Organisation for Economic Co-operation and Development

DAF/COMP/WD(2023)52

Unclassified

English - Or. English

16 May 2023

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Theories of Harm for Digital Mergers – Note by Brazil

16 June 2023

This document reproduces a written contribution from Brazil submitted for Item 8 of the 140th OECD Competition Committee meeting on 14-16 June 2023.

More documents related to this discussion can be found at https://www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03519039

Brazil[1]

1. Introduction

1. Over the past five years, the increasing number of mergers in digital markets has raised several concerns about the suitability of competition law frameworks. There is great interest in the antitrust community in the fact that some relevant mergers may slip under the agency's radar due to outdated legal thresholds for notification.[2] There are also questions as to whether agencies' substantive assessment of high-profile merger cases is well-suited to address the competition risks presented by the high concentration levels in the digital sector.[3] As a response to these challenges, proposals of ex ante regulation and novel theories of harm for digital mergers are under debate.[4]

2. The Brazilian antitrust authority (CADE) is closely tracking these developments. The legal framework for merger review established by Law 12529/2011 has been increasingly employed in the review of digital mergers. From 1995 to March 2023, CADE scrutinized 224 mergers involving digital markets to some degree. During this period, the online advertising and online retail sectors were the most affected by M&A activity in Brazil.[5] The authority's investigations took a closer look at how data-driven business models operate and how mergers could consolidate companies' economic power across several digital markets.

3. This work summarizes the current debates on new theories of harm against the backdrop of some high-profile digital mergers reviewed by CADE in the last five years. Although there are no universally accepted categorizations, this paper discusses three new theories of harm that may emerge in the analysis of horizontal, vertical, and conglomerate mergers. We focus on the exploration of new theories of harm related to unilateral effects in the context of mergers; we do not address coordinated effects.[6] Section 2 discusses how digital mergers may be used to give the merged firm access to competitively sensitive

[1] This paper was written by Victor Oliveira Fernandes and Marcella Brandão Flores da Cunha, a Commissioner at the Tribunal of CADE and his Head of the Office of the Commissioner, respectively. It was revised and edited in English by Arianne Mesquita and Ariel Menezes, in-house translators at the International Unit of CADE.

[2] OECD, 'Start-Ups, Killer Acquisitions and Merger Control' (OECD Publishing, 2020) 1 13–17.

[3] In that regard, see Elena Argentesi and others, 'Merger Policy in Digital Markets: An Ex Post Assessment' (2021) 17 Journal of Competition Law and Economics 95. (in which the authors claim "merger control enforcement has not proved able so far to cope with several of the new challenges posed by digital markets").

[4] Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne, 'Platform Mergers and Antitrust' (2021) 30 Industrial and Corporate Change 1307 (presenting four proposals to strengthen merger policy in digital platforms).

[5] Conselho Administrativo de Defesa Econômica (CADE), 'Cadernos do CADE: Mercados de Plataformas Digitais' (CADE 2021) 19 <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/plataformas-digitais.pdf>.

[6] The discussion of coordinated effects took place at CADE in the Catena-X case: Case no. 08700.004293/2022-32. Benz AG, Robert Bosch GmbH, SAP SE, Schaeffler Invest GmbH, Siemens Industry Software GmbH, T-Systems International GmbH, Volkswagen AG and ZF Friedrichshafen AG. Adjudicated by the Tribunal of CADE on December 14, 2022.

information or otherwise increase the risk of data-driven foreclosure. Section 3 discusses how digital mergers may raise privacy concerns and how the interplay between antitrust and privacy laws should be assessed. Finally, Section 4 debates new theories of harm based on the formation of digital ecosystems. The conclusion of this contribution summarizes the main lessons learned from CADE's recent case law. The experience of the Brazilian antitrust authority provides useful insights into how antitrust analysis could incorporate new theories of harm to make merger control more responsive to the potential emergence of new forms of economic power abuse in the digital economy.

2. Access to commercially sensitive information and "data foreclosure"

4. Digital mergers can provide businesses with access to information that gives them a competitive advantage, such as rivals' transactional and customer data that can be used to make strategic business decisions. The merged entity may obtain sensitive information about direct competitors in a relevant market, regardless of whether the merger is horizontal, vertical, or conglomerate[7]. Concerns about unilateral and coordinated anticompetitive effects may arise especially when a merger results in the acquisition or combination of datasets which were not previously available for one of the merging parties[8].

5. In the absence of alternative sources of data, the merged firm could foreclose competition by refusing to provide data as input in vertically integrated markets or by restricting competitors' access to data in adjacent digital mergers[9]. Drawing a parallel with the three-step analysis of the input foreclosure doctrine, Tombal[10] suggests that competition authorities should evaluate whether the merged firm has the ability and incentives to reduce downstream rivals' access to, raise the price of, or reduce the quality of, important data after the merger. Furthermore, the authority should try to predict the overall impact of the foreclosure on effective competition. Other authors, such as Steven Salop and Daniel Culley[11], propose additional evaluation parameters: (i) whether, prior to the merger, upstream or downstream divisions of the firm would already have access to sensitive information about rivals, such as an advance notice of new products or new product specifications; (ii) whether the merged firm would actually be able to use this information to respond quickly to rivals' offers or to anticipate rivals' competitive moves; and (iii) whether the merged firm's fear of "backlash" would cause rivals to avoid hiring the merged firm or to change the terms of trade to limit access to competitive information, even under more onerous conditions. Moreover, some authors suggest that focusing on absolute

[7] Viktoria H. S. E. Robertson, *Merger Review in Digital and Technology Markets: Insights from national case law*, 1 78 (2022) (asserting that "so far, data advantages obtained through an acquisition have been assessed as a novel horizontal unilateral theory of harm, as another type of horizontal harm, or as a vertical or conglomerate concern"). See also Pierre Regibeau & Ioannis Lianos, *Digital Mergers: A Primer*, AVAILABLE SSRN 3837281 1, 45–46 (2020).

[8] Bundeskartellamt, 'Merger Control in the Digital Age – Challenges and Development Perspectives' (2022) 1 28.

[9] Youenn Beaudouin and others, 'Merger Enforcement in Digital and Tech Markets: An Overview of the European Commission's Practice' (2022) 2 EC Competition Policy Brief 1, 9–10.

[10] THOMAS TOMBAL, IMPOSING DATA SHARING AMONG PRIVATE ACTORS: A TALE OF EVOLVING BALANCES 277–285 (2022).

