

PANORAMIC

COMPETITION IN DIGITAL MARKETS

Brazil



LEXOLOGY

Competition in Digital Markets

Contributing Editors

Kyriakos Fountoukakos, Stephen Wisking and Marcel Nuys

Herbert Smith Freehills LLP

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Contributors

Brazil

Advocacia Del Chiaro



Ademir Antonio Pereira Júnior

apj@ajdc.com.br

Luiz Felipe Rosa Ramos

lfr@ajdc.com.br

Yan Villela Vieira

yvv@ajdc.com.br

Gabriel de Aguiar Tajra

gat@ajdc.com.br

LEGAL AND REGULATORY FRAMEWORK

Legislation

What legislation governs competition in digital markets in your jurisdiction? Does the standard competition law framework apply or are there any special rules or exemptions?

[Federal Law No. 12.529/2011](#) (the Competition Law) is the main statutory provision regulating digital markets under a competition framework in Brazil. It establishes a pre-merger control regime and a system of ex post enforcement against business conduct that could be deemed anticompetitive (collusion and unilateral conduct).

While there is a growing debate about the specific features of digital markets and whether they may require changes to the traditional framework of enforcement, there have been no changes to the competition framework to date. Discussions are ongoing in Congress involving proposals for the ex ante regulation of digital platforms.

Law stated - 26 julho 2024

Enforcement authorities

Which authorities enforce the competition law framework in your jurisdiction's digital markets?

The Federal Competition Agency (CADE) is the primary competition enforcer dealing with digital markets. It comprises an investigatory unit (SG) and the Tribunal.

CADE has analysed most competition cases in Brazil in the context of governmental investigations. Administrative decisions issued by CADE are subject to judicial review by federal courts. While there is no dedicated digital markets authority or specific unit working within CADE, CADE created a specialised unit to investigate single-firm conducts in 2022 that has been handling most conduct investigations related to digital markets.

State and federal public prosecutors can also enforce the Competition Law with criminal and civil enforcement actions. Notwithstanding, enforcement actions by state and federal public prosecutors related to digital markets are scant.

Finally, individuals, legal or collective entities, including consumer organisations, unions and trade associations can file private lawsuits seeking injunctive relief or compensation for damages. However, private enforcement actions are scant in Brazil.

Law stated - 26 julho 2024

Regulatory guidelines

Have the authorities in your jurisdiction issued any guidelines on the application of competition law to digital markets?

There are no formal guidelines on digital markets.

Law stated - 26 julho 2024

Advisory reports

Have any advisory reports been prepared in your jurisdiction on competition law issues in digital markets?

In partnership with competition agencies from other emerging economies (the BRICS group, composed of Brazil, Russia, India, China and South Africa), CADE released a [report](#) in 2019 on competition policy in the digital economy.

In 2020, CADE's economic department (DEE) issued a [report](#) summarising various foreign [reports](#) and academic papers on competition in digital markets. That same year, the OECD launched a [report](#) on the digital environment in Brazil: Going Digital in Brazil. The report makes several policy recommendations to promote digital innovation and properly capture the implications of emerging business models in key sectors. CADE's DEE released a [report](#) on digital platforms in August 2021, recently [updated](#) in August 2023. The report summarises CADE's experience with digital platforms in both merger and conduct investigations across a wide range of industries such as online retail, video on demand and price comparison.

Also in 2023, CADE released a [report](#) on theories of harm in conglomerate mergers, dedicating an entire chapter to digital markets and discussing key cases involving digital platforms.

In February 2024, CADE released a [second report](#) in partnership with agencies of the BRICS group that deepened discussions of:

- major issues in the definition of relevant markets (multi-sidedness, zero-price markets and innovation);
- market power (portfolio, data and relative power);
- frameworks for anticompetitive behaviours (algorithm collusion, most-favoured-nation clauses, exclusive dealing, self-preferencing and tying);
- concerns around conglomerate mergers (unilateral, coordinated and portfolio effects);
- efficiencies (based on the goals of each competition law); and
- remedies design (proactive role, including divestitures, Chinese walls, non-discriminatory treatment, mandated interoperability and data portability).

