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ABUSE OF DOMINANCE IN DIGITAL MARKETS – Contribution from Brazil

- Session II -

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This contribution is submitted by Brazil under Session II of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: oe.cd/dmkt.

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Abuse of dominance in digital markets

- Contribution by Brazil[1] -

1. Introduction

1. According to Article 36 of Law 12529/2011 (the Brazilian Competition Law), it is considered "an anticompetitive infringement, regardless of fault, each and every practice carried out anyhow, that has as its object or that may generate the following effects, whether or not it is successful: (i) restrict, distort or be in anyway harmful to free competition or free enterprise; (ii) dominate a relevant market for goods or services; (iii) increase prices in an arbitrary manner; and (iv) abuse of a dominant position".

2. The Brazilian Competition Law establishes two approaches to deal with anticompetitive practices: form-based approach and effects-based approach. When facing certain practices, such as horizontal price-fixing, CADE has been using a form-based approach, as the practice could be considered a violation regardless of any actual or potential effects it might have in the relevant market. As acknowledged by the OECD, although "this approach is not to be interpreted as a clear-cut 'per se illegal' rule, CADE puts the burden on the party to justify the conduct under investigation, and to demonstrate that the conduct would not produce the alleged anticompetitive effects", whilst in the case of hardcore cartels, the agency understands that the practice is a violation of the Competition Law in itself.[2] On the other hand, CADE's predominant understanding is that unilateral conducts are considered unlawful only after its positive and negative effects in the case in question are assessed since any harmful effects it might have in the market could be outweighed by the resulting efficiencies, or could result from a reasonable economic justification.

3. In this sense, a dominant position is not in itself unlawful, considering a firm can achieve a leading position in the market by relying solely on its merits (e.g. being more efficient than its competitors; offering higher quality products), without creating artificial barriers to its rivals or engaging in other anticompetitive practices. According to Article 36 of Law 12529/2011, a firm is considered as holding a dominant position in the market when it is capable of unilaterally or coordinately alter market conditions, or when it holds at least 20% of market share in the relevant market. Therefore, an abuse of a dominant position must be identified and investigated in a case-by-case basis.

4. As we know, the traditional concept of market power as the ability to unilaterally and profitably raise prices or reduce quality beyond competition level might not fully reflect market power in digital markets, which contain many zero-priced products and services; however, one should investigate whether other stages of the value chain might offer monetary rewards to suppliers. Thus, issues like quality, innovation, and variety of products available to consumers are more relevant. Moreover, due to the sector's dynamics,

[1] This document was prepared by Luiz Augusto Azevedo de Almeida Hoffmann, Commissioner of CADE, and Rafael Rossini Parisi, Chief of Staff.

[2] OECD (2019), OECD Peer Reviews of Competition Law and Policy: Brazil. Available at: https://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf.https://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf

other theories of harm are commonly studied by the antitrust community, such as the exploitative use of data/privacy (different from traditional access to essential facilities theories), limitation of compatibility (different from traditional tying and bundling theories), self-preferencing, multi-homing limitation, and data portability.

5. Digital markets are often characterised as multidimensional or multi-sided markets since digital platforms involve interactions between two or more groups of users, and the demands of each group depend on the demands of the others. That is because digital platforms commonly operate as marketplaces where companies can both offer their products and supply third-party products (e.g. Amazon sells its own products and products by third parties; Google operates as a search tool for consumers to have access to competitors of its Google Shopping and Google Flight platforms).

6. Thus, the attractiveness of the platform for announcers relies on the number of consumers using the platform. Similarly, the higher the number of people looking for products at a specific website, the more attractive such marketplace will become for suppliers to sell their products. As a platform becomes more relevant, a greater number of users access it, which is connected to the concept of network effects, which are considered barriers to entry in digital markets. Thus, even though a new firm can enter the market in the short term, it will not be able to compete or challenge the incumbents' market power until its platform acquires a relevant number of users.

7. Therefore, digital markets tend to be highly concentrated and subject to monopolies (winner-takes-all markets). As CADE observed in Proceeding 08700.004431/2017-16 (petitioners: Itaú Unibanco S.A. and XP Investimentos S.A.), "concentration tendencies and entry barriers resulting from network effects might be mitigated should consumers be able to use competing platforms simultaneously (multi-homing)."[3] Thus, a platform might take advantage of its dominant position in the market and use a number of tools to limit multi-homing, such as: (i) adopting exclusive contractual clauses; (ii) making price structures unattractive for users using different platforms (e.g. offering quantity or loyalty discounts); (iii) setting technology standards that influence costs and/or prevent multi-homing; amongst others.[4]

2. CADE's decisions

8. The number of cases involving abuse of dominance in digital markets has increased in recent years. The following items provide further information regarding relevant decisions by the antitrust authority.

