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**Ex-Ante Regulation and Competition in Digital Markets – Note by Brazil**

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This document reproduces a written contribution from Brazil submitted for Item 2 of the 136th OECD Competition Committee meeting on 1-3 December 2021.

More documents related to this discussion can be found at  
<https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm>

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## Brazil<sup>1</sup>

### 1. Introduction

1. As the Organisation for Economic Co-operation and Development (OECD) noted in previous reports<sup>2</sup>, competition enforcement in digital markets is an incipient topic in antitrust. The dynamics and particularities of these markets make them stand out from other traditional markets. For this reason, antitrust authorities across the world face obstacles in determining the scope and proper timing for intervention, especially in cases of abuse of a dominant position. Each jurisdiction has tried to adapt to them and adjust its rules to be more effective in this new context. Against this backdrop, *ex ante* regulation emerged to supplement habitual antitrust analyses, pre-emptively addressing competition concerns ensued from digital platforms.

2. This contribution seeks to present in short the position of the Brazilian antitrust authority (CADE) on *ex ante* competition regulation of digital markets. Moreover, it presents other measures CADE takes in protecting consumer welfare within the scope of the digital economy.

### 2. *Ex ante* regulation of digital markets in Brazil

3. In Brazil, regulatory agencies are usually in charge of the *ex ante* regulation of the sectors they supervise. The Brazilian antitrust authority, however, has never acted in this manner, and adopts especially *ex post* intervention – i.e. as it is requested to take action – in reviewing mergers and sanctioning abusive behaviours, besides engaging in competition advocacy.<sup>3</sup>

4. Although it is more common that CADE adjudicates cases that involve digital platforms, there is no current debate in Brazil about a comprehensive *ex ante* competition regulation related to digital platforms or the digital economy.

5. Hence, the *ex ante* control of digital markets in Brazil is, to date, carried out by sectoral regulatory authorities. To illustrate, the Central Bank has recently regulated open banking, which resulted in pro-competitive effects on several markets connected to the payment and financial service sectors.

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<sup>2</sup> E.g. OECD. *The Digital Economy* (2012). Available at: <https://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf>. Also, OECD. *Abuse of dominance in digital markets* (2020). Available at: <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf>.

<sup>3</sup> For a brief description of competition advocacy in Brazil and the interface between competition policy and regulatory agencies, see: [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2021\)14/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2021)14/en/pdf)

6. The Brazilian antitrust authority has focused on reviewing transactions and practices brought before it, acknowledging the possibility of pro-competitive effects and weighing it against negative effects in a case-by-case basis.

7. Nonetheless, this does not mean CADE is powerless before the challenges ensued from the digital economy. The authority has initiatives such as constantly training its personnel as to topics related to the digital economy; preparing guidelines, studies, and technical opinions on the matter; and acting in partnership with other government authorities in this regard.

8. CADE's Department of Economic Studies (DEE) consistently publishes reviews of the authority's decisions, technical opinions regarding cases, and working papers – all from the economic perspective – to improve the agency's performance. In 2020, for instance, the DEE published the working paper *Competition in Digital Markets: A Review of Expert Reports*<sup>4</sup>, which sought to review the main international reports on the digital economy. In 2021, a study analysed and benchmarked the relationship between antitrust and data protection authorities across a number of jurisdictions worldwide, whereas a different one examined CADE's case law as to digital platforms.<sup>5</sup>

9. Moreover, CADE is working in coordination with other government bodies to promote a cohesion of antitrust public policies on the digital economy. Besides, through advocacy, the agency dedicates itself to promote competition before other government bodies, as detailed in another section of this contribution.

10. The following topic will introduce examples of CADE precedents in which concerns related to digital platforms were addressed. The topic merely seeks to illustrate that CADE's work has so far focused on a case-by-case examination.

## 2.1. CADE's precedents on the digital economy

### 2.1.1. Ipiranga's consultation (algorithms)

11. Case no. 08700.002055/2021-10 regards a consultation fuel company Ipiranga made on the legality of its activities, agreements, and business strategies in the markets of liquid fuel distribution and retail trade that employed algorithms.

12. Ipiranga consulted with CADE on the legality of an electronic system for distributors and retailers to negotiate maximum resale prices. To prevent violations, CADE may answer inquiries before completion of a deal, providing parties with more legal certainty and assuring them of the legality of a practice according to competition law.

13. As per Law 9,478/1997, the Brazilian Petroleum Agency (ANP) regulates the industry of liquid fuels. This industry includes multiple national and local players that carry out fuel distribution.

14. In order to boost its operations, Ipiranga explained it wanted apply algorithms to run its pricing policy. The rapporteur of this case rendered an opinion pointing out Ipiranga's policy reflects the digitalisation of economy by incorporating new technologies such as big data, artificial intelligence, and algorithms to develop business strategies.

15. As market players begin to introduce these technologies, regulatory and antitrust authorities should set the limits on these resources, and is paramount that they ponder over

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<sup>4</sup> See: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3681322](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681322).