The report notes a tendency to place more emphasis on the market power assessment than on a definitive position with regard to market definition, incorporating alternative indicators such as 'the ability to unilaterally impose terms and conditions', the possession of 'key datasets' and the 'ability to influence choice through online architecture and lack of transparency'.

Finally, in April 2024, CADE submitted a contribution to the Ministry of Finance's public consultation on regulating digital platforms. In the document, CADE defended the need for ex ante regulation of digital markets and advocated for expanding CADE's mandate by including a unit dedicated to digital markets.

Law stated - 26 julho 2024

Advance compliance guidance

Can companies active in digital markets ask the competition authority for advance guidance on competition law compliance before entering into an agreement or determining a pricing strategy?

CADE's Tribunal may formally answer queries about certain business practices or strategies under the proceeding of a business review request. To present a business review request, companies must pay a fee and submit all relevant documents with a detailed explanation of the practice or strategy. CADE has up to 120 days to respond to the request, and the response will be binding for CADE for a maximum period of five years. CADE's Tribunal has the power to, upon public interest and new facts or reasons, reconsider its interpretation in the future without retroactive effects.

Until this point, there has been no business review request specifically discussing digital markets. In any event, the fuel distributor Ipiranga submitted a [business review request](#) regarding the implementation of a maximum price suggestion policy based on algorithms in 2021.

Law stated - 26 julho 2024

Regulatory climate and enforcement practice

How would you describe government policy and the competition authorities' general regulatory and enforcement approach towards digital companies in your jurisdiction?

Enforcement practice in Brazil has been primarily neutral with regard to digital companies. Authorities pay close attention to the international debate and guidelines regarding digital markets, but no specific criteria or specific enforcement priorities have been developed. The [second report](#) of the BRICS group states that 'CADE's decisional practice has predominantly reflected neoclassical viewpoints'.

Law stated - 26 julho 2024

HORIZONTAL AGREEMENTS

Special rules and exemptions

Do any special rules or exemptions apply to the assessment of anticompetitive agreements between competitors in digital markets in your jurisdiction?

There is no special rule regarding the assessment of anticompetitive agreements between competitors in digital markets in Brazil. In general, anticompetitive agreements between competitors (eg, price fixing and market/customer allocation) are considered per se illegal in Brazil.

Law stated - 26 julho 2024

Access to online platforms

How has the competition authority in your jurisdiction addressed horizontal restrictions on access to online platforms?

In 2022, the Federal Competition Agency (CADE) launched an [investigation](#) into Google and Facebook to analyse an agreement referred to as Jedi Blue, by which Google allegedly favoured Facebook in its ad biddings in exchange for a Facebook compromise not to support alternative online advertising technologies. The investigation has recently been closed by the investigatory unit (SG) based on the existence of economic rationality in the agreement, with no 'absolute limitation' on the right of either party to develop products or services that compete with the other. In addition, it was found that the terms of the agreement do not differ significantly from common market practice. The deadline for a review order by CADE's Commissioners was still pending as at July 2024.

In 2023, CADE signed a [cease-and-desist agreement](#) with ClickBus, a bus ticket marketplace vertically integrated with an platform that facilitates integration between marketplaces and bus companies. The agreement suspended an [investigation](#) on abusive exclusive dealing between the marketplace and bus companies. The investigation also included coordinated actions with a software company (who had a common shareholder with ClickBus) to raise costs for bus companies' access to the rival platform through restrictions on software functionality. Per the cease-and-desist agreement, ClickBus committed not to demand exclusivity from bus companies, terminate existing exclusivity agreements, ensure non-discriminatory conditions and establish governance mechanisms to limit access to sensitive information belonging to other marketplaces when operating as an integrator.

Law stated - 26 julho 2024

Algorithms

Has the competition authority in your jurisdiction considered the application of competition law to the use of algorithms, in particular to algorithmic pricing?

In the past, CADE [investigated](#) airlines for implementing a technology that collected information on routes, fees, classes and available seats of around 700 airline companies in an online network, holding that such a system would facilitate tacit horizontal agreements. The investigation was closed following consent decrees. In another [proceeding](#), CADE imposed penalties on driving schools and a vertically related software vendor holding the driving schools used that vendor's software to collude and monitor a cartel.