[11] Steven C Salop and Daniel P Culley, 'Revising the US Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners' (2016) 4 Journal of Antitrust Enforcement 1, paras 25–26.

foreclosure theories of harm may be too restrictive for antitrust authorities since relevant competition concerns could emerge from the accumulation of large amounts of data from multiple data sources, hence potentially inducing relative foreclosure scenarios.[12]

6. In addition to short-term effects, access to commercially sensitive information due to a merger can adversely affect dynamic competition. The commercially sensitive information of competitors may lead the merged entity to compete less aggressively with prices or product specifications that are only marginally superior to those of its competitors and also discourage competitors from innovating.[13]

7. At least four of the mergers examined by CADE involve access to commercially sensitive information, which gives room for much discussion. The first case involved Grupo SBF S.A, which acquired control of Nike do Brasil in November 2020.[14] SBF operates a sporting good retail business in Brazil under the Centauro brand. Its operations are carried out via a number of integrated platforms (omnichannel model): physical channels, desktop and mobile websites, and applications. The Nike Group is involved in the design, commercialization (via its own stores and those operated by third-party licensees), and distribution of sporting goods. The Nike Group markets the Nike, Jordan, and Converse brands in Brazil. The merger included the acquisition of all of Nike do Brasil's contracts and assets, allowing SBF to operate not only as a distributor of the Nike brand in Brazil but also as the company in charge of its physical and online stores.

8. Commissioner Braido[15] , rapporteur of the case, concluded in his vote that the merger raised concerns about vertical integration, in particular on the potential use of competitors' sensitive information — e.g. details about orders placed from Nike Brazil— in defining SBF's retail trade strategy or in promoting retailer coordination. CADE raised the concern that SBF could use the obtained data on Nike's transactions to coordinate actions among retailers, such as geographic product allocation and tacit price fixing. The merger was ultimately approved under the terms of an agreement that imposed several measures to preclude anticompetitive discrimination against Nike do Brasil's customers and to prevent SBF and Nike do Brasil from accessing sensitive competitor information made available to SBF through Nike do Brasil's distributors and retailers. The merged companies have committed to maintaining data related to Nike do Brasil's business activities segregated from Centauro's databases in the systems of the SBF Group[16]

9. The second case dates from 2021 and concerns a merger between STNE Participações and Linx.[17] The former provides payment services and intended to acquire

[12] Jörg Hoffmann and Germán Johannsen, 'EU-Merger Control & Big Data On Data-Specific Theories of Harm and Remedies' (2019) 1 Max Planck Institute for Innovation and Competition Research Paper No. 19-05 1.

[13] Competition and Markets Authority - CMA, 'Merger Assessment Guidelines' (2021) 53.

[14] Grupo SBF S.A. – "Centauro"/Nike do Brasil Comércio e Participações Ltda., Case no. 08700.000627/2020-37, Tribunal of CADE, November 10, 2020.

[15] Grupo SBF S.A. – "Centauro"/Nike do Brasil Comércio e Participações Ltda., Case no. 08700.000627/2020-37, Tribunal of CADE, November 10, 2020, Opinion of Commissioner Luis Henrique Bertolino Braido, rapporteur of the case.

[16] Grupo SBF S.A. – "Centauro"/Nike do Brasil Comércio e Participações Ltda., Case no. 08700.000627/2020-37, Tribunal of CADE, November 10, 2020, Opinion of Commissioner Luis Henrique Bertolino Braido, rapporteur of the case [39].

[17] STNE Participações S.A. e Linx S.A., Case no. 08700.003969/2020-17, Tribunal of CADE, June 16, 2021.

all of Linx's activities, a cloud-based technology company focused on providing business management software through the Software as a Service business model. In this case, their competitors challenged a decision of the Tribunal of CADE to clear the merger. They claimed that, after the merger, STNE Participações would have access to sensitive business and commercial information, in particular regarding the commercial relationships between retailers and their customers and suppliers, but also between retailers and other acquirers that integrate their products into Linx's business management software. STNE Participações claimed that other rivals, including those affiliated to banking institutions, would not be able to access data with the same granularity, detail, and ease as the merging parties. The Tribunal of CADE found that the data would not be competitively sensitive because other players could already access the information through alternative means, such as debt reconciliation or open-banking policies. In addition, the rapporteur of the case found an information asymmetry that worked against competitors that were not vertically integrated with banks, such as Stone.

10. The merger between Bus Servicos de Agendamento S.A. and J3 Operadora Logística S.A.,[18] approved by CADE in February 2002 subject to significant remedies, is the third major case. Prior to the merger, Bus Serviços de Agendamento S.A. operated exclusively as an online travel agency (OTA) specialized in selling bus tickets under the name ClickBus. As a complementary business, Bus Serviços offers bus companies and other OTAs the service of managing their digital platforms, through white-label marketing. OTA platforms hire the white-label services of Bus Serviços, which mediates the sale of bus tickets through its Click Bus OTA. This was usually done by integrating the ClickBus OTA white-label solution into the domain of the partner company.

11. The acquiring company J3 Operadora Logística S.A. operates as an intermediation platform that connected bus companies and OTAs. The service of integration and electronic mediation provided by J3 Operadora Logística S.A. makes it possible for OTAs to access the aggregated information of several bus companies and for bus companies to diversify their sales channels on the Internet. This service includes both the sale of tickets through digital channels and the technological integration, strictly speaking, of the systems of bus stations with those of the OTAs through APIs (Application Programming Interface).

12. Therefore, the merger vertically integrated the three stages of the value chain of transportation ticket sales on online OTA platforms, namely: (i) the passenger transportation service, (ii) the intermediation and integration of bus stations' information with OTA platforms, and (iii) the sale of transportation tickets over the Internet on OTA platforms.

13. The Office of the Superintendent-General, CADE's investigative unit, concluded the merged entity would have the ability and the incentive to adopt measures to limit the access of competing OTA platforms to its service of electronic intermediation and integration of transportation information with bus stations.[19] In particular, it argued that the merged entity would have incentives to impose downstream and upstream exclusivity policies, both on road transportation operators and OTA platforms.

[18] Bus Serviços de Agendamento S.A. and J3 Participações Ltda, Case no. 08700.004426/2020-17, Tribunal of CADE, February 2, 2022.

[19] Bus Serviços de Agendamento S.A. and J3 Participações Ltda, Case no. 08700.004426/2020-17, Office of the Superintendent-General of CADE, Technical Opinion no. 12/2021/CGAA1/SGA1/SG/CADE.

