Competition in Digital Markets 2022

Contributing editors
Marcel Nuys, Kyriakos Fountoukakos and Stephen Wisking

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

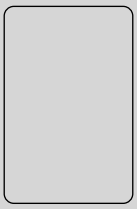
Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2021
First edition

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Competition in Digital Markets 2022

Contributing editors
Marcel Nuys, Kyriakos Fountoukakos and Stephen Wisking
Herbert Smith Freehills LLP

Lexology Getting The Deal Through is delighted to publish the first edition of *Competition in Digital Markets*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Marcel Nuys, Kyriakos Fountoukakos, Ruth Allen and Stephen Wisking of Herbert Smith Freehills LLP, for their assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
August 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in August 2021
For further information please contact editorial@gettingthedealthrough.com

Brazil

Ademir Antonio Pereira Júnior, Luiz Felipe Rosa Ramos and Yan Villela Vieira

Advocacia José Del Chiaro

LEGAL AND REGULATORY FRAMEWORK

Legislation

1 What legislation governs competition in digital markets in your jurisdiction? Does the standard competition law framework apply or are there any special rules or exemptions?

Federal Law No. 12.529/2011 (Competition Law) is the main statutory provision regulating digital markets under a competition framework in Brazil. While there is a growing debate as to the specific features of digital markets and whether they may require changes to the traditional framework of enforcement, the Federal Competition Agency (CADE) has repeatedly indicated that the current statutory regime provides adequate tools to handle cases involving digital markets.

Enforcement authorities

2 Which authorities enforce the competition law framework in your jurisdiction's digital markets?

CADE is the main competition enforcer dealing with digital markets. Most competition cases in Brazil have been analysed by CADE in the context of governmental investigations. Administrative decisions issued by CADE are subject to judicial review by federal courts. There is no dedicated digital markets authority or specific unit working within CADE.

The Competition Law can also be enforced by state and federal Public Prosecutors with criminal and civil enforcement actions. This notwithstanding, enforcement actions by state and federal Public Prosecutors related to digital markets are scant.

Finally, private parties directly or indirectly impacted by an alleged anticompetitive conduct may initiate civil lawsuits seeking injunctive relief to cease the practices or compensation for damages. Private lawsuits can be filed by an individual, a legal entity or by a collective entity. Collective actions may be initiated by consumer organisations, unions or trade associations. In any event, private enforcement actions related to digital markets are scant.

Regulatory guidelines

3 Have the authorities in your jurisdiction issued any guidelines on the application of competition law to digital markets?

There are no formal guidelines on this topic.

Advisory reports

4 Have any advisory reports been prepared in your jurisdiction on competition law issues in digital markets?

In partnership with competition agencies from other emerging economies (the BRICS group, composed of Brazil, Russia, India, China and South Africa), CADE released a report in September 2019 on competition policy in the digital economy. The report describes competition enforcement practices involving digital markets in the BRICS countries, discussing topics such as market power assessment, innovation and dynamic competition, the acquisition of entrants by incumbents, algorithmic pricing, and big data. It also presents the main challenges identified by Competition Agencies in competition enforcement within the digital economy. The report discusses specific cases in these jurisdictions to identify potential concerns in the digital economy.

In 2020, CADE's Economic Department (DEE) issued a report summarising various foreign reports and academic papers on competition in digital markets. That same year, the OECD launched a report on the digital environment in Brazil: Going Digital in Brazil. The Report makes several policy recommendations to promote digital innovation and properly capture implications of emerging business models in key sectors.

Finally, CADE's DEE released a report on markets for digital platforms in August 2021. The report summarises CADE's experience with digital platforms in both merger and infringement investigations across a wide range of industries, such as online retail, video on demand or price comparison.

Advance compliance guidance

5 Can companies active in digital markets ask the competition authority for advance guidance on competition law compliance before entering into an agreement or determining a pricing strategy?

CADE's Tribunal may formally answer queries about certain business practices or strategies under the proceeding of business review request. To present a business review request, companies need to pay a fee and submit all relevant documents with a detailed explanation of the practice or strategy. CADE has up to 120 days to provide a response to the request, and the response will be binding for CADE during a maximum period of five years. CADE's Tribunal has the power to, upon public interest and new facts or reasons emerging, reconsider its interpretation in the future without retroactive effects.