More recently, in 2021, fuel distributor Ipiranga submitted a [business review request](#) regarding the implementation of a dynamic maximum price suggestion policy based on the use of algorithms. CADE highlighted that 'the increasing use of intelligent pricing systems involving algorithms, artificial intelligence, and other mechanisms has been challenging competition authorities because of the positive and negative impacts they can have on competition'. CADE held that Ipiranga could implement its policy if it does not share both the algorithms and the data used as inputs with rivals.

Finally, in an [investigation](#) of alleged price increases by airlines, the SG analysed a potential tacit collusion involving airlines' pricing algorithms. The SG decided to close the investigation in 2022, holding that 'with no evidence of agreement or concerted practice between airlines to collude, we would be facing a tacit collusion case, a behaviour not reached by CADE's mandate'. Per reports, CADE has recently asked major airlines to submit data on tickets sold over the past five years to check whether prices have been similar over time on the same routes and timetables.

Law stated - 26 julho 2024

Data collection and sharing

Has the competition authority in your jurisdiction considered the application of competition law to 'hub and spoke' information exchanges or data collection in the context of digital markets?

CADE first convicted a cartel centrally based on a 'hub-and-spoke' theory in 2023 ([CADE v Conesul](#)). CADE convicted a distributor and its respective resellers of electronic whiteboards, holding that the distributor disseminated sensitive data among its resellers. According to CADE, the key issue was 'the sharing of competitively sensitive information, with the intention of setting the selling price of a certain product above the market price, through coverage proposals previously agreed with the other resellers, which appeared to the market as a false intra-brand competition'.

In 2022, the SG closed an [investigation](#) into the use of an 'opportunity registration system' by software companies (under which a company appoints only one of its distributors/resellers to participate in specific bids). According to the SG, this practice may raise questions from the antitrust point of view if the following elements are present:

- exclusivity of the first reseller who reports the opportunity to the software provider;
- differentiated price of the software licence to the reseller who reports the opportunity; and
- sharing of sensitive information.

Law stated - 26 julho 2024

Other issues

Have any other key issues emerged in your jurisdiction in relation to the application of competition law to horizontal agreements in digital markets?

No.

Law stated - 26 julho 2024

VERTICAL AGREEMENTS

Special rules and exemptions

Do any special rules or exemptions apply to the assessment of anticompetitive agreements between undertakings active at different levels of the supply chain in digital markets in your jurisdiction?

No special rules or exemptions under Brazilian competition law apply to the assessment of anticompetitive vertical agreements.

While Federal Competition Agency (CADE) recognises that cases that fall under the broad category of 'vertical agreements' typically result in pro-competitive efficiencies, the agency made clear in a number of precedents that such agreements may raise concerns if they result in market foreclosure.

CADE's precedents indicate that vertical restraints are subject to an effects-based approach that resembles the full-blown 'rule of reason' developed in US case law. In brief, CADE has the burden to prove that an undertaking holds a dominant position and its behaviour results in anticompetitive effects. If CADE can prove that these two criteria are fulfilled, a given vertical restraint will be deemed unlawful unless the defendant can show that its behaviour creates pro-competitive efficiencies that compensate for its anticompetitive effects.

Law stated - 26 julho 2024

Online sales bans

How has the competition authority in your jurisdiction addressed absolute bans on online sales in digital markets?

There is no specific precedent involving online sales bans in Brazil. In any event, such behaviour would likely be examined following an effects-based or rule-of-reason approach.

Law stated - 26 julho 2024

Resale price maintenance

How has the competition authority in your jurisdiction addressed online resale price maintenance?

CADE has not concluded investigations of resale price maintenance (RPM) in digital markets to date. In any event, CADE's SG has indicated that they would likely be analysed under the same framework applicable to RPM cases in traditional industries (see [CADE v Technos](#) and [CADE v Orient](#)).

Since the mid-1990s, CADE's precedents have consolidated the view that suggested or recommended prices do not raise concerns if monitoring and punishing/rewarding mechanisms do not follow them. On the other hand, RPM – either as maximum prices (price ceiling) or minimum prices (price floor) – is normally subject to lengthy scrutiny. While CADE has previously indicated that maximum prices (price ceilings) might be less harmful than minimum prices (price floors), there is no exemption to maximum prices.

