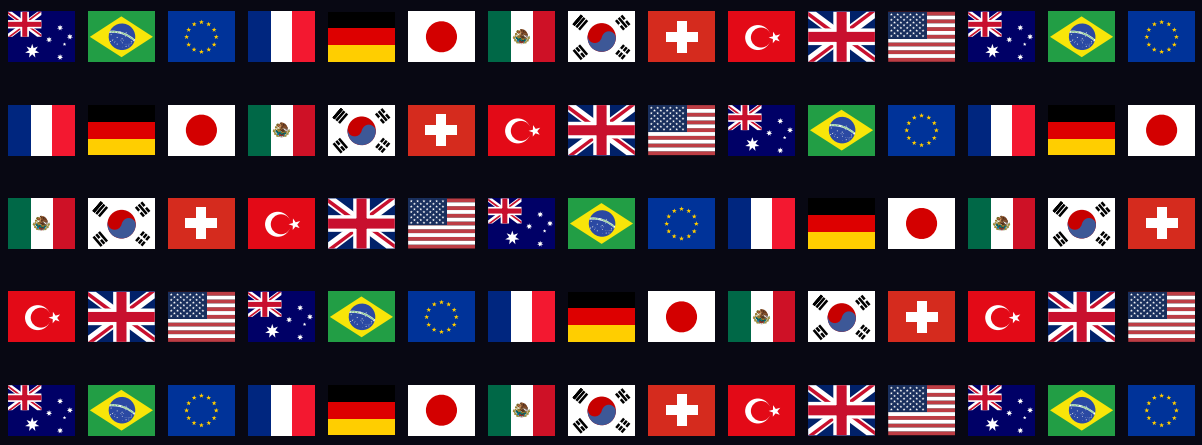
COMPETITION IN DIGITAL MARKETS

Brazil



LEXOLOGY
Getting The Deal Through

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Competition in Digital Markets

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Quick reference guide enabling side-by-side comparison of local insights into applicable legislation, enforcement authorities and regulatory guidelines; horizontal agreements; vertical agreements; unilateral anticompetitive conduct; merger control; and recent trends.

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Brazil

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LEGAL AND REGULATORY FRAMEWORK

Legislation

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 (the Competition Law) is the main statutory provision regulating digital markets under a competition framework in Brazil. It establishes a pre-merger control regime and a system of ex-post enforcement against business conduct that could be deemed anticompetitive (collusion and unilateral conduct).

While there is a growing debate about the specific features of digital markets and whether they may require changes to the traditional framework of enforcement, the Federal Competition Agency (CADE)'s leadership has repeatedly indicated that the current statutory regime provides adequate tools and sufficient flexibility to handle cases involving digital markets.

In any event, ongoing discussions in Congress involve proposals for ex-ante regulation of digital platforms.

Law stated - 21 July 2023

Enforcement authorities

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

CADE is the primary competition enforcer dealing with digital markets. It comprises an investigatory unit (SG) and the Tribunal.

CADE has analysed most competition cases in Brazil in the context of governmental investigations. Administrative decisions issued by CADE are subject to judicial review by federal courts. While there is no dedicated digital markets authority or specific unit working within CADE, CADE created a specialised unit to investigate single-firm conducts in 2022 that has been handling most conduct investigations related to digital markets.

State and federal public prosecutors can also enforce the Competition Law with criminal and civil enforcement actions. Notwithstanding, enforcement actions by state and federal public prosecutors related to digital markets are scant.

Finally, individuals, legal or collective entities, including consumer organisations, unions and trade associations can file private lawsuits seeking injunctive relief or compensation for damages. However, private enforcement actions are scant in Brazil. Recent legislation (Law No. 14.470/2022) has been enacted to create more incentives, such as double damages, for private enforcement against collusion, but with no special focus on digital markets.

Law stated - 21 July 2023

Regulatory guidelines

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

There are no formal guidelines on digital markets.

Law stated - 21 July 2023

Advisory reports

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 the implications of emerging business models in key sectors.

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

Law stated - 21 July 2023

Advance compliance guidance

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 a business review request. To present a business review request, companies must pay a fee and submit all relevant documents with a detailed explanation of the practice or strategy. CADE has up to 120 days to respond to the request, and the response will be binding for CADE for a maximum period of five years. CADE's Tribunal has the power to, upon public interest and new facts or reasons, reconsider its interpretation in the future without retroactive effects.

Until this point, there has been no business review request involving digital markets. In any event, the fuel distributor Ipiranga submitted a business review request regarding the implementation of a maximum price suggestion policy based on algorithms in 2021.

