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Session III: Practical approaches to assessing digital platform markets for competition law enforcement

– Contribution from Brazil¹ –

1. Introduction

1. One of the leading roles of competition authorities is to prevent and correct anticompetitive behavior in the market. By doing so, competition enforcement aims to encourage the efficiency of the production process, improve the quality of the products and services offered by the companies and contribute to the expansion of the range of options available for consumers. Moreover, as companies compete fairly with each other, prices tend to move down.

2. Thus, to ensure a competitive environment, antitrust agencies count on many tools for analyzing merger cases and for handling investigations involving practices that may harm competition. For instance, in order to define the relevant market and assess the competitive effects of a merger, a Hypothetical Monopolist Test (HMT) can be applied. There are also other methods to measure market power and efficiencies and to assess the effects of exclusionary conducts and vertical restraints.

3. However, technological advances and the emergence of digital markets have been putting traditional analytical tools to test, given specific features of this new digitalized environment. Therefore, antitrust authorities have been discussing how to deal with the challenges brought forth by the digital era in the competition field. For example, the definition of relevant markets and the assessment of market power become fainter when it comes to digital markets. Many of the measures of market power (such as market share, marginal costs, or the SSNIP test) are not easily applicable to multi-sided platforms and an accurate analysis must consider all interdependent customer groups that this structure connects.

4. Digital markets often operate as multi-sided platforms, connecting different groups of consumers, which influence the pricing structure and the incentives that consumers have to join these platforms. These markets are also characterized by network effects that shape how consumers interact with each other. Therefore, antitrust authorities around the world have been studying the need to adapt and adjust the existing analytical tools vis-à-vis the emergence of digital markets.

5. Since digital markets operate and are connected in a global level, joint effort among competition authorities to better understand the dynamics of these markets seems crucial. Cross-border cooperation has been proved to be increasingly necessary to better assess the effects of global mergers, as well as of possible anticompetitive conducts of digital market players.

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2. The Brazilian competition experience in digital markets

6. In Brazil, there are many companies operating in different sectors of the digital economy that have a significant presence in the digital landscape. The Brazilian Competition Authority faced some challenges when reviewing mergers cases and possible anticompetitive practices of these companies. This section will provide examples of the relevant cases, highlighting the challenges and the key findings during the review of on-going or closed proceedings.

2.1. Mergers

2.1.1. Itaú/XP

7. One of the most relevant cases involving digital markets and recently analysed by CADE was the acquisition of XP Investimentos (XP), a leading investment platform, by Itaú Unibanco (Itaú), the biggest Brazilian private bank (Merger 08700.004431/2017-16). On the one hand, the transaction could be understood as part of a strategy adopted by an incumbent company to restrain a disruptive player, which has been gaining a significant share of the financial investment market in Brazil. On the other hand, considering the design of the deal, it could be considered an attempt by the incumbent company to enter into a new and promising market, the ‘fintech’ sector.

8. In this particular case, CADE adopted behavioural remedies to limit Itaú’s capacity to interfere in XP’s businesses and to prevent the adoption of anticompetitive clauses. CADE considered that the transaction led to positive effects in the fintech sector, giving it greater credibility, which was evidenced by the fact that, ex post, many smaller platforms received significant investments.

9. Some of the challenges faced in the review of this acquisition were related to the fact that XP was considered a disruptive company. In this case, traditional tools, such as the market share or the Herfindahl-Hirshman Index (HHI) would not be sufficient to measure the potential effects of this acquisition on the competitive dynamics of the Brazilian financial market. Moreover, as disruptive markets are constantly changing, there was a concern on how to intervene in a way that would not negatively affect or undermine innovation.

10. Another issue discussed during the analysis of this acquisition was the fact that XP functioned as a multi-sided platform, connecting consumers searching for investments to those offering investment services. Since this financial platform has a dominant position in this field of investments services, one could say that new entrants would not be able to succeed in this market, as they would need to attract both sides of the platform to become appealing to users. Therefore, the presence of network effects in this market was considered a barrier to entry. The only way to avoid these competitive concerns was to enable multihoming in both sides of the platform. However, this would only work if, after approval of the transaction, XP did not establish exclusive relationships with their clients.

11. CADE cleared the acquisition with restrictions (behavioural remedies), aimed at limiting Itaú’s capacity to interfere in XP’s businesses, as well as at preventing the adoption of clauses that could have anticompetitive effects on other competing platforms.