To date, there has been no business review request involving digital markets. In any event, we should note that fuel distributor Ipiranga submitted a business review request regarding the implementation of a maximum price suggestion policy based on the use of algorithms, which was deemed legal by CADE.

Regulatory climate and enforcement practice

6 How would you describe government policy and the competition authorities' general regulatory and enforcement approach towards digital companies in your jurisdiction?

Enforcement practice in Brazil has been mostly neutral with regard to digital companies. Authorities pay close attention to the international debate and guidelines regarding digital markets, but no specific criteria or specific enforcement priorities have been developed. In an interview, CADE's newly appointed Chairman Alexandre Cordeiro indicated that CADE should be 'less interventionist' compared to 'this new wave of antitrust law that started in Europe and now gained force with Biden in the US'.

HORIZONTAL AGREEMENTS

Special rules and exemptions

7 Do any special rules or exemptions apply to the assessment of anticompetitive agreements between competitors in digital markets in your jurisdiction?

There is no special rule to the assessment of anticompetitive agreements between competitors in digital markets in Brazil. In general, anticompetitive agreements between competitors are considered 'per se' illegal in Brazil.

Access to online platforms

8 How has the competition authority in your jurisdiction addressed horizontal restrictions on access to online platforms?

While this matter does not involve a horizontal agreement, a recent investigation into exclusive arrangements involving food delivery platforms may set an important precedent. According to complainant Rappi, rival food delivery platform iFood has been abusing its dominant position in Brazil by entering into exclusivity agreements with restaurants, resulting in market foreclosure and higher barriers to entry against competing delivery platforms. In a preliminary assessment, the Federal Competition Agency (CADE)'s investigatory unit (SG) acknowledged the concerns and issued a preliminary injunction to prohibit new exclusive agreements by iFood. The SG's Technical Report indicates concerns with 'tipping effects' and argues that iFood has been able to secure exclusive relationships with 'must-have' or 'famous' restaurants, which could lead to foreclosure. The investigation is still ongoing.

Algorithms

9 Has the competition authority in your jurisdiction considered the application of competition law to the use of algorithms, in particular to algorithmic pricing?

In the past, CADE has investigated airlines for implementing ATPCO technology. Airline Tariff Publishing Company (ATPCO) is a firm located in Washington/US that collected information regarding routes, fees, classes, and available seats of around 700 airline companies in an online network. CADE held that such a system would facilitate tacit horizontal agreements, through codes and identification mechanisms. The investigation was closed following consent decrees.

In another proceeding, a technology company allegedly provided software that was used by competing driving schools to collude. CADE imposed penalties on several companies holding that the software was used to monitor a cartel. The company that commercialised the software was also convicted by CADE for facilitating a cartel.

Finally, fuel distributor Ipiranga submitted a Business Review Request regarding the implementation of a dynamic maximum price suggestion policy based on the use of algorithms. CADE highlighted that 'the increasing use of intelligent pricing systems involving algorithms, artificial intelligence, and other mechanisms, has been challenging competition authorities because of the positive and negative impacts they can have on competition'. As a result, CADE held that Ipiranga can implement a dynamic maximum price suggestion policy based on algorithms as long as it does not share both the algorithms and the data used as inputs for the algorithms with rivals.

Data collection and sharing

10 Has the competition authority in your jurisdiction considered the application of competition law to 'hub and spoke' information exchanges or data collection in the context of digital markets?

There are two ongoing investigations on 'hub-and-spoke' cartel in Brazil. Both deal with distribution of electronic whiteboards, so they are not specifically related to digital markets. In one of these investigations (*CADE v Conesul and others)*, SG issued a technical note recommending conviction of the companies involved based on a theory that an illegal agreement among resellers to rig bids was formed via exchange of information through a common distributor.

Other issues

11 Have any other key issues emerged in your jurisdiction in relation to the application of competition law to horizontal agreements in digital markets?

No.

VERTICAL AGREEMENTS

Special rules and exemptions

12 Do any special rules or exemptions apply to the assessment of anticompetitive agreements between undertakings active at different levels of the supply chain in digital markets in your jurisdiction?

There are no special rules or exemptions under Brazilian competition law that apply to the assessment of anti-competitive agreements between undertakings active at different levels of the supply chain in digital markets.