[3] See the vote of Rapporteur Commissioner Paulo Burnier da Silveira.

[4] KATZ, Michael L. Exclusionary conduct in multi-sided markets. In: OECD (2018) Rethinking Antitrust Tools for Multi-Sided Platforms. Available at: https://www.sipotra.it/wp-content/uploads/2018/07/Rethinking-Antitrust-Tools-for-Multi-Sided-Platforms-2018.pdf#page=104.https://www.sipotra.it/wp-content/uploads/2018/07/Rethinking-Antitrust-Tools-for-Multi-Sided-Platforms-2018.pdf - page=104

2.1. Bradesco and Guiabolso (2020)

9. Administrative Proceeding 08700.004201/2018-38 investigated whether Bradesco, one of the largest Brazilian retail banks, was hindering the development of the Brazilian fintech Guiabolso and, thus, negatively affecting Brazilian customers of banking services in general.[5] The petitioner claimed Bradesco was deliberately preventing its clients from sharing (at their own discretion) their financial information with Guiabolso, undermining the effectiveness of the services provided by the petitioner.

10. The case was recently suspended and will be dismissed following the signing of a cease and desist agreement between CADE and Bradesco. According to the terms of the agreement, the defendant commits to authorize its clients to share their financial data with GuiaBolso without impediments.

2.2. Microsoft and Google (2019)

11. In 2019, CADE assessed three administrative proceedings concerning alleged anticompetitive practices by Google. The three proceedings were dismissed after the Brazilian antitrust authority concluded there was not enough evidence that the defendant had engaged in illegal practices according to the Brazilian law.

12. In Administrative Proceeding 08700.005694/2013-19, started in June 2013, after Microsoft Corporation filed a complaint against Google Inc. and Google Brasil Internet Ltda. (herein jointly referred to as "Google"), CADE reviewed whether the defendant had abused its dominant position with respect to its advertising search tool "AdWords". According to Microsoft, Google was preventing advertisers from transferring data from the Google platform to competitors' sponsored search platforms (e.g. Bing, from Microsoft), and, consequently, preventing multi-homing and illegally restricting competition, by enforcing abusive clauses in contracts with advertisers (Terms of Services of the AdWords' Application Programming Interface).[6]

13. However, in September 2019, the Tribunal of CADE decided to uphold the opinions of the General Superintendence (SG), the Office of the Attorney General and the Federal Prosecution Services at CADE, and dismissed the case, concluding that there was not enough evidence that Google had actually prevented competition by adding said clauses to its Terms of Services (ToS).[7] It is worth noting that CADE performed an in-depth review of the contracts, in which prevailed that the terms and conditions provided in Google's contracts consisted of clauses commonly practised in licensing contracts, without evidence that such clauses involved exclusivity or inhibited multi-homing. The Tribunal stated that there was a reasonable commercial rationale in some clauses of the contracts, indicating that an

[5] For full access to the case description, see: Consumer data rights and competition – Note by Brazil. Available at: https://one.oecd.org/document/DAF/COMP/WD(2020)41/en/pdf.

[6] CADE noted that advertisers could create its ads in search platforms in two different manners: (i) directly by means of AdWords (in case of the Google search platform) and Bing Ads (in case of the Bing search platform), using engines provided by the platforms themselves; or (ii) by means of the terms and conditions governing the API. Solely the second manner was object of investigation since the advertiser should negotiate with Google to obtain access (through licensing) to Google's API. Once Google grants access, the advertiser develops a software (in-house or through a third party, such as an advertising agency) to communicate with the API; thus, enabling the publishing of the ad in Google's search platforms. Said software is created to communicate with the APIs of several research platforms (e.g., Google; Bing; Yahoo), including social media (e.g., Facebook; Instagram) and other websites to achieve greater efficiency and range.

[7] See the vote of Rapporteur Commissioner Mauricio Oscar Bandeira Maia.

obligation to withdraw such clauses could discourage innovation. Besides, CADE assessed the effects of the conduct in the market and, according to the Tribunal's decision, the evidence showed no significant difficulty for advertisers to synchronise ads in different platforms.

14. It seems worth highlighting that the case review involved an extensive market test, in which more than a hundred market agents were contacted, among large, medium and small-sized advertising agencies and advertisers, to understand the effects of the practice and market dynamics. The relevant market was defined as the Brazilian market for sponsored search, and, despite applicable to the case, the Tribunal understands the definition set is not binding and can be reviewed for future cases.

