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The Role of Innovation in Enforcement Cases – Note by Brazil

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1. Introduction

1. The competition policy plays a crucial role in protecting the innovation process for products and services, ultimately benefiting consumers. The topic of innovation has become more prominent in current discussions on competition policy in digital markets, where the role of innovative processes is essential in either suppressing or legitimising mergers and unilateral conducts[2].

2. A significant body of academic work supports the view that dynamic competitive strategies are essential for guiding the proper assessment of innovation in antitrust analysis. Proponents of "dynamic competition theories" emphasise the necessity of examining how business conduct and market concentration influence innovation rates. Several arguments are posited against the reliance on static models of competition. First, the normative value of the perfect competition benchmark is challenged[3]. Additionally, it is contended that dynamic efficiencies should take precedence over static efficiencies[4]. Lastly, a reassessment is called for regarding the consequences of dominance[5].

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[2] Giulio Frederico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption*, *in* INNOVATION POLICY AND THE ECONOMY 20 125 (2020) ("the critical role of competition policy is thus to prevent today's market leaders from using their market power to disable disruptive threats, either by acquiring would- be rivals or by using anticompetitive tactics to exclude them"); Richard Gilbert & Doug Melamed, *Innovation Under Section 2 of the Sherman Act*, 84 ANTITRUST LAW J. 601 (2021) ("although the Google and Facebook cases include allegations of price ef- fects for advertisers, the most significant harm to consumers attributed to the alleged conduct relates to the quality and innovation of services").

[3] Wolfgang Kerber, *Competition, Innovation, and Competition Law: Dissecting the Interplay*, 42 MAGKS JT. DISCUSS. PAP. SER. ECON. 1, 4 (2017) ("the basic problem is that in mainstream neoclassical economics competition and innovation are analyzed as two separate problems");

[4] William J. Baumol & Janusz A. Ordover, *Antitrust: Source of Dynamic and Static Inefficiencies?*, *in* JORDE, THOMAS M. TEECE, DAVID J. ANTITRUST, INNOVATION AND COMPETITIVENESS 82, 85 (1992) (*"antitrust policies [to be] excessively preoccupied with static market power and competition at the expense of intertemporal considerations").*

[5] J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPET. LAW ECON. 581, 581 (2009) (*arguing that* "a 'neo-Schumpeterian' framework for antitrust analysis that favors dynamic competition over static competition would put less weight on market share and concentration in the assessment of market power and more weight on assessing potential competition and enterprise-level capabilities"); David S. Evans & Richard Schmalensee, *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries*, 5 *in* INNOVATION POLICY AND THE ECONOMY, VOLUME 2 1 (2005) ("static price/output competition on the margin in the market is less important").

3. Despite the research development, the competition authorities still face significant challenges to transform dynamic competition concerns into concrete methodologies and guidelines to analyse mergers and conducts. Bridging theory and practice in this area seems to be an ongoing process. Under the Brazilian competition law, there are limited cases where CADE has employed sophisticated theories of harm to assess innovation impacts and dynamic competition concerns substantively. This note reviews the cases we deemed to be the most relevant to these discussions.

4. Following this introduction, Section 1 analyses the Brazilian legal framework for assessing innovation concerns, providing a critical context in the regulatory landscape, and establishing the foundations for a competition policy's treatment of innovation. After that, Section 2 conducts an in-depth examination of seminal merger cases where Brazil's competition authority specifically evaluated dynamic innovation effects and incorporated them into its merger review. Additionally, Section 3 reviews key unilateral conduct cases where CADE undertook a similar analysis of the impact on innovation. Examining these cases provides insights into how CADE has made progress on putting dynamic competition principles into practice. Finally, Section 4 synthesises the preceding analyses into conclusions and implications for the ongoing development of a competition enforcement related to innovation in Brazil.

2. Considerations on Innovation under Brazilian Merger Guidelines

5. The Brazilian Competition Law (Law No. 12529/2011) does not mention innovation as a competitive factor. However, some experts strongly agree that innovation is a relevant consideration for CADE's analysis, as the Brazilian competition authority[6]. CADE's Guide for Horizontal Merger Review ("Guide H") states that a merger's anticompetitive effect can reduce the pace of innovation[7]. The guidelines also indicate that innovation is a competitive variable, such as product quality, which significantly affects the consumer welfare[8].