14. This conclusion was largely confirmed by the Tribunal of the authority. The majority opinion of Commissioner Ravagnani conditioned the approval of the transaction on behavioral remedies, prohibiting exclusivity and any form of discrimination in the commercial relationships between Bus Serviços de Agendamento S.A. and the road transportation operators and OTA platforms in the market of electronic integration and mediation of road information.[20] In addition, CADE imposed behavioral remedies to prevent access to sensitive information about competitors. The remedies involved data protection and privacy policies, data engineering, and governance rules to prevent the staff responsible for promoting ticket sales at the ClickBus OTA from accessing rivals' information through the company Bus Serviços de Agendamento S.A, which holds data on competing OTAs.[21] It also imposed on the merged company the commitment to implement an antitrust compliance program, with the purpose of strengthening, within the company, a business environment that complies with the Brazilian competition law (Law 12529/2011) and its regulations. [22]

15. Finally, another recent case that is relevant to the discussion of data benefits is the acquisition of health-insurance company SulAmérica by the hospital services network Rede D'or in December 2022.[23] The main competition concerns raised by the merger were related to the vertical integration between Rede D'Or's health services and SulAmérica's health insurance plans. The Office of the Superintendent-General initially cleared the merger unconditionally, based primarily on the fact that the vertical integrations examined did not exceed the traditional 30-30% safe harbors for vertical mergers adopted in CADE's case law.[24] The unit found that SulAmérica's market share was generally very low in vertically related markets, that there were effective competitors in the market, and that rival hospitals had spare capacity, in general. Following the formal request of several competing hospitals, the case was examined by the Tribunal.

16. In addition to the usual theories of harm associated with vertical mergers, competitors raised the possibility that the merged company would gain access to competitively sensitive information from rival hospitals and health insurance plans. The opinion of Commissioner Hoffmann, rapporteur of the case, emphasized that the primary risk of anticompetitive harm would be that rivals could lose incentives to make procompetitive decisions following the merger.[25] In addition, the opinion of Commissioner Fernandes highlighted that access to competitively sensitive data could also harm dynamic competition, as merged companies would obtain critical information for strategic business innovations, including granular data on the number of hospital procedures hired by health

[20] Bus Serviços de Agendamento S.A. and J3 Participações Ltda, Case no. 08700.004426/2020-17, Tribunal of CADE, Opinion of Commissioner Sergio Ravagnani, rapporteur of the case.

[21] Bus Serviços de Agendamento S.A. and J3 Participações Ltda, Case no. 08700.004426/2020-17, Tribunal of CADE, Opinion of Commissioner Sergio Ravagnani, rapporteur of the case [121]-[122].

[22] Bus Serviços de Agendamento S.A. and J3 Participações Ltda, Case no. 08700.004426/2020-17, Tribunal of CADE, Opinion of Commissioner Sergio Ravagnani, rapporteur of the case [123].

[23] Rede D'Or São Luiz S.A. (Rede D'Or) and Sul América S.A. (SASA), Case no. 08700.003959/2022-35, Tribunal of CADE, December 2022.

[24] Rede D'Or São Luiz S.A. (Rede D'Or) and Sul América S.A. (SASA), Case no. 08700.003959/2022-35, Office of the Superintendent-General of CADE, Technical Opinion no. 23/2022/CGAA2/SGA1/SG, November 2022.

[25] Rede D'Or São Luiz S.A. (Rede D'Or) and Sul América S.A. (SASA), Case no. 08700.003959/2022-35, Tribunal of CADE, December 21,2022, Opinion of Commissioner Luiz Hofmann, rapporteur of the case [400].

insurance companies, contractual conditions, contracts, pricing information, patient information, epidemiological profile, and even patient complexity.[26] Access to these data could put Rede D'or in a position to free ride on the innovative medical services of its competitors.[27] On the other hand, the use of these data could also generate economic efficiencies, particularly by resolving a principal-agent problem by the coordination between hospitals and health insurance plans, potentially eliminating double marginalization. [28]

17. In light of these concerns, The Tribunal of CADE determined that three factors mitigated the incentives for the merged firm to make anticompetitive decisions.[29] The first factor was the increase in health insurance firms' hiring of hospital services in package deals, which involve less granular data. The second factor relates to the availability of at least a portion of the data in alternative sources, as the Private Health Insurance Agency (ANS) publishes a portion of this information in periodicals of the sector, such as prices of hospital services, as a reference. The third mitigating factor would be the pre-merger existence of other national players, such as the Amil/United Health and Hapvida/GNDI Groups, which already operate vertically integrated in the hospital service and health insurance plan markets. With regard to possible remedies, Commissioner Fernandes' opinion stated that restrictions on the use of data by CADE in the form of obligations to establish governance structures, to keep data separate, or to create data silos, could eventually distort competition in the sector, given that other relevant players with higher market shares than the merging parties already operate in these vertically integrated markets.[30]

18. Based on these relevant cases, one can fairly assert that CADE frequently evaluates data theories of harm by inquiring whether the merged entity has capability and incentives to use the data obtained by the merger in an anticompetitive manner in vertically integrated markets. If rivals can obtain the same merged entity's data through other viable sources, CADE generally considers the merged entity will not engage in foreclosure strategies. On the other hand, in at least one case, CADE has found that remedies based on data silos or prohibitions on the use of data for anticompetitive purposes were necessary to prevent merged firms to leverage their dominance from one market to another. Hence, the authority should assess whether these remedies are suitable or not in light of the actual conditions of competition among rivals. This "data-foreclosure" approach may be complemented in

[26] Rede D'Or São Luiz S.A. (Rede D'Or) and Sul América S.A. (SASA), Case no. 08700.003959/2022-35, Tribunal of CADE, December 21,2022, Opinion of Commissioner Victor Fernandes [32].

[27] Rede D'Or São Luiz S.A. (Rede D'Or) and Sul América S.A. (SASA), Case no. 08700.003959/2022-35, Tribunal of CADE, December 21,2022, Opinion of Commissioner Victor Fernandes [34].

[28] Rede D'Or São Luiz S.A. (Rede D'Or) and Sul América S.A. (SASA), Case no. 08700.003959/2022-35, Tribunal of CADE, December 21,2022, Opinion of Commissioner Victor Oliveira Fernandes [33].

[29] Rede D'Or São Luiz S.A. (Rede D'Or) and Sul América S.A. (SASA), Case no. 08700.003959/2022-35, Tribunal of CADE, December 21,2022,Opinion of Commissioner Luiz Hofmann, rapporteur of the case [404] – [417].

[30] Rede D'Or São Luiz S.A. (Rede D'Or) and Sul América S.A. (SASA), Case no. 08700.003959/2022-35, Tribunal of CADE, December 21,2022, Opinion of Commissioner Victor Fernandes [41].

some relevant cases by other ecosystem-based or innovation-based theories of harm, as discussed in the next sections of this paper.

