

Unclassified

English - Or. English

18 May 2021

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 10 May 2021

Data Portability, Interoperability and Competition – Note by Brazil

9 June 2021

This document reproduces a written contribution from Brazil submitted for Item 1 of the 135th OECD Competition Committee meeting on 9-11 June 2021.

More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/data-portability-interoperability-and-competition.htm>

Please contact Mr Antonio Capobianco if you have questions about this document.
[Email: Antonio.CAPOBIANCO@oecd.org]

JT03476580

Brazil¹

1. Introduction

1. As pointed out in recent OECD reports², data are fundamental elements of market dynamics in the digital economy, notably because market competitors seek to access the greatest amount and variety of data they possibly can. The data collected allow companies to develop and personalize products and services, create new business models and anticipate trends. Indeed, the use of data by companies raises concerns related to consumer rights—especially regarding data protection and privacy—and competition.

2. The enforcement of competition laws in Brazil, as in other countries, faces many challenges to assess the role of data in market dominance (e.g. whether large datasets may constitute barriers to entry, cause market foreclosure, or offer any form of unlawful competitive advantage). In this context, data portability and interoperability arise as possible mechanisms for mitigating market power in concentrated digital markets, either by reducing switching costs and lock-in effects or facilitating the access of competitors to data.

3. The present contribution aims to briefly examine possible applications of data portability and interoperability by the Brazilian competition authority—in light of competition law’s intersection with other laws and regulations (notably the Brazilian Data Protection Law)—and to analyse some of CADE’s recent cases.

2. Data portability and interoperability under the Brazilian legal and regulatory framework

4. The Brazilian Civil Rights Framework for Internet Use (Law 12965/2014, commonly known as *Marco Civil da Internet*) establishes internet governance in Brazil to promote compliance with open technology standards that allow for communication, accessibility, and interoperability between applications and databases³. To this end, the Law sets forth the roles and responsibilities of all levels of government in promoting interoperability in various sectors of economy⁴.

5. The Brazilian Data Protection Law (known either as Law 13709/2018 or as *Lei Geral de Proteção de Dados Pessoais* in Portuguese), which came into effect in 2020⁵, sets forth the right to data portability⁶. It establishes that individuals are entitled to obtain from

¹ This document was prepared by Luiz Augusto Azevedo de Almeida Hoffmann, Commissioner of CADE, Lucas de Góis Barrios, Advisor at the Office of Commissioner Hoffmann, and Bernardo Quezado Rodrigues Silva, Trainee of the Office.

² E.g. OECD. *Consumer Data Rights and Competition - Background note* (2020). Available at [https://one.oecd.org/document/DAF/COMP\(2020\)1/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)1/en/pdf).

³ Law 12965/2014, Article 4, Item IV.

⁴ Law 12965/2014, Article 24, Item IV.

⁵ The sanctions are expected to come into effect in August 2021. However, there are still ongoing discussions in Congress to anticipate or postpone this date.

⁶ Article 18, Item V.

the data controller, at any time and upon request, the “portability of the data to other providers of services or goods, at the consumer’s express request, and respecting commercial and industrial secrecy, according to the provisions of the Data Protection Authority”. Thus, this provision requires that data portability be regulated by the Brazilian Data Protection Authority (ANPD), which is still pending.

6. Moreover, according to the Brazilian Data Protection Law, ANPD (the Brazilian Data Protection Authority) may regulate interoperability standards for portability, free access to data, security matters, and storage terms for records, respecting the principles of necessity and transparency⁷.

7. The Brazilian Data Protection Law also establishes that the data transferred will not include data that have been anonymized by the data controller⁸. According to the Law, anonymized data is defined as those “relating to a data subject that cannot be identified, considering the use of reasonable technical means available at the time of processing”⁹.

8. Over the years, different regulatory authorities have made efforts to promote data portability within their sectors. We discuss some of these efforts below.

9. In the telecommunications sector, the Brazilian National Telecommunications Agency (ANATEL), issued its Normative Regulation 460/2007, which establishes the portability of landline and mobile phone numbers, making it easier for consumers to switch carriers, change their plans and move their services to a new address. As from 2008, after the regulation came into effect, there have been more than 67 million phone numbers ported in Brazil.