2.3. Buscapé, Bondfaro and Google (2019)

15. In Administrative Proceeding 08012.010483/2011-94, started in October 2013, E-Commerce Media Group Informação e Tecnologia Ltda. (owner of the price-comparison websites Buscapé and Bondfaro) filed a complaint that Google was abusing its dominant position to favour its own price-comparison shopping platform in detriment of its rivals' platforms. According to the petitioner, Google was placing Google Shopping in a privileged position (first page) in consumers' search results. The practice was allegedly harming competing price-comparison platforms and could end up being harmful to consumers by reducing their options and increasing prices.

16. Considering the allegations, CADE examined, based on the Brazilian law, whether Google had engaged in any of the following anticompetitive practices: (i) discrimination against competitors' price-comparison platforms; (ii) refusal to allow competitors to place their price-comparison platforms at Google's search platform, by suing the Product Listing Ads (PLA); (iii) tying sale (price-comparison websites could only have their ads on Google's search result pages if they provided Google with specific information about their products); and, (iv) predatory innovation (changing technical elements to restrict competition).[8] However, the Tribunal decided by a majority of votes to dismiss the case, since the practice presented efficiencies and there was no evidence of harmful effects to competition.[9]

17. After carrying out a detailed analysis of the market dynamics, CADE defined the affected relevant markets as the Brazilian market of general search services and the Brazilian market of price-comparison search. The agency was cautious with regards to the definition of the relevant market, stating that when there is any relation to dynamic markets (e.g. digital economy), the definition of relevant markets should be flexible so that the conclusions related to any given case are not open to distortions.[10] Despite the complaint, CADE concluded that Google's website, its features (such as Product Listing Ads) and the data it requires from announcers were not to be considered as essential facilities, since there are efficient alternatives available to Google's competitors.

[8] SCHREPEL, Thibault. Predatory Innovation: the time has come today! In: Digital Markets in the EU. Available at: https://thibaultschrepel.com/wp-content/uploads/2020/10/chapter-5.pdf.https://thibaultschrepel.com/wp-content/uploads/2020/10/chapter-5.pdf

[9] See the vote of Rapporteur Commissioner Mauricio Oscar Bandeira Maia.

[10] See: PIKE, Chris. Exclusionary conduct in multi-sided markets. In: OECD (2018) Rethinking Antitrust Tools for Multi-Sided Platforms. Available at: https://www.sipotra.it/wp-content/uploads/2018/07/Rethinking-Antitrust-Tools-for-Multi-Sided-Platforms-2018.pdf#page=104.https://www.sipotra.it/wp-content/uploads/2018/07/Rethinking-Antitrust-Tools-for-Multi-Sided-Platforms-2018.pdf - page=104

18. Furthermore, the Tribunal's decisive vote referred to similar investigations conducted by the Federal Trade Commission (FTC) and the European Commission (EC), including the difficulties faced by such authorities in developing an effective and viable remedy to tackle competition concerns. For this case, CADE scrutinized and refused the remedy proposed by the petitioners, stating that "the market under analysis is highly dynamic and, as such, any antitrust intervention is extremely difficult, since it can become obsolete in a short period of time." In addition, a false positive, that is, punishing a procompetitive practice, could be extremely harmful to society since a potential remedy would be imposed on the defendant's final product and hinder innovation. Besides, in any potential intervention, CADE would substitute Google in its private decision-making related to programming the algorithm and designing its website, which would imply some dangerous second-guessing on Google's products.

2.4. Online Travel Agencies (2018)

19. In Administrative Investigation 08700.005679/2016-13, involving Expedia do Brasil Agência de Viagens e Turismo Ltda., Decolar.com Ltda., and Booking.com Brasil Serviços de Reserva de Hotéis Ltda., CADE investigated whether the online travel agencies were imposing most-favored-nation (MFN) clauses in its contracts with hotels in an abusive manner. According to the complaint filed by an association of hotel service providers, such clauses were preventing hotels from offering in different sale channels (e.g., hotel's website) prices or other conditions more beneficial to consumers than the ones offered by the online travel agencies.

20. The case was dismissed after the signing of a cease and desist agreement between the defendants and CADE, in which they committed to cease using broad parity clauses in their commercial relations with hotels.