3. Privacy degradation

19. The debate about the relationship between competition and privacy have gained traction in Brazil, particularly since the enactment of the General Data Protection Law (Law no. 13709) in 2018. This law came into effect in 2020 and is currently enforced by the Brazilian Data Protection Authority (ANPD), which is solely responsible for imposing the legislation through administrative sanctions. In parallel, recently many competition agencies have expressed concerns about mergers in digital markets leading to lower levels of privacy.[31]

20. The main privacy-based theory of harm in both EU and US case law considers a merger may have a negative impact on privacy due to a component of quality-based competition in relevant markets.[32] Mergers may be detrimental to consumers if they reduce competition for the provision of digital services with more privacy-friendly terms and conditions.[33] In addition, the merged entity may be able to collect significantly more consumer data than in the pre-merger scenario while not providing meaningful compensation to customers.[34] Alternatively, a merger could be a means of collecting data from a given market to strengthen dominance in another adjacent market through target advertising, for instance.[35]

21. Albeit the privacy-as-quality approach remains the most accepted in digital merger reviews, there are some obstacles entailed in applying this framework. First, in some digital markets, firms may choose not to differentiate their products in terms of privacy, and even if they do, consumers may find it difficult to assess privacy quality[36]. Second, a merger may affect different aspects of product quality, so agencies could face trade-offs about how to weigh potential privacy losses against quality improvements[37]. Third, there are legitimate disagreements about how competition agencies should deal with the relationship between data protection and antitrust legislations. Under the quality dimension, if privacy is not a

[31] AUTORITÉ DE LA CONCURRENCE & BUNDESKARTELLAMT, *Competition Law and Data*, 22–25 (2016); COMPETITION AND MARKETS AUTHORITY - CMA, ONLINE PLATFORMS AND DIGITAL ADVERTISING: MARKET STUDY FINAL REPORT 171–181 (2020) and Australian Competition & Consumer Commision, *Digital Platforms Inquiry* (ACCC Publisher 2019) 7.

[32] Erika M Douglas, *Digital Crossroads: The Intersection of Competition Law and Data Privacy*, TEMPLE UNIV. LEG. STUD. RES. PAP. NO. 2021-40 1, 64 (2021) and Eleonora Ocello, Cristina Sjödin and Anatoly Subočs, 'What's Up with Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU Merger Case' (2015) 1 Competition Merger Brief 1.

[33] U.S. House of Representatives. Subcommittee on Antitrust, 'Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations' (2020) 1 18.

[34] Samson Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' [2018] University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2018-26 15.

[35] European Commission, *Case M.7217 – Facebook/ WhatsApp*, COMM. DECIS. PURS. TO ARTIC. 6(1)(B) COUNC. REGUL. NO 139/2004 36, 184 (2014).

[36] James Mancini and Cristina Volpin, 'Quality Considerations in Digital Zero-Price Markets' [2018] OECD Background Paper DAF/COMP(2018)14 46, 7.

[37] Erika M Douglas, 'The New Antitrust/Data Privacy Law Interface' (2021) 2280 The Yale Law Journal Forum 647, 657.

relevant parameter of market competition, antitrust authorities may overlook the risk of a merger violating privacy laws. Given these shortcomings, some authors propose to assess privacy as a non-monetary price paid[38]. Others state that privacy restrictions should be viewed as market failures resulting from the platform's ability to use its market dominance to directly exploit consumers[39].

22. The privacy-as-quality approach is largely consistent with CADE's merger review adjudication. Quality is explicitly recognized as a relevant feature of competition analysis under the terms of the Brazilian antitrust law. The law also establishes that CADE may approve mergers that improve the quality of goods and services even if they substantially eliminate competition in a specific market.[40] Moreover, the quality parameter is expressly addressed as an element of antitrust analysis in the Guide for Horizontal Merger Review of CADE.[41]

23. CADE lacks cases in which it directly addressed theories of harm related to privacy. However, contingent in some mergers involving risks of access to commercially sensitive information, the authority discussed how it should assess the competitive risks posed by a merger regarding the provisions of the Brazilian data protection law.

24. The first case example dates from April 2021 and refers to a merger between Hub Prepaid Participações S.A. and Magalu Pagamentos Ltda.[42] Magalu Pagamentos is a payment institution that used to provide captive payment services to Grupo Magazine Luiza, one of the largest online retailers in Brazil. The acquired company, Hub Prepaid Participações S.A., is a payment institution regulated by the Central Bank of Brazil. It operates as a banking service platform and provides prepaid card processing services, serving customers in various segments such as retail, mobile, financial institutions, and fintech.

25. The privacy-related concerns has been raised by the interested third party MercadoPago.com, a rival that operates as a payment platform controlled by the website Mercado Livre–one of the largest marketplaces in Brazil that competes with Magalu Pagamentos. MercadoPago.com argued that in 2016 it reached an agreement with the Hub Group, transferring to Hub significant data about users and retailers of Mercado Livre marketplace. Therefore, MercadoPago.com argued that if CADE approved the merger, Magalu Group would have significant incentives to access the data it previously transferred to Hub Group, granting the merging firm a competitive advantage in the market.

---

[38] Elias Deutscher, 'How to Measure Privacy-Related Consumer Harm in Merger Analysis?: A Critical Reassessment of the European Commission's Merger Control in Data-Driven Markets' [2018] EUI Working papers, Department of Law, LAW 2018/13 1.

[39] Nicholas Economides & Ioannis Lianos, *Restrictions on Privacy and exploitation in the Digital Economy: a market failure perspective*, 17 J. COMPET. LAW ECON. 765 (2021).

[40] According to art. 88, § 6, item I, sub item B of Law 12529/2011..

[41] CADE, Horizontal Merger Guidelines (2016) 8 < https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/GUIDE%20FOR%20HORIZONTAL%20MERGER%20REVIEW.pdf> ("Mergers may have concurrently negative and positive effects. The negative effects may be: price rises for customers; decreases in quantity, quality and/or the variety of products or services at a given price; and a slower pace of innovation in contrast to the levels before the transaction").

[42] Magalu Pagamentos Ltda. and Hub Prepaid Participações S.A., Case no. 08700.000059/2021-55, Tribunal of CADE, Abril 14, 2021.

26. CADE's Tribunal dismissed the claim. The rapporteur of the case, Commissioner Paula Azevedo, considered the transaction would not incur the alleged risks as the deal would not allow for Hub violating contractual, legal, and regulatory obligations.[43] The rapporteur also pointed out that the Brazilian data protection law would reinforce "the impossibility that the personal data related to the customers of Mercado Pago be passed on and processed by third parties without the consent of holders and/or the observance of various procedures and principles".[44]

27. A second relevant case, from May 2021, concerned a joint venture between the telecommunications firm Claro S.A. and the company Serasa S.A., which operates mainly as a credit analysis and risk management business in Brazil.[45] The agreement regarded Claro transferring users' data to Serasa to use it as input for its credit cycle and fraud prevention solutions. In return Serasa would invest in technologies and solutions that could add value to Claro's data.

