF LAW: THE CASE OF THE "REGULATORY TRIPOD" OF COMPETITION, CONSUMERS, AND DATA

Because it is a topic that impacts market relations, the Economic Freedom Act has its effects felt mainly in the areas of competition, consumer relations, and, with technological advances, data, and can be applied with other legal subsystems such as consumer, competition, and data law.[13]

12 https://www.camara.leg.br/noticias/638296–abuso–do–poder–regulatorio–podera–ser–transformado–em–infracao–economica/
13 We will address the effects of the LLE on the "regulatory tripod" of the data–driven economy in a further publication.

Competition

As discussed above, the LLE seeks to promote a healthy market environment for economic agents, based on free initiative. This objective includes, among other things, the preservation of competition, without the state abusing its prerogatives to, for example, benefit a certain economic group to the detriment of others. By preventing the abuse of the state's regulatory power, the Economic Freedom Act aims to guarantee competition in the market and, consequently, the well–being of consumers. In this way, in parallel to the actions of the Administrative Council for Economic Defense (Cade), the Competition and Competitiveness Advocacy Secretariat can speak out about normative acts capable of harming competition, reducing so–called "legal or regulatory" barriers to entry (Barriers 2005).

About CADE's actions themselves and their impact on the economy, we highlight the analysis of the actual or potential effects of mergers and unilateral conduct. In these cases, CADE weighs the negative effects on competition and the positive effects –efficiencies– that possible mergers and unilateral conduct can have on certain markets.

The analysis of digital markets, however, has presented some challenges, given their dynamics and the fact that the scenario can change rapidly. In cases involving digital markets, it is possible for the antitrust authority to act in a timely, which can have significant effects on the organic growth of *players* in the market, reinforcing the dominant position of an existing *player* and raising "concentration levels and barriers to entry".[14] In this sense, the debate on CADE's intervention in digital markets essentially refers to the LLE and the discussion of the effects of this intervention in terms of false positives and false negatives in evidentiary terms that can contribute to or harm free competition. In other words, the LLE brings an additional layer of protection to economic freedom (free enterprise) and must be observed by CADE itself.

In addition, as a point of attention at the intersection between LLE and competition, it is clear that CADE's administrative decisions in which the conversion of a summary procedure to an ordinary procedure in a Merger Administrative Proceeding (CA) occurs may indicate intervention–albeit indirect–in the market, harming the free initiative of an economic agent, which is normally done by CADE without any consideration of immediate effects and/or consequences. This is because until any CA is approved, economic agents cannot carry out the deal, under the penalty of "gun jumping". Despite these specific challenges, the essence of the LLE in terms of analyzing the impacts of CADE's intervention in the economy is already part of the antitrust authority's routine when it evaluates the efficiencies of a CA when it applies the rule of reason principle in conduct sanctioning proceedings, among other practices.

Consumer

If, in competition law, the logic behind the limits to state regulation contained in the LLE is present in CADE's actions, in consumer law the road is more arduous and the learning curve greater, as there is still a rather paternalistic and interventionist view among most consumerists and the Brazilian consumer himself.

Understanding the increase in the variety of products, the dissemination of market information, and the need to make a profit, companies provide better conditions for consumption, guaranteeing benefits to consumers. In practical terms, consumer benefits mean better prices and better products on the market. But how does the LLE directly help with this? Article 3 lists the basic pillars of LLE, including in item III, the free definition, in unregulated markets, of the prices of products and services, based on changes in supply and demand. In short: price control practiced by state intervention is prohibited by the LLE. Structurally, prices are made up of the sum of (i) raw material and labor costs; (ii) costs linked to logistics; (iii) the market price; and, in the case of regulated markets, (iv) the costs of state regulation.

In the case of price controls, the state adopts minimum and maximum parameters for certain products and services to be sold and circulated on the market. In this way, the price construction structure adopted by

14 Technical Note No. 4/2021/CGAA1/SG1/SG/CADE (Administrative Inquiry No. 08700.004588/2020–47).

the equation between variable costs according to the product is ignored and replaced by the intervention of values specific to the private agent. Thus, profits –the goal of business activity– are drastically minimized in favor of state definitions of the market variables of supply and demand. And how does this harm the consumer?

When prices are imposed, the structural axis of the market, made up of supply and demand, is altered, generating a shortage of products and/or services. The LLE, therefore, chooses the voluntary purchasing decisions of consumers, based on market demand, as the main determinant of the cost and price structure of the products and services offered on the market. The more consumer demand, the more suppliers and sellers generate innovative and quality offers.

Price controls invert the logic of the market, demanding production at prices imposed on the market agent, imposing maximum values which, in many cases, do not generate any profit margin. The consequence of this is a shortage of products and services, since consumption will increase and demand will not be sufficient to meet consumer needs. Market prices stimulate consumers and sellers based on supply and demand conditions. In this way, price control is an instrument that is ruled out with the application of LLE to the consumer market.

On the other hand, article 5 of the LLE lists the need for a Regulatory Impact Analysis (RIA) for any state regulations. This means that to impose regulatory costs–one of the factors indicated as premises for structuring the prices of products and services–federal public administration bodies and entities, including the National Consumer Secretariat (SENACON), must carry out an impact analysis, which will contain information and data on the possible effects of the normative act to verify the reasonableness of its economic impact. It is arguable that other consumer protection bodies also need this RIA when they intervene in the market. For consumers, the RIA makes it possible to be transparent about the prices adopted by the market, avoiding costly and unnecessary over–regulation that leads to price increases without adequate technical–regulatory justification.