CADE has consolidated the use of the rule of reason to assess RPM conduct, but it may follow a more rigorous framework. If a player holds a dominant position, CADE may work

under the assumption that the conduct produces negative effects, shifting the burden to the dominant player to prove that it is unable to harm competition (eg, there is still sufficient inter-brand competition) or that it produces substantial efficiencies to consumers that outweigh the reduction in intra-brand competition.

This rigorous approach towards RPM cases was first employed in a precedent from 2011 ([Procon v SKF](#)). In a recent business review request submitted by Ipiranga, however, CADE indicated that a presumption of anticompetitive effects would only be used in cases where the RPM policy was implemented as part of an agreement among suppliers or retailers to coordinate prices and that RPM policies implemented as a legitimate business strategy by manufacturers would be subject to the standard rule of reason approach.

CADE usually considers that controlling advertised prices may result in similar effects to RPM. In a [business review](#) request submitted by tyre manufacturer Michelin, a CADE Commissioner indicated that controlling advertised prices in e-commerce platforms may result in the same effects as an RPM strategy. In this scenario, advertised prices and final prices would necessarily be the same – in contrast to physical retailers, which can offer discounts in relation to advertised prices after negotiating with each customer.

Law stated - 26 julho 2024

Geoblocking and territorial restrictions

How has the competition authority in your jurisdiction addressed geoblocking and other territorial restrictions?

CADE has not launched investigations into geoblocking and other territorial restrictions on online sales to date. stores within a certain radius of the shopping mall, provide guidance on the applicable framework, indicating they would be likely subject to the rule of reason standard ([MPFRS v Shopping Iguatemi and others](#)).

Nonetheless, CADE is usually sceptical of justifications for radius clauses. In precedents from the early 2000s (eg, [CADE v Condomínio Shopping Center Iguatemi](#)), CADE held that radius clauses might be anticompetitive for their potential to make it impossible for rival shopping malls to offer a competitive ‘tenant mix’ to customers.

In addition to the cases related to radius clauses, CADE’s case law on territorial restrictions is scant. There are two precedents regarding clauses imposed by vehicle manufacturers to prevent dealerships from actively making sales to customers located outside of designated geographical areas ([MPFSP v Car makers](#), Proceeding No. 08012.010760/2007-82 and [MPF v Scania and others](#), Proceeding No. 08012.004034/2002-16). These cases indicate that a rule of reason standard is applicable. In [MPF v Scania and others](#), CADE cleared the defendant after finding that it held less than 30 per cent of the relevant market; in [MPFSP v Car makers](#), CADE cleared the defendants after finding that the territorial restrictions imposed were necessary to eliminate free-riding and increased inter-brand competition, objectives outlined in the sectoral legislation that authorises restrictions.

Law stated - 26 julho 2024

Platform bans

How has the competition authority in your jurisdiction addressed supplier-imposed restrictions on distributors' use of online platforms or marketplaces and restrictions on online platform operators themselves?

CADE has not launched investigations on supplier-imposed restrictions on distributors' use of online platforms or marketplaces to date. In any event, CADE's case law indicates they would likely be examined under a rule of reason standard. More specifically, selective distribution systems usually do not raise antitrust concerns in Brazil unless they are part of a vertically integrated firm's strategy to dominate a downstream market. In [Inox-Tech v APERAM](#), CADE investigated APERAM for discriminating distributors of stainless steel. APERAM held an alleged monopoly in stainless steel production and supplied authorised distributors and an undertaking of its economic group. CADE concluded that APERAM was offering favourable conditions to its own distributor to harm rivals and create difficulties in importing stainless steel. In 2015, APERAM signed a consent decree ceasing both practices completely.

Law stated - 26 julho 2024

Targeted online advertising

How has the competition authority in your jurisdiction addressed restrictions on using or bidding for a manufacturer's brand name for the purposes of targeted online advertising?

CADE has not launched any investigation of supplier-imposed restrictions on using or bidding for a manufacturer's brand name for the purposes of targeted online advertising to date. In any event, such behaviour would likely be examined following an effects-based or rule-of-reason approach.

Law stated - 26 julho 2024

Most-favoured-nation clauses

How has the competition authority in your jurisdiction addressed most-favoured-nation clauses?