6. When assessing mergers substantively, having enhanced innovation in products or processes can constitute a specific efficiency benefit[9]. The Guide for Horizontal Merger Review also considers eliminating maverick firms as a potential theory of harm[10]. A transaction involving an innovative maverick firm could decrease current or potential competition, reduce rivalry, and discourage further innovation in the market. Maverick firms may also play an important role in deterring cartel formation.

[6] For an overview, see VICTOR OLIVEIRA FERNANDES, DIREITO DA CONCORRÊNCIA DAS PLATAFORMAS DIGITAIS: ENTRE ABUSO DE PODER ECONÔMICO E INOVAÇÃO 169–175 (2022).

[7] Brazil Administrative Council for Economic Defense, *Guidelines for Horizontal Merger Review*, 1 (2016).

[8] *Id.*

[9] *Id.*

[10] *Id.*

7. CADE does not have guidelines for non-horizontal mergers yet. However, there is a draft of the Non-Horizontal Merger Guidelines ("Guide V+")[11], recently released for public consultation. The document was elaborated by the Office of the Superintendent General (SG) to consolidate the authority's decisional practice to assess non-horizontal effects. As illustrated in the Guide H, the document states that a merger's negative effect can reduce product innovation by the remaining companies in the market[12].

8. Guide V+ states that defining the relevant market involves identifying economic agents that have influence in decisions related to innovation[13]. Moreover, when it comes to complex, highly innovative markets, the definition process may be more challenging[14]. Among the listed theories of harm, there is access to sensitive innovation data or weakened innovation incentives[15]. In the assessment of unilateral effects, Guide V+ indicates that an input can be considered relevant if it has a determining role in a product's innovation rate[16]. Regarding coordinated effects, the degree of market innovation requires examination[17]. Guide V+ highlights there should be not only static but also dynamic competition analysis by "assessing potential developments of new technologies, products, or production processes and innovation"[18]. Such analysis may be complex owing to the limited data. In addition, a qualitative approach can be of assistance in more dynamic, rapidly evolving markets.

9. CADE's merger guidelines show the authority's focus on evaluating innovation and dynamic competition, especially the recent Guide V+ draft. However, CADE lacks comparable guidelines to review anticompetitive conducts. According to the precedents, as our analysis indicates, CADE has undertaken few cases examining innovation and dynamic competition substantively.

3. Mergers Involving Innovative Markets

10. In general, CADE has limited merger cases that specifically consider the impact of innovation on market analysis. The theories of harm associated with the reduction of innovation are not frequently adopted.

11. Three merger cases judged by CADE since the enactment of the current Brazilian Competition Law (Law No. 12529/2011) were selected for analysis. These cases prominently featured discussions on innovation. The mergers analysed are: (1) Bayer's

[11] Brazil Administrative Council for Economic Defense, *Draft on Guidelines on Non-Horizontal Mergers (Guia V+)*, (2023).

[12] *Id.* at § 2, 69, 156, 194.

[13] *Id.* at § 94.

[14] *Id.* at § 107

[15] *Id.* at § 117-118

[16] *Id.* at § 351

[17] *Id.* at § 376

[18] *Id.* at § 146-147

acquisition of Monsanto between 2017-2018; (2) Itaú's acquisition of stake in XP Investimentos between 2017-2018; and (3) Microsoft's acquisition of Activision in 2022.

12. This note focuses on factors related to innovation that influenced CADE's decisions in these important cases rather than providing a complete reconstruction of CADE's rulings.

3.1. Bayer/Monsanto Merger

13. The case of Bayer/Monsanto merger examined innovation in technological solution markets in the agricultural industry. The transaction entailed Bayer's acquisition of Monsanto. Bayer, a company with operations in the agricultural sector, globally acquired Monsanto, a global company focused on agricultural technology solutions and product supply.

14. The merger entailed horizontal overlaps within seeds and agricultural chemicals industries. The study also identified potential vertical integrations in three segments: active ingredients and formulated products; seed production and marketing, as well as agricultural chemical marketing; and research and development of genetically modified events and genetic improvement of soybean and corn seeds.

15. The Office of the Superintendent General of CADE found that the markets affected by the merger were characterised by a strong focus on research and development, substantial intellectual property rights, and a high degree of technical complexity. Therefore, it was rendered crucial to assess the remaining competitor's capacity to compete effectively with the parties involved after the merger, in addition to the customary factors examined in rivalry analysis

16. A study on the impact of transactions on innovation was conducted by the Department of Economic Studies at CADE (DEE). The study did not provide a definitive answer; however, CADE's DEE has advised against dismissing the possible negative effects on research and development activities. A survey was conducted among market participants, who primarily identified Monsanto and Bayer as the main innovators in traits R&D projects.