<sup>5</sup> Available in Portuguese at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/plataformas-digitais.pdf>

the positive and negative effects they have on competition, as well as their benefits to consumers.

16. Against this backdrop, the OECD pointed<sup>6</sup> algorithms should not be banned; rather, authorities ought to understand the risks entailed in their use and come up with solutions that fit the innovative nature of this market. After all, algorithms can be advantageous to consumers.

17. Finally, the Tribunal of CADE chose to examine the consultation and decided it had reasons to deem the pricing strategy legal from an antitrust perspective, as smart mechanisms and pricing algorithms incurred low competition risks in that case. Moreover, the Tribunal ruled the algorithm and the database employed by the firm to feed its system must be of Ipiranga's exclusive use. Lastly, in light of the innovative use of algorithms to suggest maximum resale prices on an individual basis, in addition to the potential they have to bring about unpredictable adverse effects, the Tribunal established the response to the consultation is only valid for two years.<sup>7</sup>

### ***2.1.2. Expedia, Decolar, and Booking case (MFN clauses)***

18. Another interesting case CADE analysed is Case no. 08700.00 5679/2016-13. The authority verified whether online travel agencies Expedia, Decolar, and Booking incorporated abusive most-favoured-nation (MFN) clauses into agreements with hotels to prevent them from offering better prices or sale conditions in other sales channels.

19. The conduct investigated, although not a "pure self-preferencing", is similar to this practice, and can be understood as what antitrust theory understands as "secondary line differentiation" (that is, the company practicing the conduct does not act in the vertically integrated market, unlike "pure" self-preferencing, but exploits some customers to the detriment of others, distorting competition in the downstream market, for its own benefit).

20. The case has resulted in the execution of a Cease and Desist Agreement, a settlement through which the scrutinised companies agreed to pay a fee to the authority and to cease to use this type of clause in deals with hotels.

### ***2.1.3. Google AdWords***

21. Case no. 08700.005694/2013-19 was launched to investigate claims about Google's anticompetitive use of its AdWords advertising tool. Microsoft filed the initial claim alleging AdWords' API Terms of Service did not authorise advertisers to use the data introduced into its platform on competing platforms. Hence, the complaint argued it hindered interoperability and portability between AdWords and competing sponsored ad platforms, preventing multihoming and lessening competition.

22. CADE probed the case, defining the relevant market, assessing the defendant's market power, and determining whether AdWords's agreement terms prevented or not multihoming – that is, if it precluded advertisers from using multiple digital platforms to promote a product or service.

23. In the rapporteur vote, each of the alleged problematic clauses was examined, in which no impediment to multihoming was identified, which could occur by different

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<sup>6</sup> In Algorithms and Collusion: Competition Policy in the Digital Age. OECD, 2017. Available at: [www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm](http://www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm). Retrieved 13 October 2021.

<sup>7</sup> CADE Resolution 12/2015, Article 8.

means, and the few limitations viewed proved to be rational and justifiable for both the use of Google and the advertisers and even consumers. In fact, it was found that such clauses would be common clauses also used in other licensing and adhesion contracts.

24. CADE also probed into the potential effects of the conduct and, to this end, notified numerous advertisers of the Brazilian market. From their answers, the authority found the advertisers could announce in more than one digital platform at a time in several manners, such as through optimisation platforms, tools developed by the companies, or even in a non-automated way. Therefore, the Tribunal did not find the clauses directly caused losses to advertisers' multihoming practice. Additionally, it was also noted that search platforms actually offer ad optimization and synchronization tools, encouraging multihoming.

25. Therefore, CADE's Tribunal dismissed the case for lack of evidence, finding the AdWords' Terms of Service alone were unable to impede advertisers' multihoming with several platforms that include search advertisements.

### 3. CADE competition advocacy and cooperation with other agencies

26. Competition advocacy and cooperation with other public authorities are two means CADE employs to respond to the challenges of the digital economy.

27. As to competition advocacy, CADE assists other government bodies such as regulatory agencies, governmental authorities, and the Brazilian Congress, seeking to encourage the promotion of competition in public policies, regulations and pending bills.

28. Additionally, the authority's Department of Economic Studies regularly issues technical opinions on different subjects, including the digital economy<sup>8</sup>. To illustrate, in August 2021, the Department wrote a technical opinion presenting suggestions to a bill intended to regulate the use of artificial intelligence in Brazil<sup>9</sup>. Some of the suggestions concerned conceptual changes and the institution of a regulatory sandbox.

29. Another example is a technical opinion that examined the competitive effects of articles 17 and 18 of Bill No. 1,179/2020, which established a deduction in commissions charged by transport service applications. The opinion concluded it could negatively affect these firms' performance and the competitive conditions of the affected markets.<sup>10</sup>

30. In regard to cooperation, CADE's seeks to coordinate itself with public policies developed by other authorities, such as the Brazilian National Authority for Data Protection (ANPD) and the Brazilian Secretariat for Consumer Protection (Senacon). Such coordination takes place within the Brazilian Council for Consumer Protection (CNDC), a forum established in 2020 for governmental bodies to discuss and coordinate joint actions on public policies, including competition, data protection, and consumer protection.<sup>11</sup>

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<sup>8</sup> See, in Portuguese: [www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm](http://www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm).

