ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE

CADE's contribution to the Ministry of Finance's Public consultation for regulation of digital platforms

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Administrative Council for Economic Defense

Institutional Presentation

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Executive Summary

I. Objectives and Regulatory Rationale

- CADE supports the necessity of ex-ante regulation for digital markets, complementing the regime of Law 12.529, of November 30, 2011 (the Brazilian Competition Act);
- Ex-ante regulation of platforms should address dysfunctions in digital ecosystems, such as functional and distributive failures that affect the generation and appropriation of value, which are distinct from market failures in traditional regulated sectors;
- Regulatory intervention should aim to foster competition by reducing entry barriers and protecting the competitive process, nurturing market contestability.

II. Sufficiency and Adequacy of the Current Framework of Economic Regulation and Competition

- CADE has consistently acted in digital markets but features such as network externalities and market tipping tendencies may limit the effectiveness of exclusively ex-post interventions by the competition authority;
- Supplementing Brazilian legislation with an ex-ante regulatory framework would enable the structuring of more proactive interventions, overcoming challenges in design and implementation related to the adoption of traditional antitrust remedies in the digital context;
- Thus, the regulatory framework should promote consumer protection, innovation, and entrepreneurship, while simultaneously preserving market dynamism and expanding contestability in the digital economy.

III. Design of a Possible Pro-Competitive Economic Regulatory Framework

- There is no single framework of ex-ante regulation for digital platforms; each foreign proposal weighs the pros and cons of a more flexible or more restricted regulatory intervention;
- A flexible regulatory structure, with specific adjustment of provisions and continuous monitoring, could be useful in Brazil;
- Brazil needs to ensure the relevance of its regulatory approaches compared to international experiences.

IV. Institutional Framework for Regulation and Supervision

- Before establishing a new regulatory agency, the country should conduct a detailed Regulatory Impact Analysis (RIA);
- Expanding CADE's competencies by including a unit dedicated to digital markets could be the most pragmatic and immediate approach;
- CADE has a track record of developing expertise in analyzing competition issues in the digital economy and has the advantage of operating across various sectors of the economy, unlike regulatory agencies aimed at specific economic sectors;
- Dialogue with international jurisdictions and participation in global competition policy forums reinforce the convenience of this approach.

Introduction

Competition Advocacy is one of the main goals of the Brazilian Competition Act. Just as in other economies with an extensive tradition of state-owned enterprises and entrenched regulation, it is crucial for Brazil to create and enhance the understanding and broader acceptance of competition principles. In this regard, the Administrative Council for Economic Defense (CADE) has engaged in many advocacy activities, including publications, market studies, guidelines, impact assessments, seminars, and close cooperation with regulatory agencies and other public bodies[1].

Considering its institutional role, CADE submits this contribution to Public Consultation n. 1, dated January 18, 2024, in which:

"THE SECRETARIAT OF ECONOMIC REFORMS OF THE MINISTRY OF FINANCE, considering the provisions of article 12, III, of Decree n. 9,215 of November 29, 2017, and in accordance with the powers conferred by article 74 of Decree n. 11,344 of January 1, 2023, NOTIFIES that a PUBLIC CONSULTATION will be opened, with a period for the submission of contributions from January 19 to March 18, 2024, aimed at gathering comments and suggestions on the regulation of **economic and competition-related aspects of digital platforms**, with the objective of collecting information that will best support the debate and formulation of public policies related to the subject." (free translation)

In addition to this introduction, this note provides responses to the questions posed by the Secretariat.

[1] BRAZIL. ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE - CADE. *Publications*. Available at: https://www.gov.br/cade/en/content-hubs/publications. Accessed on February 1st, 2024.

I. Objectives and Regulatory Rationale

1. What economic and competitive reasons would justify the regulation of digital platforms in Brazil?

1.1. Are there different reasons to regulate or not regulate different types of platforms?

Yes. The movement towards competition regulation in digital markets arises from the perception in some jurisdictions that traditional competition law frameworks, based on *ex-post* interventions, may no longer be sufficient to preserve open and contestable digital markets, largely due to the economic characteristics of such business models. In this regard, over the past seven years, several antitrust authorities[2], international organizations[3], and academic think-tanks[4] have published reports and market studies exploring the challenges of competition policy in digital markets. In 2019, CADE released its publication "Competition in Digital Markets: A Review of Specialized Reports"[5], examining 21 studies and reports[6] about digital markets. The studies argue

[2] AUSTRALIAN COMPETITION & CONSUMER COMMISION. *Digital Platform Services Inquiry*. n. September, p. 1– 214, 2022; AUTORITÉ DE LA CONCURRENCE. *Online Advertising: Development of an ecosystem with strong growth and led by two stakeholders,* 2018; AUTORITÉ DE LA CONCURRENCE; BUNDESKARTELLAMT. *Competition Law and Data*, 2016; AUTORITÉ DE LA CONCURRENCE; BUNDESKARTELLAMT. Algorithms and Competition. n. November, 2019; COMPETITION AND MARKETS AUTHORITY - CMA. *Online Platforms and Digital Advertising: Market Study Final Report*. London: Competition and Markets Authority, 2020; BRICS COMPETITION INNOVATION LAW & POLICY JOINT RESEARCH PLATFORM. *Digital Era Competition: Brics View*. Moskow: Brics Competition Law and Policy Centre, 2020.

[3] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT - OECD. *An Introduction to Online Platforms and Their Role in the Digital Transformation*. Paris: OECD Publishing, 2019; ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT - OECD. *Big Data:* Bringing Competition Policy to the Digital Era. Background Paper by the Secretariat, n. April, p. 40, 2016.

[4] STIGLER CENTER. Stigler Committee on Digital Platforms Final Report. Chicago, 2019; FURMAN, J. et al. Unlocking Digital Competition: Report of the Digital Competition Expert Panel. London, 2019; CRÉMER, J.; DE MONTJOYE, Y.-A.; SCHWEITZER, H. Competition Policy for the Digital Era European Commission Report. Brussels: European Commission Final Report, 2019.

[5] BRAZIL. ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE - CADE. *Concorrência em Mercados Digitais: uma revisão dos relatórios especializados*. Brasília: CADE, 2019.

[6] The studies were the following: 1. Sub-committee on Market Structure and Antitrust Report, authored by the Committee for the Study of Digital Platforms of the Stigler Center at the University of Chicago, United States; 2. Big Data and Innovation: Key Themes for Competition Policy, by the Competition Bureau of Canada; 3. Competition Law and Data, a joint study by the French Autorité de la Concurrence and the German Bundeskartellamt; 4. Competition Policy for the Digital Era, a report by a panel of three experts for the Directorate-General of Competition of the European Union; 5. Digital Platforms Inquiry – Final Report, by the Australian Consumer and Competition Commission (ACCC); 6. Ex-post Assessment of Merger Control Decisions in Digital Markets, a report by LEAR consultancy for the Competition and Markets Authority of the United Kingdom; 7. Market Study – Mobile App Stores, by the Authority for Consumers and Markets of the Netherlands; 8. Price Effects of Non-Brand Bidding Agreements in the

that there are economic characteristics of digital markets that favor high levels of concentration. Among these characteristics, the following are highlighted:

a) Relevant economies of scale and scope: some types of platforms benefit from economies of scope due to complementarities between two or more of the services they provide on a given platform or between platforms – in some cases, development costs and/or data can be shared across business lines. Additionally, applications may have a similar appearance and behavior so that consumers become used to platforms more quickly, which can lead to rapid success for new platforms, providing them with a competitive advantage. The cost of digital services is significantly lower than expected if it were directly proportional to the number of customers served, and the digital environment strengthens this efficiency, providing a substantial competitive advantage to established companies.[7] Furthermore, offering a wider array of services is a way to keep users connected to the platform, which may mean that the platform has more opportunities to collect user data to improve its services. This can lead to efficiencies, but it can also lead to anti-competitive conduct towards downstream or upstream business users.[8] Therefore, it is necessary to distinguish cases that are close to becoming natural monopolies from those

Hotel Sector, also by the Authority for Consumers and Markets of the Netherlands; 9. Report on the Monitoring Exercise Carried Out in the Online Hotel Booking Sector by EU Competition Authorities in 2016, by the European Commission in collaboration with the European Competition Network; 10. Digital Comparison Tools Market Study, by the Competition and Markets Authority of the United Kingdom; 11. Publicité En Ligne: La Constitution d'un Écosystème En Forte Croissance et Tiré Par Deux Acteurs, a report by the French Autorité de la Concurrence; 12. Online Platforms and Digital Advertising – Market Study Final Report, by the Competition and Markets Authority of the United Kingdom; 13. Report of the Study Group on Data and Competition Policy, by the Japanese Fair Trade Commission (JFTC); 14. Report Regarding Trade Practices on Digital Platforms, also by the Japanese Fair Trade Commission (JFTC); 15. Rethinking Competition in the Digital Economy, by the Mexican COFECE; 16. Unlocking Digital Competition, a report by a panel of experts for the Government of the United Kingdom; 17. Working Paper: Market Power of Platforms and Networks, by the Bundeskartellamt; 18. Modernizing the Law on Abuse of Market Power, by Heike Schweitzer, Justus Haucap, Wolfgang Kerber, Robert Welker at the request of the German Ministry of Economics; 19. A New Competition Framework for the Digital Economy, by the "Competition 4.0" Commission at the request of the German Federal Ministry for Economic Affairs and Energy; 20. Ecossistemas Digitais, Big Data e Algoritmos, by the Portuguese Competition Authority; 21. Market Study on E-Commerce in India, by the Competition Commission of India.

[7] CRÉMER, J.; DE MONTJOYE, Y.-A.; SCHWEITZER, H. *Competition Policy for the Digital Era European Commission Report*. Brussels: European Commission Final Report, 2019.

[8] CONSELHO ADMINISTRATIO DE DEFESA ECONÔMICA - CADE. *Cadernos do Cade. Mercado de Plataformas digitais*. Reviewed and Updated Edition, 2023. Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-docade/Caderno_Plataformas-Digitais_Atualizado_29.08.pdf.

that economists call contestable markets, i.e., parts that can be commercially challenged by new competitors.[9]

b) Cross-subsidization: is one of the ways platforms use to achieve a viable scope to exploit the multi-sided market nature, due to pricing structures. This occurs when companies subsidize one side of the market to succeed on the other side. For example, when a search engine does not charge for searches to attract more users and thus become more appealing to advertisers. In order to increase the user base on one side of the market, many platforms subsidize it. Consequently, subsidized users may pay a lower price, as the subsidy is not always total. Sometimes, it can be said that it is not even a subsidy per se, just asymmetric pricing. Among the types of platforms that employ this strategy are most or all major search engines, social networks, media platforms, and instant messaging platforms, where advertising revenues enable offering free services to users on the other side of the platform's business.[10] It is important to note, however, that this practice also occurs in non-digital markets, such as the card market, and is not necessarily always harmful.

c) Data Collection and Use of Data: although not the only type of companies that collect and generate data, platforms are the ones that best use them to refine and attract users[11]. Platforms use data as an essential input[12], creating a kind of "dynamic economy of scale", as companies with more data improve their products at lower costs than smaller companies. This would imply a potential barrier to entry.[13] This data acquisition can be used to increase productivity and gain more market share, further expanding the amount of data available and the possibility of market power.[14] The use of data can also imply price differentiation. From an economic standpoint, price discrimination tends to increase total surplus in the economy, being an efficient

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[9] ASEAN. *Competition Law and Regulation in Digital Markets*. Available at: https://www.apec.org/publications/2022/03/competition-law-and-regulation-in-digital-markets. Accessed on January 23, 2024.

[10] OECD. *An Introduction to Online Platforms and Their Role in the Digital Transformation*, OECD Publishing, Paris, 2019.

[11] OECD. *An Introduction to Online Platforms and Their Role in the Digital Transformation*, OECD Publishing, Paris, 2019.

[12] Data is an essential input for platforms because it allows for product improvement and the expansion of activities. For example, companies can apply machine learning to large datasets to enhance their products and venture into new areas. Data enables better consumer identification, allowing for more value extraction through personalized offers and even increasing the cost of switching for consumers.

[13] STIGLER COMMITTEE ON DIGITAL PLATFORMS, *Stigler Committee on Digital Platforms: Final Report*, 2019.

[14] BAJARI, Patrick, et al. The Impact of Big Data on Firm Performance: An Empirical Investigation. *AEA Papers and Proceedings*, 2019, p. 33–37.

practice. However, the practice does not always benefit all consumers. In digital markets, discrimination is more easily implemented[15], leading to new challenges for consumer law, privacy, and antitrust law. The use of such data for economic purposes must, however, respect the legal parameters of personal data protection. Furthermore, the ability to use data to innovate and develop new services and products is a competitive factor whose importance will continue to grow, expanding the reach of this type of market organization to a large part of economic activities and sectors.[16]

d) Switching Costs: Some platforms can generate high costs for users to switch platforms. For example, on a social network, there are switching costs such as setting up a new profile, uploading new content, establishing a new community of friends or followers. These costs may include simply becoming familiar with the platform or feeling confident in using it. When these costs are not easily transferable, they can discourage users from switching to other platforms, even with increased prices, decreased quality, or less privacy. Additionally, when data is not linked to a single platform but to an ecosystem in which the platform is only a part, users may be less inclined to switch platforms.[17]

e) Network Externalities: The value of using a technology or service grows as the number of users increases, demonstrating direct and indirect network effects. Therefore, for a new competitor, it is not enough to offer superior quality or lower prices than the incumbent; it is also essential to convince existing users to migrate to the new service, a challenging task due to network effects. These effects can make it difficult to replace a dominant platform even if a superior alternative is available, also known as lock-in effects. The extent of this "incumbent advantage" is influenced by factors such as the possibility of multiple associations (multi-homing), data portability, and interoperability between platforms, which are more critical in digital markets than in traditional network industries.[18] In multi-sided markets, a central operator facilitates interaction between various consumer groups, where the perceived utility of one group depends directly on the participation of other groups. This business model is marked by both direct network effects—where

[15] BISELLI, E. C. J. T. Discriminação de preços na economia digital. In: PEREIRA NETO, C. M. D. S. *Defesa da concorrência em plataformas digitais*. São Paulo: FGV, 2020.
[16] CRÉMER, J.; DE MONTJOYE, Y.-A.; SCHWEITZER, H. *Competition Policy for the Digital Era European Commission Report*. Brussels: European Commission Final Report, 2019.
[17] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). *The Digital Economy*. OECD, Paris, 2012. Available at: https://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf. Accessed on January 23, 2024.
[18] CRÉMER, J.; DE MONTJOYE, Y.-A.; SCHWEITZER, H. *Competition Policy for the Digital Era European Commission Report*. Brussels: European Commission Final Report, 2019.

the value of the service increases directly with the number of users—and indirect effects, where the value grows due to increased supply of products or services in complementary markets. In this context, the presence of robust network effects can generate a negative network externality, where the incremental benefit of a new user to the network is not compensated, affecting the distribution of benefits among existing users.[19] These dynamics are distinct from those found in traditional network industries, where network effects are generally more uniform and less dependent on complex interactions between multiple user groups. In digital markets, complexity increases as the interdependence between different sides of the platform intensifies both competitive opportunities and challenges, demanding more sophisticated regulatory strategies to maintain competitiveness and innovation.

f) "Winner Takes All" or "Winner Takes Most" Competition: As a result of positive network effects, economies of scale and scope, most markets in which platforms operate exhibit this trend. This occurs when network effects are strong, switching costs are high, and users find it difficult or undesirable to use multiple platforms simultaneously.[20] Given these three factors, which are significant advantages of the "first mover," competition can be stifled, entrenching the market positions of the winners they helped create. Specifically, the first entrant in a "winner-take-all" or "winner-take-most" market can become strong so quickly that it leaves subsequent entrants at a disadvantage. The paths of entrants may be more challenging because, unlike the first company, they are entering a market that already has a large and promising incumbent benefiting from economies of scale and direct network effects. However, on the other hand, direct network effects, the fact that platforms can grow more rapidly and cheaply compared to physical goods markets, and the non-rivalrous nature of digital information are also factors that facilitate entrants in offering a better service to quickly surpass incumbents. In other words, some of the characteristics that help the incumbent assume a market position may eventually favor the entrant. Each user who leaves a platform with positive and direct network effects makes other users more likely to leave it as well. Consequently, being a leading

[19] According to Katz and Shapiro, network effects occur when the value that a consumer attributes to certain products or services increases with the number of other users consuming them. This increase in marginal value can arise from both direct growth of the network supporting the service, known as direct positive network effects, and from an increase in the supply of goods and services in markets complementary to the network, called indirect positive network effects (KATZ, M. L.; SHAPIRO, C. Systems competition and network effects. *The Journal of Economic Perspectives*, v. 8, n. 2, pp. 93–115, 1994).