Anticompetitive agreements between undertakings that fall under the broad category of 'vertical restraints' or 'vertical agreements' typically include certain types of practices by manufacturers or suppliers related to the resale of their products. In the majority of cases, these agreements are pro-competitive and produce efficiencies that benefit consumers. Notwithstanding, vertical restraints can also generate concerns in certain circumstances where they may foreclose rivals (restricting inter-brand competition) or significantly reduce intra-brand competition in markets where there is a low degree of inter-brand competition.

While most investigations into vertical restraints do not involve digital markets, the Federal Competition Agency (CADE)'s precedents regarding traditional industries indicate that vertical restraints are subject to an effects-based approach that resembles the full-blown 'rule of reason' developed in the US Case Law. In brief, CADE has the burden to prove that (1) an undertaking holds a dominant position and (2) its behaviour results in anticompetitive effects. If CADE can prove that these two criteria are fulfilled, a given vertical restraint will be deemed unlawful unless the defendant can show that its behaviour creates (3) pro-competitive efficiencies that compensate its anticompetitive effects.

Online sales bans

13 How has the competition authority in your jurisdiction addressed absolute bans on online sales in digital markets?

There are no precedents involving online sales bans or online platform bans in Brazil. In any event, such behaviour would likely be examined following an effects-based or rule of reason approach.

Resale price maintenance

14 How has the competition authority in your jurisdiction addressed online resale price maintenance?

CADE has not concluded any investigation of online resale price maintenance in digital markets to date. In any event, the investigative unity (SG) has indicated that online resale price maintenance (RPM) should be analysed under the same framework CADE developed to assess RPM in traditional industries (see *CADE v Technos*).

Since the mid-1990s, CADE's precedents have consolidated the view that suggested/recommended prices do not raise competition concerns. To be admitted as such, however, suggested/recommended prices should not be followed by any mechanism that fosters or punishes the adoption of such prices by resellers, as CADE recently reiterated in the business review request submitted by fuel distributor Ipiranga.

RPM either as price ceiling or a price floor is normally subject to lengthy scrutiny. While CADE has previously indicated that maximum prices (price ceilings) might be less harmful than minimum prices (price floors), there is no exemption to maximum prices.

CADE has consolidated the use of the rule of reason to assess an RPM conduct, but since 2013 it follows a more rigorous framework in this line of cases – once it is established that the player implementing an RPM policy holds a dominant position, CADE will work under the assumption that the conduct produces negative effects. Therefore, CADE will demand from the defendant detailed explanations as to the impacts of the conduct and the business justifications. It means CADE has shifted the burden of proof in these cases, imposing on defendants the burden to produce evidence that the conduct is unable to harm competition (eg, there is still sufficient inter-brand competition) or that it produces substantial efficiencies to the benefit of consumers (that outweigh the reduction in intra-brand competition).

This rigorous approach towards RPM cases was first employed in a precedent from 2011 (*Procon v SKF*). In a recent business review request submitted by Ipiranga, however, CADE indicated that a presumption of anticompetitive effects will only be used in cases where the RPM policy was implemented as part of an agreement among suppliers or retailers to coordinate prices, and that RPM policies implemented as a legitimate business strategy by manufacturers would be subject to the standard rule of reason approach.

Geoblocking and territorial restrictions

15 How has the competition authority in your jurisdiction addressed geoblocking and other territorial restrictions?

CADE has not launched any investigation of geoblocking and other territorial restrictions related to online sales to date.

In any event, CADE considered territorial restrictions in other cases that provide some standards that may be applicable to an eventual investigation of geoblocking. First, CADE reviewed a few cases related to 'radius clauses', which ban shopping mall tenants from opening stores within a certain radius from the shopping mall. Under CADE's precedents, radius clauses are subject to a rule of reason standard – in 2016, the majority of CADE's Tribunal rejected a proposal from one of the commissioners to declare radius clauses unlawful per se (*MPFRS v Shopping Iguatemi and others*).