28. Some rivals have expressed concerns about the risk of foreclosure, given that Claro would stop sharing the data of users with actual or potential competitors in the credit bureau market. They alleged market foreclosure would likely happen particularly due to an exclusivity clause in the joint venture agreement. However, the Office of the Superintendent-General of CADE concluded that the joint venture did not raise relevant competition concerns because, among other reasons, the transferable data could be obtained through alternative sources. In addition, the investigative body considered that: "it is not up to CADE to analyze whether or not the partnership agreement under analysis and the respective exclusivity clauses are in accordance with the Brazilian data protection law (Law no. 13709/2018)".[46] Moreover, the approval of the deal by CADE "regards only antitrust issues and does not entail an analysis of merit as to the adherence or not of the Applicants to the data protection regulations, whose compliance monitoring is the responsibility of the respective governmental authorities."[47]

29. Against this backdrop, we can conclude that CADE might consider the data protection law's regulatory and contractual restrictions on data use as a factor that may prevent anticompetitive data use by a merged entity. This could be interpreted as CADE's deference to the Brazilian data protection agency's jurisdiction.[48] Given that the data protection agency is still in its initial stages, one can criticize this reasoning as being based on unrealistic assumptions about the capacity of the data protection authority to enforce the data protection legislation across several digital markets.

---

[43] Magalu Pagamentos Ltda. and Hub Prepaid Participações S.A., Case no. 08700.000059/2021-55, Tribunal of CADE, Abril 14, 2021. Opinion of Commisioner Paula Farani de Azevedo, rapporteur of the case.

[44] Magalu Pagamentos Ltda. and Hub Prepaid Participações S.A., Case no. 08700.000059/2021-55, Tribunal of CADE, Abril 14, 2021. Opinion of Commisioner Paula Farani de Azevedo, rapporteur of the case [84].

[45] Serasa S.A. and Claro S.A., Case no. 08700.006373/2020-61, Tribunal of CADE, May 2021.

[46] Serasa S.A. and Claro S.A., Case no. 08700.006373/2020-61, Tribunal of CADE, May 2021, Technical Opinion no. 10/2021/CGAA2/SGA1/SG [75].

[47] Serasa S.A. and Claro S.A., Case no. 08700.006373/2020-61, Tribunal of CADE, May 2021, Technical Opinion no. 10/2021/CGAA2/SGA1/SG [75].

[48] Victor Oliveira Fernandes, 'Privacy Harms in Platform Mergers: Lessons from Brazil' (2022) 1 Competition Policy International. CPI Columns Latin America 1, 4–5.

4. Theories of harm on conglomerate mergers and digital ecosystems

30. Conglomerate mergers are much less common in CADE's case law in comparison to horizontal and vertical mergers. Although the authority's merger guidelines refer to horizontal mergers only, CADE often draws inspiration from the EU Non-Horizontal Merger Guidelines to scrutinize mergers involving complementary markets.[49] In most of the relevant cases, CADE has put forward theories of harm based on reciprocal dealing to examine the ability and incentives of the merging firm to offer complementary products through tying and bundling strategies.[50] CADE's decision-making practice in conglomerate mergers is vastly in line with conventional antitrust thinking, which poses moderate competition concerns.[51]

31. Economic research has seen a renewed interest in conglomerate mergers in recent years, with the rise of digital ecosystems.[52] Digital ecosystems are networks of different economic players offering products with different complementary levels based on a structure of non-hierarchical and aligned interdependent relationships for creating economic value from modular digital technologies.[53] Big Tech companies commonly create "multi-product ecosystems" offering a range of complementary or interdependent products and services around a core platform. The provision of complementary services increases the overall economic value of an ecosystem's products and services to consumers in a way that exceeds the aggregate value of isolated supply.

32. Competition law literature has become increasingly interested in how the emergent digital ecosystems may require the revision of some antitrust methodologies.[54] Platforms occupying a central position as ecosystem orchestrators hold a new form of economic power the traditional antitrust understanding of dominance does not reflect fully. It is more

[49] See, for instance, Essilor International (Compagnie Générale d'Optique) S.A. and Luxottica Group S.p.A., Case no. 08700.004446/2017-84, Tribunal of CADE, March 27, 2018. Opinion of Commissioner Paulo Burnier da Silveira, rapporteur of the case [56]-[57].

[50] Relevant transactions involving conglomerate mergers in CADE's case law: Danaher Corporation and General Electric Company, Case no. 08700.004203/2019-16. Unconditionally cleared on November 4, 2019; Saint-Gobain do Brasil Produtos Industriais e para Construção Ltda. and Rockfibras do Brasil Indústria e Comércio Ltda., Case no. 08700.04162/2018-79, The Office of the Superintendent-General challenged the case that was dismissed after the parties withdrawal. May 14, 2019; Bayer Aktiengesellschaft and Monsanto Company, Case no. 08700.001097/2017-49. Conditionally cleared on February 16, 2018; WEG Equipamentos Elétricos S/A and TGM Indústria e Comércio de Turbinas e Transmissões Ltda., Case no. 08700.008483/2016-81. Conditionally cleared on March 6, 2018; and Tigre S/A - Tubos e Conexões and Condor Pincéis Ltda., Case no. 08700.009988/2014-09, Blocked on September 9, 2015.

[51] OECD, *Roundtable on Conglomerate Effects of Mergers - Background Note*, 1 31 (2020) (observing that competition agencies guidelines generally "emphasise that most conglomerate mergers do not pose competition problems").

[52] See, for instance, Wen Wen and Feng Zhu, 'Threat of Platform-Owner Entry and Complementor Responses: Evidence from the Mobile App Market' [2019] Strategic Management Journal 1336 and Andrew Rhodes and Jidong Zhou, 'Consumer Search and Retail Market Structure' (2019) 65 Management Science 2607..

[53] Michael G Jacobides, Carmelo Cennamo and Annabelle Gawer, 'Towards a Theory of Ecosystems' (2018) 39 Strategic Management Journal 2255, 2264.