Law stated - 21 July 2023

Regulatory climate and enforcement practice

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 primarily 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, current CADE's chairman Alexandre Cordeiro indicated that CADE should be 'less interventionist' than 'this new wave of antitrust law that started in Europe and now gained

force with Biden in the US'.

Law stated - 21 July 2023

HORIZONTAL AGREEMENTS

Special rules and exemptions

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 regarding the assessment of anticompetitive agreements between competitors in digital markets in Brazil. In general, naked anticompetitive agreements between competitors (eg, price fixing and market/customer allocation) are considered per se illegal in Brazil.

Law stated - 21 July 2023

Access to online platforms

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

The Federal Competition Agency (CADE) has not concluded investigations on horizontal restrictions on access to online platforms. In terms of ongoing enforcement initiatives, CADE launched in September 2022 an investigation into Google and Facebook to analyse an agreement referred to as Jedi Blue, by which Google allegedly favoured Facebook in its ad biddings in exchange for a Facebook compromise not to support alternative online advertising technologies. The investigation is still ongoing.

Law stated - 21 July 2023

Algorithms

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 investigated airlines for implementing a technology that collected information on routes, fees, classes and available seats of around 700 airline companies in an online network, holding that such a system would facilitate tacit horizontal agreements. The investigation was closed following consent decrees. In another proceeding , CADE imposed penalties on driving schools and a vertically related software vendor holding the driving schools used that vendor's software to collude and monitor a cartel.

More recently, 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'. CADE held that Ipiranga could implement its policy if it does not share the algorithms and the data used as inputs with rivals.

Finally, in an investigation of alleged price increases by airlines, the SG analysed a potential tacit collusion involving airlines' pricing algorithms. However, the SG decided to close the investigation in 2022, holding that 'with no evidence of agreement or concerted practice between airlines to collude, we would be facing a tacit collusion case, a behavior not reached by CADE's mandate'.

Law stated - 21 July 2023

Data collection and sharing

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?

CADE first convicted a cartel centrally based on a 'hub-and-spoke' theory in 2023 (CADE v Conesul). CADE convicted a distributor and its respective resellers of electronic whiteboards, holding that the distributor disseminated sensitive data among its resellers. According to CADE, the key issue was 'the sharing of competitively sensitive information, with the intention of setting the selling price of a certain product above the market price, through coverage proposals previously agreed with the other resellers, which appeared to the market as a false intra-brand competition'.

In 2022, the SG closed an investigation into the use of an 'opportunity registration system' by software companies (under which a company supports only one of its distributors/resellers to participate in specific bids). According to the SG, this practice may raise questions from the antitrust point of view if the following elements are present:

- exclusivity of the first reseller who reports the opportunity to the software provider;
- differentiated price of the software licence to the reseller who reports the opportunity; and
- sharing of sensitive information.

Law stated - 21 July 2023

Other issues

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

No.

Law stated - 21 July 2023

VERTICAL AGREEMENTS

Special rules and exemptions

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?

No special rules or exemptions under Brazilian competition law apply to the assessment of anticompetitive vertical agreements.

While Federal Competition Agency (CADE) recognises that cases that fall under the broad category of 'vertical agreements' typically result in procompetitive efficiencies, the agency made clear in a number of precedents that such agreements may raise concerns if they result in market foreclosure.

CADE's precedents 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 an undertaking holds a dominant position and 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

procompetitive efficiencies that compensate for its anticompetitive effects.

Law stated - 21 July 2023

Online sales bans

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

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

Law stated - 21 July 2023

Resale price maintenance

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

CADE has not concluded investigations of resale price maintenance (RPM) in digital markets to date. In any event, CADE's SG has indicated that they would likely be analysed under the same framework applicable to RPM cases in traditional industries (see CADE v Technos).

Since the mid-1990s, CADE's precedents have consolidated the view that suggested or recommended prices do not raise concerns if monitoring and punishing/rewarding mechanisms do not follow them. On the other hand, RPM – either as maximum prices (price ceiling) or minimum prices (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 RPM conduct, but it may follow a more rigorous framework. If a player holds a dominant position, CADE may work under the assumption that the conduct produces negative effects, shifting the burden to the dominant player to prove that it is unable to harm competition (eg, there is still sufficient inter-brand competition) or that it produces substantial efficiencies to 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 would 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.