[20] IANSITI, M.; LAKHANI, K. Managing our hub economy. *Harvard Business Review*, Vol. 95, N° 5, pp. 84-92, 2017. Available at: https://hbr.org/2017/09/managing-our-hub-economy. Accessed on January 23, 2024.

platform (even in a "winner-takes-all" market) is not a guarantee that the leadership position will be permanently maintained or that one is invulnerable to competition. Moreover, not all markets in which online platforms operate have "winner-take-all" or "winner-takes-most" characteristics. Direct network effects must be strong, transaction costs must be high, and users must find it difficult or undesirable to "multi-home" (meaning they do not tend to use multiple or rival platforms simultaneously).[21] Experience shows that it is extremely challenging to overcome the major digital incumbent players, although there is little empirical evidence quantifying the cost of this difficulty.

Notwithstanding the listing of this set of characteristics, it must be considered, however, that digital ecosystems should not be seen as "essential facilities"[22-23]. The economic power of a platform within a digital ecosystem result from its ability to create and capture value from nonlinear interactions between different groups of suppliers and consumers, through the internalization of network externalities resulting from choices in shaping the business model rather than exogenous technological attributes, as is the case with traditional "essential facilities".[24]

This approach fails to capture the specific and innovative dynamics of digital platforms, requiring a more refined and adapted regulatory approach to the reality of the digital environment. The possible analogy lies in the conception of an essentiality attributed to controlled data flows, for example, but the tools designated for the discussion of "essential facilities" tend to be much more rigid and static than those necessary for digital platforms.

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[21] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). *An Introduction to Online Platforms and Their Role in the Digital Transformation*. Available at: https://doi.org/10.1787/53e5f593-en. Accessed on January 23, 2024.

[22] An "essential facilities doctrine" (EFD) specifies when the owner(s) of an "essential" or "bottleneck" facility is mandated to provide access to that facility at a "reasonable" price. For example, such a doctrine may specify when a railroad must be made available on "reasonable" terms to a rival rail company or an electricity transmission grid to a rival electricity generator. The concept of "essential facilities" requires there to be two markets, often expressed as an upstream market and a downstream market. (The case of two complementary products is logically the same, but confusing in exposition.) Typically, one firm is active in both markets and other firms are active or wish to become active in the downstream market. (See below for a fuller discussion of the market configurations found by some commentators to be relevant to an EFD.) A downstream competitor wishes to buy an input from the integrated firm, but is refused." ROUNDTABLE, OECD Policy. *The essential facilities concept*. OCDE/GD (96), v. 113, 1996, p. 7.

[23] "The doctrine grants competitors rights of access to monopolist facilities to the extent that these competitors depend on the facilities and cannot reasonably duplicate them. This approach forced railroad companies and utility providers to share their infrastructure, for example." (GUGGENBERGER, Nikolas. The Essential Facilities Doctrine in the Digital Economy: dispelling persistent myths. *Yale Journal of Law & Technology*, v. 23, Spring 2021).

[24] LIANOS, I. Value Extraction and Institutions in Digital Capitalism: towards a Law and Political Economy Synthesis for Competition Law. *European Law Open*, v. 1, p. 852–890, 2022. p. 881.

Hence, it is asserted that the *ex-ante* regulations under discussion do not aim to address market failures but rather ecosystem failures[25], which consist of functional and distributive failures in the generation and capture of value by the participating agents of the ecosystem that prevent such participants from being adequately compensated for their products and services.[26] In this sense, the objectives of a digital platform regulation model should include goals related to the need to generate contestability and expand rivalry in the various spaces of the digital economy.[27]

Due to the tipping tendency of digital markets[28], there are risks of harm to consumers that antitrust authorities must be aware of. From the perspective of competition policy, there is a legitimate concern that dominant digital companies have strong incentives to engage in anticompetitive behavior.[29] Although various digital markets operate with zero-price, low levels of competition raise concerns related to the reduction of available service options, decreased innovation rates, deterioration in service quality, excessive data

[25] "Accordingly, platform ecosystems are seen as 'semi-regulated marketplaces' that foster entrepreneurial action under the coordination and direction of the platform sponsor (Wareham, Fox, & Cano Giner, 2014, p. 1211), or as 'multisided markets' enabling transactions among distinct groups of users (Cennamo & Santaló, 2013).4" JACOBIDES, M. G.; CENNAMO, C; GAWER, A. Towards a theory of ecosystems. *Strategic Management Journa*l, v. 39, n. 8, p. 2255-2276, 2018, p. 2258.

[26] CENNAMO, C. Ecosystem Failures - Global Dictionary of Competition Law. *Concurrences*, Art. N° 117878 ("ecosystem failures capture new inefficiencies related to competitive and cooperative dynamics that are distinct from the competitive behaviour in the subject of competition law. These consist of instances where an inferior product is supplied due to a misalignment in the incentives of ecosystem participants or when the value generated is distributed in a way that fails to sufficiently compensate one or many ecosystem participants"). See also CENNAMO, Carmelo. The EU Digital Markets Act: It Is Not About Markets But Ecosystem Failures! *Network Law Review*, 2023. Disponível em: https://www.networklawreview.org/dma-ecosystems/. Acesso em 25/04/2024.

[27] FERNANDES, V. O. Lost in translation? Critically assessing the promises and perils of Brazil's Digital Markets Act proposal in the light of international experiment. *Computer Law & Security Review: The International Journal of Technology Law and Practice*, v. 52, p. 105937, 2024. pp. 105956. ("while public utility regulation is primarily aimed at preventing natural monopolies from directly exploiting consumers, therefore correcting a market failure, digital ecosystems regulations are far more ambitious in reshaping the market structure, as they aim both to encourage threats to large incumbent platforms and to promote other societal values of economic competition").

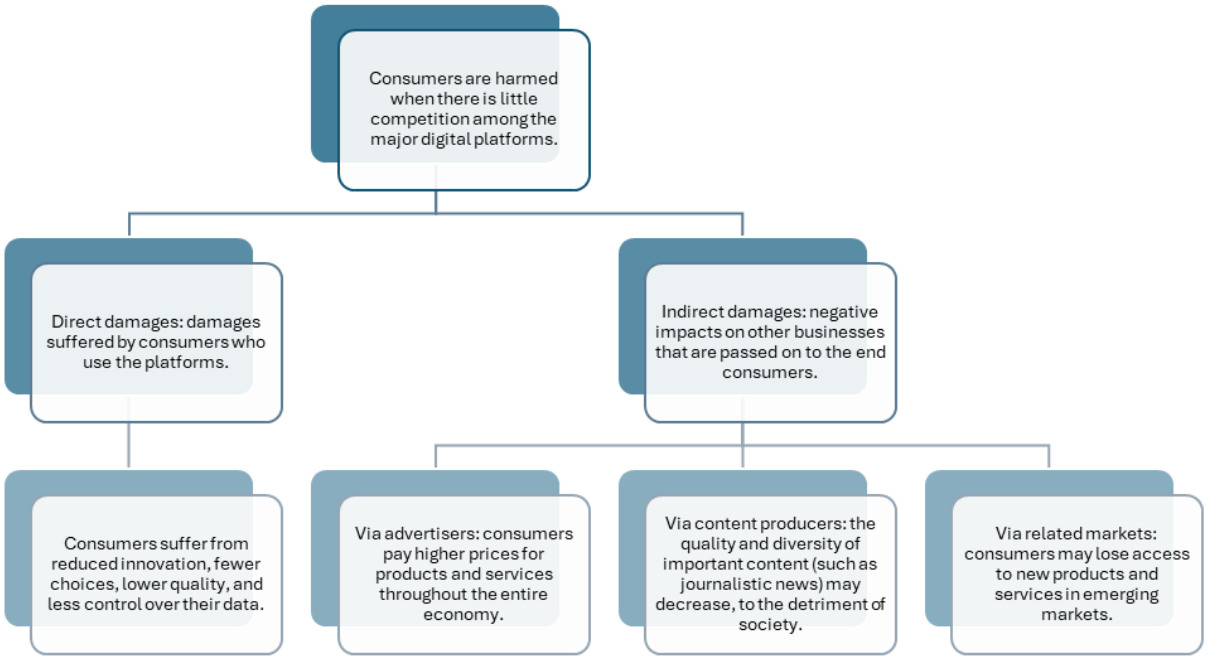
[28] It is frequently argued that, due to network effects, digital markets are prone to 'tipping,' where once a producer achieves significant market share, they rapidly become a near-total or total monopolist. Even though these markets may initially be highly competitive, they tend to exhibit a 'winner takes all' dynamic. Ex-ante regulations often seek to prevent or address this situation, focusing on the size of a company or companies holding market power.

[29] CRÉMER, J.; DE MONTJOYE, Y.-A.; SCHWEITZER, H. *Competition Policy for the Digital Era European Commission Report*. Brussels: European Commission Final Report, 2019.

collection, privacy erosion, access restriction, and interoperability restriction, among others.[30-31]

The figure below, adapted from a study by the Competition and Markets Authority (CMA) of the United Kingdom, systematizes the various potential forms of consumer harm in digital markets:

Figure 1 – Potential Direct and Indirect Harms for Competition in Digital Markets



Sources: elaboration by the authors.

These harms can be perpetrated through various business strategies. Over the last decade, these strategies have been scrutinized in numerous antitrust investigations.[32] Through self-preferencing strategies of products and

[30] BRAZIL. ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE). *Concorrência em Mercados Digitais: uma revisão dos relatórios especializados.* 2019. p. 37–50. Regarding how anticompetitive conduct by digital platforms can harm consumers even in zero-price markets, see NEWMAN, J. M. Antitrust in Zero-Price Markets: Applications. *Washington University Law Review*, v. 94, n. 1, 2016.

[31] "Multiple categories of sustainable (i.e., long-run) business models have gained prominence in zero-price markets. These include tying strategies, two- or multisided models, and 'premium upgrade' or (more commonly) 'freemium' models. The common thread between each of these categories is the presence of interrelated products. Where for-profit firms are competing in zero-price markets, invariably they are making money somehow. In this context, they do so by offering some other product that is somehow interrelated with the zero price product.". NEWMAN, J. M. Antitrust in zero-price markets: Foundations. *University of Pennsylvania Law Review*, p. 154, 2015.

[32] For a summary of the main investigations in question, see BOSTOEN, F. Understanding the Digital Markets Act. *Antitrust Bulletin*, v. 68, n. 2, p. 263–306, 2023. p. 7 e ALEXIADIS, P.; DE STREEL, A.

services offered by the economic group of the platform itself, for example, large technology companies can exclude rivals. This can occur in different ways, such as in displaying online search rankings, distributing app stores, or even imposing difficulties on interoperability, where a dominant platform restricts competitors' ability to interoperate with its platform or access key inputs such as data, APIs, or app stores, raising entry barriers.[33]

Digital platforms can also redefine conventional abusive practices, such as exclusivity arrangements, product tying, and tying sales.[34] Some examples include pre-installing apps from a particular company on mobile operating systems, imposing joint social network services and e-commerce advertisements, among others. In addition to these practices with potential exclusionary effects on rivals, concerns are raised about exploitation abuses, such as imposing abusive terms and conditions of use in app distribution stores[35], using third-party data to calibrate offerings of the platform's own products[36], excessive data collection, and using this data in different businesses of the same economic group.[37]

It is important to highlight that within this debate, although there is discussion about the existence of specific structures and expertise to deal with digital markets, the recognition of the central role of the antitrust authority as responsible for the resulting public policy has been practically unanimous. Illustrating this point, a recent study developed by the G7 within the scope of

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Designing an EU Intervention Standard for Digital Platforms. *EUI Working Papers RSCAS 2020/14*, v. 1, n. 1, p. 1–50, 2020. p. 9– 17.

[33] The notion of 'self-preferencing' is taken as an umbrella term encompassing various theories of harm, see MOTTA, M. Self-Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases. *BSE Working Paper* 1374, 2022. Therefore, some authors have questioned the utility of treating self-preferencing strategies as a distinct legal category, COLOMO, P. I. Self-preferencing: yet another epithet in need of limiting principles. *World Competition*, v. 43, n. 4, pp. 417–446, 2020 ("self-preferencing may be misleading as a legal category insofar as it may obscure the true issues underpinning a case and may lead to the use of the same legal test for the assessment of practices that are fundamentally different"). Nevertheless, the nomenclature helps to explain concerns arising in these investigations regarding the potential for anticompetitive leveraging through abusive strategies.

[34] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT - OCDE. *Abuse of Dominance in Digital Markets*. Paris: OECD Publishing, 2020, p. 23-50; WU, Q.; PHILIPSEN, N. J. The Law and Economics of Tying in Digital Platforms: Comparing Tencent and Android. *Journal of Competition Law & Economics*, v. 19, n. 1, p. 103–122, 2023.

[35] GERADIN, D.; KATSIFIS, D. The Antitrust Case Against the Apple App Store. *TILEC Discussion Paper* N° DP2020- 035, v. 17, n. 3, p. 503–585, 2020.

[36] REVERDIN, V. M. K. Abuse of Dominance in Digital Markets: Can Amazon's Collection and Use of Third-Party Sellers' Data Constitute an Abuse of a Dominant Position under the Legal Standards Developed by the European Courts for Article 102 TFEU? *Journal of European Competition Law and Practice*, v. 12, n. 3, p. 181–199, 2021.