17. The Office of the Superintendent General investigated theories of harm pertaining to innovation in the biotech markets for soybean and cotton seeds. Several potential negative consequences could arise if the parties involved in research pipelines overlap. Firstly, there may be a reduction in efforts made by these parties. Secondly, there could be fewer long-term biotech developments if the parties operate independently. Thirdly, there may be decreased incentives for other players to innovate in transgenic research and development. Lastly, there could be increased barriers to entry and the introduction of new products. Therefore, the SG suggested the dismissal of the merger by the Tribunal of CADE and the implementation of antitrust measures.

18. The opinion of Commissioner Paulo Burnier da Silveira, along with most of the Tribunal, fully endorsed the considerations put forth by the Office of the Superintendent General. As a result, CADE imposed that Bayer shall divest all its soybean and cottonseed assets, along with related non-selective herbicides, to BASF SE. BASF's potential to pose a substantial challenge to the merged firm's innovation endeavours was considered. The implementation of a structural remedy allowed BASF SE to compete with Bayer and promote innovation. The dominant viewpoint highlighted the importance of international collaboration in developing effective solutions for global mergers.

3.2. Itaú/XP

19. The Itaú/XP case prompted notable debate on financial sector innovation. The transaction involved Brazil's largest private bank, Itaú Unibanco S.A. (“Itaú”), partially acquiring the fintech firm XP Investimentos S.A. (“XP”). The acquisition phases were proposed with Itaú ultimately attaining 74.9% of XP’s total capital and 49.9% of voting shares. While Itaú represents a traditional Brazilian banking conglomerate, XP operated primarily as an investment product distribution platform.

20. CADE was notified of the transaction in July 2017. The Office of the Superintendent General submitted the case to the Tribunal for analysis. In March 2018, a majority of the Tribunal approved the operation subjected to behaviour remedies.

21. CADE’s SG opinion invoked CADE’s Horizontal Merger Guidelines, US guidelines, and doctrine to definitively deem XP a maverick firm. It also emphasised XP was widely considered disruptive—mainly because of its innovative business model, which offered investments from several financial institutions to the consumer.

22. The main competitive concerns arose from the vertical integration of securities brokerage and investment product distribution. The Office of the Superintendent General acknowledges that authorities face challenges in analysing disruptive firm acquisitions due to limited practical tools. XP was regarded as an early “debunking” mover, with customers migrating from traditional to open-model banks offering distinct investments. Due to XP's substantial growth in some of its operating markets (i.e., brokering and distribution of investment products), the SG could not dismiss the possibility of a causal relationship between the transaction and an increase in market power potential without further investigation. Itaú, as an incumbent, would have incentives to purchase the incoming XP, with the aim to cool down the competitive pressure among the applicants.

23. The Office of the Superintendent General of CADE negotiated remedies with the parties to address the concerns. The remedies included obligations that limit Itaú's interference in XP's commercial decisions, ensuring the target company's independence in decision-making. Additionally, the agreement aims to reduce entry and development barriers for XP's competitors, mitigating any potential loss of competitive momentum for XP after the transaction.

24. A majority of CADE’s Tribunal endorsed the remedies proposed by the Office of the Superintendent General. Commissioner Paulo Burnier da Silveira recognised in his opinion that XP was disruptive in the stock brokering and investment product distribution markets. The model introduced by XP, which involves an open platform for distributing investment products, was considered disruptive. It was acknowledged that XP cannot be entirely dismissed as a maverick. The SG concurred that it was necessary to eliminate the use of HHI as a criterion for establishing causal links, given the operational peculiarities. Ultimately, the Tribunal concurred with the Attorney General's assertion that the proposed agreement put forth by XP had the potential to mitigate the identified competitive issues.

25. This case warrants examination due to the perceived unconventional nature of XP, which prompted a comprehensive evaluation of potential competition. The conclusion reached by CADE was that the dynamic and innovative characteristics of the market made it unsuitable for summary approval based solely on HHI criteria and more traditional merger review standards.