Similar to investigations in Europe, CADE investigated whether adopting most-favoured-nation (MFN) clauses in contracts signed by online travel agencies (OTAs) with hotels could harm competition ([FOHB v Booking.com, Decolar.com and Expedia](#)). The investigation ended with a settlement agreement, so there is no final decision by CADE. In any event, by demanding the removal of 'wide' MFN clauses (which restrict better terms to competing travel platforms), CADE indicated that wide clauses could limit price competition and raise barriers for entrants as hotels would not be able to pass on to consumers lower commissions charged from entrants. On the other hand, by allowing 'narrow' clauses (which restrict better offers on the hotel's own website), CADE indicated that narrow clauses were legitimate given the need to prevent free-riding (platforms invest considerably in their websites to attract users and would suffer if consumers were able to find a hotel via the

platform and then book at a lower price via the hotel's own website). As a result, OTAs continue to enforce narrow price parity provisions.

CADE also [investigated](#) whether GymPass, a gym aggregator platform, was abusing its dominant position by adopting MFN clauses in exclusivity arrangements with gyms. While CADE seemed particularly concerned with the exclusivity agreements, MFN provisions were also part of the investigation. In a [preliminary injunction](#) issued in December 2021, the SG suspended all MFN clauses, including narrow clauses.

According to the SG, 'even if they do not jeopardise competing platforms, since the gyms were already exclusive to the GymPass, they could harm consumers because the gym itself could not offer lower prices'. The SG's decision was upheld by CADE's Tribunal in December 2022. After the preliminary injunction was upheld, GymPass signed a cease-and-desist agreement in September 2022. Per the [cease-and-desist agreement](#), GymPass cannot introduce either wide or narrow MFN clauses preventing gyms from offering lower prices than those charged by GymPass.

In addition, a [cease-and-desist agreement](#) signed in [Rappi v iFood](#) prohibited wide MFN clauses, although MFN clauses were not specifically under investigation.

Law stated - 26 julho 2024

Multisided digital markets

How has the competition authority in your jurisdiction addressed vertical restraints imposed in multisided digital markets? How have potential efficiency arguments been addressed?

In [Rappi v iFood](#), CADE investigated whether iFood, an online delivery platform, abused its dominant position in the Brazilian market for online food orders by entering into exclusivity agreements with restaurants. In March 2021, the SG issued a [preliminary injunction](#) prohibiting new exclusive agreements by iFood due to potential concerns with 'tipping effects'. According to the SG, iFood was securing exclusive relationships with 'must-have' or 'famous' restaurants, which could raise barriers to entry to competing platforms and result in the market foreclosing.

After the preliminary injunction, iFood negotiated a cease-and-desist agreement limiting its exclusivity agreements to facilitate multihoming by restaurants. Per the [cease-and-desist agreement](#) signed in February 2023, iFood limited its exclusivity agreements to restaurants representing 25 per cent of its national Gross Merchandising Value; and 8 per cent of affiliated restaurants in its network in each city with more than 500,000 residents. The cease and desist also provides that iFood cannot sign exclusivity agreements with franchise networks that have more than 30 units. It also disciplined specific compensations for restaurants made exclusive.

Similarly, in [Total Pass v GymPass](#), CADE investigated whether GymPass, a gym aggregator platform, abused its dominant position in the Brazilian market for gym aggregator platforms by entering into exclusivity agreements containing MFN clauses with gyms. In December 2021, the SG issued a [preliminary injunction](#) prohibiting new exclusive agreements by GymPass. CADE's Tribunal amended the decision in February 2022 by a [majority vote](#) that suspended all exclusivity agreements and MFN clauses by GymPass. CADE's

Tribunal held that there was no evidence of efficiencies generated by GymPass' exclusive arrangements, which amounted to 80 per cent of its affiliated network. After the preliminary injunction, GymPass negotiated a cease-and-desist agreement in September 2022. Per the [cease-and-desist agreement](#), GymPass must limit exclusivity agreements to up to 20 per cent of the total number of affiliated gyms in its network; and only renew or sign new exclusivity agreements if it proves they are relevant to support investments.