CADE usually considers that controlling advertised prices may result in similar effects to RPM. In a business review request submitted by tyre manufacturer Michelin, a CADE Commissioner indicated that controlling advertised prices in e-commerce platforms may result in the same effects as an RPM strategy. In this scenario, advertised prices and final prices would necessarily be the same – in contrast to physical retailers, which can offer discounts in relation to advertised prices after negotiating with each customer.

Law stated - 21 July 2023

Geoblocking and territorial restrictions

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

CADE has not launched investigations of geoblocking and other territorial restrictions on online sales to date. In any event, CADE's case law related to 'radius clauses', which ban shopping malls tenants from opening stores within a certain radius of the shopping mall, provide guidance on the applicable framework, indicating they would be likely subject to the rule of reason standard (MPFRS v Shopping Iguatemi and others).

Nonetheless, CADE is usually sceptical of justifications for radius clauses. In precedents from the early 2000s (eg, CADE v Condomínio Shopping Center Iguatemi), CADE held that radius clauses might be anticompetitive for their potential to make it impossible for rival shopping malls to offer a competitive 'tenant mix' to customers.

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 – Proceeding no. 08012.004034/2002-16). 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; in MPFSP v Car makers , CADE cleared the defendants after finding that the territorial restrictions imposed were necessary to eliminate free-riding and increased inter-brand competition, objectives deemed in the sectorial legislation that authorizes restrictions.

Law stated - 21 July 2023

Platform bans

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 investigations on supplier-imposed restrictions on distributors' use of online platforms or marketplaces to date. In any event, CADE's case law indicates they would likely be examined under a rule of reason standard.

More specifically, selective distribution systems usually do not raise antitrust concerns in Brazil unless they are part of a vertically integrated firm's strategy to dominate a downstream market. In Inox-Tech v APERAM , CADE investigated APERAM for discriminating distributors of stainless steel. APERAM held an alleged monopoly in stainless steel production and supplied authorised distributors and an undertaking of its economic group. CADE concluded that APERAM was offering favourable conditions to its own distributor to harm rivals and create difficulties in importing stainless steel. In 2015, APERAM signed a consent decree ceasing both practices completely.

It is also worth mentioning a two-decades-old precedent that involved Microsoft's selective distribution system (SDE v Microsoft and TBA). In that case, CADE fined Microsoft and a distributor 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 was issued in the early 2000s, CADE has never again held that 'discrimination' by suppliers that are not vertically integrated could be anticompetitive.

Law stated - 21 July 2023

Targeted online advertising

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 targeted online advertising to date. In any event, such behaviour would likely be examined following an effects-based or rule-of-reason approach.

Law stated - 21 July 2023

Most-favoured-nation clauses

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

CADE has concluded two investigations involving most-favoured-nation (MFN) clauses to date.

Similar to investigations in Europe, CADE investigated whether adopting MFN clauses in contracts signed by online travel agencies (OTAs) with hotels could harm competition (FOHB v Booking.com, Decolar.com and Expedia). The investigation ended with a settlement agreement, so there is no final decision by CADE. In any event, by demanding the removal of 'wide' MFN clauses (which restrict better terms to competing travel platforms), CADE indicated that such 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. On the other hand, by allowing 'narrow' clauses (which restrict better offers on the hotel's own website), CADE indicated that narrow clauses 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, OTAs continue to enforce narrow price parity provisions.

CADE also investigated whether GymPass, a gym aggregator platform, was abusing its dominant position by adopting MFN clauses in exclusivity arrangements with gyms. While CADE seemed particularly concerned with the exclusivity agreements, MFN provisions were also part of the investigation. In a preliminary injunction issued in December 2021, the SG suspended all MFN clauses, including narrow clauses.

According to the SG, 'even if they do not jeopardize competing platforms, since the gyms were already exclusive to the GymPass, they could harm consumers because the gym itself could not offer lower prices'. CADE's Tribunal upheld the SG's decision to impose a preliminary injunction in February 2022. After the preliminary injunction was upheld, GymPass signed a cease and desist agreement in September 2022. Per the cease and desist agreement , GymPass cannot introduce either wide or narrow MFN clauses preventing gyms from offering lower prices than those charged by GymPass.

Law stated - 21 July 2023

Multisided digital markets

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 investigated whether iFood, an online delivery platform, abused its dominant position in the Brazilian market for online food orders by entering into exclusivity agreements with restaurants. In March 2021, the SG issued a preliminary injunction prohibiting new exclusive agreements by iFood due to potential concerns with 'tipping

effects'.