[37] ROBERTSON, V. H. S. E. Excessive Data Collection: Privacy Considerations and Abuse of Dominance In The Era of Big Data*. Common Market Law Review*, v. 57, n. 1, p. 161–190, 2020.

analyzing regulatory instruments for competition issues in digital markets[38] indicates that, among the analyzed jurisdictions (European Union, Germany, United Kingdom, USA, Japan, and Brazil), only Brazil considers the possibility of law enforcement by an entity other than the competition defense agency.[39]

In fact, the legislations that have so far been proposed to fill these enforcement gaps have preferentially opted for some form of *ex-ante* competitive regulation such as the Digital Market Act (DMA) of the European Union[40] and its correlates, such as the Digital Markets, Competition and Consumers Bill (DMCC Bill) in the United Kingdom[41], the new article 19-A of the German Competition Act[42], among others. As systematized by the OECD in the latest version of the G7 inventory on new rules for digital markets, there is a growing action towards *ex-ante* regulation of large digital platforms in jurisdictions such as the European Union, United Kingdom, Germany, United States, Japan, and South Korea.[43] Besides these jurisdictions, more recent legislative proposals are also under debate in India (Proposed Digital Competition Act).[44] The table below summarizes the main points of some of these:

[38] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). *Analytical note on the G7 inventory of new rules for digital markets*. Analytic note, 2023. Available at: https://www.oecd.org/competition/analytical-note-on-the-G7-inventory-of-new-rules-for-digital-markets-2023.pdf . Accessed on April 22, 2024.

[39] The Japanese case is an exception since the law's implementation is handled by the Ministry of Industry. In this sense, it is worth noting that the law observed in Japan is primarily consumer-oriented rather than competition-oriented, which explains the regulator's decision.

[40] EUROPEAN UNION. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair digital markets and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Regulation). Official Journal of the European Union, Brussels, 12 Oct. 2022. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925. Accessed on April 22, 2024.

[41] UNITED KINGDOM. *Digital Markets, Competition and Consumers Bill.* London: UK Parliament, 2023. Available at: https://publications.parliament.uk/pa/bills/cbill/58-03/0285/220285.pdf. Accessed on April 22, 2024.

[42] GERMANY. Act against Restraints of Competition (GWB). Federal Ministry of Justice, 2021. Available at: https://www.gesetze-im-internet.de/gwb/. Accessed on April 22, 2024. (Article 19a added in 2021).

[43] OECD. *G7 inventory of new rules for digital markets*. Available at: https://www.oecd.org/competition/g7-inventory-of-new-rules-for-digital-markets-2023.pdf. Accessed on April 22, 2024.

[44] INDIA. Ministry of Corporate Affairs. Report of the Committee to Review the Competition Act, 2002 and Propose a Digital Competition Act. New Delhi: Government of India, 2024. Available at: https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open. Accessed on April 22, 2024. (This report includes a legislative proposal itself, the Dr*aft Digital Competition Bill*).

Table 1 – Comparison of *Ex-Ante* Regulation Proposals

JURISDICTION	LEGISLATIVE PROPOSAL	IMPLEMENTATION STATUS	MAIN CHARACTERISTICS	AUTHORITY RESPONSIBLE FOR ENFORCEMENT
European Union	Digital Markets Act (DMA)	September 2022: DMA's adoption by the European Parliament and Council. November 2022: DMA's entry into force. May 2023: DMS's start of applicability with notification requirement by the European Commission to companies meeting the criteria. Subsequent period: after notification, 45 business days to designate gatekeepers, who had up to six months to comply with DMA obligations.	Designation of "gatekeepers" subject to obligations and prohibitions on matters of self-preferencing, data handling, interoperability, etc.	European Commission
United Kingdom	Digital Markets, Competition and Consumers Bill (DMCC)	Proposal under discussion in the British Parliament since April 2023	Allows designation of companies with "strategic market bylaws" based on criteria such as market power and strategic position and imposes a tailored code of conduct for designated companies	Digital Markets Unit (special unit within the Competition and Markets Authority – CMA)

United States [45]	American Innovation and Online Choice Act (AICOA) + other 5 proposals	Under discussion in the U.S. Congress	Designation of "covered platforms" and imposition of obligations to curb practices like self-preferencing, conflicts of interest, and mergers that impede innovation	Federal Trade Commission (FTC) and Department of Justice (DoJ)
India	Proposed Digital Competition Act	Under discussion in the Indian parliament since February 2024	Designation of "systematically important digital platforms" and regulation of their behaviors	CCI (competition defense authority)
Germany	Section 19-a of the Act Against Restraints of Competition — GWB	In force since 2021	Designates economic agents of "exceptional importance for competition across different markets" and imposes obligations by the competition authority's own actions	Bundeskartellamt (competition defense authority)

Sources: elaboration by the authors.

The content of these legislative proposals and their comparative differences will be explored more deeply throughout this contribution. In general terms, however, it is relevant to highlight that they share the objective of imposing specific obligations and prohibitions on certain platforms, aiming to prevent anti-competitive practices and promote more open and contestable digital markets. As will also be addressed throughout this contribution, the legislative proposal under discussion in Brazil (Bill 2,768/2022) presents significant differences compared to these compared models.[46]

[45] Regarding the current state of the discussion on reforms in competition law in the United States, see KLOBUCHAR, A. *Antitrust: taking on monopoly power from the Gilded Age to the Digital Age*. Alfred A. Knopf: New York, 2021.

[46] For a comparative analysis in this regard, cf. FERNANDES, V. O. Lost in translation? Critically assessing the promises and perils of Brazil's Digital Markets Act proposal in the light of international experiment. Computer Law & Security Review: The International Journal of Technology Law and Practice, v. 52, p. 105937, 2024.

Considering all these movements, we understand that it is up to public policymakers in Brazil to discuss transparently and in depth the need for adopting *ex-ante* competitive regulation for digital platforms in the country. Unlike the mentioned jurisdictions, there has been no institutional assessment in Brazil so far of the potential limits and possibilities of applying Law 12,529/2011 to digital markets. Moreover, Bill 2,768/2022, which proposes *ex-ante* regulation in our country, was not preceded by any discussion document on the current state of antitrust enforcement in Brazil.[47]

The global operation of many digital services, with similar business models and strategies in different countries, suggests that the competitive dilemmas identified by foreign jurisdictions may also manifest, to some extent, in Brazil. Although caution is necessary when transferring diagnoses and legal solutions between different realities, international experience can offer important subsidies to assess the capacity of the instruments provided in Brazilian competition legislation to satisfactorily respond to the risks posed by the growing economic power of large digital platforms operating in the country.

Due to the inherent complexities of regulating digital platforms and the potential implications of new regulatory obligations on the competitive dynamics and these markets, it is timely to prepare a comprehensive and technically based Regulatory Impact Analysis (RIA). The study could delve into the characteristics and peculiarities of the main digital platform markets in the country, examining factors such as concentration levels, entry barriers, innovation patterns, single-homing and multi-homing patterns by users, as well as the potential anti-competitive effects resulting from vertical and conglomerate integration strategies adopted by dominant platforms. Furthermore, the regulatory impact analysis is relevant for responsible and effective regulation in a specific sector.[48] This process was exemplified by the

[47] In CRÉMER, J.; DE MONTJOYE, Y.-A.; SCHWEITZER, H. Competition Policy for the Digital Era European Commission Report. Brussels: European Commission Final Report, 2019, Commissioner Margrethe Vestager explicitly requested a preliminary study to identify how competition policy should evolve to continue promoting pro-consumer innovation in the digital age. See: "*Commissioner Vestager has asked us to explore how competition policy should evolve to continue to promote pro-consumer innovation in the digital age*."

[48] In Brazil, Decree N° 10,411 was promulgated on June 30, 2020, requiring federal public administration entities, including autarchies and foundations, to consider this analysis when proposing regulations that affect economic agents or users of public services, according to their attributions. This analysis, as defined in Article 2, I, of this Decree, involves a preliminary assessment before implementing regulations, compiling data and information on the expected effects to ensure the proportionality of impacts and support informed decisions.

European Commission (EC) when introducing the DMA[49], where three approaches to regulation were examined.[50]

Additionally, any public policy evaluation should scrutinize the effectiveness of the tools traditionally employed by CADE in its enforcement activities in these markets, such as the methodologies for defining relevant markets, the criteria used for assessing dominant positions, and the parameters that have guided the design of behavioral remedies. CADE defends the need for *ex-ante* regulation and believes that the insights gathered from this diagnostic effort could underpin, more consistently and technically, discussions about the possible need for revision or improvement of the Brazilian legal-regulatory framework.

1.2. How does the Brazilian context compare to other jurisdictions that have adopted or are considering new regulations for digital platforms? What specific cases, studies, or examples in Brazil highlight the need to review the Brazilian legal-regulatory framework?

The Brazilian context presents both similarities and differences when compared to other jurisdictions that have adopted or are considering new ex-ante competition legislation. One key similarity is the growing concern over the economic power accumulated by large platforms that control digital ecosystems, which can dictate conditions for access and participation within these ecosystems. Given the global trend of high concentration in digital markets, there are reasons to transfer concerns identified by foreign jurisdictions regarding the risks of harm to consumers to the Brazilian scenario. However, a thorough analysis is necessary for each specific sector.

Another similarity involves the procedural limitations of ex-post conduct control. Although the Brazilian Competition Law is relatively modern, incorporating flexible forms of intervention such as preventive measures (which CADE has used in cases involving digital platforms), investigations into

[49] Refer to the Proposal for a Regulation of the European Parliament and of the Council on Contestability and Fairness in Digital Markets (Digital Markets Act): "*The Impact Assessment underpinning the proposal was considered by the Commission's Regulatory Scrutiny Board, which issued a positive opinion on 10 December 2020. The opinion of the Board, the recommendations and an explanation of how they have been taken into account are included in Annex 1 of the Staff Working Document accompanying this proposal. Annex 3 provides an overview of who would be affected by this proposal and how.*." Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:842:FIN. Accessed on April 25, 2024.

[50] The first proposed a specific list of "gatekeepers" and corresponding obligations, the second suggested a semi-flexible model to identify gatekeepers and adjust existing rules, and the third approach recommended flexible regulatory criteria based on qualitative data.

abuse of dominant position in Brazil can still take many years[51], similar to the European experience. Designing effective behavioral or structural remedies is also challenging, as market conditions tend to change substantially during investigations, especially in sectors marked by rapid technological changes. This raises debates about the regulatory and competitive expertise necessary for the adoption and implementation[52] of such measures.

Since the 1990s, the competition policy in Brazil has been guided by an approach that emphasizes targeted market intervention. This has resulted in an occasional and non-regulatory policy that remains distant from political-party influences and adopts a more reactive stance. For example, Article 36 of the Brazilian Competition Law allows a company to gain market power by becoming more efficient than its competitors, and Article 90 of the same law permits the approval of mergers that eliminate competition in a significant part of a market, provided that the merger promotes productivity, competitiveness, or technological or economic development. This approach has led to a policy that acknowledges the natural tendency for competition to prevail, where success depends on its ability to be constrained, thus stabilizing as a residual and reactive policy. The policy assumes a mission to promote a culture of competition.[53-54]

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[51] The investigation of the Google Shopping case (PA 08012.010483/2011-94), for example, lasted seven years and six months in Brazil. Other cases of abuse of dominant position involving Google also had lengthy durations, such as Google Scraping (five years and eight months) and Google AdWords (five years and eleven months).

[52] LANCIERI, F.; PEREIRA NETO, C. M. da S. Designing Remedies for Digital Markets: The Interplay Between Antitrust and Regulation. *Journal of Competition Law and Economics*, v. 18, n. 3, p. 613–669, 2022.

[53] CARVALHO, V. M. de. *Política de Defesa da Concorrência: dos fundamentos teóricos à implementação*. São Paulo: Editora Singular, 2023. p. 265–273 and MIOLA, I. Z. *Competition law and neoliberalism: the regulation of* economic *concentration in Brazil*. Direito & Práxis, v. 07, n. 4, p. 643–689, 2016.

[54] According to Article 170 of the Constitution of the Federative Republic of Brazil, Brazil's economic organization is based on the appreciation of human labor and the freedom of enterprise, aiming to ensure a dignified life for all in accordance with the principles of social justice. Additionally, Article 173, in its fourth paragraph, mandates that legislation curbs the abuse of economic power aimed at market domination, elimination of competition, and arbitrary increases in profits. The provisions of the Brazilian Competition Law, particularly Article 36, along with the actions of CADE and the judiciary's respect for its decisions, reflect the effort to harmonize these various objectives. In this regard, see CARVALHO, V. M. de. *Política de Defesa da Concorrência: dos fundamentos teóricos à implementação*. São Paulo: Editora Singular, 2023. p. 267: "For the purposes of the discussion proposed in this chapter, it suffices to mention its normative configuration expressed in §4º of art. 173 of the CF, in verbis: 'The law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition and arbitrary increase of profits.' In other words, the objective of the competition defense policy is to repress the abuse of economic power aiming at these mentioned effects or, in another sense – taking into account the provisions of §1º of art. 36 of Law 12,529/2011 –, to avoid the achievement of market power that is not based on merit-based competition. The law, in fact, associates its objective with the notion of (potential) effect and not necessarily conscious intent, reinforcing the consensus derived from the application of economic theory that it makes no sense to inquire into a subjective assessment of business behavior, which, in turn, significantly reduces the space for the imposition of moral judgments on it. (free translation)"

These legal provisions, along with CADE's decision-making practices since the 1990s, highlight the alignment of Brazilian competition policy with the consumer welfare[55] paradigm within the post-Chicago economic perspective. Due to its accumulated experience and operational excellence, it is indisputable that CADE possesses the substantive expertise necessary to lead discussions on revisions to the Brazilian legal-regulatory framework, particularly regarding digital markets. With a vast array of analyzed cases, CADE stands out not only for the depth of its legal and economic analyses but also for its ability to adapt to the rapidly changing dynamics of digital ecosystems. This experience uniquely positions CADE to stay aligned with technological developments and emerging market practices. Furthermore, CADE's ongoing engagement with regulatory complexities across multiple sectors makes it the most suitable body to formulate policies that effectively address the challenges posed by the digitization of the economy.

At the same time, the antitrust authority, due to its goals and objectives, develops structures focused on enhancing market entry capacity and dynamism. This contrasts with the logic of sectoral regulation, which often begins by conditioning practices already established by significant market players under analysis. Consequently, regulatory structures of this type tend to be designed and developed in market contexts with structural concerns and issues, making them more rigid. In contrast, competition policy observes the competitive dynamics of markets, primarily focusing on mechanisms of rivalry and potential competition, such as the ability of new players to enter the market.

In the antitrust control of conduct, CADE's recent jurisprudence has highlighted the difficulties faced by the authority in applying conventional antitrust law methodologies to cases involving digital platforms. In the Google Shopping[56], Google AdWords, and Google Scraping cases, for example, there

[55] MATTOS, C. *A Revolução do Antitruste no Brasil: Teoria Econômica Aplicada a Casos Concretos*. São Paulo: Editora Singular, 2003 (This collection brings together articles by specialists and former members of the Brazilian Competition Defense System, detailing how, starting in the 1990s, there was a growing introduction of more sophisticated economic analysis into Brazilian antitrust thinking, with significant influence on concrete cases judged by CADE). Further discussing this alignment with the economic orthodoxy of American antitrust policy, cf. SCHUARTZ, L. F. *A Desconstitucionalização do Direito de Defesa da Concorrência*. Revista do IBRAC, v. 16, n. 1, p. 1–26, 2009 e RAMOS, L. F. R. *Antitrust and the Multivalued Function of Competition*. Baden-Baden: Hart Publishing, Nomos, 2021, p. 87–89 (describing how the consumer welfare standard is adopted in important CADE decisions).