[54] Frederic Jenny, *Competition Law and Digital Ecosystems: Learning To Walk Before We Run*, 30 IND. CORP. CHANG. 1143 (2021) (proposing an research agenda on competition issues raised by digital ecossystems)

broadly related to the power to define the architecture and governance of the ecosystem, potentially leading to undue access, choice, and innovation restrictions.[55] Especially in the context of intra-ecosystem competition, complementor firms may compete in ways that do not convert into the traditional forms of horizontal or vertical competition foreseen by antitrust law.[56]

33. The antitrust literature has discussed several ecosystem-based theories of harm assumptions for merger review, emphasizing that conglomerate mergers in digital markets may increase the chances that the core platform distorts competition by leveraging entry barriers in adjacent and neighboring markets where independent complementor rivals operate.[57] Some potential risks of ecosystem-based mergers involve (i) bundling and tying sales of digital services provided by the ecosystem orchestrator[58]; (ii) envelopment of digital services, when the merger introduces a combination of core platform functionalities with the ones of a firm operating in another market to leverage shared users[59], (iii) possible foreclosure strategies in adjacent markets[60], and (iii) diminishing digital competition in the long-run scenario.[61] Up to now, competition authorities have rarely adopted these new theories of harm.[62]

34. Only a few recent examples on CADE's case law regards new theories of harm based on digital ecosystems.[63] The first noteworthy case is the acquisition of Hortigil Hortifruti S.A by Group LASA through IF Capital Ltda[64]. Group LASA is the shareholder of Lojas Americanas S.A., one of the largest retailers in Brazil, operating both online and physical stores. Hortigil is a retailer of fresh and organic foods with physical stores and an online marketplace. The merger would allow LASA to expand its operation into the organic and fresh food market. The Office of the Superintendent-General of CADE found that the

[55] Michael G Jacobides and Ioannis Lianos, 'Ecosystems and Competition Law in Theory and Practice' (2021) 30 Industrial and Corporate Change 1199, 1204–1211.

[56] Daniel A Crane, 'Ecosystem Competition and the Antitrust Laws' (2019) 98 Nebraska Law Review 412, 422–423.

[5757] JACQUES CRÉMER, YVES-ALEXANDRE DE MONTJOYE & HEIKE SCHWEITZER, *Competition Policy for the Digital Era*, EUROPEAN COMMISSION REPORT 116–117 (2019) and STIGLER CENTER, *Stigler Committee on Digital Platforms Final Report*, 71–72 (2019).

[58] Marc Bourreau and Alexandre de Streel, 'Digital Conglomerates and EU Competition Policy' [2019] Université de Namur e Telecom ParisTech 28–31.

[59] Daniele Condorelli and Jorge Padilla, 'Harnessing Platform Envelopment in Digital Word' (2020) 16 Journal of Competition Law & Economic 134.

[60] Hoffmann and Johannsen (n 10) 23–24.

[61] Jasper van den Boom and Peerawat Samranchit, 'Digital Ecosystem Mergers in Big Tech-A Theory of Long-Run Harm with Applications' (2022) 13 Journal of European Competition Law and Practice 365.

[62] Robertson (n 5) 77.

[63] Nicolo Zingales and Bruno Renzetti, 'Digital Platform Ecosystems and Conglomerate Mergers: A Review of the Brazilian Experience' (2022) 45 World Competition 473 (examining four relevant cases in this regard, two of which are discussed in this section. In this study, the authors conclude that CADE's lack of finding substantial concerns in these mergers could be explained, among other reasons, by the low number of cases reviewed and the lack of formal guidance in this area).

[64] IF Capital Ltda. (Americanas S.A.) and Hortigil Hortifruti S.A., Case no. 08700.004481/2021-80, Tribunal of CADE, September 17, 2021.

deal raised horizontal overlaps and vertical integrations, neither of which resulted in serious competition concerns. Therefore, the authority unconditionally cleared the merger.

35. The rapporteur of the case, Commissioner Paula Azevedo, considered that the complementarity between the self-service retail operations offered by the parties involved in the merger should be further analyzed. In addition, other concerns regarded LASA Group possibly using its position as the largest food marketplace in Brazil to extend its dominance to the retail market focused on organic and fresh products, where Hortigil operates. Furthermore, the integration of Hortigil's retail business with Americana's delivery app business could increase incentives and risks of discrimination and market foreclosure, especially in cities where Hortigil already has a significant market position. The rapporteur further pointed out that "although the literature suggests that conglomerate mergers do not in principle raise significant competition concerns, recent developments in digital markets and the ecosystem strategy should draw attention to cases in which conglomerate effects may lead to potential market foreclosure or tipping effects".[65]

36. Despite the rapporteur's considerations, the Tribunal of CADE upheld the opinion of the Office of the Superintendent General. However, the case promoted central discussions on conglomerate effects of mergers in digital ecosystems. In his vote, Commissioner Luiz Hoffmann asserted that the merging entities operate in different relevant markets focusing on distinct consumer preferences.[66] Commissioner Sérgio Ravagnani considered that LASA Group did not have an expressive operation in the grocery delivery market, dismissing the competition concerns involving vertical and conglomerate effects. Ravagnani's vote also highlighted that the merger could lead to relevant efficiencies.[67] Therefore, by its majority position, the Tribunal dissented from Commissioner Azevedo's opinion.

37. A second example is the full acquisition of KaBum! by Magazine Luiza.[68] As already mentioned, Magazine Luiza Group is one of the largest online retailers in Brazil. It controls a large digital sales platform (e-commerce) through application and website (www.magazineluiza.com.br). The company also owns 942 physical stores and 205 virtual ones in Brazil. Over the last few years, Magazine Luiza Group has evolved into a complex digital ecosystem that includes retail operations, payment methods and online advertising. The creation of this digital ecosystem derived from 35 mergers since 2011, out of which only four were notified to CADE as they met the thresholds for mandatory notification established by Law 12,529/2011. On the other hand, Kabum! is a large e-commerce website with more than two million active users in Brazil focused on video games and gamer culture.

38. The Office of the Superintendent-General of CADE found only one significant horizontal overlap in the market for online sales of electronic and computer products, but dismissed competition concerns due to the parties' limited aggregate market share. The investigative body also noted that the merger could raise conglomerate concerns due to the

[65] IF Capital Ltda. (Americanas S.A.) and Hortigil Hortifruti S.A., Case no. 08700.004481/2021-80, Tribunal of CADE, September 17, 2021. Opinion of Commissioner Paula Farani de Azevedo [22].

[66] IF Capital Ltda. (Americanas S.A.) and Hortigil Hortifruti S.A., Case no. 08700.004481/2021-80, Tribunal of CADE, September 17, 2021. Opinion of Commissioner Luiz Augusto Azevedo de Almeida Hoffmann [4].

[67] IF Capital Ltda. (Americanas S.A.) and Hortigil Hortifruti S.A., Case no. 08700.004481/2021-80, Tribunal of CADE, September 17, 2021. Opinion of Commissioner Sergio Costa Ravagnani [10].

[68] Magazine Luiza S.A. and Kabum Comércio Eletrônico S.A., Case No. 08700.003780/2021-05, Office of the Superintendent-General of CADE, October 19, 2021.

parties' complementary activities in online retail. However, in its opinion for approving the merger, the authority considered that the e-commerce activities of Magazine Luiza and Kabum had different focuses and niche, as Kabum users were more specific. In addition, the authority considered that the online retail sector in Brazil is highly competitive and that there are other established rivals with a wide product portfolio, such as Amazon, Americanas, and Mercado Livre, meaning that the conglomerate effect would not be exclusive to the merged entity.