3.3. Microsoft/Activision Blizzard

26. The third case that merits additional examination is the recent merger between Microsoft and Activision Blizzard, approved by CADE in October 2022. The merger led to horizontal overlaps in (i) game development and publishing, (ii) game distribution, (iii) online advertising, and (iv) merchandising. It also reinforced vertical integration between upstream game publishing and downstream distribution markets. Additionally, the Office of the Superintendent General (SG) identified complementarities between the parties' activities in: (i) game publishing and Microsoft's console business; and (ii) game publishing and online advertising. Microsoft's cloud gaming businesses was considered to exhibit minimal relevance within the Brazilian market.

27. Based on the SG's research, Microsoft had attained over 30% of the market share globally and domestically in 2021 in the console digital game distribution market. Given this substantial position, the SG pursued an in-depth review as per standard practice in vertical merger investigations. Initially, the SG determined that Activision Blizzard's Call of Duty and other major titles do not enjoy the same popularity in Brazil compared to other countries, especially the United States. Combining this finding with additional market conditions, the SG concluded that Activision's gaming portfolio should not be considered essential assets for either Microsoft's current competitors or potential future market entrants.

28. After assessing the market dynamics, the Office of the Superintendent General concluded that Microsoft lacks any incentives to discontinue the commercialisation of third-party games on the Xbox platform. As a result, the possibility of upstream foreclosure was dismissed by the SG's analysis. Furthermore, the SG evaluated the possibility of Microsoft acquiring content preferentially from Activision, which could make it more difficult for other game publishers to access Microsoft's distribution platforms. This analysis indicated that Microsoft was likely transitioning towards a subscription-based service model, as evidenced by its efforts to expand the Xbox Game Pass subscription offering.

29. The downstream foreclosure analysis encompassed an examination of the market for game distribution via multi-game subscription services and cloud gaming services. Microsoft holds a significant share in this specific market, attributable at least partially to the company pioneering these service offerings. Regarding cloud gaming, it is acknowledged that there is currently limited adoption of this model by players. Experts suggest that streaming may not replace the device-centric model predominant in the gaming industry in the near future. However, even in a scenario where streaming gained wider popularity, the Office of the Superintendent General determined that the transaction would not hinder the growth of competitors or entry of new companies into the cloud gaming segment. Among the firms offering such services, Google and Amazon represent sophisticated players possessing the financial and technical capabilities required to invest and participate competitively in a potential expansion of the cloud gaming market driven by increased consumer uptake.

30. This case demonstrates how CADE conducted an examination of potential competition within an innovative segment (specifically the video game subscription service market employing a cloud delivery model), where Microsoft had commenced operations as a pioneering firm. The analysis undertaken can be categorised as conservative in nature, evidenced by the focus of the Office of the Superintendent General on the discrete and nascent subset of the digital game distribution sector constituted by subscription cloud gaming, including a discussion of prospective innovation trajectories shaping the evolution of this market.

31. The merger cases analysed in this section encompass highly differentiated markets—agricultural technologies, financial systems, and the video game industry—and approach the consideration of innovation from varying perspectives. The Bayer/Monsanto case focused on preserving innovation competition in the post-merger marketplace. Conversely, the Itaú/XP case spotlighted recognition of XP's disruptive nature as the crux underscoring the in-depth analysis and carefully constructed remedies. Finally, within the Microsoft/Activision matter, the Office of the Superintendent General of CADE sought to elucidate the transaction's impacts on the emerging subscription-based business model segment of the gaming sphere, where Microsoft maintained a commanding market share.

32. Therefore, it can be concluded that while CADE possesses existing guidelines and precedents that could constitute references to inform examinations of dynamic competition and innovation in merger review proceedings, a systematic categorisation of analytical frameworks mobilised to scrutinise impacts on innovation remains lacking[19]. However, future cases may introduce novel complications—given that the particularities of innovations across individual cases can be markedly varied—or necessitate expanding upon the parameters employed in previous adjudications.

4. Anticompetitive practices related to innovation

33. Three pertinent cases in digital platform markets have examined the matter of innovation in greater depth within the context of anti-competitive conduct. The areas of focus include Google Scraping, Google Multi-Homing, and Google Shopping. Cases (i) and (iii) originated from a complaint filed by E-Commerce Media Group Informação e Tecnologia Ltda., the proprietor of Brazilian price comparison websites Buscapé and Bondfaro. Distinct proceedings have been initiated to address specific charges.

4.1. Google Scraping

34. The Google Scraping case investigated allegations that Google was automatically scraping product reviews from Buscapé and improperly using them on its own price comparison site, Google Shopping. The complainant stated, among other things, that this alleged misappropriation, which would occur without compensation or authorisation, would reduce competitors' incentives to continue investing in collecting and organising reviews—that is, that there would be a reduction in the incentive for innovation to improve its goods and services.