According to the SG, iFood was securing exclusive relationships with 'must-have' or 'famous' restaurants, which could raise barriers to entry to competing platforms and result in the market foreclosing. After the preliminary injunction, iFood negotiated a cease and desist agreement limiting its exclusivity agreements to facilitate multihoming by restaurants. Per the cease and desist agreement signed in February 2023, iFood limited its exclusivity agreements to restaurants representing 25 per cent of its national Gross Merchandising Value; and 8 per cent of affiliated restaurants in its network in each city with more than 500,000 residents. The cease and desist also provides that iFood cannot sign exclusivity agreements with franchise networks with more than 30 units. It also disciplined specific compensations for restaurants made exclusive.

Similarly, in Total Pass v GymPass , CADE investigated whether GymPass, a gym aggregator platform, abused its dominant position in the Brazilian market for gym aggregator platforms by entering into exclusivity agreements containing MFN clauses with gyms. In December 2021, the SG issued a preliminary injunction prohibiting new exclusive agreements by GymPass. CADE's Tribunal amended the decision in February 2022 when the majority vote suspended all exclusivity agreements and MFN clauses by GymPass. CADE's Tribunal held that there was no evidence of efficiencies generated by GymPass' exclusive arrangements, which amounted to 80 per cent of its affiliated network.

In addition, GymPass' behaviour was especially concerning because it was a 'first mover' restricting various gyms from contracting with rival platforms, which could generate significant cross-side network effects and block rivals' entry, as entrants would only be capable of attracting customers if they could offer a relevant pool of gyms for use. After the preliminary injunction, GymPass negotiated a cease and desist agreement in September 2022. Per the cease and desist agreement , GymPass must limit exclusivity agreements to up to 20 per cent of the total number of affiliated gyms in its network; and only renew or sign new exclusivity agreements if it proves they are relevant to support investments.

Law stated - 21 July 2023

Other issues

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

No.

Law stated - 21 July 2023

UNILATERAL ANTICOMPETITIVE CONDUCT

Establishing market power

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 are subject to the same criteria adopted in 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. Notwithstanding, the 20 per cent mark is not absolute (parties can refute it and show that a 20 per cent share does not result in a dominant position in a specific market).

For merger investigations, the 20 per cent threshold is used to determine whether a merger resulting in horizontal

overlaps is eligible for fast-track review (if the overlap is higher than 20 per cent and the HHI variation exceeds 200 points, the merger will require lengthier scrutiny). On the other hand, a higher threshold of 30 per cent is used to determine whether a merger resulting only in vertical integration can be subject to fast-track review.

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 the Federal Competition Agency (CADE) to drop an investigation based on a lack of market power. Notwithstanding, precedents indicate that CADE is unlikely to find that a player can implement unilateral conduct and produce anticompetitive effects unless its market share is higher than 40 to 50 per cent. In any event, there are certain cases where CADE has benefited from the relatively low statutory provision to launch investigations against payers holding 20 to 30 per cent market share.

In specific cases, CADE has recognised that digital markets may have certain features to consider in the market power analysis. For example, in OLX/Zap , the SG indicated that:

- multisided 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 some instances but not in others; and
- access to user data may be relevant to 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 widespread 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'.

Finally, a few cases in the healthcare industry have considered economic dependence as an additional factor in antitrust analysis (CADE v Unimed and Hormonal v Unimed).

Law stated - 21 July 2023

Abuse of market power

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.

Law stated - 21 July 2023

Data access

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

In GuiaBolso 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 establishing an interface that would allow GuiaBolso to access the data of users that provided consent. This commitment was valid until the Open Banking Regulation by the Central Bank entered into force. A similar case against Banco Inter was closed by the SG because the defendant did not hold a dominant position in any scenario.

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 enable 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 could acquire similar data from numerous service providers other than Claro.

Law stated - 21 July 2023

Data collection

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. In 2021, 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 a 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. Its claim was that 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' could be in and of itself an abuse of dominance, with no reference to any impact to competition.

In May 2021, Facebook/WhatsApp committed to work with CADE and other agencies to clarify questions. A year later, in May 2022, CADE, Brazil's Data Protection Agency, the Federal Consumer Protection Bureau and the Public Prosecutors Office released their final report , concluding that Facebook/WhatsApp complied with the

recommendations made by the agencies.

In the acquisition of Hub Prepaid by Magalu Pagamentos , a rival complainant argued that, after the merger, Magalu Pagamentos would have increased incentives to access third-party data collected by Hub Prepaid and gain a competitive advantage over rivals in its retailer business. CADE's Tribunal dismissed this claim holding that Hub would be constrained by contractual, legal, and regulatory obligations, including Brazil's Data Protection Law.