39. The last illustrative case example is the acquisition of Activision Blizzard by Microsoft.[69] In Brazil, the antitrust authority cleared the merger unconditionally in October 2022. The transaction raised two main ecosystem-based theories of harm. First, CADE assessed whether the merger would increase Microsoft's incentives to foreclose its digital ecosystem to competitors in several markets. Second, whether the merger would stifle potential innovation in the market of distribution of digital games via multi-game subscription services and cloud gaming services.

40. CADE examined whether the merged entity would have incentives to make Activision Blizzard's games (especially Call of Duty) exclusive to the Xbox ecosystem (consoles, digital stores, subscription services). The exclusivity could give Microsoft a significant competitive advantage over rivals, thereby harming competition in the digital industries of game distribution and consoles. In addition, the authority investigated whether the transaction would increase considerably the size and diversity of Microsoft's first-party game catalogue, which would include Activision Blizzard's successful franchises in addition to games developed by Microsoft's own studios and the recently acquired Zenimax. The increased portfolio of games could reduce Microsoft's demand for third-party content in its ecosystem, thereby reducing the distribution channels available to other game publishers. In other words, as the company would possibly have sufficient first-party content in its ecosystem, it would reduce the demand for third-party games for its own consoles and on its digital stores and subscription services, consequently foreclosing the Xbox ecosystem to third-party content.

41. In its opinion, The Office of the Superintendent-General asserted that, even if Microsoft decided to limit the Xbox Game Pass subscription service to first-party content, competitors in game console markets would still have access to alternative distribution channels such as digital stores (PlayStation Store, Nintendo eShop and the Xbox Store), competing subscription services (on consoles, primarily PlayStation Plus) or even physical game distribution.[70] Furthermore, the investigative body concluded that Microsoft would have no incentive to stop selling third-party games on the Xbox ecosystem because that would result in a decrease in the number and variety of games available on its platforms, potentially making the Xbox ecosystem less appealing to customers.[71]

42. The Office of the Superintendent-General did not find any impeding factors to competition in the market and entry of new players, even if considering a possible scenario in which companies overcome technological difficulties and the model of game streaming

[69] Microsoft Corporation and Activision Blizzard, Inc., Case no. 08700.003361/2022-46, Office of the Superintendent-General of CADE, October 6, 2022.

[70] Microsoft Corporation and Activision Blizzard, Inc., Case no. 08700.003361/2022-46, Office of the Superintendent-General of CADE, October 6, 2022, Technical Opinion no. 23/2022/CGAA3/SGA1/SG/CADE [261].

[71] Microsoft Corporation and Activision Blizzard, Inc., Case no. 08700.003361/2022-46, Office of the Superintendent-General of CADE, October 6, 2022, Technical Opinion no. 23/2022/CGAA3/SGA1/SG/CADE [263].

becomes popular worldwide.[72] It was also considered that, among the companies that offer cloud gaming services, there are extremely sophisticated players like Google (responsible for Stadia) and Amazon (responsible for Luna), both global leaders in their respective core businesses that are well positioned among the largest companies in the world.[73] Thus, according to the investigative body, as the cloud gaming model becomes more widespread among gamers – therefore also more profitable for the service providers – such companies would have full financial and technological conditions to produce (or purchase) exclusive content and insert themselves more competitively in the video game market. The challenges to entry for new providers of subscription game and cloud gaming services did not seem, in essence, very different from those faced by Microsoft when it launched the first Xbox in 2001, in a console market dominated by Sony and Nintendo; or those faced by Sony when launching the first PlayStation in 1994, when it entered a market dominated by Nintendo and SEGA, and shortly thereafter became the leader in the segment.[74] Based on these reasons, CADE concluded the merger would not have the potential to foreclose access to the game distribution market for competitors of Microsoft.

43. Based on such cases, we can observe that CADE has lightly considered concerns related to the digital ecosystems in merger review. In most cases, the substantive assessment of digital mergers seemed to focus on horizontal or vertical dimensions of competition. On the other hand, discussions raised in some recent cases, such as the Microsoft/Activision Blizzard case, suggest that CADE may carefully examine how a merger could affect the incentives to foreclose large digital ecosystems around products and services of first-party orchestrators.

5. Conclusion

44. Assessing the competitive impact of digital mergers has become imperative as the digital economy continues to grow. Even though such mergers can bring numerous benefits to companies and stakeholders, they can also have negative consequences such as reduced quality and innovation, and price rises for consumers. To tackle these potential harms, many theoretical frameworks have been proposed to guide regulators and policymakers in evaluating digital mergers. Here, we provided a view of how CADE has applied theories of harm when evaluating digital mergers in Brazil, focusing on data foreclosure, privacy degradation, and digital ecosystems conglomerate harms.

45. Despite CADE unconditionally clearing the majority of the mergers, the cases illustrate the emergence of new competition risks associated with data concentration. At least in two cases, CADE imposed remedies based on the separation of databases within the merged entity and the use of competitively sensitive information. The extensive experience of CADE suggests that the advancing theories of harm related to digital mergers are extremely relevant for competition policy.

[72] Microsoft Corporation and Activision Blizzard, Inc., Case no. 08700.003361/2022-46, Office of the Superintendent-General of CADE, October 6, 2022, Technical Opinion no. 23/2022/CGAA3/SGA1/SG/CADE [300].

[73] Microsoft Corporation and Activision Blizzard, Inc., Case no. 08700.003361/2022-46, Office of the Superintendent-General of CADE, October 6, 2022, Technical Opinion no. 23/2022/CGAA3/SGA1/SG/CADE [300].

[74] Microsoft Corporation and Activision Blizzard, Inc., Case no. 08700.003361/2022-46, Office of the Superintendent-General of CADE, October 6, 2022, Technical Opinion no. 23/2022/CGAA3/SGA1/SG/CADE [301].

