

# *Remedies in Digital Markets: Dealing with Moving Targets*

*Prof. Caio Mario da Silva Pereira Neto*  
*FGV Direito SP*

**Brasília – August 1<sup>st</sup>, 2019**



# MOVING TARGETS



# CHALLENGING CONTEXT TO DESIGN REMEDIES I



- Dynamic markets
  - Fast changes in structure and business models
  - Innovation quickly blurs and reshapes the boundaries of markets
- Complex characteristics
  - Multi-sided platforms
  - Network effects of different intensities
  - Data as an input
  - Economies of scope and ecosystems
  - Zero pricing markets etc.
- Increasing interdisciplinary challenges (privacy and data protection, freedom of speech, sectoral regulations – telecom, banking, etc.)



# CHALLENGING CONTEXT TO DESIGN REMEDIES II



- Potential spillover effects of a remedy in adjacent markets and ecosystems
  - Important to consider the interfaces in ecosystems
- Global Platforms v. National Jurisdictions
  - Difficulties in designing national remedies
  - Consider impact of balkanization of platforms and development of multiple paths



# UNCERTAINTY, ERRORS AND RISK ASSESSMENT

- Two levels of uncertainty (compounded effect)
  - Identification of the infringement
  - Design of the remedies
- Remedies in digital markets are more subject to errors:
  - Type I error (false positives) – over-inclusive remedies with negative spillover effects
  - Type II error (false negatives) – under-inclusive remedy not solving the antitrust concern
- Important to balance probabilities and weigh the potential negative effects of both types of errors  
**(choosing between imperfect alternatives)**



# EMERGING REMEDIES IN DIGITAL MARKETS

- Authorities face the challenge of designing **clear, precise and proportionate remedies** in dynamic markets
- Some recent discussions on remedies applied to digital platforms
  - Non-discrimination remedies dealing with leveraging/self-preferencing
  - Interoperability - effects on intra and inter-platform competition
  - Remedies addressing access to data/data portability
  - Limits on data gathering
  - Design of contractual provisions (e.g. narrow parity clauses in OTAs)
  - “Killer acquisitions”/“acqui-hire” – emerging discussion on remedies focusing on preserving “potential competition”
  - Challenges to implement structural remedies
- Potential emergence of more complex behavioral remedies



# ANTITRUST V. REGULATORY REMEDIES

- After identifying a competitive concern, it is important to ask:
  - what **type of remedy** is best suited to deal with the problem?
  - What **type of authority** can best implement/monitor remedies?
- Regulatory agencies with specialized knowledge and monitoring capabilities may be best suited to design and implement remedies
- Regulatory or quasi-regulatory remedies may be necessary/adequate

Antitrust Remedy	Regulatory Remedy
Limited to the company(ies) investigated	Applied to all agents in the same position in the market
<i>Ex post</i> (except for mergers)	<i>Ex ante</i>
Limited intervention: structural or targeted behavioral	Broader intervention: more room for detailed behavioral provisions
Each adaptation requires an exceptional procedure	Allows for constant adaptation of the regulation

# IMPORTANCE AND LIMITS OF MARKET TESTS

- Market tests are relevant and can help to **reduce information asymmetries** in the design of remedies  
however...
- Important to **clearly define the competitive concern** that must be addressed by the remedy
- Significant role of the investigated party in **proposing solutions** for a specific concern
- **Testing solutions** with affected stakeholders (competitors, suppliers and customers)
  - Careful with biased inputs from certain players
- Important **interface with regulatory agencies** (where applicable)





# MONITORING AND ADAPTING REMEDIES

- Dynamic markets require **adaptative remedies**
- Importance of **reporting and monitoring tools**
- **Procedure to adapt remedies** as the market evolves
- **Procedure to drop remedies** that are no longer necessary
- Be careful with **long-term remedies** in rapid evolving markets
- **Ex-post evaluation** of the impact of the remedy



# SOME FINAL REMARKS

- Competition Law remains a relevant framework to identify market failures, distortions and infringements in digital markets

## However...

- Remedy design will require **deeper reflections** and **relevant adjustments** in dynamic markets
- Competition law may not provide the best suited tools to remedy the problems identified
- Important **to broaden the tool kit** and consider when *ex ante* rules/regulations may also be necessary
  - More interaction with regulatory agencies
  - Increasing importance of competition advocacy
- International cooperation and coordination



# Thank you

[caio.pereira@fgv.br](mailto:caio.pereira@fgv.br)

[caiomario@pnm.adv.br](mailto:caiomario@pnm.adv.br)