2.1.2. Disney/Fox

12. Another acquisition analyzed by CADE concerning the digital market field involved Twenty-First Century Fox and The Walt Disney Company (Merger 08700.004494/2018-53). This merger was notified in 25 different jurisdictions around the world and generated competitive concerns in the Brazilian market. The main concerns were related to the market of cable sports channels, since the Brazilian antitrust authority understood that there was a potential for quality and diversity reduction in the available sports content. At that time, there was only one rival capable of competing in this market. In addition, CADE's General Superintendence considered that the cost increase could be passed to the consumers.

13. To address the competition concerns raised by the acquisition, CADE's Tribunal decided to apply a structural remedy as a condition to clear the merger. This structural remedy envisaged the sale of Fox Sports channel assets to maintain the same level of competitive pressure in the market. This condition would enable the Brazilian consumers to have access to three options of sports channels: SporTV, ESPN and another company with Fox Sports assets.

14. When assessing the competitive effects of this acquisition, CADE interacted with competition authorities from Mexico (IFT²), Chile (FNE), United States of America (DoJ) and Argentina (CNDC) to better understand the main competitive concerns, the relevant markets affected and possible remedies for each jurisdiction.

15. In terms of the relevant product market, there was no conclusions whether all TV channels should be considered part of the same relevant market or if they should be divided into different categories of channels. CADE examined both scenarios. In the first scenario, in which all TV channels were considered part of the same relevant market, no competitive concerns were raised, since the market concentration found was moderate, with a small variation of the HHI index resulting from the merger. In the second scenario, whereby different categories of TV channels formed distinct relevant markets, nine segments were defined. The category of sport channels was the only one that raised competitive concerns, since CADE identified a potential for quality and diversity reduction in this scenario.

2.1.3. Naspers/Delivery Hero

16. The Naspers and Delivery Hero transaction consisted in the acquisition of 13% of the Rocket Internet's shares in Delivery Hero by Naspers (Merger 08700.007262/2017-76). The transaction would result in horizontal overlap in the market of online food delivery. The main conclusions of the General Superintendence were that (i) there was a high expectation of growth for the segment in the next years; (ii) there were recent entries of important global players in the market, such as UberEATS and Rappi; and (iii) although there was low domestic rivalry, there was expectation of increase of competition in the near future. It is worth mentioning that the General Superintendence considered important to monitor the iFood's acquisition strategy in the segment and the exclusive agreements in future cases, as these could become entry barriers for new players. The transaction was cleared without restrictions due to low market concentration resulting from the deal – the market concentration was prior to the transaction.

² Instituto Federal de Telecomunicaciones, Mexican antitrust authority for the Telecom sector.

2.2. Anticompetitive conducts

2.2.1. Google (search/API/scraping)

17. In terms of anticompetitive conducts, CADE opened six cases to investigate Google's conducts, with three of them closed in 2019. CADE investigated the abuse of dominant position related to Google's activities concerning its search engine that allegedly gave illegal advantage to its own comparison-shopping (Administrative Proceeding 08012.010483/2011-94). Google was also under investigation for allegedly scraping content from downstream competing price comparison sites (e.g. reviews provided by users of the site Buscapé) to improve the results of its own comparison shopping engine (Administrative Proceeding 08700.009082/2013-03). CADE also investigated Google's advertisement tool (AdWords), under allegations that it prevented advertisers from transferring data from Google's platform to competitors' sponsored search platforms, preventing multihoming and illegally restricting competition (Administrative Proceeding 08700.005694/2013-19). These three cases were closed by the Tribunal due to lack of evidence. Recently, CADE has opened an investigation involving an alleged use by Google of the Android Operating System. The other two investigations relate to a potential abuse of dominance by Google involving the use of third parties' content to leverage its own platforms (Google Shopping and Google News), and the deviation of traffic to its own local search engine (Yelp x Google). Information on these cases is restricted and the investigations are under assessment.

2.2.2. Online Travel Agencies/Most Favored-Nation Clauses (MFN)

18. Another recent case of unilateral conduct in the digital market involved three major online travel agencies (OTAs) operating in Brazil (Booking, Expedia and Decolar), investigated due to the adoption of parity clauses, also known as most-favored-nation clauses (MFN) (Administrative Proceeding 08700.005679/2016-13). According to the General Superintendence, such clauses may restrict competition between the OTAs above mentioned and other OTAs, and may hinder new platforms from entering the market. The case was closed with the conclusion of Cease and Desist agreements between CADE and the three companies whereby they agreed to cease the adoption of wide MFN clauses. The use of narrow clauses, however, was allowed to ensure them to request parity treatment with regard to websites of the accommodation providers. This conclusion was based on the understanding that prohibiting MFN clauses under all circumstances might give hotels incentives to free ride and offer deals at lower prices than the ones announced on the OTAs' platforms.