[56] Administrative Process n. 08012.010483/2011-94. Complainant: E-Commerce Media Group Informação e Tecnologia Ltda. Defendants: Google Inc. and Google Brasil Internet Ltda. Reporting Commissioner: Maurício Bandeira Maia. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBtn3BfPLlu9u7akQAh8mpB9yOb0rdAAnkZ36Rru6H33qbFO51_fjuVWb1uid6m5S5BxJ8gFyW8xprjnuylPdYbaX3VDhhG3SAtGWLJPIqjsEDX. Accessed on April 22, 2024.

were lengthy debates about the standards of proof and the presumption regimes of illegality necessary to demonstrate the anticompetitive effects of the practices analyzed. In these decisions, CADE's Tribunal observed that applying concepts such as "relevant market"[57], "dominant position," and "market foreclosure" can be quite complex given data-driven business models. The analysis of non-price anticompetitive effects that create exclusionary situations becomes intricate in these contexts.[58-59]

The primary challenge lies in identifying legal and economic tests that can be consistently applied across various types of conduct, such as self-preferencing practices, interoperability restrictions, and the appropriation of user and rival data. Dominant digital platforms employ strategies that manifest in diverse forms, complicating efforts to categorize them under fixed types of infractions like "refusal to deal," "tying," or "discrimination," each of which entails different assumptions and burdens of proof.

Moreover, even when the legality of specific conduct can be determined, designing effective behavioral or structural remedies tends to be complex, particularly when they involve issues such as data access, interoperability standards, and portability. These remedies not only demand specialized technical knowledge but also pose challenges in terms of monitoring and

[57] See, for example, an excerpt from Statement N° 12/2019/CGAA4/SGA1/SG. Case N. 08700.002703/2019-13. Applicants: Mosaico Negócios de Internet S.A. and Buscapé Company Informação e Tecnologia Ltda. Merger Act: "*As stated in the Guide to the Analysis of Horizontal Merger Acts ('Guide H'), the relevant market is composed of agents that effectively constrain each other's competitive decisions. According to the Guide, the definition of the relevant market is not binding on Cade and can sometimes be left open, particularly when low concentration is observed in all possible scenarios, as well as in cases where the market is dynamic. In the case of the sector under analysis, there is notable dynamism and flexibility in the provision of services. Regarding this sector, according to the recent study by the European Commission 'Competition policy for the digital era,' the greatest challenges in the analysis of digital markets are precisely related to the definition of the relevant market. According to the document, 'In the digital world, market boundaries may not be as clear as in traditional markets. They can change very quickly. Furthermore, in the case of multi-sided platforms, the interdependence of the 'sides' becomes a crucial part of the analysis, considering that the traditional role of market definition has been to isolate problems. Therefore, we argue that in digital markets, we should place less emphasis on market definition analysis and more emphasis on theories of harm and identification of anticompetitive strategies.*'" (free translation). Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yNFX2zITWZpdTGXEYBIVFw1PGXb6TIvXiWU284zf5znoamUXUh9vX8U2WaoaKx5sRom4Yvof0Hud9nvdnnByrAT. Accessed on April 22, 2024.

[58] For a review of these decisions see PEREIRA NETO, C. M. S.; PASTORE, R. F.; PAIXÃO, R. *Competition Law Enforcement in Digital Markets: The Brazilian Perspective on Unilateral Conducts*. The Antitrust Bulletin, p. 1–20, 2022.

[59] LYRA, M. P. O.; PIRES-ALVES, C. C. Innovation Competition and Innovation Effects in Horizontal Mergers: Theory and Practice in the United States and European Commission. Antitrust Bulletin, v. 68, p. 460-476, 2023.

require continuous updates due to the rapid technological changes inherent in digital markets.[60]

In merger reviews, CADE has explored theories of harm related to data, probing whether a specific merger possesses the capability and incentives to utilize data acquired through the consolidation process in an anticompetitive manner across related markets.[61] When competitors can access equivalent data from the merged entity through alternative viable sources, CADE generally determines that the merged firm is unlikely to pursue exclusionary strategies. However, in at least one instance, the Brazilian antitrust authority concluded that measures centered on data compartmentalization or prohibitions on the use of data for anticompetitive purposes were essential to prevent merged companies from exploiting their dominance in one market to gain advantage in another.[62]

There are also recent examples in CADE's jurisprudence that involve new theories of harm related to digital ecosystems and conglomerate mergers.[63] Notable examples are the acquisition of Hortigil Hortifruti S.A. by Grupo LASA through IF Capital Ltda.[64], the acquisition of KaBum! by Magazine Luiza[65] and Microsoft's acquisition of Activision Blizzard.[66]

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[60] MARSDEN, P. *Google shopping for the empress's new clothes -when a remedy isn't a remedy (and how to fix it)*. Journal of European Competition Law and Practice, v. 11, n. 10, p. 553–560, 2020. (Discussing how the remedy applied by the European Commission in the Google Shopping case faced difficulties in making price comparison service results more visible on the search engine's page).

[61] For a review of the main cases decided by CADE in this regard see FERNANDES, V.; FLORES DA CUNHA, M. Theories of Harm for Digital Mergers - Note by Brazil. *Written contribution from Brazil submitted for Item 8 of the 140th OECD Competition Committee meeting on 14-16 June 2023*, p. 1–18, 2023. p. 3–8.

[62] BRAZIL. ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE). Grupo SBF S.A. – "Centauro" / Nike do Brasil Comércio e Participações Ltda., Case n. 08700.000627/2020-37. Court of CADE, 2020.

[63] ZINGALES, N.; RENZETTI, B. *Digital Platform Ecosystems and Conglomerate Mergers: a review of the Brazilian experience*. World Competition, v. 45, n. 4, 2022, p. 473-510.

[64] BRAZIL. ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE). Cade N° 08700.004481/2021-80 (IF Capital Ltda. and Hortigil Hortifruti S.A.). Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?1MQnTNkPQ_sX_bghfgNtnzTLgP9Ehbk5UOJvmzyesnbE-Rf6Pd6hBcedDS_xdwMQMK6_PgwPd2GFLljH0OLyFSTSfxLVAzL2khUIwnEp3D00wI0yBqwJXo2jqd9PlFVE . Accessed on January 30, 2024.

[65] BRAZIL. ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE). Case n. 08700.003780/2021-05 (Magazine Luiza S.A. e Kabum Comércio Eletrônico S.A.) Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?1MQnTNkPQ_sX_bghfgNtnzTLgP9Ehbk5UOJvmzyesnbE-Rf6Pd6hBcedDS_xdwMQMK6_PgwPd2GFLljH0OLyFYbHCnCI0EgKnanUj_j63jhCMIGTyz5Ew9bkN3VoJTjU. Accessed on January 30, 2024.

[66] BRAZIL. ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE). Case n. 08700.003361/2022-46 (Microsoft Corporation e Activision Blizzard, Inc.). Available at https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?1MQnTNkPQ_sX_bghfgNtnzTLgP9Ehbk5UOJvmzyesnbE-Rf6Pd6hBcedDS_xdwMQMK6_PgwPd2GFLljH0OLyFX6gl2sGKAL6BCs1NvfGDcTA25PStaVelgicwm5iRue6. Accessed on January 30, 2024.

The analysis of Microsoft's acquisition of Activision underscored significant differences in approach among various jurisdictions, including the United States, the European Union, and Brazil[67-68], reflecting the nuances of each regulatory context. For instance, the European Commission (EC)[69] and the UK's Competition and Markets Authority (CMA)[70] focused their reviews on the distinct dynamics of digital markets, considerations of potential competition, and potential effects on market foreclosure. They identified shortcomings in Microsoft's proposed remedies that could impact competition in the emerging cloud gaming sector.

In CADE's analysis of Microsoft's acquisition of Activision, the Brazilian authority evaluated Microsoft's potential to expand its game portfolio, which theoretically could diminish the necessity for third-party content and potentially limit distribution channels for other publishers. However, CADE concluded that such expansion would not significantly diminish competition, given that competitors would still have access to alternative distribution channels.

This case underscores CADE's competence and methodology in addressing and analyzing complex issues in dynamic and technologically advanced markets, such as digital markets. CADE has placed significant emphasis on assessing the unique characteristics of digital markets in its analyses, progressively deepening its understanding of these dynamics.

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[67] BRAZIL. ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE). Concentration Act N° 08700.003361/2022-46. Opinion N° 23/2022/CGAA3/SGA1/SG/Cade. Published in the Official Gazette of the Union on October 6, 2022.

[68] For more details, see FERNANDES, V.; FLORES DA CUNHA, M. Theories of Harm for Digital Mergers - Note by Brazil. *Written contribution from Brazil submitted for Item 8 of the 140th OECD Competition Committee meeting on 14-16 June 2023*, p. 1–18, 2023. p. 3–8.

[69] EUROPEAN COMMISSION. Mergers: *Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions*. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705. Accessed on April 25, 2024.

[70] On July 31, 2023, Microsoft renotified the transaction to the CMA, proposing "fix it first" remedies in response to CMA's concerns. Additionally, Microsoft offered a structural commitment through the transfer of cloud gaming broadcasting rights from Activision Blizzard to Ubisoft Entertainment. With the renotification, Microsoft aimed to conclude the review process before the 90-day extension deadline in the acquisition agreement with Activision. Under the new framework, Microsoft cannot exclusively launch Activision games on its cloud gaming service (Xbox Cloud Gaming) or exclusively control licensing terms for competing services. Ubisoft will hold cloud gaming broadcasting rights for Activision games, fostering innovation in business models and global cloud distribution. Ubisoft will compensate Microsoft for these rights through a one-time payment and wholesale pricing mechanism. Moreover, Ubisoft may offer games to non-Windows competing services. Microsoft will maintain obligations to provide cloud gaming broadcasting rights in the EEA, in line with commitments to the European Commission. For more details, see: SMITH, Brad. Microsoft and Activision Blizzard restructure proposed acquisition and notify restructured transaction to the UK's Competition and Markets Authority. Available at: https://blogs.microsoft.com/on-the-issues/2023/08/21/microsoft-activision-restructure-acquisition/. Accessed on April 25, 2024.

Internationally, cases like the Google Shopping case in the European Union and the Microsoft-Activision case highlight the increasing readiness of other jurisdictions to scrutinize and intervene in major mergers and business practices within the digital sector. They apply theories of market foreclosure that acknowledge the dynamic nature of these markets.

The potential expansion of CADE's regulatory approach aims to strengthen and broaden its regulatory toolkit to effectively address the complexities of the digital economy. This initiative seeks to establish CADE not only as an authority with extensive experience and expertise but also as fully equipped to address and overcome current limitations within a robust regulatory framework tailored to the requirements of modern digital markets. Thus, it is evident that while the Brazilian context shares similarities with other jurisdictions regarding competition concerns raised by large digital platforms, there are significant particularities in our legal-institutional framework that must be considered when discussing the potential adoption of an ex-ante regulatory regime.

II – Sufficiency and Adequacy of the Current Economic Regulation and Competition Defense Model

2. Is the existing legal and institutional framework for competition defense - notably Law 12,529/2011 - sufficient to deal with the dynamics related to digital platforms? Are there competition and economic issues that are not satisfactorily addressed by the current legislation? What improvements would be desirable for the Brazilian Competition Defense System (BCDS) to deal more effectively with digital platforms?

As mentioned above, the different proposals for ex-ante regulation of platforms are triggered by a perception among some foreign regulators that traditional antitrust laws are not sufficient to address the risks of harm to consumers and society in general arising from competition issues in digital ecosystems. This assessment still needs to be carefully deepened in the Brazilian case, considering the specificities of the national legal-institutional framework. However, in the spirit of contributing to the advancement of this discussion, it is important to understand the focal points of insufficiency that have been identified so that this assessment can be deepened in relation to the regime of Law 12,529/2011.

In this context, it is interesting to note that there are procedural and substantive public policy reasons that have driven ex-ante legislation. From a procedural point of view, some consider that the enforcement of antitrust interventions in digital markets is intrinsically incapable of preserving open and contestable markets.[71] In this sense, the Impact Assessment that underpinned the proposal of the DMA in the European Union, for example, pointed to the slowness of investigations of abuse of dominant position as one of the reasons to justify the adoption of this legislation. According to the report, investigations under Article 102 of the TFEU are excessively slow, consume many resources, and in many cases, the remedies imposed at the end fail to restore competitive conditions years after the investigated practice has been consummated. Moreover, the case-by-case nature of these investigations, which requires strict observance of procedural rights in an adversarial context, potentially complicates and prolongs the decision-making process.[72]

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[71] CABRAL, L. *et al. The EU Digital Markets Act: A Report from a Panel of Economic Experts*. 2021. Available at: https://doi.org/10.2760/139337; OECD. *Ex-ante Regulation and Competition in Digital Markets*. Paris: OECD Publishing, 2021. p. 12.

[72] EUROPEAN COMMISSION. *Impact Assessment Report - Proposal for The Digital Markets Act*. Brussels. 2020, pp.32-36 ("*the main challenges with regard to the enforcement of Article 102 TFEU relate to*

It is important to note that, even before the DMA, European legislation already provided for the adoption of 'interim measures' as a form of rapid intervention to preserve market competitiveness, similarly to what is provided for in Article 84 of Law 12,529/2011 in Brazil. These measures aim to halt harmful conduct while the investigation is ongoing, ensuring the effectiveness of the outcome of the process. Through this provision, the General Superintendent or the Reporting Commissioner may, ex officio or upon request, adopt interim measures that determine the immediate cessation of conduct under investigation when there is an indication or founded fear that the defendant, directly or indirectly, causes or may cause irreparable or difficult-to-repair harm to the market or renders the outcome of the process ineffective.

Preventive measures can reduce the effects of the time lag often created due to the dynamism of digital markets. They can also drive the adoption of remedies agreed upon by the players involved in the market dynamics by addressing potential competition issues. Such measures can be adjusted based on new information revealed during the investigation. Furthermore, contributions from the players can be used to formulate their terms and reduce information gaps. They can help avoid litigation, as the antitrust authority may be persuaded not to take action during an investigation. Market players can more easily reach a consensus since they already know the authority's initial position; and cooperation among market players reduces enforcement costs. [73]

This tool has been used by CADE in recent cases involving digital platforms, such as those involving iFood and Gympass.[74] In these cases, during the course of administrative investigations, CADE's General Superintendence adopted preventive measures that mandated the suspension of new exclusivity contracts by these platforms with restaurants and gyms, respectively, until the investigations were concluded. These measures were important to preserve competitive conditions in the affected markets while the investigations were still ongoing.

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situations where dominance does not exist, and the difficulties with remedying a conduct found to be anti-competitive in an appropriate and effective manner, notably once the damage has already occurred").