Data Processing and Free Initiative

Today, the data–driven economy must be understood as both an economic and legal phenomenon. This is because new technologies are increasingly interfering with and participating in our daily lives. This new face of capitalism, which is capitalism of "ideas" and no longer "concrete" (Cooter 1985), ends up distributing, perhaps, fewer direct jobs than a traditional factory. However, it seems to be an inexorable process, so much so that the USA, China, India and perhaps Brazil seems to be heading in this direction.

And what does it take for a country to generate innovation if it doesn't want to be stuck in outdated capitalism? According to a seminal *paper* by Cooter (1985), innovation requires a combination of funding and ideas (*seed money, Angel investors,* etc.). In the US model, those who have ideas are private agents looking for a financial return. The state must do less, and by doing less, it does more. With this metaphor, Cooter refers to the theory that when government agents are unable to predict the future, they should put aside industrial policy and concentrate on what they can do best: education and infrastructure. The situation is different in Asia, where the state takes on the role of directing investment (remembering that Asia is not yet the frontier of technological innovation).

Faced with this reality, Federal Law No. 13,709/2018 –the General Data Protection Law (LGPD)– stands as a regulatory challenge for the Public Administration, enabling dissemination and oversight, and for the private sector, ensuring that its practices comply with legislative requirements. Digital markets and the impact of technology on productive sectors are challenges faced worldwide in terms of the need –or is it the need? – of regulation. The COVID–19 pandemic has accelerated the digitization of services and products, bringing the issue to the forefront of discussion among global leaders.

However, specifically about the relationship between data processing and economic freedom (free enterprise), if there were no economic freedom, most technological advances would be impossible. Linked to traditional regulation, technology mechanisms would become impractical in terms of the innovation and disruption

intrinsically linked to their value. The LLE and LGPD deal with regulation, in a broad sense, for economic agents to calibrate regulatory intensity according to the explored business activities and, consequently, the processing of personal data.

In this way, one of the principles listed in article 2 of the LLE is identified and structured: the subsidiary and exceptional intervention of the state in the exercise of economic activities. With the recognition of the subsidiarity of regulation, both by the LGPD and the LLE, the level of competitiveness of Brazilian economic agents, in terms of the processing of personal data, is enhanced and strategically valued for better positioning in the international market.

Therefore, based on this premise, the structure required by the LGPD is implemented in a way that is less costly for the economic agent, reducing costs and making it easier to meet demand. It can thus be seen that the LGPD, which is much more modern than the CDC, for example, already has the principles or at least the spirit of the LLE in terms of controlling the regulatory excesses of the state and respecting economic freedom (free enterprise) as the core of technological innovation.

CONCLUSION

Economic freedom (free enterprise) is a fundamental right linked to the right to freedom, more specifically to economic freedoms, and represents the essence of a market economy. Economic freedom (free enterprise) guarantees market agents the freedom to act in the market, in principle, without interference from the government. State interference in the economy –Economic Regulation– can, however, occur, for example, when the Government wishes to preserve competition, guarantee freedom of choice for consumers, or protect citizens' privacy about personal data. In this context, although regulation indicates limitations, it guarantees the right to economic freedom, for example, by generating incentives for new players to enter the market or mitigating the risks of cartelization. In short, through regulation, the state can establish guidelines for market *players* in a specific sector to fully enjoy the principle of economic freedom. However, regulatory activity can also deviate from the optimum level, presenting government failures. Therefore, the recent Economic Freedom Law plays a key role in guaranteeing economic freedom (free enterprise), among other things, by setting limits on state regulation through the adoption of Regulatory Impact Analysis (RIA) and the control of regulatory abuse by FIARC/SEAE of the Ministry of Economy.

CÁLAMO / Revista de Estudios Jurídicos. Quito - Ecuador. Núm. 23 (Julio, 2025): 112-123
ISSN Impreso 1390-8863 ISSN Digital 2737-6133

REFERENCES

Aranha, Marcio. 2019. *Manual de Direito Regulatório: Fundamentos de Direito Regulatório*. Sao Paulo: Laccademia Publishing.

Baldwin, Robert; Cave, Martin, and Martin Lodge. 2011. *Understanding Regulation. Theory, Strategy, and Practice*. Oxford: Oxford University Press.

Caldeira, Jorge. 2017. *História da riqueza do Brasil.* São Paulo: Mameluco Editions.

Cavalcanti, Mariana. 2020. *Economic Freedom Bill of Rights. Comments to Law 13.874/2019 (2020). Sao Paulo:* Juspodvum.

Coase, Ronald. 1988. *The Firm, the Market, and the Law*. Chicago: University of Chicago Press.

Cooter, Robert. 1985. *Bargaining with the State*. Princeton: Pinceton University Press.

Friedman, Milton and Rose Friedman. 2015. *Livre para escolher. Um depoimento pessoal–Uma reflexão sobre a relação entre liberdade e economia*. Rio de Janeiro: Editora Record.

North, Douglas C. 1990. *Institutions, Institutional Change and Economic Performance*. Cambridge: Cambridge University Press. DOI: https://doi.org/10.1017/CBO9780511808678

Shleifer, Andrei. 2005. "Understanding Regulation". European Financial Management, Vol. 11 (4): 439–451. DOI: https://doi.org/10.1111/j.1354–7798.2005.00291.x

Stigler, George J. 1971. "The Theory of Economic Regulation". The Bell Journal of Economics and Management Science, Vol. 2, no. 1: 3–21. DOI: https://doi.org/10.2307/3003160

Williamson, Oliver. 2005. "Why Law, Economics and Organizations?". Annual Review of Law and Social Science, Vol. 1: 369–396. DOI: https://doi.org/10.1146/annurev.lawsocsci.1.031805.111122