2.2.3. Incumbent banks/Fintechs

19. In 2018, CADE also started investigations regarding exclusionary practices by traditional banks against emerging technology companies, especially companies offering financial services (such as crypto currency companies) known as fintechs. CADE is investigating allegations that Brazilian banks have been denying access of fintechs to bank accounts and other traditional banking services in order to restrict competition in the financial market. As an ongoing case, further information is restricted.

3. Cross-border cooperation between competition authorities

20. CADE's proceedings and investigations are driven by empirical evidence, academic literature and information obtained through international cooperation with other competition authorities upon waivers granted from parties. This also applies to cases related to the digital economy. For instance, Cade's findings related to Google cases quote both rulings from the European Commission and the US Federal Trade Commission (FTC). It is worth mentioning that documents from international organizations, such as the OECD's report on 'Market definition in multi-sided markets' are also referenced by CADE when analysing platform markets.

21. The table below presents the most recent and relevant cases involving digital markets in which there was international cooperation between CADE and other jurisdictions.

Table 1. Cooperation between CADE and other jurisdictions

INTERNATIONAL COOPERATION IN DIGITAL MARKETS					
Companies involved	Year	Administrative proceeding	Process category	Jurisdictions consulted	Issues addressed
Google	2015/2018	n° 08012.010483/2011-94 (Google shopping), n° 08700.009082/2013-03 (scrapping) and n° 08700.005694/2013-19 (API)	unilateral conduct	DG – Comp (Europe)	Main competitive concerns, definition of relevant market, possible remedies
Disney/Fox	2018/2019	n° 08700.004494/2018-53	merger	FNE (Chile), IFT (Mexico), DOJ (EUA) and CNDC (Argentina)	Main competitive concerns, possible remedies
IBM/Red Hat	2019	n° 08700.001908/2019-73	merger	DOJ (EUA) and DG – Comp (Europe)	Overlaps resulting from the merger (ongoing case)

Source: Administrative Council for Economic Defense (CADE) *Elaboration:* Department of Economic Studies (DEE)

22. As mentioned above, digital markets involve companies with international scope. Thus, the global nature of these markets in the economy has been increasingly demanding international cooperation between competition authorities of different jurisdictions.

4. Market studies in the digital markets

23. All documents prepared by the Brazilian antitrust authority with regard to proceedings and decisions, such as technical reports, petitions and votes are publicly available online at the Electronic System of Information (Sistema Eletrônico de Informações – SEI) portal. For instance, the public documents of the cases mentioned throughout this document and related to digital markets are available at SEI and can be accessed by the proceeding numbers provided for reference.

24. Additionally, CADE's Department of Economic Studies (DEE) regularly publishes studies that address topics related to the digital economy. In 2015, the DEE published two studies about the impacts of new technologies in the private transportation market: "The market for individual passenger transportation: regulation, externalities and urban balance"

(Working Paper 01/2015)³ and “Post entry rivalry - the immediate impact of Uber's app on taxi rides” (Working Paper 03/2015)⁴. More recently, in early 2018, the DEE published the updated version of the previous studies: “Competition effects of the sharing economy in Brazil: Has Uber’s entry affected the cab-hailing app market from 2014 to 2016?” (*Working Paper 01/2018*)⁵. The main findings of this study are summarized in the box below.

Box 1. Competition effects of the sharing economy in Brazil: Has Uber’s entry affected the cab-hailing app segment from 2014 to 2016?

The rise of the sharing economy and the emergence of P2P platforms have brought significant changes to the competitive environment of several traditional economic sectors. In such context, many ridesharing apps, such as Uber and Cabify, began to operate in Brazil, generating structural changes in the competitive environment of the individual transport sector and, consequently, reactions from the incumbent industry of cab-hailing apps. Therefore, in 2016, CADE decided to study the competition effects of Uber’s entry into the incumbent cab-hailing app segment in Brazil, over the period of 2014 to 2016.

To that end, CADE used a fixed-effects regression model with panel data and a dataset of 590 municipalities and 36 months, covering the period from 2014 to 2016. The study observed that Uber’s entry generated, on average, a reduction of 56.8% in the number of cab-hailing app rides in cities where the platform was operating. Additionally, the authors verified that a 1% increase in the number of Uber rides represented a 0.09% reduction in the number of cab-hailing app rides. This evidence set, together with some descriptive information on the dynamics of the number of ridesharing apps, suggests that, in addition to conquering users from other types of transportation that did not use cab-hailing app services, Uber also competed with the cab-hailing app services, attracting some of their users. Moreover, for all 590 municipalities, on average, the taxi segment did not react to the increased competition and did not offer discounts in the final value of the ride.