35. Both the Office of the Superintendent General and the Tribunal of CADE agreed on the lack of evidence proving the existence of violation, which led to the dismissal of the case in June 2019. However, some considerations were made regarding the analysis of innovation in the conduct. The opinions mention, in general, that the antitrust analysis of digital platforms poses challenges, including the innovation present in these business models.

36. The SG's opinion states that the conduct would constitute a possible leveraging of its dominant position in vertically related markets. Further, it would be difficult to measure a reduction in production due to lack of incentives for innovation; however, according to the Brazilian law, the mere potentiality of this harm would already be sufficient to establish

[19] João Felipe Achar de Azambuja, *Incentivos à Inovação no Direito da Concorrência Sem Bola de Cristal: Análise de atos de concentração aprovados com restrições pelo CADE em 10 anos de vigência da Lei nº 12.529/2011*, 2023.

any violation. The rapporteur of the case, Commissioner Pollyana Vilanova, agreed in her vote that there was insufficient evidence of the conduct.

37. In addition, the vote of Commissioner Paula Azevedo recognised that competition in digital markets would largely occur through innovation itself. Thus, the measurement of market power in a static way by market share would be insufficient. It would be impossible to assess, for example, the challenge faced by the incumbent company against the innovation introduced by new players—i.e., a scenario of dynamic competition.

38. She noted, in this context, that Google's dominant position in the universal search market had not been challenged over the eight years of investigation; therefore, there would be potential competitive harm resulting from the conduct. Thus, there could be a leveraging from the upstream search market to the downstream product search market. However, she understood that there was no evidence of misconduct in the specific case.

39. Therefore, CADE understood that the alleged conduct should be analysed from the perspective of an anticompetitive leveraging theory of harm, considering that harm to innovation could occur given the relationships between vertically related markets. However, in the authors' view, it would be possible to assess whether the appropriation of third-party content itself (i.e., in the product search market) would restrict innovation. This would occur through an improper use of information that restricts innovation-enhancing competition or by restricting competitors' ability to capture the benefits of innovation. This point could be further developed in cases to be analysed by the agency.

4.2. Google AdWords

40. In the Google Multi-Homing case, CADE investigated restrictions on multi-homing in the AdWords application programming interfaces, Google's sponsored search platform. The case was initiated based on a complaint from Microsoft, which alleged that, due to the insertion of terms and conditions in AdWords, it restricted the communication of the software with multiple search platforms.

41. As summarised in the vote of the rapporteur of the case, Commissioner Maurício Oscar Bandeira Maia, the possible effects of the conduct were related to "(i) the possibility or impossibility of other competitors also having access to the monetisation form in the sponsored search market, which is the sale of advertisements or (ii) the imposition or not of abusive prices on advertisers, or any other conduct that prevented them from broadcasting advertisements on various platforms" (§75). In its defence, Google claimed that the practice protected its business from improper use by third parties and that, in the absence of these measures, there could be a reduction in market competition and the level of innovation of services provided by Google.

42. In analysing the case, the Office of the Superintendent General of CADE opined that there was insufficient evidence of infringement of the economic order. It considered in its analysis that the authority should be cautious when considering intervening in markets with constant innovation, such as the technology market. It assessed that the companies' decision to no longer use more than one platform for their campaigns would be mainly due to issues other than Google AdWords terms. Furthermore, there would be no evidence that Google's AdWords terms and conditions contributed to Microsoft and its search engines having reduced market share.

43. The Tribunal followed the opinion of the rapporteur of the case, Commissioner Maurício Oscar Bandeira Maia. In his vote, he analysed the terms and conditions clauses (which underwent changes between 2013 and 2015 due to the investigation of the conduct within the scope of the Federal Trade Commission) and concluded that none of them had

anticompetitive content. In this analysis, the Commissioner brought up the idea that there could be a disincentive to innovate, in the absence of clauses that were aimed at combating the "lowest common denominator" problem. As for the effects of the conduct, it assessed that clients were satisfied with the possibilities for multi-homing in the market; therefore, there was no evidence that Google AdWords' terms and conditions were impacting users' ability to use more than one platform for advertising campaigns.