[73] CORDEIRO, A. *et al.* Brazil: Interim Measures as an Enforcement Policy in Digital Markets. *In*: JEFFS, C.; SOKOL, D.; NING, S. GCR, *Digital markets guide* - 1st Edition. [S.l.]: Law Business Research, 2021. p. 196-205.

[74] BRAZIL. ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE). Technical Note. 14/2021/GAB-SG/SG/CADE Administrative Inquiry 08700.004136/2020-65. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?HJ7F4wnIPj2Y8B7Bj80h1lskjh7ohC8yMfhLoDBLddaqOuY58g0A5bT5wmqGLIBLFIYZ4hPeWK2iU03zOJKYWuAeXqrtK95YGPPF2x0AHjQQo8NdtwmX-lYxgI5KyATo. Accessed on April 24, 2024.

Another tool provided by Law 12,529/2011 that can contribute to speeding up CADE's intervention in cases involving digital platforms is the possibility of entering into Cease-and-Desist Agreements (CDA), as provided in Article 85 of Law 12,529/2011, in investigations of unilateral conduct. Through these agreements, the investigated companies can commit to adopting certain measures negotiated with CADE to address competition concerns without waiting for the conclusion of the investigations. This occurred, for example, in the two aforementioned cases involving iFood and Gympass, in which the companies committed to limiting existing exclusivity contracts.[75]

Of course, although quite effective, these tools remain constrained by an *ex-post* enforcement model, based on case-by-case assessment. Likewise, it is not always straightforward for antitrust authorities to design, implement, and monitor remedies. These aspects require careful consideration by policymakers in light of the concerns raised with the procedural limitations discussed.

Although legislation provides tools for investigating and penalizing anticompetitive practices, there is a predominantly reactive nature to these measures. Investigations can be time-consuming and often fail to keep pace with the rapid evolution of market conditions in digital platforms. In this regard, a desirable enhancement to the Brazilian Competition Defense System (BCDS) would be the implementation of a continuous regulatory dialogue model. This model emphasizes proactive interaction between competition authorities and market agents, aiming not only to punish but primarily to guide and ensure compliance with competition norms. Such an approach would reduce the need for punitive interventions by requiring companies to clarify compliance uncertainties and propose solutions to meet regulatory standards.

Furthermore, this ongoing regulatory dialogue would provide a foundation for more agile and adaptive law enforcement, quickly adjusting to technological innovations and new market configurations. This mechanism should be implemented in a way that encourages platforms themselves to seek guidance from authorities, fostering a culture of compliance rather than evasion of penalties. Therefore, updating the BCDS to incorporate this continuous dialogue model could be a fundamental change in addressing the complexities and dynamics of digital platforms more effectively.

It is important to emphasize that *ex-ante* regulatory models for digital platforms have fostered a convergence of antitrust intervention measures and

[75] For an analysis of the iFood case, see KIRA, B. *Is iFood Starving the Market? Antitrust Enforcement in the Market for Online Food Delivery in Brazil.* World Competition Law and Economics Review, v. 46, n. 2, p. 133–162, 2023.

sectoral regulation, as these laws make authorities more attuned to the preventive role of competition law in shaping digital ecosystems. As a result, these laws have been proactively used to decentralize digital markets, enabling new operators to compete with and challenge historical operators, while also promoting consumer choice.[76]

In addition to these procedural issues, the enactment of *ex-ante* regulatory laws sometimes involves a deeper substantive change in competition policy[77]. The adoption of *ex-ante* obligations applicable to specific sets of platforms in legislations such as the DMA, the DMCC Bill, and other similar initiatives represents an effort to reorient competition law[78] beyond the conventional economic approach based on a "static" view of competition.[79] These laws aim to more proactively promote a range of public policy objectives, such as reducing entry barriers, stimulating innovation by rivals, and protecting the interests of professional users and consumers. Such a shift in focus suggests a broader redefinition of the purposes and tools of competition law.

The notion that the DMA pursues broader objectives than traditional competition laws is particularly clear. The law is guided by two fundamental normative principles: contestability and fairness in commercial relationships. Contestability concerns the need to combat practices or structures that contribute to raising entry barriers in digital markets[80], thereby leveling the playing field of competition between gatekeepers and professional users who

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[76] BIETTI, E. *Structuring Digital Platform Markets:* Antitrust And Utilities' Convergence. Forthcomming in University of Illinois Law Review, v. 4, p. 1–74, 2024. p. 58. ("Antitrust enforcers are increasingly sensitive to antitrust remedies' role in pre- and restructuring digital ecosystems, and sectoral regulation is now aimed proactively at decentralizing digital markets, enabling new entrants to compete against incumbents, promoting consumer choice").

[77] CRÉMER, J. *et al. Fairness and Contestability in the Digital Markets Act.* Yale Tobin Center for Economic Policy Policy Discussion Paper N° 3, p. 1–35, 2021.

[78] ANDRIYCHUK, O. Shifting the digital paradigm: towards a sui generis competition policy. *Computer Law & Security Review*, v. 46, p. 1–14, 2022. p. 5. ("*the references to contestability and fairness as the central objectives of competition policy, go far beyond the rationale of the replacement of the current competition orthodoxy by the old ones*").

[79] KOVACIC, W. E.; SHAPIRO, C. Antitrust policy: a century of economic and legal thinking. *Journal of Economic Perspectives*, v. 14, n. 1, pp. 52–55, 2000 (The Chicago School is identified as an intellectual movement that originated in the USA in the 1970s, driven by the contributions of Posner and Bork. They questioned the implementation of antitrust regulations based on the principles of the Harvard School, extending its impact until the early 1990s).

[80] Unlike the DMA, which adopts a proactive and not reactive approach to prevent such practices before they harm the market, Brazilian legislation tends to act reactively, intervening after the detection of anticompetitive practices. The legal provision in the Brazilian context regarding the contestation of practices or structures of large digital platforms that raise barriers to entry is clearly defined in Article 36 of Law 12.529/2011. According to paragraph 3, subsection IV of this article, it is considered an infringement of the economic order to "create difficulties for the establishment, operation or development of a competitor company or supplier, acquirer or financier of goods or services."

depend on them[81]. Fairness, on the other hand, relates to correcting power imbalances in bargaining between dominant platforms and professional users, aiming to ensure that they can fairly benefit from digital ecosystems.[82]

The DMA makes it clear that these objectives are complementary to the competition policy objective established by the rules of the Treaty on the Functioning of the European Union (TFEU). In this regard, Recital 11 of the law states:

> "Articles 101 and 102 TFEU and the corresponding national competition rules concerning anticompetitive multilateral and unilateral conduct as well as merger control have as their objective the protection of undistorted competition on the market. **This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market**, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. **This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application**." (emphasis by the authors)

In contrast, the UK's DMCC Bill lists its main objectives as promoting "fair dealing," "open choices," and "trust and transparency" in digital markets. The concept of "fair trading" involves ensuring that companies engage ethically in their dealings with consumers.[83] "Open choices," in turn, is associated with guaranteeing that users have choices and access to information that enable them to make informed decisions about how to interact with platforms[84]. Lastly, "trust and transparency" concerns the duty of platforms to provide users with adequate information so they understand the terms of services and can make appropriate choices.[85]

By emphasizing concepts such as fairness, transparency, and freedom of choice, these legislations signal a greater willingness to intervene in the

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[81] EUROPEAN UNION. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). Official Journal of the European Union, L 265/1, 18 Oct. 2022, recital 32.

[82] EUROPEAN UNION. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). Official Journal of the European Union, L 265/1, 18 Oct. 2022, recital 33.

[83] UNITED KINGDOM. Parliament. *Digital Markets, Competition and Consumers Bill*. Chapter 3, section 6. [S.l.], 2023.

[84] UNITED KINGDOM. Parliament. *Digital Markets, Competition and Consumers Bill*. Chapter 3, Section 6. [S.l.], 2023.

[85] UNITED KINGDOM. Parliament. Digital *Markets Competition and Consumers Bill*. Chapter 3, Section 8. [S.l.] 2023.

structure of digital markets to promote a more balanced environment conducive to innovation and contestability in the long term. This approach reflects an understanding that, in the specific context of digital markets, merely repressing anti-competitive conduct *ex-post* may not be sufficient to achieve these objectives. Therefore, it is possible to understand that the discussed *ex-ante* legislations, fundamentally, constitute new instruments for digital markets, beyond traditional antitrust measures.

With this understanding, the discussion on the potential need for *ex-ante* regulation for digital platforms in Brazil should be based on a deeper analysis of the purposes of competition policy. As explained earlier, Law 12,529/2011 is linked to a perspective of "consumer welfare." The debate on the need for *ex-ante* regulation requires legislative consideration of how the competition policy traditionally conceived in the country around microeconomic objectives should be reformulated for the context of digital markets. Ultimately, this is a decision for legislators and policymakers in the country.

In this context, the lack of delineation of public policy objectives to be achieved with *ex-ante* regulation can be problematic. In this respect, it is noted that the current Bill 2,768/2022 lacks clarity on what it aims to achieve with competition regulation for digital markets. The lack of conceptual delimitation of the objectives of the Bill may lead to uncertainties about whether the obligations imposed on dominant platforms should be guided exclusively by the objective of consumer welfare protection, in line with the approach guiding the application of Law 12,529/2011 by CADE, or whether they should incorporate other public policy objectives. Bill 2,768/2022 does not precisely define, for example, the concept of "fair competition" it seeks to promote in digital markets, which may allow for different interpretations of the scope and purpose of regulatory intervention.[86]

It is essential to develop new tools and strengthen the cross-cutting role of antitrust authority in digital markets, aiming to create fairer and more competitive conditions. This approach should always be preceded by a detailed analysis of regulatory impact, evaluating the trade-offs between static and

[86] For a critique in this regard, cf. FERNANDES, V. O. Lost in translation? Critically assessing the promises and perils of Brazil's Digital Markets Act proposal in the light of international experiment. Computer Law & Security Review: The International Journal of Technology Law and Practice, v. 52, 2024, p. 105954 ("The lack of detailed objectives in Brazil's PL 2768/2022 stands in stark contrast to these foreign experiences. While Articles 4 and 5 include various economic and non-economic objectives, PL 2768 fails to adequately analyze the substantive concept of 'competition' it aims to facilitate in digital markets. A more exact expression of the objectives of the law is necessary, particularly because PL 2768 does not adhere to a comprehensive set of responsibilities but instead permits significant regulatory discretion. In this regard, legislators face a crucial choice in deciding whether ANATEL's obligations should conform to or diverge from the economic principles typically upheld in Brazil's Competition Law").

dynamic competition, income distribution in digital ecosystems, and the contestability and openness of markets for complementary services. Thus, it is up to Brazilian legislation to enhance intervention tools to effectively adapt to the specificities of digital markets.

3. The Law 12,529/2011 establishes, in §2 of article 36, that: "Dominant position shall be presumed whenever a company or group of companies is capable of unilaterally or collectively altering market conditions or controlling 20% (twenty percent) or more of the relevant market, this percentage may be altered by CADE for specific sectors of the economy." Are the definitions in Law 12,529/2011 related to market power and abuse of dominant position sufficient and adequate, as applied, to identify market power in digital platforms? If not, what are the limitations?

The definition of dominant position provided in §2 of article 36 of Law 12,529/2011 establishes a broad concept of market power, which corresponds to the ability of a company or group of companies to unilaterally or collectively alter market conditions. This definition merits recognition for not adhering to rigid market share criteria, acknowledging that dominant position can manifest in different forms depending on the specific characteristics of each economic sector. Indeed, the presumption of dominant position based on controlling 20% or more of the relevant market is merely indicative and not determinative for establishing market power. The law itself allows CADE to adjust this percentage for specific sectors of the economy, recognizing that the market share required to confer economic power can vary significantly across different industries.

In the context of digital markets particularly, the use of criteria strictly based on market share has proven increasingly inadequate for identifying situations of economic power. As observed by Jacobides and Lianos, "the market definition focuses on substitutability, and the metric used to measure market power — market share — does not account well for the issues raised by intraecosystem competition, where the relevant issue is not substitutability through horizontal rivalry but competition for the rents emerging from complementarities".[87]

In fact, dominant digital platforms often act as orchestrators of vast ecosystems, intermediating relationships between different user groups and complementary economic agents. In such cases, the economic power of the platform arises not only from its market share in an isolated market but primarily from its ability to control access terms to markets it intermediates and influence competitive dynamics in adjacent markets. It is increasingly important to understand that market power analysis should not only focus on

[87] JACOBIDES, M. G.; LIANOS, I. Ecosystems and competition law in theory and practice. *Industrial and Corporate Change*, v. 30, n. November, p. 1199–1229, 2021, p. 1212.

the potential for price increases in a narrowly defined relevant market but also on the potential for imposing behaviors such as data exploitation abuse.[88]

These new forms of economic power have been captured by terms such as "gatekeepers" in *ex-ante* competition laws.[89] The notion of "gatekeeper" precisely describes the strategic position held by certain dominant digital platforms, enabling them to control access by third parties to data, users, and essential resources for innovation and competition in digital markets. Other concepts have been proposed to capture the specificities of platform economic power arising from the strategic position held within a value network, such as "bottleneck power"[90], "intermediationsmacht"[91], "strategic market status"[92], and "unavoidable trading partner".[93]

These new concepts acknowledge that even when not holding significant market share in an adjacent market, orchestrator platforms can adopt strategies to prevent future attacks from complementary agents on the main market they dominate. Thus, the dominant position of the platform in the primary market can confer the ability to interfere in secondary markets, regardless of its participation in these markets measured in static terms.

[88] ZINGALES, N.; STYLIANOU, K. Das plataformas aos ecossistemas digitais: implicações para a definição do poder de mercado. In: ZINGALES, N.; AZEVEDO, P. F. *A aplicação do direito antitruste em ecossistemas digitais: desafios e propostas*. Rio de Janeiro: FGV Direito Rio, 2022, p. 47-82.
[89] TOMBAL, T. Ensuring contestability and fairness in digital markets through regulation: a comparative analysis of the EU, UK and US approaches. *European Competition Journal*, v. 18, n. 3, p. 468–500, 2022. p. 473–485.
[90] STIGLER COMMITTEE ON DIGITAL PLATFORMS. *Stigler Committee on Digital Platforms Final Report*. Chicago: Stigler Center for the Study of the Economy and the State. 2019. pp. 105–106.
[91] SCHWEITZER, H. et. al. *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen*. Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie (BMWi) - Projekt Nr. 66-17, pp. 66–74, 2018.
[92] FURMAN, J. et. al. *Unlocking digital competition: report of the digital competition expert panel*. Londres: 2019. p. 41.
[93] CRÉMER, J.; DE MONTJOYE, Y. A.; SCHWEITZER, H. *Competition policy for the digital era*. Bruxelas: European Commission Final Report, 2019. p. 49.

4. Certain behaviors with potential competitive risks have become relevant in discussions about digital platforms, including: (i) economic discrimination by algorithms; (ii) lack of interoperability between competing platforms under certain circumstances; (iii) excessive use of collected personal data associated with potential discriminatory behaviors; and (iv) leveraging the product of the platform itself to the detriment of other competitors in adjacent markets, among others. To what extent does competition law provide mechanisms to mitigate competitive concerns arising from vertical or complementary relationships in digital platforms? Which potentially anti-competitive behaviors would not be identified or corrected through traditional antitrust enforcement tools?