In [Guichê Virtual v ClickBus](#), CADE investigated whether ClickBus, an online bus ticket marketplace vertically integrated with a platform that intermediates marketplaces and bus companies, abused its dominant position by demanding exclusivity agreements with bus companies and marketplaces. In 2023, the company signed a cease-and-desist agreement suspending the investigation that obliges it not to demand exclusivity and not to offer discounts that could induce exclusivity from bus companies and marketplaces, while also terminating exclusivities in place.

Law stated - 26 julho 2024

Other issues

Have any other key issues emerged in your jurisdiction in relation to the application of competition law to vertical agreements in digital markets?

No.

Law stated - 26 julho 2024

UNILATERAL ANTICOMPETITIVE CONDUCT

Establishing market power

What are the relevant criteria for establishing market power in digital markets in your jurisdiction? Is there any concept of 'abuse of economic dependence' where a company's market power does not amount to a dominant position?

Cases involving digital markets are subject to the same criteria adopted in traditional industries. Market share analysis is generally used as an initial screening to assess market power. There is an assumption under the Competition Law that a company holding over 20 per cent market share is dominant. Notwithstanding, the 20 per cent mark is not absolute (parties can refute it and show that a 20 per cent share does not result in a dominant position in a specific market).

In specific cases, the Federal Competition Agency (CADE) has recognised that digital markets may have certain features that should be considered in the market power analysis. For example, in [OLX/Zap](#), the SG indicated that:

- multisided platforms that facilitate transactions or matching of users may be marked by network externalities and require a critical mass of users on various sides;
- users may tend to multi-homing in certain cases but not in others; and
-

access to user data may be relevant to the platform's ability to provide helpful services and, therefore, effectively compete.

In [Mosaico/Buscape](#), the SG recognised the fast pace of digital markets, indicating that rapid changes may result in evolving market definitions and erosion of market power.

[CADE's Horizontal Merger Guidelines](#) contain a short discussion about two-sided markets (very common in the digital space). The guidelines indicate that CADE will decide on a case-by-case basis whether to 'consider competition in one side or both'.

Finally, a few cases in the healthcare industry have considered economic dependence as an additional factor in antitrust analysis ([CADE v Unimed](#) and [Hormonal v Unimed](#)).

Law stated - 26 julho 2024

Abuse of market power

To what extent are companies with market power in digital markets subject to the rules preventing abuse of that power in your jurisdiction?

The Competition Law and its specific provisions on abuse of market power are generally applicable to digital markets.

Law stated - 26 julho 2024

Data access

How has the competition authority in your jurisdiction addressed concerns surrounding access to data held by companies with market power in digital markets?

In [GuiaBolso v Bradesco](#), fintech GuiaBolso accused Bradesco (one of Brazil's top retail banks) of blocking access to user data by establishing a two-step verification system that allegedly prevented GuiaBolso from accessing data of users' checking accounts on Bradesco. Bradesco signed a consent decree and committed to establishing an interface that would allow GuiaBolso to access the data of users that provided consent until the Open Banking Regulation by the Central Bank entered into force.

In 2023, CADE closed an [informal inquiry](#) against Reclame Aqui, an online platform for consumer complaints. The accusation involved blocking, without prior notice, access to the platform by the complainant's clients who carry out automated complaint monitoring. CADE decided that blocking access to the platform based on irregularities in such clients' IP addresses was a legitimate exercise of contractual rights aimed to protect personal data.

In the merger review space, the [constitution of a joint venture](#) among Brazil's top five banks to create a new credit bureau generated an important discussion. According to CADE, the vertical integration of Brazil's top five banks (which collectively held roughly 90 per cent of the banking industry) with the market of credit bureaus increased the risks that these banks would no longer provide data to or consult with rival bureaus, which could harm their ability to compete. Therefore, CADE conditioned approval of the joint venture to

several non-discrimination obligations that would secure access to the banks' credit data to third-party credit bureaus, as well as enable clients to provide data to more than one bureau.

In [Serasa/Claro](#), CADE reviewed a partnership under which telecom operator Claro would grant credit bureau Serasa access to certain types of user data. CADE concluded there were no competition concerns because Serasa's rivals could acquire similar data from numerous service providers other than Claro.

Law stated - 26 julho 2024

Data collection

How has the competition authority in your jurisdiction addressed concerns surrounding the collection of data by companies with market power in digital markets?