In the acquisition of Linx (software) by Stone (payment services), complainants argued that Stone would gain access to commercially sensitive data, including the commercial relationship between retailers that used Linx software solutions and their customers, suppliers, and payment providers. Rivals also claimed that other payment providers, including those linked to banking institutions, would not be capable of accessing data with the same granularity, detail, and ease of information obtained by the merging parties. Nevertheless, CADE held that the data would not be competitively sensitive, mainly because the information it contained, owned by the establishments, could already be accessed by other players in alternative ways, such as via reconciliation of receivables or via open banking policy.

CADE also closed a confidential inquiry into Google's acquisition of Fitbit. Among other issues, the complainant argued Google would be able to use personal data to deteriorate competition in the digital and health markets. CADE has investigated the matter but did not find reasons to extend the review.

Finally, in an ongoing investigation (ABBT v Ifood), the SG dismissed a claim that iFood, the central Brazilian platform for food delivery, was collecting sensitive data through its marketplace to prospect new customers for its own food voucher. The SG dismissed the complaint after concluding there was no evidence of anticompetitive effects, mainly because food vouchers represented a relatively small percentage of the total sales in iFood's marketplace and, therefore, would not grant iFood any significant competitive advantage. In addition, the SG indicated that rivals could find similar information in the market. At the beginning of 2023, CADE's Tribunal ordered the investigation to continue different and unrelated claims (the investigation is closed regarding the data collection claim).

Law stated - 21 July 2023

Leveraging market power

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 against its own price comparison service with favourable placement and format on its search results page. In 2019, 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 results on the Google search results page was a pro-competitive product improvement, holding that 'Brazilian Law recognises that changes in the design of a product that benefits consumers are usually pro-competitive, 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'.

In September 2022, CADE closed a long-standing investigation against Google involving alleged discrimination of its local services. According to a complaint filed by Yelp, Google was deviating users of rival local search services by placing a box named Local Universal with thematic local results on its Google Search results page. During the investigation, however, the SG concluded that Google Search wasn't an essential input for local search services and that local search rivals are not dependent on the Google Search results page since they have other channels to reach

users. In addition, the SG held that launching and positioning the Local Universal in Google Search's results page was a legitimate design choice with important benefits to users, while data on users' traffic over time showed there was no harm to competition.

In 2023, CADE closed two other investigations. In an investigation involving an enterprise software vendor (controlled by financial technology solutions company StoneCo), CADE concluded that the company did not create interoperability problems to discriminate payment institutions and leverage its position in the market for credit and debit card operation, since specific operability problems could be explained by technical reasons and degrading interoperability would not result in immediate gains for the company. In another investigation involving the market for real state advertising platforms, CADE dismissed complaints of tying two different platforms.

Finally, CADE is investigating whether iFood, a food delivery platform that also offers a food voucher, discriminates against rival food vouchers in its food delivery platform (ABBT v Ifood).

Law stated - 21 July 2023

Other theories of harm

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

CADE has identified no other theory.

Law stated - 21 July 2023

MERGER CONTROL

Merger control framework

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 the following:

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

The Federal Competition Agency (CADE) maintains cooperation protocols with various agencies and regulatory bodies, including the Brazilian Data Protection Agency (ANPD). The cooperation protocol with ANPD provides for eventual cooperation in cases involving data transfer or processing (eg, CADE could ask ANPD for specific assessments on topics involving data protection).

Law stated - 21 July 2023

Prohibited mergers

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

CADE has imposed remedies and ultimately blocked a merger related to digital markets. At the beginning of 2023,

CADE's Tribunal blocked the creation of a JV based in Germany that would create an 'interoperable infrastructure for standardized data' across the automotive industry and allow the 'commercialisation of applications based on it' (as described by Applicants BASF, BMW, Henkel, Mercedes-Benz, Robert Bosch, SAP, Schaeffler, Siemens, T-Systems, Volkswagen and ZF). The SG initially cleared the transaction, but the Tribunal asked to review the case. Ultimately, CADE's Tribunal held that the merger raised concerns, especially regarding the risk of exchange of sensitive information among rivals and imposed remedies to the transaction as follows:

- obligation to monitor and store information exchanged between users of the JV's IT Systems;
- appointment of a Chief Compliance Officer responsible for issuing safeguard rules, as well as receiving and investigating allegations of violations of antitrust rules;
- development and adoption of tracking software designed to identify possible violations of antitrust rules within the scope of information exchange via the JV's IT Systems;
- adoption of a Compliance by Design system, through which the JV's IT Systems must be conceived and designed to integrate compliance with antitrust legislation; and
- appointment of an independent auditor (Trustee) responsible for monitoring the obligations and the implementation of the indicated solutions.