Nonetheless, CADE is usually sceptical of justifications to radius clauses. In precedents issued in the early 2000s (eg, *CADE v Condomínio Shopping Center Iguatemi)*, CADE held that radius clauses may be anticompetitive for their potential to make it impossible for rival shopping malls to offer a competitive 'tenant mix' to customers. This understanding was confirmed years later in *MPFRS v Shopping Iguatemi and others*, where CADE imposed fines on seven shopping centres for adopting radius clauses. While the agency did not set safe harbours in that case, it held that the following elements are critical to determine whether such clauses are lawful:

- duration;
- whether they only banned tenants from opening stores under the same brand or if they banned tenants from opening any stores in the same line of business; and
- if there were justifications to the extension of the geographic radius.

In addition to the cases related to radius clauses, CADE's case law on territorial restrictions is scant. There are two precedents regarding clauses imposed by vehicle manufacturers to prevent dealerships from actively making sales to customers located outside of designated geographical areas (*MPFSP v Car makers* and *MPF v Scania and others*). These cases indicate that a rule of reason standard is applicable. In *MPF v Scania and others*, CADE cleared the defendant after finding that it held less than 30 per cent of the relevant market; and in *MPFSP v Car makers*, CADE cleared the defendants after finding that the territorial restrictions imposed were necessary to eliminate free-riding and increased interbrand competition.

Platform bans

16 How has the competition authority in your jurisdiction addressed supplier-imposed restrictions on distributors' use of online platforms or marketplaces and restrictions on online platform operators themselves?

CADE has not launched any investigation of supplier-imposed restrictions on distributors' use of online platforms or marketplaces to date. In any event, such behaviour would likely be examined by CADE following an effects-based or rule of reason approach.

With regards to selective distribution systems, there is no recent case involving digital markets. More generally, however, selective distribution normally does not raise antitrust concerns in Brazil, unless it is part of a vertically integrated firm's strategy to exclude rival distributors and dominate a downstream market. Although there are very few precedents, it is possible to infer that selective distribution systems would be subject to a rule of reason standard.

In *Inox-Tech v APERAM*, CADE investigated APERAM Inox América do Sul for discriminating its distributors of stainless steel. APERAM held an alleged monopoly in stainless steel production, supplying authorised distributors, while AMIB Serviços, an undertaking part of APERAM's economic group, also competed in the stainless-steel distribution market. After receiving complaints from distributors, CADE opened an investigation and found evidence that APERAM was (1) offering more favourable commercial conditions to AMIB to harm independent distributors and (2) creating difficulties to imports of stainless steel. In 2015, APERAM signed a consent decree with CADE, agreeing to cease both practices completely.

It is also worth mentioning an almost two decades-old precedent that involved Microsoft's selective distribution system (S*DE v Microsoft and TBA)*. In that case, CADE imposed a fine on Microsoft and a distributor named TBA after finding that Microsoft, which held 90 per cent of the software market, recurrently altered the criteria that qualified undertakings as authorised distributors to make sure that TBA was its sole authorised distributor for sales to the federal government, thus

eliminating intra-brand competition and raising prices in public bids. However, it is important to highlight that this precedent should be taken with caution: since that ruling issued in the early 2000s, CADE has never again held that 'discrimination' by suppliers that are not vertically integrated could be anticompetitive.

Therefore, undertakings should be careful with selective distribution systems especially if (1) they hold a dominant position in upstream markets, (2) they are vertically integrated, and (3) their commercial policy favours the distributors it owns or that are part of its economic group at the expense of independent distributors. Moreover, the existence of procompetitive justifications should play a relevant role in determining whether a selective distribution system is lawful.

Targeted online advertising

17 How has the competition authority in your jurisdiction addressed restrictions on using or bidding for a manufacturer's brand name for the purposes of targeted online advertising?

CADE has not launched any investigation of supplier-imposed restrictions on using or bidding for a manufacturer's brand name for the purposes of targeted online advertising to date. In any event, such behaviour would likely be examined by CADE following an effects-based or rule of reason approach.

Most-favoured-nation clauses

18 How has the competition authority in your jurisdiction addressed most-favoured-nation clauses?

Similar to investigations in Europe, CADE investigated whether the adoption of MFN or parity clauses by online travel agencies in contracts with hotels could harm competition (*FOHB v Booking.com, Decolar.com and Expedia*). Like most cases in Europe, the investigation in Brazil ended with a settlement with online travel agents agreeing to remove 'wide' price parity clauses, but retaining 'narrow' clauses.