Article 36 of Law 12,529/2011 establishes a broad legal prohibition against any act capable of limiting, distorting, or harming free competition. The breadth of this legal prohibition is reflected in the comprehensive nature of the concepts presented. Article 36, §3 of Law 12,529/2011 lists various actions that can be classified as abuses of dominant position, such as: restricting access to the market, imposing exclusive contracts or discounts, discriminatory pricing, refusal to contract, tying the sale of products, and abusive use of intellectual property rights, among other examples.

In light of this legal framework, provisions regarding abuse of dominant position can fully apply to digital markets. CADE's precedents make it clear that there are no obstacles to the application of Law 12,529/2011 even in zero-price relationships, when economic transactions are based on data and attention exchanges that indicate costs for users[94]. In such cases, the competition authority can penalize various forms of abuse that affect competition parameters beyond price, such as reductions in innovation and quality. Recent experiences at CADE shows that it is possible, based on contemporary theories of harm, to classify practices such as imposing restrictions on interoperability[95], scraping and copying of content in price comparison markets[96] and self-favoring relationships under the legal abuse clause. in search markets.[97]

[94] For a review of this debate, cf. FERNANDES, V. O. *Direito da Concorrência das Plataformas Digitais:* entre abuso de poder econômico e inovação. São Paulo: Revista dos Tribunais, 2022. p. 171–175.
[95] BRAZIL. MINISTRY OF JUSTICE. CADE. Administrative Process n. 08700.005694/2013-19. Reporting vote by Commissioner Maurício Oscar Bandeira Maia (SEI n. 0628841). 2019
[96] BRAZIL. MINISTRY OF JUSTICE. CADE. Administrative Process n. 052754. Reporting vote by Commissioner Polyana Vilanova (SEI n. 0527547). 2019.
[97] BRAZIL. MINISTRY OF JUSTICE. CADE. Administrative Process n. 08012.010483/2011-94. Reporting vote by Commissioner Maurício Oscar Bandeira Maia (SEI n. 0632170). 2019

Some digital markets may be more prone to manifest the types of harms that competition law seeks to protect against. The complementary dynamics among different services or products offered within platforms and ecosystems can result in barriers to entry or expansion for competitors. For instance, integrating a popular operating system with other digital services may discourage competition and create a closed ecosystem where innovation by small developers is limited.

Given these risks, competition authorities can adopt multiple criteria for presumption of unlawfulness and standards of proof, considering risks of under-enforcement and over-enforcement[98]. In this context, authorities can adopt new standards for assessing dominant position and implement legal tests aimed at evaluating how leveraging and intra-platform discrimination practices can lead to exclusion of competitors and exploitation of users.[99]

5. Regarding structural control, is there a need for some form of adaptation in the parameters for submission and analysis of merger transactions to more effectively detect potential competition harms in digital markets? For example, mechanisms for reviewing acquisitions below notification thresholds, burden of proof, and analytical elements—such as the role of data, among others—that contribute to a holistic approach on the subject.

Authorities in various jurisdictions have faced the question of how to conduct structural control in light of the challenges posed by digital platforms. In Brazil, these discussions are not overlooked; however, Brazilian competition law already includes provisions capable of providing solutions.[100] As previously mentioned, paragraph 7 of article 88 of Law 12,529/2011 provides Brazilian legislation with a mechanism for controlling mergers below notification thresholds. This mechanism could be utilized in the context of nascent acquisitions and killer acquisitions in digital markets. Such a provision has the potential to serve as "a flexibility valve for structural control."

Internationally, concerns over market concentration and control over user data are increasingly concentrated in the hands of a few digital platforms. This is reflected in Article 14 of the DMA, which requires gatekeepers to inform

[98] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). *Abuse of Dominance in Digital Markets*. Paris: OECD Publishing, 2020. p. 58.
[99] BOSTOEN, F. Online platforms and pricing: Adapting abuse of dominance assessments to the economic reality of free products. *Computer Law and Security Review,* v. 35, n. 3, p. 263–280, 2019.
[100] BRAZIL. Law 12.529/2011: "Art. 88. The following shall be submitted to Cade by the parties involved in the operation of acts of economic concentration in which, cumulatively: (...) § 7º Cade may, within one (1) year as of the respective date of consummation, require the submission of the concentration acts that do not fall within the provisions of this article."

the European Commission about any planned concentrations involving core platform services or other services in the digital sector that enable data collection, even if these transactions are not subject to EU or national merger rules - a provision aimed at controlling potential killer acquisitions.[101]

Specifically, in Austria and Germany, transaction value thresholds were introduced in 2017 to capture transactions that may have significant market impacts, regardless of the companies' revenues. In Austria, transactions exceeding €200 million need to be notified, while in Germany, the threshold is €400 million. These measures aim to ensure that transactions involving large values, often indicative of strategic acquisitions of startups by major digital platforms, are properly evaluated for their anti-competitive effects[102]. The adoption of new notification criteria abroad reflects an adaptation of antitrust policies to the realities of digital markets, where assets such as intellectual property and data can be extremely valuable but not necessarily reflected in revenue.

The analysis of anti-competitive effects that transcend price dimensions, particularly impacts on innovation, requires a broad and meticulous perspective. This assessment requires an understanding of the specific innovative dynamics of digital platforms. According to Lyra and Pires-Alves[103], the challenge lies in the complexity of identifying and evaluating such effects, given that the impact of operations on innovation often does not follow predictable patterns and can manifest in subtle and multifaceted ways. This context requires competition authorities to have high technical expertise to effectively diagnose and intervene in practices that may restrict competition and innovation. Thus, there is a reinforced need for detailed and specialized expertise capable of understanding the specifics of innovation and what determines firms' ability and incentive to innovate, as well as navigating the intricate relationships between innovation, market power, and antitrust regulation, ensuring proactive and efficient measures are implemented to preserve market competitiveness.

III – Designing a Potential Regulatory Model for Pro-Competitive Economic Regulation

[101] ROBERTSON, Viktoria H.S.E. The Future of Digital Mergers in a Post-DMA World. In: *European Competition Law Review*. 2023; Vol. 44, N° 10. p. 447-450.
[102] ROBERTSON, Viktoria H.S.E. The Future of Digital Mergers in a Post-DMA World. *In*: *European Competition Law Review*. 2023; Vol. 44, N° 10. p. 447-450.
[103] LYRA, M. P. O.; PIRES-ALVES, C. C. Innovation Competition and Innovation Effects in Horizontal Mergers: Theory and Practice in the United States and European Commission. *Antitrust Bulletin*, v. 68, p. 460-476, 2023.

6. Should Brazil adopt specific preventive rules (*ex-ante*) to address digital platforms, aiming to prevent conduct harmful to competition or consumers? Would competition law—with or without amendments specifically to address digital markets—be sufficient to effectively identify and remedy competitive issues, either after the occurrence of anticompetitive conduct (*ex-post* model) or through the analysis of merger transactions?

Yes, Brazil should consider adopting specific preventive rules (*ex-ante*) to address the peculiarities of digital platforms, in order to prevent conduct that may be harmful to competition and/or consumers. Although the competition authority has been striving to address these issues with existing instruments and know-how, specific legislative changes are necessary to address unique challenges in digital markets. In this regard, such changes should include mechanisms for more effective and direct monitoring of market practices and the implementation of policies that anticipate and prevent problems before they arise.

The market power and inherent potential of digital platforms to exacerbate it represent a significant concern. An *ex-post* approach through residual, occasional and reactive intervention may not be considered sufficient to address the issue.

The Competition Defense Policy carried out by CADE is, in this context, essential to address the challenges posed by market power. In a scenario where monopolistic or oligopolistic tendencies are aggravated by the digital nature of platforms, it is essential that CADE implements a proactive and comprehensive approach, capable of encompassing various sector players. Although historically, Competition Defense Policy in Brazil has been characterized by action focused on concrete cases and a reactive stance, there is a growing need for a more structured and coordinated policy, which goes beyond case-by-case interventions. This includes its cross-cutting integration, promoting competition as a central and ongoing objective.[104] Specific platform-type orientation can also include broader competition and regulatory goal assessments, for example. The effectiveness of Competition Defense Policy, therefore, depends not only on resolving individual cases but also on its transversal capacity to guide market behaviors.

In addition to the analysis of specific cases mentioned above, CADE has played an active role in analyzing digital markets through specialized studies and reports. Among them, the work "Concorrência em mercados digitais: uma

[104] CARVALHO, V. M. de. *Política de defesa da concorrência:* dos fundamentos teóricos à implementação. São Paulo: Editora Singular, 2023. p. 235.

revisão dos relatórios especializados" ("Competition in Digital Markets: A Review of Specialized Reports) prepared by the Department of Economic Studies (DEE) with contributions from Filippo Maria Lancieri and Patrícia Alessandra Morita Sakowski[105], stands out. Furthermore, CADE published "BRICS in the Digital Economy: Competition Policy in Practice"[106] and the updated study on "Mercado de plataformas digitais" ("Digital Platform Markets") part of the "Review of CADE's Decisions"[107] series, focusing on new areas of action by the agency. This latest report reflects a review of the original 2021 publication and aligns with the latest trends and interventions by CADE in digital markets. These documents highlight the need for an updated approach adapted to the rapid transformations of digital markets.

CADE has demonstrated significant involvement in various global and regional initiatives focused on digital markets, reflecting the growing importance of this area for antitrust policy. In 2023, CADE participated in a series of international events, notably for its collaboration and leadership in discussions on the digital economy. Notably, CADE coordinated the Working Group on digital market competition of the BRICS, in partnership with the competition authority of Russia, and co-chaired important working groups in the International Competition Network (ICN). Moreover, CADE played an active role in the Latin American and Caribbean Competition Forum (LACCF) and made significant contributions to events such as the BRICS+Digital Competition Forum, held in Brazil. This forum addressed key issues in the digital market and involved experts, authorities, and academics from various regions. Other notable events include the 22nd Annual ICN Conference in Spain, where CADE played a central role in discussions on digital mergers and regulatory markets.[108]

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[105] BRAZIL. ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE). *Concorrência em mercados digitais*: uma revisão dos relatórios especializados. 2020. Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2020/documento-de-trabalho-n05-2020-concorrencia-em-mercados-digitais-uma-revisao-dos-relatorios-especializados.pdf. Accessed on April 23, 2024.

[106] BRAZIL. ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE). *BRICS in the digital economy*: Competition Policy in Practice. 2nd Report. Available at: https://cdn.cade.gov.br/Portal/assuntos/noticias/2024/BRICS%20Digital%20Economy.pdf. Accessed on April 23, 2024.

[107] BRAZIL. ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE). Mercado de plataformas digitais. Part of the series "Review of CADE's Decisions". 2023. Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/Caderno_Plataformas-Digitais_Atualizado_29.08.pdf. Accessed on April 23, 2024.

[108] Examples of international and regional events on digital markets in which CADE collaborated, as highlighted in the Relatório Integrado de Gestão do Conselho Administrativo de Defesa Econômica (Cade) - Exercício 2023, available at https://cdn.cade.gov.br/Portal/acesso-a-informacao/Transpar%c3%aancia%20e%20Presta%c3%a7%c3%a3o%20de%20Contas/2023/RIG-2023.pdf

Therefore, while the current *ex-post* model, focused on identifying and remediating competition issues after they occur, has its value, it may not be sufficiently agile or effective enough to address the dynamics and speed of changes in digital markets. An *ex-ante* approach, complemented by legislative reforms within competition law itself — allowing for systemic, coherent, and specialized action in terms of objectives, principles, and institutional design — would be more appropriate to ensure a comprehensive role for the antitrust authority, thereby preserving healthy competition and protecting consumer interests in the digital environment.

There is a need for a combination of *ex-ante* and *ex-post* efforts to address the challenges posed by digital platforms and ecosystems in the current economic scenario. These efforts are not mutually exclusive but rather complementary. While *ex-ante* regulation may aim to level market conditions and promote contestability by creating structural and behavioral conditions for new entrants to challenge the dominant position of incumbents, *ex-post* conduct control aims to restore the competitive environment to the status quo ante, inhibiting and penalizing behaviors that disrupt the proper functioning of the market. These are two tools within the same toolbox.

Finally, it is worth noting that the institutional design of the Brazilian System for Defense of Competition, especially the competencies established for CADE, ensures the competition authority's cross-sectoral role in the economy, not limited to a specific sector like regulatory agencies. This characteristic provides CADE with expertise capable of identifying situations deserving attention across various sectors.

6.1. What is the possible combination of these two regulatory techniques (ex-ante and ex-post) for digital platforms? Which approach would be recommended for the Brazilian context, considering the different degrees of flexibility needed to adequately identify economic agents that should be the focus of potential regulatory action and corresponding obligations?

There is no single model of *ex-ante* regulation for digital platforms, as can be seen even within different structures under the same regulatory framework[109]. There are self-executing rules, as seen in Article 5 of the Digital Markets Act (DMA) of the European Union, and more principle-oriented norms that require detailed regulation by authorities, such as in Article 6 of the DMA.

[109] FERNANDES, V. O. *Leis de regulação concorrencial de plataformas digitais:* cardápio de opções. Available at https://www.conjur.com.br/2022-nov-12/victor-oliveira-fernandes-leis-regulacao-concorrencial-plataformas/. Accessed on April 24, 2024.