References

Argentesi E and others, 'Merger Policy in Digital Markets: An Ex Post Assessment' (2021) 17 Journal of Competition Law and Economics 95

Australian Competition & Consumer Commision, *Digital Platforms Inquiry* (ACCC Publisher 2019)

Autorité de la Concurrence and Bundeskartellamt, 'Competition Law and Data' (2016)

Beaudouin Y and others, 'Merger Enforcement in Digital and Tech Markets: An Overview of the European Commission's Practice' (2022) 2 EC Competition Policy Brief 1

Bourreau M and de Streel A, 'Digital Conglomerates and EU Competition Policy' [2019] Université de Namur e Telecom ParisTech

Bundeskartellamt, 'Merger Control in the Digital Age – Challenges and Development Perspectives' (2022) 1

Competition and Markets Authority - CMA, *Online Platforms and Digital Advertising: Market Study Final Report* (Competition and Markets Authority 2020)

——, 'Merger Assessment Guidelines' (2021)

Condorelli D and Padilla J, 'Harnessing Platform Envelopment in Digital Word' (2020) 16 Journal of Competition Law & Economic 134

Conselho Administrativo de Defesa Econômica (CADE), 'Cadernos Do CADE: Mercados de Plataformas Digitais' (CADE 2021) <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/plataformas-digitais.pdf>

Crane DA, 'Ecosystem Competition and the Antitrust Laws' (2019) 98 Nebraska Law Review 412

Crémer J, De Montjoye Y-A and Schweitzer H, 'Competition Policy for the Digital Era' (European Commission Final Report 2019)

Deutscher E, 'How to Measure Privacy-Related Consumer Harm in Merger Analysis?: A Critical Reassessment of the European Commission's Merger Control in Data-Driven Markets' [2018] EUI Working papers, Department of Law, LAW 2018/13 1

Douglas EM, 'Digital Crossroads: The Intersection of Competition Law and Data Privacy' [2021] Temple University Legal Studies Research Paper No. 2021-40 1

——, 'The New Antitrust/Data Privacy Law Interface' (2021) 2280 The Yale Law Journal Forum 647

Economides N and Lianos I, 'Restrictions On Privacy and Exploitation In The Digital Economy: A Market Failure Perspective' (2021) 17 Journal of Competition Law and Economics 765

Esayas S, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' [2018] University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2018-26

Fernandes VO, 'Privacy Harms in Platform Mergers: Lessons from Brazil' (2022) 1 Competition Policy International. CPI Columns Latin America 1

Hoffmann J and Johannsen G, 'EU-Merger Control & Big Data On Data-Specific Theories of Harm and Remedies' (2019) 1 Max Planck Institute for Innovation and Competition Research Paper No. 19-05 1

Jacobides MG, Cennamo C and Gawer A, 'Towards a Theory of Ecosystems' (2018) 39 Strategic Management Journal 2255

Jacobides MG and Lianos I, 'Ecosystems and Competition Law in Theory and Practice' (2021) 30 Industrial and Corporate Change 1199

Jenny F, ‘Competition Law and Digital Ecosystems: Learning To Walk Before We Run’ (2021) 30 Industrial and Corporate Change 1143

Mancini J and Volpin C, ‘Quality Considerations in Digital Zero-Price Markets’ [2018] OECD Background Paper DAF/COMP(2018)14 46

Ocello E, Sjödin C and Subočs A, ‘What’s Up with Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU Merger Case’ (2015) 1 Competition Merger Brief 1

OECD, ‘Roundtable on Conglomerate Effects of Mergers - Background Note’ (2020) 1

——, ‘Start-Ups, Killer Acquisitions and Merger Control’ (OECD Publishing, 2020) 1

Parker G, Petropoulos G and Van Alstyne M, ‘Platform Mergers and Antitrust’ (2021) 30 Industrial and Corporate Change 1307

Regibeau P and Lianos I, ‘Digital Mergers: A Primer’ [2020] Available at SSRN 3837281 1

Rhodes A and Zhou J, ‘Consumer Search and Retail Market Structure’ (2019) 65 Management Science 2607

Robertson VHSE, ‘Merger Review in Digital and Technology Markets: Insights from National Case Law’ (2022) 1

Salop SC and Culley DP, ‘Revising the US Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners’ (2016) 4 Journal of Antitrust Enforcement 1

Stigler Center, ‘Stigler Committee on Digital Platforms Final Report’ (2019)

Tombal T, *Imposing Data Sharing among Private Actors: A Tale of Evolving Balances* (Kluwer Law International 2022)

U.S. House of Representatives. Subcommittee on Antitrust, ‘Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations’ (2020) 1

UNIÃO EUROPÉIA. COMISSÃO EUROPEIA., ‘Case M.7217 – Facebook/ WhatsApp’ [2014] Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004 36

van den Boom J and Samranchit P, ‘Digital Ecosystem Mergers in Big Tech-A Theory of Long-Run Harm with Applications’ (2022) 13 Journal of European Competition Law and Practice 365

Wen W and Zhu F, ‘Threat of Platform-Owner Entry and Complementor Responses: Evidence from the Mobile App Market’ [2019] Strategic Management Journal 1336

Zingales N and Renzetti B, ‘Digital Platform Ecosystems and Conglomerate Mergers: A Review of the Brazilian Experience’ (2022) 45 World Competition 473

Cases mentioned

Case no. 08700.004426/2020-17. Bus Serviços de Agendamento S.A. and J3 Participações Ltda. Ajudicated by the Tribunal of CADE on February 2, 2022.

Case no. 08700.000627/2020-37. Grupo SBF S.A. and Nike do Brasil Comércio e Participações Ltda. Adjudicated by the Tribunal of CADE on November 10, 2020.

Case no. 08700.004481/2021-80. IF Capital Ltda. (Americanas S.A.) and Hortigil Hortifruti S.A. Adjudicated by the Tribunal of CADE on September 17, 2021.

Case no. 08700.004431/2017-16. Itaú Unibanco S.A. and XP Investimentos S.A. Adjudicated by the Tribunal of CADE on March 14, 2018.

Case no. 08700.000059/2021-55. Magalu Pagamentos Ltda. and Hub Prepaid Participações S.A. Adjudicated by the Tribunal of CADE on April 14, 2021.

Case no. 08700.003780/2021-05. Magazine Luiza S.A. and Kabum Comércio Eletrônico S.A. Opinion of the Office of the General Superintendent of CADE issued on October 19, 2021.

Case no. 08700.003361/2022-46. Microsoft Corporation and Activision Blizzard, Inc. Opinion of the Office of the General Superintendent of CADE issued on October 6, 2022.

Case no. 08700.007262/2017-76. Naspers Ventures B. V., Rocket Internet SE and Delivery Hero AG. Opinion of the Office of the General Superintendent of CADE issued on March 8, 2018.

Case no. 08700.003959/2022-35. Rede D'Or São Luiz S.A. (Rede D'Or) and Sul América S.A. (SASA). Adjudicated by the Tribunal of CADE on December 2022.

Case no. 08700.006373/2020-61. Serasa S.A. and Claro S.A., Adjudicated by the Tribunal of CADE on May 2021.

Case no. 08700.003969/2020-17. STNE Participações S.A. and Linx S.A. Adjudicated by the Tribunal of CADE on June 16, 2021.

Case no. 08700.004293/2022-32. BASF SE, BMW Holding B.V., Henkel AG & Co. KGaA, Mercedes-Benz AG, Robert Bosch GmbH, SAP SE, Schaeffler Invest GmbH, Siemens Industry Software GmbH, T-Systems International GmbH, Volkswagen AG and ZF Friedrichshafen AG. Adjudicated by the Tribunal of CADE on December 14, 2022.