This investigation ended with a settlement, so there is no final decision by CADE on the matter. In any event, the decision that accepts the settlement proposals contains important guidance. In brief, wide clauses would restrict hotels from offering better terms to competing travel platforms. CADE indicated that wide clauses could limit price competition and raise barriers for entrants as hotels would not be able to pass on to consumers lower commissions charged from entrants or travel agents willing to compete more aggressively. All companies investigated in Brazil agreed to remove this provision. On the other hand, narrow clauses only prohibit better offers on the hotel's own website, and CADE indicated they were legitimate given the need to prevent free-riding (platforms invest considerably in their websites to attract users, and would suffer if consumers were able to find a hotel via the platform and then book at a lower price via the hotel's own website). As a result, travel agents continue to enforce narrow price parity provisions.

Multisided digital markets

19 How has the competition authority in your jurisdiction addressed vertical restraints imposed in multisided digital markets? How have potential efficiency arguments been addressed?

In *Rappi v iFood*, CADE is investigating whether exclusivity arrangements with restaurants entered into by the biggest food delivery platform in Brazil have harmed competition. The SG acknowledged that exclusivity agreements with restaurants signed by iFood may result in foreclosure of rival delivery platforms. In particular, the SG mentioned that, since it operates in a multi-sided market, iFood's behaviour may result in 'tipping effects', ie, the domination of the market by only one platform. The SG also highlighted that exclusivity agreements signed by iFood were likely to result in efficiencies. Nonetheless, the SG held that the risk of harm to competition was significant and issued a Preliminary Injunction to prohibit new exclusive agreements by iFood.

Other issues

20 Have any other key issues emerged in your jurisdiction in relation to the application of competition law to vertical agreements in digital markets?

No.

UNILATERAL ANTICOMPETITIVE CONDUCT

Establishing market power

21 What are the relevant criteria for establishing market power in digital markets in your jurisdiction? Is there any concept of 'abuse of economic dependence' where a company's market power does not amount to a dominant position?

Cases involving digital markets have been subject to the same criteria adopted for traditional industries. Market share analysis is generally used as an initial screening to assess market power. There is an assumption under the Competition Law that a company holding over 20 per cent market share is dominant. This notwithstanding, the 20 per cent mark is not absolute (parties can rebut it and show that a 20 per cent share does not result in dominant position in a specific market) and, in practice, the Federal Competition Agency (CADE) actually uses it more as a screening device.

For merger investigations, the 20 per cent threshold is used to determine whether a merger is eligible for fast-track review. Markets with horizontal overlaps lower than 20 per cent are eligible for fast-track review, as CADE can safely conclude that the merging entity does not hold sufficient market power to raise prices. If, on the other hand, the overlap is higher than 20 per cent and the HHI variation exceeds 200 points, the merger will not be eligible for fast-track review and may require a lengthier scrutiny.

As to conduct cases, the 20 per cent statutory threshold also works as a screening tool. A company holding less than 20 per cent share may be able to persuade CADE to drop an investigation based on lack of market power. Notwithstanding, precedents indicate that CADE is unlikely to find that a player can implement a unilateral conduct and produce anticompetitive effects unless its market share is higher than 40–50 per cent. In any event, there are certain cases where CADE has benefited from the rather low statutory provision to launch investigations against payers holding 20–30 per cent market share.

In specific cases, CADE has recognised that digital markets may have certain features that should be considered in the market power analysis. For example, in *OLX/Zap*, the SG (investigative unit) indicated that:

- multi-sided platforms that facilitate transactions or matching of users may be marked by network externalities and require a critical mass of users on various sides;
- users may tend to multi-homing in certain cases but not on others; and
- access to user data may be relevant in the platform's ability to provide helpful services and therefore effectively compete.

In *Mosaico/Buscape*, the SG recognised the fast pace of digital markets, indicating that rapid changes may result in evolving market definitions and erosion of market power.

CADE's Horizontal Merger Guidelines contain a short discussion about two-sided markets (very common in the digital space). The Guidelines indicate that CADE will decide on a case-by-case basis whether to 'consider competition in one side or both'.

Abuse of market power

22 To what extent are companies with market power in digital markets subject to the rules preventing abuse of that power in your jurisdiction?

The Competition Law and its specific provisions on abuse of market power are generally applicable to digital markets. While there is a debate as to the specific features of digital markets and whether they may require changes to the traditional framework of enforcement, CADE has repeatedly indicated that the current statutory regime provides adequate tools to handle cases involving digital markets.