For example, the UK's proposal includes general principles legislation but establishes specific codes of conduct for each type of platform in certain economic sectors, with a retrospective assessment of effects. In other instances, such as the DMA, the regulation has a broader scope and focuses on the specific cross-competitive dynamics inherent to the digital nature of a defined set of services, as interpreted by the legislative and regulatory authorities of the European Union.[110] Thus, even though the DMA specifies a limited set of services, its inherent transversal and dynamic characteristics of digital markets are incorporated into the regulatory framework through provisions that anticipate the inclusion of new services resulting from the expansion of digitalization in other markets and the development of new digital ecosystems.[111]

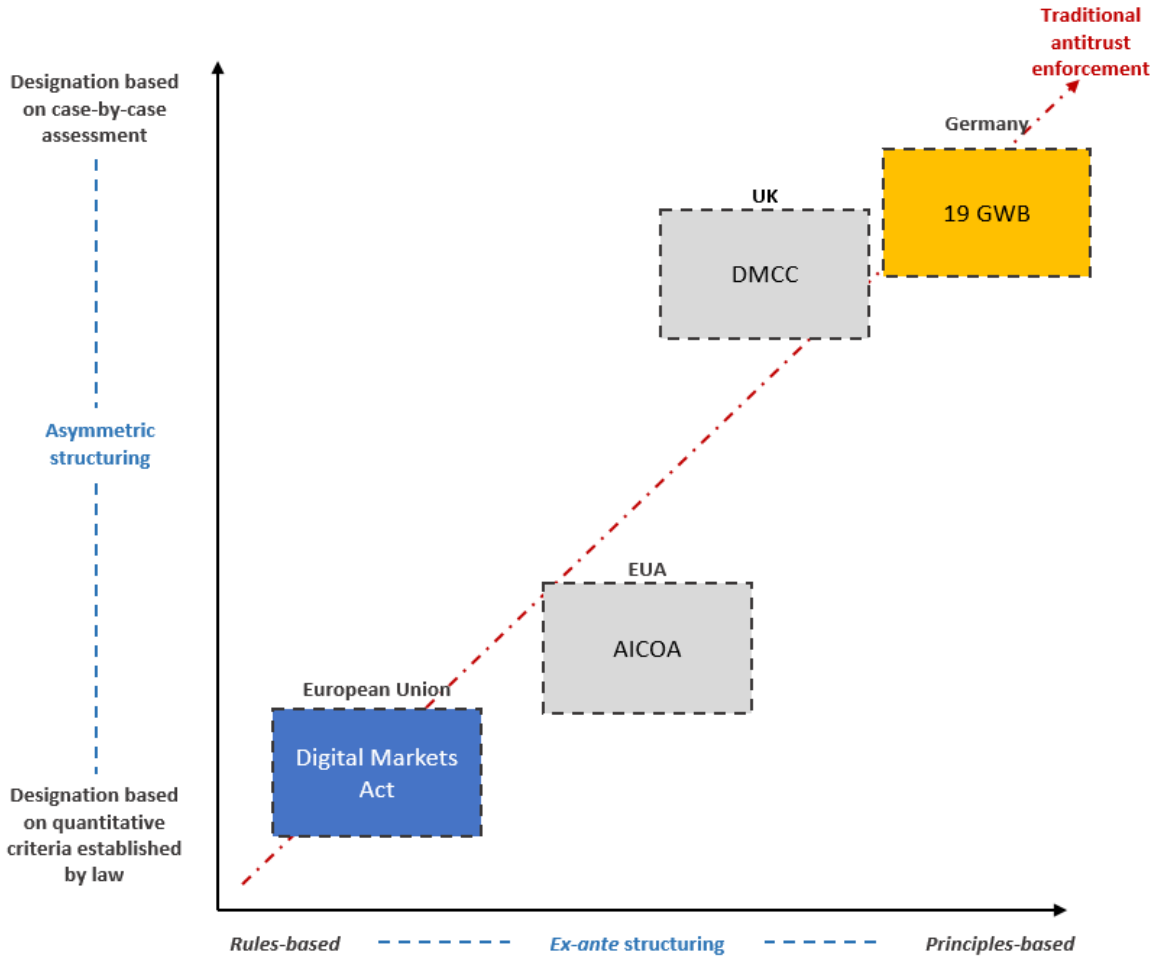
When examining the primary foreign legislative proposals, it becomes clear that each one carefully evaluates the advantages and disadvantages of flexible versus stricter regulatory interventions. Moreover, each proposal examines differently the dilemmas associated with diverging from the conventional approach to antitrust intervention. As represented in the following figure, these distinctions can be mapped along at least two axes: (i) the asymmetric nature of regulation based on the designation of a specific set of agents subject to it; and (ii) the prevalence of a command-and-control regulation strategy (rule-based) compared to a more market-oriented regulation model typical of antitrust approaches (and more strongly structured based on principles).[112]

[110] FGV-Rio. *Relatório referente à 3ª Reunião do Núcleo de Estudos em E-commerce,* 2023. Available at: https://direitorio.fgv.br/sites/default/files/arquivos/direito_rio_livro_neec_ap2.pdf. Accessed on January 25, 2024.

[111] OLIVEIRA, Paulo Henrique de. *A economia política da regulação concorrencial de mercados digitais:* um estudo comparativo entre EUA e União Europeia*.* Master's Dissertation, FGV-EAESP, 2024.

[112] FERNANDES, V. O. *Leis de regulação concorrencial de plataformas digitais:* cardápio de opções*.* Available at https://www.conjur.com.br/2022-nov-12/victor-oliveira-fernandes-leis-regulacao-concorrencial-plataformas/. Accessed on April 24, 2024.

Figure 2 – Differences among the legislative proposals for the competition regulation of platforms



Sources: OLIVEIRA, Paulo Henrique de. *A economia política da regulação concorrencial de mercados digitais:* um estudo comparativo entre EUA e União Europeia. Master's Dissertation, FGV-EAESP, 2024. Adapted from: FERNANDES, V. O. *Leis de regulação concorrencial de plataformas digitais:* cardápio de opções. Available at: https://www.conjur.com.br/2022-nov-12/victor-oliveira-fernandes-leis-regulacao-concorrencial-plataformas/. Accessed on April 24, 2024.

The approaches presented by regulations implemented in foreign jurisdictions mostly share the common point that *ex-post* antitrust intervention could be complemented (without replacement) by asymmetrical *ex-ante* regulatory regimes, which would be applied by the competition defense authorities themselves.[113] In this sense, disregarding the challenges associated with each regulatory aspect can generate substantial risks for the digital economy. Furthermore, it can mean an irreversible trajectory towards a less equitable economic order with less transparent rules for economic agents. On

[113] FERNANDES, V. O. *Leis de regulação concorrencial de plataformas digitais:* cardápio de opções. Available at https://www.conjur.com.br/2022-nov-12/victor-oliveira-fernandes-leis-regulacao-concorrencial-plataformas/. Accessed on April 24, 2024.

the other hand, the appropriate regulatory choice can make digital markets more competitive and aligned with competitive concerns, which have become so serious that they can no longer be ignored.[114]

In regulations of other jurisdictions, there are differences in determining the regulatory target (asymmetrical nature of the decision on regulated agents): each legislation establishes its own normative concept to define the "target" of regulatory intervention. For example, in the DMA, the concept of "gatekeeper" is used. In the UK's proposal, the concept of "strategic market status" is introduced. In the Aicoa (American Innovation and Choice Online Act)[115], proposal, it deals with "covered platforms." In the German law (GWB - Gesetz Gegen Wettbewerbsbeschränkungen)[116], in turn, economic agents with "exceptional importance for competition across markets" are analyzed. These concepts are related to the idea that the positions occupied by large platforms should trigger regulatory intervention, going beyond the ability to set prices above the competitive level in rigidly defined markets. The designation of these regulatory targets depends on quantitative and/or qualitative criteria that vary in each jurisdiction.

The main discrepancies between the proposals concern the regulatory strategy adopted in each regime. One strategy is command and control, imposing exhaustive prohibitions under a rule-based logic, while the other involves market control strategies, applying principle-based prohibitions that consider the particularities of each economic context. The choice between these strategies reflects on the administrative discretion of the regulatory authority and the possibility of economic justifications presented by the economic agents subject to regulation.[117]

The DMA, at least in its Article 5, opted for an *ex-ante* regime of detailed rules. On the other hand, Article 6 of the DMA allows for negotiated procedures between the European Commission and the gatekeepers, providing flexibility that can be crucial to adapting regulatory obligations to the specific market

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[114] FERNANDES, V. O. *Leis de regulação concorrencial de plataformas digitais:* cardápio de opções*.* Available at https://www.conjur.com.br/2022-nov-12/victor-oliveira-fernandes-leis-regulacao-concorrencial-plataformas/. Accessed on April 24, 2024.

[115] The legislation aims to prevent large technology companies from promoting their own products to the detriment of competitors. Platforms covered by the legislation would be prohibited from harming the products or services of other companies. The legislation would also prohibit covered platforms from using non-public data collected from commercial users to unfairly benefit the platforms' own products. Available at: https://www.congress.gov/bill/117th-congress/senate-bill/2992/text>. Acessed on January 19, 2024.

[116] Section 19 of the German law refers to the abusive behavior of companies with significant competitive impact. Available at: https://www.gesetze-im-internet.de/gwb/>. Accessed on January 19, 2024.

[117] FERNANDES, V. O. Lost in translation? Critically assessing the promises and perils of Brazil's Digital Markets Act proposal in the light of international experiment. *Computer Law & Security Review:* The International Journal of Technology Law and Practice, v. 52, p. 105937, 2024. p. 10552-10553.

realities[118]. Additionally, the DMA contains provisions such as Article 15, which demands an annual and audited description of consumer profiling techniques used. The Aicoa, in turn, presents a shorter list of prohibitions with the possibility of economic justifications. The UK's proposal establishes a continuous process of drafting codes of conduct for platforms, and the German legislation allows prohibitions to be waived if the behavior is objectively justified, transferring the burden of proof to the company with significant market position.[119]

In contrast to these international experiences, the current version of Brazilian Bill n. 2,768, in addition to lacking clearly defined objectives to guide its regulatory approach, also addresses the obligations attributed to platforms considered essential access controllers in a very generic and open manner. By attempting to deviate from the DMA's list of obligations model, Article 10 of the legislative proposal assigns broad delegation of powers to the regulatory authority, without even making it possible to assess whether the potential prohibitions would align with the competitive concerns identified in the foreign experience in digital markets.

A regulatory framework endowed with flexibility, characterized by the individual adjustment of regulatory provisions and continuous monitoring, could be particularly useful in Brazil. As pointed out by the OECD[120], such a solution should stem from the hybridization of *ex-ante* structuring concomitant with the *ex-post* dynamics already developed within the scope of the Brazilian Competition Defense System (BCDS). Adapting this approach would allow a more effective response to the challenges presented by digital platforms. This would include ensuring that the imposed obligations are proportionate and balanced, considering both the costs to companies and the effectiveness of these measures in maintaining a healthy and vibrant competitive environment. Additionally, the idea of constant and adaptive regulatory dialogue could help mitigate the risk of outdated regulations that fail to keep pace with digital innovation.

The widespread digitalization and platformization of the economy require antitrust authorities to adopt a cross-sectoral approach capable of encompassing multiple markets, rather than limiting themselves to narrow

[118] ANDRIYCHUK, O. Shifting the digital paradigm: Towards a sui generis competition policy. *Computer Law & Security Review*, v. 46, p. 105733, 2022.
[119] FERNANDES, V. O. *Leis de regulação concorrencial de plataformas digitais:* cardápio de opções. Available at https://www.conjur.com.br/2022-nov-12/victor-oliveira-fernandes-leis-regulacao-concorrencial-plataformas/. Accessed on April 24, 2024.
[120] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). Ex-ante regulation of digital markets, *OECD Competition Committee Discussion Paper*, 2021. Available at: https://www.oecd.org/daf/competition/ex-ante-regulation-andcompetition-in-digital-markets.htm. Accessed on January 31, 2024.

sectoral regulation. This approach is crucial because digital platforms operate in a wide range of economic contexts, influencing various sectors beyond their original markets. The interconnection and interdependence between different sectors, intensified by the presence of digital platforms, necessitate regulation that can effectively address the complexities of these new market dynamics.

Therefore, the antitrust authority, when taking charge of this regulation, must possess the ability to apply rules and guidelines that transcend traditional sectoral boundaries. This involves a deep understanding of the operational strategies of digital platforms and how these strategies can affect not just a single sector, but the economic ecosystem as a whole. The authority must then be equipped with regulatory tools and frameworks that allow for effective and adjustable intervention, tailored to the specific needs and challenges presented by the growing digital integration across multiple sectors of the economy.

The proposed regulatory model should ensure that antitrust measures can identify and mitigate competitive risks on a broad and integrated basis, reflecting the interconnected nature of the digital economy. This will not only enhance the effectiveness of competition policy but also ensure that innovation and economic growth are promoted in a fair and balanced manner across all sectors impacted by platformization. Hence, considering the Brazilian peculiarities, it is crucial to weigh which approach would be the most appropriate.

It is fundamental that the resulting competition regulation and the authority responsible for its implementation — CADE — are capable of promptly preventing strategies and business models typical of digital markets from having anti-competitive effects, ensuring fair and equitable competition in these markets. At the same time, effective enforcement and monitoring should be maintained through *ex-post* control of competitive risks arising from the pervasiveness of widespread digitalization — both new and traditional — economic sectors, which can enable new and sophisticated forms of abuse of economic power.

7. Jurisdictions that have implemented or are considering pro-competitive regulatory frameworks — such as the new rules in the European Union, legislation in Japan, and the regulatory proposal in the United Kingdom, among others - have chosen an asymmetric regulatory approach. This approach distinguishes the impact of digital platforms based on their sector of operation and their size, as demonstrated by the gatekeeper concept in the European DMA.

7.1. Should Brazilian legislation introducing parameters for the economic regulation of digital platforms be symmetrical, encompassing all market agents, or, on the contrary, an asymmetrical, establishing obligations only for some economic agents?

The main jurisdictions that have adopted or are considering adopting pro-competitive regulation models for digital platforms have opted for an asymmetrical regulation model, as already developed in item 6. This model establishes differentiated obligations for economic agents depending on their size and their position in the respective segments in which they operate.

The most emblematic example is the DMA (Digital Markets Act) of the European Union, which establishes a set of *ex-ante* obligations applicable only to a restricted group of large digital platforms classified as "gatekeepers." To be classified as a gatekeeper, the company must provide an "essential platform service" and meet certain quantitative criteria, such as having an annual revenue exceeding 7.5 billion euros or a market capitalization exceeding 75 billion euros, in addition to having more than 45 million monthly active end users and more than 10,000 active business users in the European Union.

Similarly, the proposal of the Digital Markets, Competition and Consumers Bill in the United Kingdom provides for the imposition of regulatory obligations only for companies designated as having "Strategic Market Status" (SMS). This designation is made based on a case-by-case analysis that considers factors such as the existence of "substantial and entrenched market power" and a "position of strategic significance" of the company in relation to a particular digital activity.

On the other hand, the Brazilian Bill n. 2,768/2022, inspired by the European DMA, adopts a purely quantitative criterion for defining the platforms subject to asymmetrical regulation. According to Article 9 of the bill, regulatory obligations would apply only to companies that operate specific business models listed in Article 6 (such as online intermediation services, search engines, social networks, operating systems, among others) and have an annual operating revenue in the country equal to or greater than R$ 70 million from offering services to the Brazilian public.[121]

The adoption of an asymmetrical regulation model is justified by the recognition that not all digital platforms have the same potential to generate risks to competition and innovation in their respective operating ecosystems. Platforms with high economic power and that act as gatekeepers to access

[121] It is worth mentioning that the value of R$70 million is below the minimum revenue criteria for an economic agent to have to submit a merger to CADE (R$75 million).

essential users and resources tend to have a greater capacity to adopt exclusionary and exploitative behaviors, thus requiring more intense regulatory scrutiny.

Conversely, indiscriminately imposing regulatory obligations on all agents operating in digital platform markets, regardless of their size and market position, could generate disproportionate compliance costs and discourage innovation and the entry of new competitors. A "one-size-fits-all" symmetrical regulation would hardly be able to adequately address the competitive challenges posed specifically by large dominant platforms, while it could impose excessive burdens on smaller companies with less offensive potential.

Therefore, if Brazil adopts *ex-ante* regulation for digital platforms, it would be most advisable to follow the example of major foreign jurisdictions and opt for an asymmetrical model, which concentrates regulatory obligations on agents with greater economic power and capacity to influence competition conditions in the markets they intermediate.

7.2. If the response leans towards adopting asymmetric regulation, what parameters or references should be used for such differentiation? What criteria (quantitative or qualitative) should be adopted to identify the economic agents that should be subject to platform regulation in the Brazilian context?