In 2021, CADE joined forces with Brazil Data Protection Agency, Federal Consumer Protection Bureau and the Public Prosecutors Office to release a joint [recommendation](#) to Facebook and WhatsApp regarding a change in WhatsApp terms of service and privacy policy, including:

- WhatsApp should postpone the launch of the new privacy policy;
- WhatsApp should continue service to users even if they reject the new policy, maintaining the same level of service they have today;
- WhatsApp should adopt changes related to data processing and transparency issued by the Data Protection Agency in a report; and
- Facebook should not process or share data collected by WhatsApp based on the new privacy policy.

CADE has rejected purely exploitative theories of harm for the past two decades, holding that exclusionary effects are central in unilateral conduct cases. This case, however, could be a departure from such a standard of analysis, as there seems to be no theory of exclusion of rivals against *Facebook/WhatsApp*.

In May 2021, *Facebook/WhatsApp* committed to work with CADE and other agencies to clarify questions. A year later, in May 2022, CADE, Brazil's Data Protection Agency, the Federal Consumer Protection Bureau and the Public Prosecutors Office released their final [report](#), concluding that *Facebook/WhatsApp* complied with the recommendations made by the agencies.

In the acquisition of [Hub Prepaid by Magalu Pagamentos](#), a rival complainant argued that, after the merger, Magalu Pagamentos would have increased incentives to access third-party data collected by Hub Prepaid and gain a competitive advantage over rivals in its retailer business. CADE's Tribunal dismissed this claim holding that Hub would be constrained by contractual, legal, and regulatory obligations, including Brazil's Data Protection Law.

In the acquisition of [Linx \(software\) by Stone](#) (payment services), complainants argued that Stone would gain access to commercially sensitive data, including the commercial relationship between retailers that used Linx software solutions and their customers, suppliers, and payment providers. Rivals also claimed that other payment providers, including those linked to banking institutions, would not be capable of accessing data

with the same granularity, detail, and ease of information obtained by the merging parties. Nevertheless, CADE held that the data would not be competitively sensitive, mainly because the information it contained, owned by the establishments, could already be accessed by other players in alternative ways, such as via reconciliation of receivables or via open banking policy.

CADE also closed a confidential inquiry into Google's acquisition of Fitbit. Among other issues, the complainant argued Google would be able to use personal data to deteriorate competition in the digital and health markets. CADE investigated the matter but did not find reasons to extend the review.

Finally, in an ongoing investigation ([ABBT v Ifood](#)), the SG dismissed a claim that iFood, the biggest Brazilian platform for food delivery, was collecting sensitive data through its marketplace to prospect new customers for its own food voucher. The SG dismissed the complaint after concluding there was no evidence of anticompetitive effects, especially because food vouchers represented a relatively small percentage of the total sales in iFood's marketplace and, therefore, would not grant iFood any significant competitive advantage. In addition, the SG indicated that rivals could find similar information in the market. CADE's Tribunal ordered the investigation to continue into different and unrelated claims (the investigation is closed regarding the data collection claim).

Law stated - 26 julho 2024

Leveraging market power

Has the competition authority in your jurisdiction adopted any decisions involving theories of harm relating to leveraging market power in digital markets, such as through tying, bundling or self-preferencing?

The most relevant conduct case involving digital markets in Brazil is the [Google Shopping case](#), where complainants argued that Google was discriminating against its own price comparison service with favourable placement and format on its search results page. In 2019, CADE ultimately dismissed this claim. The vote issued by Commissioner Mauricio Maia (who was the leading commissioner in this review) held that Google should not be treated as an essential facility and concluded that 'these theories of harm are frontally contradicted by the facts, with no effect on price comparison sites on one side and a degree of users/merchants' satisfaction on the other.' The vote issued by Chairman Barreto further confirmed that the introduction of shopping results on the Google search results page was a pro-competitive product improvement, holding that 'Brazilian Law recognises that changes in the design of a product that benefits consumers are usually pro-competitive, unless such change has been introduced only to harm rivals; that such change blocks access to an essential facility; or if it produces actual harm to consumers'.