After CADE's Tribunal decided to impose remedies to the deal, the applicants said they would not go further with the transaction in Brazil. Against this background, CADE's Tribunal considered the applicants failed to accept CADE's restrictions and declared that the transaction was blocked.

Law stated - 21 July 2023

Market definition

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 different business models are competing in the marketplace, and technology is constantly evolving, 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 the 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.

More specifically, in a merger reviewed in 2014 involving online travel agencies in the market for air tickets, CADE first segmented the product dimension of a retail market into online and offline sales. Since then, CADE has consistently indicated that e-commerce is not a close substitute for offline sales (eg, Nasper/Delivery Hero). In terms of geographic dimension, platforms are usually national in scope due to their offerings in the entire Brazilian territory.

Law stated - 21 July 2023

'Killer' acquisitions

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 has indicated in speeches that the agency plans to understand whether some of these mergers could harm competition and should have been reviewed. In parallel, CADE is working on a benchmark report of mandatory notification thresholds adopted by various foreign jurisdictions.

Moreover, in 2022, CADE initiated an informal inquiry into enterprise software vendor Linx (controlled by financial technology solutions StoneCo) following a complaint by credit and debit card operator Cielo. According to Cielo, Linx abused its dominance in the market for enterprise management software, reached via several 'killer acquisitions', to dominate the market for credit and debit card operation. The investigation was closed in 2023.

Law stated - 21 July 2023

Substantive assessment

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 actual cases.

Law stated - 21 July 2023

Remedies

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

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.

ClickBus/J3 is the main case involving digital markets in Brazil that has been subject to remedies to date. CADE conditioned the merger to behavioural remedies aimed at addressing concerns with a vertical integration between ClickBus' activities as an online platform that sells bus tickets with J3, a company active in the market for global distribution services (intermediation services between online platforms and bus travel operators to manage the portfolio of bus travels). Remedies included:

- ending exclusivity agreements between the companies;
- commitments to not discriminate nor refuse to deal with rivals;
- keeping ClickBus and J3's business units separated to avoid sharing of sensitive information; and
- adopting an antitrust compliance programme and hiring a trustee to monitor compliance with the remedies.

CADE's Tribunal initially imposed behavioural remedies to the creation of a JV based in Germany that would create an 'interoperable infrastructure for standardized data' across the automotive industry and allow the 'commercialisation of

applications based on it', including the following:

- obligation to monitor and store information exchanged between users of the JV's IT Systems;
- appointment of a Chief Compliance Officer responsible for issuing safeguard rules, as well as receiving and investigating allegations of violations of antitrust rules;
- development and adoption of tracking software designed to identify possible violations of antitrust rules within the scope of information exchange via the JV's IT Systems;
- adoption of a Compliance by Design system, through which the JV's IT Systems must be conceived and designed to integrate compliance with antitrust legislation; and
- appointment of an independent auditor (Trustee) responsible for monitoring the obligations and the implementation of the indicated solutions.

The constitution of a joint venture among Brazil's top five banks to create a new credit bureau generated an important discussion about remedies to deal with access to data. 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 enable clients to provide data to more than one bureau.

Law stated - 21 July 2023

UPDATE AND TRENDS

Recent developments and future prospects

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 (CADE) in discussing competition enforcement in digital markets. CADE has been promoting events and sponsoring staff reports to create knowledge and keep up to speed on discussions in foreign jurisdictions.

CADE has continuously indicated that the current statutory regime and the traditional analysis framework 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 chill innovation.

In any event, there are ongoing discussions in Congress involving Bill of Laws proposing ex-ante regulation of digital platforms.

Law stated - 21 July 2023

Jurisdictions

Australia	Gilbert + Tobin
Brazil	Advocacia José Del Chiaro
European Union	Herbert Smith Freehills LLP
France	Nomos
Germany	Herbert Smith Freehills LLP
Japan	Nishimura & Asahi
Mexico	Galicia Abogados SC
South Korea	Yoon & Yang LLC
Switzerland	Prager Dreifuss
Turkey	ELIG Gürkaynak Attorneys-at-Law
United Kingdom	Herbert Smith Freehills LLP
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