<sup>9</sup> Technical Opinion 21/2021/Department of Economic Studies/CADE.

<sup>10</sup> Technical Opinion 21/2020. See, in Portuguese: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/notas-tecnicas/2020/nota-tecnica-n21-advocacy-08027000294202035.pdf>

<sup>11</sup> See, in Portuguese: <https://www.gov.br/secretariageral/pt-br/noticias/2020/julho/governo-federal-cria-conselho-nacional-de-defesa-do-consumidor>.

31. Furthermore, CADE signed several technical cooperation agreements with government bodies: (1) the ANPD, to coordinate actions regarding merger review and data privacy abuses<sup>12</sup>; (2) Senacon, to exchange technical information and develop educational programmes in the interface between antitrust and consumer protection<sup>13</sup>; (3) the Central Bank of Brazil, to share information, prepare market studies, etc.<sup>14</sup>; and (4) the Federal Prosecution Services, to work together in merger review, antitrust proceedings, and competition advocacy<sup>15</sup>.

32. These institutional agreements should help resolving conflicts with digital platforms, as observed in a recent Brazilian case.

33. In January 2021, WhatsApp announced changes in its privacy policy, authorising the sharing of users' account information with Facebook, which is part of the same economic group. Users had to accept the new policy within the stipulated period; otherwise, they would be unable to use the application.

34. However, in May 2021, due to the potential competition issues ensued from the privacy policy change and possible violations of individuals' data privacy, CADE, alongside ANPD, Senacon, and the Federal Prosecution Services, prepared a joint recommendation on the matter<sup>16</sup>. The document pointed that WhatsApp should not preclude users that did not agree with the new terms from accessing the application, and that Facebook should refrain from processing WhatsApp-provided data. After the joint action of the aforementioned authorities, WhatsApp has undertaken to comply with the recommendations on its privacy policy and will be subject to the analysis regarding the adoption of these measures.<sup>17</sup>

35. Although the abovementioned cases do not characterise as *ex ante* regulation of digital platforms (at least in a similar sense to the initiatives currently proposed in Europe), it is understood that CADE has been looking for ways to improve its institutional role in the digital economy, including preventively, together with other public authorities or influencing regulations and laws under discussion, in order to encourage free competition.

#### 4. Conclusion

36. This contribution sought to report on the Brazilian experience regarding *ex ante* regulation of digital markets. As evidenced, the Brazilian antitrust authority has no initiative related to the *ex ante* regulation of digital platforms.

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<sup>12</sup> See, in Portuguese: <https://www.gov.br/anpd/pt-br/assuntos/noticias/anpd-e-cade-assinam-acordo-de-cooperacao-tecnica>.

<sup>13</sup> See, in Portuguese: <https://www.gov.br/cade/pt-br/assuntos/noticias/cade-firma-acordo-de-cooperacao-com-senacon>.

<sup>14</sup> See, in Portuguese: [https://www.bcb.gov.br/content/acessoinformacao/convenios\\_docs/convenioBacenCADE.pdf](https://www.bcb.gov.br/content/acessoinformacao/convenios_docs/convenioBacenCADE.pdf).

<sup>15</sup> See, in Portuguese: <http://en.cade.gov.br/cade/noticias/cade-e-mpf-firmam-acordo-de-cooperacao-tecnica>.

<sup>16</sup> See, in Portuguese: [https://www.gov.br/anpd/pt-br/assuntos/noticias/inclusao-de-arquivos-para-link-nas-noticias/recomendacao\\_whatapp\\_-\\_assinada.pdf](https://www.gov.br/anpd/pt-br/assuntos/noticias/inclusao-de-arquivos-para-link-nas-noticias/recomendacao_whatapp_-_assinada.pdf)

<sup>17</sup> See, in Portuguese: <https://www.telesintese.com.br/whatsapp-vai-atender-recomendacoes-da-anpd/>

37. To date, CADE has focused on analysing cases brought before it, whether in reviewing mergers, sanctioning abusive behaviours, or answering to companies' inquiries before they consummate any transaction.

38. Moreover, to face the challenges posed by the digital economy, CADE consistently promotes training for its personnel, develops studies and technical opinions in the field of the digital economy, dedicates itself to competition advocacy before other bodies of the Executive and Legislative branches in Brazil, and acts in coordination and cooperates with other government bodies, including in relation to digital markets.

39. The preventive role of competition advocacy and CADE's collaboration with other public bodies are of great value to promote competition in the digital economy and to support the authority's probing activities, allowing for greater effectiveness and harmonization of antitrust, consumer protection and personal data protection policies, despite the inexistence so far of *ex ante* competitive regulation of digital markets.