10. In the health sector, the Brazilian National Regulatory Agency for Private Medical Insurance (ANS) issued its Normative Regulation 438/2018¹⁰—which came into force in 2019—setting rules to make it easier for consumers to port their health insurance policies while keeping any benefits they have accrued over time. Even though this norm does not regulate data portability itself, it is aimed at promoting competition in the private medical insurance sector.

11. The Central Bank of Brazil (BACEN), through its Normative Regulations 2835/2001, 3402/2006 and 4292/2013, allowed for, respectively, (i) data portability, granting customers the right to transfer their registration data to other financial institutions, (ii) salary portability, meaning it is possible to transfer your pay check to the institution of your choice, and (iii) credit portability, allowing customers to transfer loans or financings from one financial institution to another at no cost¹¹.

12. Furthermore, the Central Bank of Brazil, together with the Brazilian National Monetary Council (CMN), issued their Joint Normative Regulation 1/2020, which is expected to be in full effect by October 2021. It regulates open banking in Brazil, and makes interoperability mandatory in the financial sector. Participating institutions are required to sign a convention covering matters such as technology standards and operational procedures, the standardization of data and services layout, the channels available to

⁷ Article 40.

⁸ Article 18 (7).

⁹ Article 5, Item III. Moreover, according to Article 12(3) of Law 13709/2018, the Brazilian Data Protection Authority has the prerogative to regulate the standards and techniques used in anonymization processes and to monitor the safety of these processes.

¹⁰ It replaces previous portability standards established by Normative Regulation 186/2009.

¹¹ PONCE, Paula. Relatório Técnico: Portabilidade de Dados e Concorrência. ITS, 2020.

process demands, amongst others¹². The open banking regulation is expected to have intense pro-competitive effects in the Brazilian financial and payments markets.

13. In conclusion, data interoperability and portability laws and regulations play an important role in promoting competition in Brazil. Furthermore, as the Brazilian Data Protection Law has only recently come into effect, and the Brazilian Data Protection Authority was created even more recently, the wider impact of interoperability and portability is still to be felt in larger sectors of the economy.

3. Possibilities for the Brazilian competition policy and the role of CADE

14. The Administrative Council for Economic Defense (CADE), the Brazilian antitrust authority, is responsible for enforcing Brazilian competition laws and regulations (especially Law 12529/2011), by reviewing mergers and acquisitions, analysing abuse of dominance cases, ensuring competition law enforcement before the Judiciary, and promoting competition advocacy in the Executive and Legislative branches.

15. In merger review or abuse of dominance cases, the Brazilian Competition Law allows CADE to impose any remedies and restrictions necessary to mitigate actual or potential harmful effects to the relevant markets¹³. Therefore, CADE could impose data portability and interoperability, should those measures be necessary to mitigate anticompetitive effects of mergers or abusive practices. Particularly in abuse of dominance cases, CADE may settle cases by means of cease-and-desist agreements, by which respondents recognize their involvement in anticompetitive practices, agree to make financial contributions, and commit to adopt certain measures to prevent eventual harm to competition¹⁴.

16. Thus, CADE has declared that it is “aware of the risks that the exploitation of big data by companies may pose to the protection of other users’ rights, such as the right to privacy. Therefore, CADE understands that the dynamics of digital platforms give rise to a close relationship between data protection, privacy and competition policy. Accordingly, it is important to have an active co-operation and coordinated work between competition and other related authorities, such as Senacon (Consumer Protection Secretariat) or the now being-established Brazilian Data Protection Authority to deal with the multifaceted aspects of data in the digital world”¹⁵.

17. In this regard, the Brazilian National Council for Consumer Defense (CNDC), led by SENACON, was established in 2020¹⁶ as a forum intended to bring together regulatory authorities, agencies and government bodies to discuss and coordinate public policies

¹² Article 44.

¹³ Article 61, § 1 and § 2, VI; Article 37, VII.

¹⁴ Article 85.

¹⁵ *BRICS in the digital economy: competition policy in practice*. 1st Report by the Competition Authorities Working Group on Digital Economy. 2019.

¹⁶ Decree No. 10.417 of 2020.

related to consumer protection¹⁷. It may lead to the formulation of policies that fall at the intersection of consumer defense, data protection and competition.