Data access

23 How has the competition authority in your jurisdiction addressed concerns surrounding access to data held by companies with market power in digital markets?

There has been no final decision on conduct cases focusing on an alleged duty to share data with rivals. In G*uiaBolso v Bradesco*, fintech GuiaBolso accused Bradesco (one of Brazil's top retail banks) of blocking access to user data by establishing a two-step verification system that allegedly prevented GuiaBolso from accessing data of users' checking accounts on Bradesco. Bradesco signed a consent decree and committed to establish an interface that would allow GuiaBolso to access data of users that provided consent. This commitment will be valid until the Open Banking Regulation by the Central Bank enters into force in the end of 2021.

In the merger review space, the constitution of a joint venture among Brazil's top five banks to create a new credit bureau generated an important discussion. According to CADE, the vertical integration of Brazil's top five banks (which collectively held roughly 90 per cent of the banking industry) with the market of credit bureaus increased the risks that these banks would no longer provide data to or consult with pre-existing bureaus. CADE's decision reveals a concern with rival bureaus being cut off from access to credit data from the top five banks in Brazil, indicating that this could harm their ability to compete. Therefore, CADE conditioned approval of the joint venture to several non-discrimination obligations that would secure access to the banks' credit data to third-party credit bureaus, as well as to enabling clients to provide data to more than one bureau.

In *Serasa/Claro*, CADE reviewed a partnership under which telecom operator Claro would grant credit bureau Serasa access to certain types of user data. CADE concluded there were no competition concerns because Serasa's rivals would be able to acquire similar data from numerous service providers other than Claro.

Data collection

24 How has the competition authority in your jurisdiction addressed concerns surrounding the collection of data by companies with market power in digital markets?

In speeches and op-eds, CADE's current leadership has indicated that data protection concerns related to data collection techniques often fall outside the scope of competition law. Recently, however, CADE joined forces with Brazil Data Protection Agency, Federal Consumer Protection Bureau and the Public Prosecutors Office to release a joint Recommendation to Facebook and WhatsApp regarding a change in WhatsApp terms of service and privacy policy, including:

- WhatsApp should postpone the launch of the new privacy policy;
- WhatsApp should continue service to users even if they reject the new policy, maintaining the same level of service they have today;
- WhatsApp should adopt changes related to data processing and transparency issued by the Data Protection Agency in a report; and
- Facebook should not process or share data collected by WhatsApp based on the new privacy policy.

CADE has rejected purely exploitative theories of harm for the past two decades, holding that exclusionary effects are central in unilateral conduct cases. This case, however, could be a departure from such standard of analysis, as there seems to be no theory of exclusion of rivals against Facebook/WhatsApp. In fact, CADE's justification to assert its authority is purely based on a theory of exploitative abuse, claiming that it could be an abuse of dominance the 'rupture of continuity of a communications service essential to users in case they refuse to accept mandatory sharing of their data with Facebook and its partners'.

In May 2021, Facebook/WhatsApp committed to work with CADE and other agencies to clarify questions. Until this point, there is no formal investigation against Facebook/WhatsApp.

Leveraging market power

25 Has the competition authority in your jurisdiction adopted any decisions involving theories of harm relating to leveraging market power in digital markets, such as through tying, bundling or self-preferencing?

The most relevant conduct case involving digital markets in Brazil is the Google Shopping case, where complainants argued that Google was discriminating its own price comparison service with favourable placing and format on its search results page. CADE ultimately dismissed this claim. The vote issued by Commissioner Mauricio Maia (who was the leading commissioner in this review) held that Google should not be treated as an essential facility and concluded that 'these theories of harm are frontally contradicted by the facts, with no effect on price comparison sites on one side and a degree of users/merchants' satisfaction on the other.' The vote issued by Chairman Barreto further confirmed that the introduction of shopping result on the Google search results page was a procompetitive product improvement, holding that 'Brazilian Law recognizes that changes in the design of a product that benefit consumers are usually procompetitive, unless such change has been introduced only to harm rivals; that such change blocks access to an essential facility; or if it produces actual harm to consumers.'

Other theories of harm

26 What other types of conduct have been found to amount to abuse of market power in digital markets in your jurisdiction?