44. We understand that the analysis of CADE on multi-homing restrictions in this case could have been further developed. It would be possible to presume the wrongfulness of the conduct if it had been able to reinforce Google's dominant position over the years. Google would have to "demonstrate that the terms and conditions of use of the AdWords application programming interfaces were unavoidable to maintain the functioning of the platform and some quality of service."

4.3. Google Shopping

45. Finally, there is the Google Shopping case, which investigated an alleged practice of favouring the display of Google Shopping search results in Google's universal search results. In its analysis, CADE investigated whether Google's innovation in its search engine could have negative effects on competition—thus bringing up the debate on predatory innovation.

46. The SG understood that there would be no robust elements to condemn Google for the practices investigated in the process. It understood that Google could abuse its market power in the search market, transferring it to the adjacent price comparison market. Regarding the alleged predatory innovation conduct, the SG recognised the difficulty in differentiating pro-competitive innovation from anticompetitive innovation in markets with high levels of innovation. It concluded that the market maintained and evolved new agents, entry of new players and new business models, and that the investigation had not proven that the actual or potential damages would outweigh the consumer benefits.

47. The rapporteur of the case, Commissioner Maurício Oscar Bandeira Maia, followed by a majority of the Tribunal, concluded that the conduct had not produced anticompetitive effects in Brazil. Nevertheless, there was disagreement between the commissioners of CADE regarding whether the potential effects of the conduct would be sufficient to condemn the alleged wrongdoing[20].

48. Regarding the issue of predatory innovation, the rapporteur of the case stated that it would be linked "to the changes made by Google in the way it presents its search results", to the extent that "these innovations would be harming the alleged neutrality of Google's search mechanism" (§335). He also listed some questions that would be ways to analyse the potential effects of predatory innovation.

49. In our view, the Google Shopping case is a starting point for the debate regarding what would be the applicable legal test for anticompetitive innovation conduct in Brazil. The agency's opinions do not provide a clear answer to this question. It would be interesting to assess the effects of innovation in the market, but there are significant difficulties in

[20] For more details about Commissioners opinions, see Paulo Burnier da Silveira & Victor Oliveira Fernandes, *Google Shopping in Brazil: highlights of CADE's decision and takeaways for digital economy issues,* CONCURR. E-BULLETIN 1 (2019).

measuring the potential benefits or harms caused by an innovation since dynamic competition efficiencies, not just static ones, must be considered[21].

50. Beyond assessing the predatory innovation issue, the Google Shopping decision did not examine other issues of possible harm to innovation and dynamic competition. In this context, the authority could have considered whether the conduct (i) could have negatively affected competitors' incentives to innovate in the current relevant market for price comparison services, and (ii) could have reduced rivalry in the price comparison market and increased Google's ability to appropriate the benefits of innovation (product listing ads)[22].

51. The analysis of the above cases allows us to conclude that, regarding anticompetitive conduct, the innovation debate at CADE has focused on digital platform markets, in dynamic and innovative sectors. In addition, each of the three cases discussed different behaviours: (i) misappropriation of third-party content in Google Scraping; (ii) impediments to the use of multiple platforms in Google Multi-Homing; and (iii) anticompetitive innovation and self-preferencing in Google Shopping. Therefore, although these cases bring up the discussion on dynamic competition, there is still much to be developed by the agency in future discussions.

5. Final Remarks

52. This note aimed to provide an overview of how enforcement of cases involving innovation has occurred so far at CADE. To do so, we examined the legal framework surrounding innovation in the Brazilian competition law and discussed the main cases addressing the topic in the context of anticompetitive conduct and merger control. The analysed cases were judged by CADE between 2018 and 2022.

53. In the specific case of merger control, despite introducing the potential competition theory in Guide H (which provides guidelines for horizontal mergers) and including innovation discussions in the draft Guide V+ (which provides guidance for non-horizontal deals), CADE still seems somewhat reluctant to apply these theories of harm. The three discussed merger cases involved very different markets, with different competition issues regarding innovation.

54. CADE currently does not have a guide for analysing anticompetitive conduct. As seen, the most prominent innovation cases involve Google, a platform with high market share in online search. The authority had no trouble recognising that the affected digital markets investigated were dynamic with high innovation rates. Nevertheless, commissioners' opinions, especially in the Google Shopping Case, show that the case law of CADE still provides little clarity on evidentiary standards involving dynamic competition theories of harm. This may be a topic of great relevance in the Brazilian competition policy in the coming years.

[21] FERNANDES, *supra* note 6 at 351–352.

[22] FERNANDES, *supra* note 6 at 359.

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