4. The experience of CADE: discussion of cases reviewed by the authority

18. CADE has been dealing more and more with cases involving data portability and interoperability in recent years, in abuse of dominance and merger review cases alike. Thus, the present section presents some of the most recent cases.

4.1. The GuiaBolso/Bradesco Case

19. This investigation was launched as a result of a complaint against the Brazilian Banco Bradesco, accused of abuse of a dominant position to the disadvantage of GuiaBolso (Administrative Proceeding 08700.004201/2018-38). In brief, GuiaBolso is a smartphone application which accesses personal bank information with the user's permission (i.e., users provide their internet banking password to the app) to take advantage of personal financial management tools and obtain credit services within the app.

20. Bradesco was accused of making it difficult for GuiaBolso to access its internet banking service, by implementing a random password system in its internet banking interface. Additionally, Bradesco had filed a lawsuit to prevent GuiaBolso from collecting data from its clients, alleging security and bank secrecy issues.

21. At the beginning of CADE's investigation, in 2018, the Office of the Superintendent General understood that the arguments presented by Bradesco were potentially unjustified and could be an attempt to beat off competition. Its practices were deemed as possibly having "an anticompetitive nature, insofar as they limit initiatives that tend to increase competition in a particularly concentrated market that currently imposes on Brazilians the largest bank spread in developed and developing economies".

22. In 2019, CADE's Office of the Superintendent General, supported by literature and international case law, asserted that the services offered by GuiaBolso allowed for more inclusion and innovation in the financial system and the allegations of risks associated to information security which were raised by Bradesco were unreasonable. Thus, the authority decided to launch administrative proceedings to further access the situation considering Bradesco's dominant position in the upstream markets and that some financial technology firms (such as GuiaBolso and financial institutions connected to it) operate in markets where the bank also operates in, it is observed that there are incentives for market foreclosure. Although the foreclosure is 'subtle', characterized not by an explicit refusal, but by the requirement of a double factor authentication to access bank information, there are indications of a possible abuse of a dominant position".

23. In the course of the investigation, in 2020, Bradesco signed a Cease and Desist Agreement (TCC), ratified by CADE's Tribunal, in which the bank agreed to cease the conduct and implement an interoperability mechanism to allow GuiaBolso to access its internet banking system, until the open banking regulation of the Central Bank of Brazil comes into force, which is expected to happen by December 2021. As a result of the agreement, Bradesco also committed to make a financial contribution of about BRL 23.8

¹⁷ BRASIL. *Governo Federal cria Conselho Nacional de Defesa do Consumidor*. 2020. Available at: <<https://www.gov.br/secretariageral/pt-br/noticias/2020/julho/governo-federal-cria-conselho-nacional-de-defesa-do-consumidor>>.

million. Thus, the administrative proceeding was stayed and, should all behavioural obligations be fulfilled, it may be closed.

4.2. The Credit Bureau Case

24. Another case involving interoperability is Merger Case 08700.002792/2016-47. In sum, the case dealt with a joint venture created by the largest banks in Brazil (Banco Bradesco, Banco do Brasil, Banco Santander, Caixa Econômica Federal and Itaú Unibanco) to structure a credit bureau, whose main input was to be consumer data obtained by the aforementioned financial institutions.

25. A credit bureau needs multiple market agents, such as financial institutions and service providers, to provide pieces of information. This data is then reorganized to offer credit information services. Thus, the transaction raised concerns because of the vertical integration between large financial institutions and the market of credit bureaus, which would make it possible for parties to exercise market power on both ends.

26. Due to these concerns, CADE imposed certain remedies for the transaction to be completed. In short, the agreement signed with the referred parties establishes the obligation of supplying information observing isonomic and non-discriminatory conditions to other credit bureaus, banks and competitors that wish to access input and consumer data, which in some ways addresses the issues related to interoperability. Furthermore, an independent external trustee was assigned to monitor compliance with the obligations established in the agreement.

4.3. The Stone/Linx Case

27. Merger Case 08700.003969/2020-17 – still pending clearance by CADE’s Tribunal – also discusses interoperability issues. The case concerns the acquisition of Linx by Stone, and a discussion about overlapping ecosystems involving the retail management software, credit services and payment markets.