Theories related to data collection and access to data have been considered by CADE. The *GuiaBolso v Bradesco* case resulted in a consent decree, without a final decision on the merits. Finally, the review of Facebook/WhatsApp's terms of service is still ongoing.

MERGER CONTROL

Merger control framework

27 How is the merger control framework applied to digital markets in your jurisdiction?

There are no specific rules or thresholds for mergers involving digital markets. Transactions with potential effects in Brazil require notification if the parties involved (and their respective group of companies) meet certain turnover thresholds. Effects in Brazil are normally identified:

- in the presence of assets, legal entities or activity in Brazil;
- in the presence of revenues originating in Brazil, even if through exports only and regardless of the amount; and
- if at least one of the relevant markets involved in the transaction has a global dimension.

The Federal Competition Agency (CADE) maintains cooperation protocols with various agencies and regulatory bodies, including the Brazil Data Protection Agency (ANPD). The cooperation protocol with ANPD provides for eventual cooperation in cases involving data transfer or data processing (for example, CADE could ask ANPD for specific reports or assessments of topics involving data protection issues related to cases under CADE's review).

Prohibited mergers

28 | Has the competition authority prohibited any mergers in digital markets in your jurisdiction?

Mergers with digital markets at their cores have not been blocked or subject to remedies in Brazil.

Market definition

29 | How has the competition authority in your jurisdiction addressed the issue of market definition in the context of digital markets?

CADE has recognised that digital markets may have specific features that should be considered in the market definition phase. For example, in *Mosaico/Buscape*, the SG recognised the fast pace of digital markets, indicating that rapid changes may result in evolving market definitions. The SG emphasised that it is challenging to work with well-defined market definitions because there are different business models competing in the marketplace, and technology is constantly evolving and resulting in changes to the services offered by each platform. As a result, CADE should strive to 'identify the players that effectively constrain competitive decisions' and does not need to commit to rigid market definitions.

In the *Google Shopping* case, Commissioner Maia's vote indicated that relevant market definition 'should not be taken as an end in itself'. In dynamic markets, it should be considered 'an auxiliary guide', allowing certain flexibility to incorporate all relevant market features and players.

'Killer' acquisitions

30 | How has the competition authority in your jurisdiction addressed concerns surrounding 'killer' acquisitions in digital markets?

In 2020, CADE launched a market inquiry asking companies working in digital markets for various pieces of information on transactions undertaken in the past 10 years. CADE's leadership indicated in speeches that the agency plans to understand whether some of these mergers could be harmful to competition and should have been reviewed. In parallel, CADE is working on a benchmark report of mandatory notification thresholds adopted by various foreign jurisdictions.

Until this point, CADE's leadership has not announced any proposal of change in statutory thresholds or in CADE's internal policy towards mergers in digital markets.

Substantive assessment

31 | What factors does the competition authority in your jurisdiction consider in its substantive assessment of mergers in digital markets?

Most cases involving digital markets followed the same review standards applicable to traditional industries. While CADE's leadership has indicated the agency is open to considering new theories of harm (such as concerns with future innovation or the role of data), CADE has been very careful in avoiding speculative theories in real cases.

Remedies

32 | How has the competition authority in your jurisdiction approached the design of remedies in mergers in digital markets?

Mergers with digital markets at their cores have not been blocked or subject to remedies in Brazil. While CADE generally indicates a preference for structural rather than behavioural remedies, CADE has resorted to extensive behavioural remedies and complex monitoring conditions in several mergers in traditional industries.

UPDATE AND TRENDS

Recent developments and future prospects

33 | What are the current key trends, legislative and policy initiatives, recent case law developments and future prospects for the enforcement of competition law in digital markets in your jurisdiction?

There is increasing interest from the Brazilian competition authority in discussing competition enforcement in digital markets. The Federal Competition Agency (CADE) has been promoting events and sponsoring staff's reports to create knowledge and keep up to speed on discussions taking place in foreign jurisdictions.

In any event, CADE has continuously indicated that the current statutory regime and traditional framework of analysis are well suited to dealing with digital markets. Furthermore, in real-world cases, CADE has taken a careful approach, avoiding speculative theories of harm. Instead, CADE has conducted detailed investigations to collect extensive market data before issuing a decision. Under this approach, CADE has shown concerns about avoiding undue intervention that could stall innovation.

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Digital Business
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business