2.5. Telecom/zero-rating (2017)

21. Administrative Investigation 08700.004314/2016-71 involved alleged market foreclosure by providers of telecommunication services (such as Claro, Oi, Tim, and Vivo), resulting from offering certain services under the called zero-rating services[11] which violates the network neutrality principle.[12] According to the complaint filed by the Prosecution Services, zero-rating policies would require antitrust scrutiny, since they could hinder competition in the market, by discriminating between players and favouring some players over others, and by making it more difficult for new players to enter the market, under the Brazilian Competition Law (Article 36, Section 3, Item 4). Besides, zero-rating measures could impede innovation and result in incentives for increasing the prices charged for other services to compensate for the zero-priced services.

22. However, in August 2017, after preliminary investigations, the General Superintendence decided not to launch an administrative proceeding due to lack of evidence of anticompetitive behaviour, concluding that certain characteristics of the relevant markets and the lack of any exclusive relationships mitigated antitrust concerns.

[11] Zero-rating policies can be described as the transferring of mobile data related to a certain application (or group of applications) with no direct price charged.

[12] Network neutrality is the principle that all content available on the internet should be treated the same way and access should be free to all users.

3. Future perspectives on competition enforcement

23. The abuse of dominance in digital markets is a current issue faced not only in Brazil but by the entire international antitrust community, since complaints to antitrust authorities have been increasing worldwide and antitrust authorities often face similar challenges within their own jurisdictions. In fact, the aforementioned cases involving Microsoft/Google (2019) and Buscapé/Bondfaro/Google (2019) had many similarities with investigations started by antitrust authorities in the United States[13] and in Europe[14]. Therefore, international cooperation initiatives should be encouraged as they could come to play a great role in understanding the development of digital markets and its consequences to market competition.

24. The elaboration of a report on competition policies and enforcement regarding digital markets in the BRICS countries (Brazil, Russia, India, China and South Africa) shows the importance CADE has been giving to the discussions related to abuse of dominance in digital markets. The report *BRICS in the Digital Economy: Competition Policy in Practices,* issued in September 2019, provides an overview of competition and enforcement policies current in place in member countries.[15] The document addresses different experiences in the application of antitrust measures as a means to explore common challenges and come up with possible insights for each of the group's authorities. As stated in the report, "the main challenge in the context of the digital economy is how to intervene in highly dynamic markets", since, on "one hand, intervention might be necessary to protect competition and consumers, and, on the other hand, it might hamper innovation or have unintended exclusionary effects."

25. Moreover, CADE is preparing additional studies focused specifically on competition in digital markets.[16] However, no legal changes are being considered at the moment, given that the concerns current at issue are related to abuse of dominance in digital markets.

[13] Further information available at: https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf.https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf

[14] Further information available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1624.https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1624

[15] Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf.http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf

[16] Further information available at: http://www.cade.gov.br/acesso-a-informacao/concursos-e-selecoes/consultoria-vagas-concluidas/cade-contrata-consultores-tecnicos-para-elaboracao-de-estudos. Portuguese version only.http://www.cade.gov.br/acesso-a-informacao/concursos-e-selecoes/consultoria-vagas-concluidas/cade-contrata-consultores-tecnicos-para-elaboracao-de-estudos

4. Final remarks

26. CADE reviews unilateral conducts using an effects-based approach, which involves examining the specificities of the case at issue. Up to now, the Brazilian agency has been duly assessing complaints regarding any potential abuse of dominance in digital markets. Thus, the review carried out by CADE involves defining the relevant market; assessing whether the defendant holds a dominant position in the relevant market; analyzing the conduct and the case elements (for example, contracts and/or commercial relationships of the defendant in the multi-sided stages of the value chain); examining both actual and potential effects of the investigated conduct in the market, including whether positive competition effects overcome negative ones, and if the adopted practice is reasonably justified.

27. Digital markets are extremely dynamic and have specificities that might favour cases involving abuse of a dominant position. The antitrust enforcement experience in Brazil and abroad indicates that the digital markets characteristics present several challenges the competition review process, for example, by making it harder to define relevant markets (although these definitions are not final and might be more flexible) and to determine whether a certain platform consists of an essential feature. Moreover, the issue concerning when and how the authorities should intervene in the markets is not easily solvable, since it is necessary to be cautious when coming up with an effective remedy to avoid discouraging innovation, which would in turn be harmful to consumer welfare. Nevertheless, in Brazil, the prevailing understanding is that such challenges do not imply a need to make changes to legislation at the moment, or that abandoning current consumer welfare standards is desirable.[17]

[17] Further information available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/publicacoes-dee/DocumentodeTrabalhon5_Concorrenciaemmercadosdigitaisumarevisaodosrelatoriosespecializados.pdf.http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/publicacoes-dee/DocumentodeTrabalhon5_Concorrenciaemmercadosdigitaisumarevisaodosrelatoriosespecializados.pdf