28. During the merger review, some third parties expressed their concern about the interoperability between business management software used in retail and payment services. The third parties alleged the transaction would cause market foreclosure by generating incentives for the adoption of lock-in strategies and the creation of interoperability barriers.

29. Even though some third parties stated their concern, the Office of the Superintendent General issued an expert note pointing out the transaction would not be a cause for concerns with respect to competition, and would be in conformity with current regulations by the Central Bank of Brazil. In addition, the authority dismissed the allegations of market foreclosure. However, considering the third parties appealed, the case is currently pending before the Tribunal of CADE.

4.4. The Google Shopping Case

30. Administrative Proceeding 08012.010483/2011-94, adjudicated in 2019, concerns alleged restrictions on data portability, involving a hypothetical refusal of access to data (which could be qualified as a refusal to deal, per the theory of harm). The investigation was launched after a complaint was presented by the E-Commerce Media Group Information and Technology Ltd. about alleged anticompetitive practices adopted by Google. In the complaint, it was alleged that “the practice of placing Google Shopping in privileged positions at the top of the ‘organic searches’ of Google Search would cause rival

price comparison websites to lose audience, clicks and revenue, which would in turn result in higher prices to end consumers and losses to Google Shopping rivals”. Thus, the Complainant's price comparison websites would be harmed because they were supposedly refused space (and had compromised access to Google data).

31. CADE’s Commissioner Maurício Oscar Bandeira Maia, the rapporteur of the case, who wrote the majority opinion, analysed the supposed exclusionary practices using the essential facility doctrine to verify whether Google’s competitors needed to have access to the data. To do so, he applied the essential facility doctrine to three ‘inputs’ listed in the administrative proceedings: “(i) the first of these inputs are advertisements with photos and sub-links, which he concluded would not be essential because the online advertising market is highly competitive—and there is a certain substitutability in the way ads are served, including offline advertising; (ii) then there is the thesis that appearing in the 1st page of Google results would be essential to boost website traffic, which the Commissioner refuted by stating that the Google results are easily replaceable by direct access to the websites or by using other search engines or price comparison websites; and (iii) the Rapporteur also analysed whether personal data could be considered essential inputs”.¹⁸

32. In short, the Commissioner defended that “personal data are non-rival, non-exclusive and ubiquitous assets, the difference being the treatment given to this information, which concerns Google’s own know-how, different from any essential structure”. Given the above, it was concluded that the refusal to deal theory of harm did not apply as alleged by the complainant.

33. Basically, the case dealt with a possible restriction of data portability which was alleged to be equivalent to a refusal to deal. Thus, it was necessary to understand the data transferred and their essentiality for the market. It is noted, therefore, that data portability and interoperability are limited by the types of data involved, and cannot be applied as a remedy in any situation, as it has already been expressed in several reports¹⁹. CADE has to assess whether such mechanisms should be applied, depending on the importance of the data to the dynamics of the relevant market in question.

5. Final Considerations

34. This contribution sought to report on the Brazilian experience with data portability and interoperability. In this sense, the use of these mechanisms in Brazil may be imposed by means of ex ante regulations applicable to all sectors (e.g. the Brazilian Data Protection Law), sectorial regulations (e.g. the telecom and open banking regulations), and interventions of the antitrust authority.

35. Discussions related to data portability and interoperability are happening in the context of merger control and abuse of dominance cases alike. In both types of proceedings, CADE has the ability of signing agreements (cease and desist agreements and merger control agreements), in which it can include obligations related to portability and interoperability, as applicable.

¹⁸ Translated from PONCE, Paula. *Direito à portabilidade de dados: entre a proteção de dados e a concorrência*. RDC, vol. 8, n. 1. June 2020, p. 166.

¹⁹ E.g., CADE/DEE. Working Document No. 005/2020. Competition in digital markets: a review of specialized reports. 2020, p. 24. Available at: <<https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2020/documento-de-trabalho-n05-2020-competition-in-digital-markets-a-review-of-specialized-reports.pdf>>.

36. There are cases in which CADE has to assess whether there are unreasonable restrictions on portability and interoperability by a dominant player. In these cases, imposing some remedies may be important to mitigate or eliminate possible competitive issues. Nonetheless, remedies should be imposed according to the relevance of the data involved in the dynamics of the market and contractual relationships.