Asymmetric regulation, if adopted, should aim for fairness by reducing entry barriers within digital ecosystems, balancing rights and obligations. Moreover, it should be periodically evaluated since the conditions leading to asymmetry may change over time, especially in such a dynamic environment as digital platforms.

The criteria adopted, whether qualitative or quantitative, should be chosen following a thorough market analysis and consultation with various stakeholders. Quantitative criteria establish specific thresholds based on revenue or market share, regardless of market dominance, to identify companies subject to new regulations. The goal of these quantitative criteria is to ensure that the new regulations cover platforms of the largest companies with extensive ecosystems that have raised significant competition concerns.

On one hand, greater normative flexibility reflects a stronger focus on proportionality to avoid targeting companies without sufficient justification, while still allowing for the inclusion of companies that do not formally meet quantitative criteria. Additionally, it aims to make the new rules more enduring over time and prevent service fragmentation strategically used by companies

to evade quantitative criteria. On the other hand, such flexibility may create ambiguity regarding the outcome of the regulatory definition process and increase costs and risks for companies needing to independently assess if they fall within the scope of the new provisions.[122]

The definition of specific qualitative criteria can be used to identify companies subject to new regulations, largely based on the extent of a company's market power in the upstream intermediation market, the enduring or transient nature of the company's power, and the existence of businesses relying on the company's product or service to access other markets.[123]

Therefore, if asymmetric regulations are adopted, both qualitative and quantitative criteria can be used, considering the advantages and disadvantages highlighted and reinforcing the need for thorough studies and assessments – drawing significantly from the expertise gained through cases and markets analyzed by the Brazilian Antitrust System (BCDS) over the past years – to establish suitable criteria for asymmetric segmentation.

8. There are risks for Brazil stemming from the non-adoption of a new pro-competitive regulatory model, especially considering the scenario where other jurisdictions have already adopted or are in the process of adopting specific rules aimed at digital platforms, given the global operations of major platforms. What benefits could be gained from adopting similar regulation in Brazil?

The non-adoption of pro-competitive regulatory instruments creates vulnerabilities in a context of increasing digitalization, implying clear risks of reduced competition in markets that are increasingly socially and economically relevant. Furthermore, the adoption of instruments by other jurisdictions, coupled with the global nature of operations of large digital platforms, indicates a dynamic where regulatory frameworks from these jurisdictions spill over into the Brazilian context. Therefore, it is relevant for the legislative and national regulatory bodies to develop their own understanding of the needs and scope of regulatory action.

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[122] SCHNITZER, M. et al. *International coherence in digital platform regulation:* an economic perspective on the US and EU proposals - Digital Regulation Project, Policy Discussion Paper N° 5., 2021. Available at: https://research-portal.uea.ac.uk/en/publications/international-coherence-in-digital-platform-regulation-an-economi. Accessed on February 1st, 2024.

[123] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). *Ex-ante Regulation and Competition in Digital Markets*, 2021. Available at: https://web-archive.oecd.org/2021-12-01/616997-*ex-ante*-regulation-and-competition-in-digital-markets-2021.pdf. Accessed on February 1st, 2024.

Lastly, the existence of regulatory frameworks for the digital scenario enhances legal certainty and predictability for economic agents, which is particularly crucial in dynamic and innovative sectors such as the digital economy. Adopting such a regulatory model has the potential to mitigate significant risks for these economic agents, fostering a competitive and balanced business environment.

Indeed, Brazil stands out as a reference in the agenda of reducing inequalities while expanding economic dynamism, where antitrust can play a more relevant role. This context underscores the need for a regulatory framework that not only promotes consumer protection but also encourages innovation and entrepreneurship. With a well-calibrated regulatory approach, the country can strengthen its position as a leader in promoting equity and sustainable economic growth in the digital landscape.

It is important to emphasize that regulation, antitrust enforcement, and innovation are not mutually exclusive.[124] Indeed, studies show that many technological innovations during the 20th century were only possible due to specific interventions by competition authorities that restrained anticompetitive practices by incumbents and created opportunities for innovative newcomers. In this sense, Massarotto (2024)[125] explains how antitrust decisions in the AT&T (1956), IBM (1969), and Microsoft (2001) cases were essential in reducing the market power of incumbents and fostering the emergence of new economic players. For instance, the decision to break up IBM's activities facilitated the growth of an independent software market. This new environment favored the rise of innovators, such as Microsoft itself, which became a software supplier for IBM.

Additionally, it is important to highlight the presence of gatekeepers that operate primarily in Brazil and Latin America with significant economic and social impact, and due to their local specificity, they are not subject to the DMA or other similar international regulatory frameworks. This scenario underscores the need to develop antitrust policies adapted to the specific realities and challenges of Brazil, thus ensuring fair competition and fostering a more inclusive and diverse digital market.

[124] Gorgen, J. *Inovar ou regular:* uma falsa escolha para o digital. JOTA, 2024. Available at: https://www.jota.info/opiniao-e-analise/artigos/inovar-ou-regular-uma-falsa-escolha-para-o-digital-29042024?utm_campaign=jota_info. Accessed on April 29, 2024.

[125] MASSAROTTO, G. *Driving Innovation with Antitrust.* In: ProMarket, Chicago Booth – Stigler Center for the Study of the Economy and the State. Available at: https://www.promarket.org/2024/04/10/driving-innovation-with-antitrust/. Accessed on April 10, 2024.

8.1. How would Brazil, in the case of adopting potential pro-competition regulation, integrate into this global context?

As discussed earlier, regulations adopted in various jurisdictions are not uniform. However, due to the global nature of most platforms, regulation in any jurisdiction can have extraterritorial effects. The different legal approaches adopted in various jurisdictions make absolute consistency unrealistic and likely undesirable.[126] Nonetheless, any potential Brazilian regulation, if enacted after careful analysis, should strive for the greatest possible coherence to be effective and capable of limiting any negative consequences. It is crucial to have cooperation with international bodies – as CADE has extensively developed – so that the regulation yields more coherent results.

CADE cooperates internationally with its peers, notably through its active participation in the OECD (Organisation for Economic Co-operation and Development). This international cooperation encompasses both bilateral aspects, through the exchange of experiences and best practices with foreign competition authorities, and multilateral aspects, where CADE contributes to discussions in international forums such as the aforementioned OECD, the ICN (International Competition Network), and UNCTAD (United Nations Conference for Trade and Development). This global interaction not only reinforces antitrust regulatory practices in Brazil but also positions them in a global context, allowing the country to influence the international dynamics of competition policy.

The recent acceptance of Brazil as a permanent member of the OECD Competition Committee marks a significant step in the international recognition of its antitrust policies. This approval is the result of more than two decades of collaboration and alignment with international best practices and reflects Brazil's ongoing commitment to strengthening competition defense. Brazil's entry into the committee not only strengthens cooperation with other authorities within the organization but also emphasizes the country's commitment to more efficient markets and alignment with the highest international standards of public policy. Moreover, while Mexico, Chile, and Colombia are members of the OECD, Brazil stands out as the first South American country to specifically join the Competition Committee, highlighting its growing international prestige and its ability to contribute effectively to OECD activities.

[126] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). *Ex-ante Regulation and Competition in Digital Markets*, 2021. Available at: https://web-archive.oecd.org/2021-12-01/616997-ex-ante-regulation-and-competition-in-digital- markets-2021.pdf. Accessed on February 1, 2024.

Furthermore, Brazil actively participates in competition discussions within the BRICS countries. In 2017, CADE hosted the BRICS Competition Conference. In 2019, the conference was held in Moscow and included the participation of several CADE members and civil society involved in competition discussions. On that occasion, the report "Digital Era Competition: a BRICS view" was launched, which includes a specific chapter on Brazil and its competitive actions in digital markets. In 2023, CADE played a significant role in collaborations with BRICS, acting as coordinator of the Working Group on digital market competition alongside Russia's competition authority. Additionally, in the same year, CADE had a notable presence at the BRICS+Digital Competition Forum held in Brazil. This event focused on addressing the crucial challenges of digital markets and included the participation of experts, authorities, and academics from various regions. These initiatives highlight CADE's active involvement in 2023 to strengthen relations and collaboration among BRICS countries in the area of digital competition.[127]

To further strengthen this trajectory, it is crucial that the national Legislative and Executive powers take an active role in this agenda, ensuring that Brazil is at the forefront of decision-making regarding the digital economy in its multiple dimensions, including competition, where CADE and the Brazilian Competition Defense System are international references. Thus, the initiative reinforces Brazil's commitment to promoting a coherent and predictable regulatory environment, essential for sustainable and competitive economic development, avoiding external dependence and ensuring that local decisions reflect national needs and specificities.

[127] As shown in the Relatório Integrado de Gestão do Conselho Administrativo de Defesa Econômica (CADE) – Exercício 2023, Available at https://cdn.cade.gov.br/Portal/acesso-ainformacao/Transpar%c3%aancia%20e%20Presta%c3%a7%c3%a3o%20de%20Contas/2023/RIG-2023.pdf:

1. Brics Head of Competition Authorities, South Africa;
2. 8th Brics International Competition Conference 2023, India;
3. Brics+Digital Competition Forum, Brazil.

IV – Institutional Arrangement for Regulation and Supervision

9. Is a specific regulator necessary for the supervision and regulation of large digital platforms in Brazil, considering only the economic-competitive dimension?

The question of whether a specific regulator is needed to supervise and regulate large digital platforms in Brazil, considering only the economic-competitive dimension, is highly relevant and complex. International experiences and the dynamics of digital markets indicate that any decision regarding the creation of a new regulatory authority or the extension of the powers of an existing one requires a meticulous and well-founded approach.

The first step in this process, therefore, would be to conduct a comprehensive Regulatory Impact Analysis (RIA). Such analysis allows for the assessment of the potential effects of available regulatory options, considering not only the expected benefits but also the possible costs and challenges associated with the regulation of digital platforms. The RIA should encompass international case studies, economic models, and possible future scenarios, ensuring that the basis for policy decisions is solidly evidence-based and technically robust.

Upon completion of the RIA, it would be possible to clearly identify the necessity (or lack thereof) of establishing a new specific regulatory authority for the sector. However, as observed in other jurisdictions, the trend has been towards strengthening existing competition authorities, such as CADE in Brazil. This is because these authorities already possess significant expertise in analyzing market issues, including the complexities of digital markets.

Indeed, CADE has reiterated the importance of strengthening its structure by creating a specific career path focused on the economic regulation of digital markets. This would involve forming a specialized unit within the authority, dedicated exclusively to handling cases related to digital platforms, ensuring a more effective and informed approach. This model follows the logic of other international initiatives, such as the Digital Markets Unit (DMU) in the United Kingdom, which operates within the antitrust authority and specializes in issues related to strategic digital markets. Under the DMA, the Directorate-General for Competition of the European Commission (DG-Comp) will have a central role in enforcing the established rules, directly supervising gatekeepers and large online platforms. This leadership emphasizes the crucial role of DG-Comp in maintaining competition and effective regulation of digital markets in the European Union. According to the 2023 management plan, the

implementation of the DMA represents a new and significant line of work for DG-Comp, involving the creation of a new operational directorate responsible for applying the act and preparing a series of implementation decisions.[128]

This approach corroborates the need for technical expertise and adequate resources to tackle the challenges posed by the dynamic environment of digital markets, a lesson that could be adapted and applied to the Brazilian context by expanding CADE's competencies. Moreover, both national and international experiences indicate that CADE, with its expertise and track record, would be the most suitable authority to assume the expanded responsibility if it is decided that there is no need to create a new regulatory entity. The expertise already developed by CADE in dealing with complex competition issues provides a solid foundation for adapting and expanding its capabilities to specifically address the nuances of digital markets.

In summary, before proceeding with the creation of a new specific regulator, it is crucial to conduct a detailed RIA to underpin any decision. Based on this analysis, expanding CADE's competence to include a unit dedicated to digital markets could be the most pragmatic and efficient approach, aligning with global trends and maximizing the use of already available resources and expertise.

Opting to broaden CADE's competencies to encompass a specialized unit for digital markets emerges as a pragmatic and effective solution, aligning with international trends and optimizing the use of pre-existing resources and expertise. Such a strategy not only capitalizes on CADE's established regulatory infrastructure and accumulated experience but also avoids the substantial costs and time delays associated with creating and stabilizing a new regulatory entity. Additionally, integrating regulatory responsibilities in digital markets within CADE's existing operational scope promotes synergies among related antitrust domains, facilitating a more cohesive and efficient regulatory response to the volatile dynamics characterizing the contemporary digital environment.

[128] Original quote: "A major task for DG Competition in 2023 is the implementation of the Digital Markets Act (DMA). This new instrument complements the regulatory toolbox of the Commission in the digital sector and grants enforcement and investigative powers to the Commission. Therefore, the DMA will be a major new work stream for DG Competition in 2023, and beyond, requiring a new operational directorate tasked with enforcing the Act as well as preparing the adoption of a number of implementing decisions." Available at: https://commission.europa.eu/system/files/2023-02/comp_mp_2023_en.pdf. Accessed on January 29, 2024.

9.1 If so, would it be appropriate to create a specific regulatory body or assign new competencies to existing bodies? Which mechanisms of institutional coordination would be necessary, both in a scenario involving existing bodies and institutions, and in the event of creating a new regulator?

As discussed in response to item 9, the complexity and need for technical and regulatory expertise to deal with large digital platforms indicate the importance of a coordinated and integrated approach among existing authorities. In this context, the possibility of assigning new competencies to existing bodies, such as CADE, presents itself as the most appropriate, feasible, and efficient alternative.

CADE, in executing competition policy, which is horizontal, already operates with various institutional coordination mechanisms with regulatory agencies, such as the National Supplementary Health Agency (ANS), the National Electric Energy Agency (ANEEL), the National Telecommunications Agency (Anatel), and the National Petroleum, Natural Gas and Biofuels Agency (ANP). This collaboration is essential to ensure an integrated and effective approach to regulation in different sectors, promoting competition and consumer welfare.

On the other hand, in the event of creating a new regulator, coordination becomes even more crucial to avoid regulatory fragmentation and ensure that policies are implemented cohesively. In this case, formal cooperation structures between the new body and the already established authorities, such as CADE, Anatel, and ANPD, would be necessary. These structures could include cooperation protocols, information-sharing agreements, and joint decision-making mechanisms in cases that cross the competencies of the different agencies.

A crucial consideration is that, while CADE does not oppose the occasional expansion of the scope of other authorities such as ANPD and Anatel, there is a clear preference for the competition content to remain under its jurisdiction. This would ensure the maintenance of CADE's expertise and approach, optimizing resources and maximizing regulatory effectiveness in addressing issues related to digital markets. CADE's robust track record in implementing remedies to restore market competitiveness, including digital ones, combined with its specialized regulation, is essential for efficiently dealing with antitrust issues in this dynamic sector. Centralizing this competency strengthens the agency's ability to adapt to the complexities and innovations of digital markets, avoiding fragmented oversight and ensuring timely and informed interventions.

Finally, it is highlighted that interaction with other international bodies of similar competence would be facilitated, especially considering that the

international experience of jurisdictions closer to Brazil points to the transversal solution of the competition authority. This strengthened collaboration between CADE and its international counterparts would allow for the exchange of knowledge and best practices, contributing to a more effective approach aligned with global trends in competition regulation.