By investigating the competitive impacts of Uber, considering only Brazilian capitals, the magnitude of Uber’s entry falls to -36.9%, indicating that the competitive effect tends to be lower (in percentage terms) in cities where the market is larger. In addition, by comparing the markets of the capitals of the North and Northeast regions and the capitals of the South, Southeast, and Central West regions, the study showed that there is important spatial heterogeneity in the competitive effects of the platform. This may be explained, to some extent, by the moment of entry of the platform in these regions. A late entry of the app was observed (between March 2016 and December 2016) in the group of capitals of the North and Northeast regions. On the other hand, when considering the group of capitals of the South, Southeast, and Central West regions, the authors verify that the entries began in May 2014.

Thus, it is possible to compare the results of the effects of recent entries (less than a year) vis-à-vis entries that occurred more than two years ago. When only capitals in the South, Southeast, and Central West regions are examined, the effect of Uber on cab-hailing app rides is weaker (a reduction of 26.1%) than when compared to the results for the capitals of the North and Northeast regions (a reduction of 42.7%).

³ Available at <http://en.cade.gov.br/topics/about-us/dee/working-paper-001-2015.pdf>

⁴ Available at <http://en.cade.gov.br/topics/about-us/dee/working-paper-003-2015.pdf>

⁵ Available at http://en.cade.gov.br/topics/about-us/dee/working-paper-uber_01-2018.pdf

This indicates that Uber's entry in a municipality may have a strong initial effect, reducing substantially the number of cab-hailing app rides, but there is a gradual recovery in the number of rides of the incumbent sector over time.

The results suggest that, only for the group of capitals of the South, Southeast and Central West regions, Uber's entry reduced cab-hailing app fares (a reduction of 12.1%). This indicates that the cab-hailing apps reacted via discounts in their fares after a longer period of exposure to a competitive environment. It is possible to verify a rising rivalry between the two types of apps, where Uber's entry provokes a reduction in the number of cab-hailing app rides, reactions via price reductions, and, finally, a recovery in the number of cab-hailing app rides.

Finally, in order to bring more benefits to consumers in terms of innovative services, improved quality and security, lower prices and more options, the paper argues that it is necessary to increase the debate towards a gradual deregulation of taxi services, especially on issues related to barriers to entry and pricing freedom.

25. In sum, the empirical results (see Box 1) applied to the competition policy corroborate the hypothesis that the services provided by Uber would serve the same relevant market that the cab-hailing apps serve (EasyTaxi and 99Taxis). This evidence does not exclude the possibility that other types of transportation are also part of this same relevant market. In this sense, the data collected help future cases that may involve questions such as the analysis of mergers and acquisitions of companies that operate in the individual passenger transport market, as well as in the investigation of unilateral conducts.

5. Conclusion

26. In order to enhance the enforcement in digital markets, CADE has been investing in the training of its staff. For instance, in the first semester of 2019, the Department of Economic Studies, along with the International Unit of CADE, organized an internal workshop to discuss the main challenges brought by the digital era. During this event, issues like the definition of relevant markets, remedies, unilateral conducts and algorithmic pricing were discussed. Additionally, another issue raised during the event was that digital markets have a dynamic nature and, therefore, investigations in this field are often complex and take time to reach a final decision. Hence, one could say that it is important to beware of the timing of competition authorities' interventions for the effectiveness of the decisions taken.

27. The international conference "Designing Antitrust for the Digital Era" was another event promoted by CADE that aimed to discuss general developments around the world regarding the digital markets and its competitive dynamics. The representatives of the BRICS' competition authorities attended to the conference that took place in the beginning of August 2019. Some experts in this field and the Brazilian State Secretary for Consumer Protection also participated in this event.

28. Moreover, CADE is conducting studies and benchmarking on competition enforcement in the digital economy worldwide, whose conclusions will be used to further train and qualify its staff, as well as to introduce institutional enhancements.

29. Besides that, the Brazilian competition authority also holds a multilateral relationship with other jurisdictions and renowned institutions – OECD, ICN, UNCTAD and BRICS – in order to remain updated with discussions, techniques and tools for assessing competition concerns in the digital markets. As previously stated, the global nature of the growing digital economy increased not only the complexity of the analysis of these markets, but also the need of higher cooperation in competition law enforcement.