In 2022, CADE closed a long-standing [investigation](#) against Google involving alleged discrimination of its local services. According to a complaint filed by Yelp, Google was deviating users of rival local search services by placing a box named Local Universal with thematic local results on its Google Search results page. During the investigation, the SG concluded that Google Search wasn't an essential input for local search services and that local search rivals are not dependent on the Google Search results page since they have other channels to reach users. In addition, the SG held that launching and positioning the Local

Universal in Google Search's results page was a legitimate design choice with important benefits to users, while data on users' traffic over time showed there was no harm to competition.

In 2023, CADE closed two other investigations. In an [investigation](#) involving an enterprise software vendor (controlled by financial technology solutions company StoneCo), CADE concluded that the company did not create interoperability problems to discriminate payment institutions because specific interoperability problems could be explained by technical reasons and degrading interoperability would not result in immediate gains for the company. In an [investigation](#) involving the market for real state advertising platforms, CADE dismissed complaints of tying two different platforms.

Finally, CADE is investigating whether iFood, a food delivery platform that also offers a food voucher, discriminates against rival food vouchers in its food delivery platform ([ABBT v Ifood](#)).

Law stated - 26 julho 2024

Other theories of harm

What other types of conduct have been found to amount to abuse of market power in digital markets in your jurisdiction?

In 2023, CADE's Tribunal issued a [preliminary injunction](#) in an [investigation](#) against state-owned bank CAIXA for allegedly abusing its dominant position in the lottery market to 'prevent future competition' from online intermediation platforms by banning lottery operators from using other online intermediation platforms rather than CAIXA's own platform, while also promoting a defamatory campaign alleging that other online intermediation platforms were illegal.

Law stated - 26 julho 2024

MERGER CONTROL

Merger control framework

How is the merger control framework applied to digital markets in your jurisdiction?

There are no specific rules or thresholds for mergers involving digital markets. Transactions with potential effects in Brazil require notification if the parties involved (and their respective group of companies) meet certain turnover thresholds. Effects in Brazil are normally identified in the presence of the following:

- assets, legal entities or activities in Brazil;
- revenues originating in Brazil, even if through exports only and regardless of the amount; or
- at least one relevant market with a global dimension involved in the transaction.

The Federal Competition Agency (CADE) maintains cooperation protocols with various agencies and regulatory bodies, including the Brazilian Data Protection Agency (ANPD). The [cooperation protocol with ANPD](#) provides for eventual cooperation in cases involving data transfer or processing (eg, CADE could ask ANPD for specific assessments on topics involving data protection).

Law stated - 26 julho 2024

Prohibited mergers

Has the competition authority prohibited any mergers in digital markets in your jurisdiction?

In 2023, CADE [blocked](#) the creation of a joint venture based in Germany that would create an 'interoperable infrastructure for standardised data' across the automotive industry and allow the 'commercialisation of applications based on it' (as described by Applicants BASF, BMW, Henkel, Mercedes-Benz, Robert Bosch, SAP, Schaeffler, Siemens, T-Systems, Volkswagen and ZF). CADE's Tribunal held that the merger raised concerns, especially regarding the risk of exchange of sensitive information among rivals and imposed behavioural remedies to the transaction. After CADE's Tribunal decided to impose remedies to the deal, the applicants said they would not go further with the transaction in Brazil. Against this background, CADE's Tribunal considered the applicants failed to accept CADE's restrictions and declared that the transaction was blocked.

Law stated - 26 julho 2024

Market definition

How has the competition authority in your jurisdiction addressed the issue of market definition in the context of digital markets?

CADE has recognised that digital markets may have specific features that should be considered in the market definition phase. For example, in [Mosaico/Buscape](#), the SG recognised the fast pace of digital markets, indicating that rapid changes may result in evolving market definitions. The SG emphasised that it is challenging to work with well-defined market definitions because different business models are competing in the marketplace, and technology is constantly evolving, resulting in changes to the services offered by each platform. As a result, CADE should strive to 'identify the players that effectively constrain competitive decisions' and does not need to commit to rigid market definitions.

In the [Google Shopping case](#), Commissioner Maia's vote indicated that the relevant market definition 'should not be taken as an end in itself'. In dynamic markets, it should be considered 'an auxiliary guide', allowing certain flexibility to incorporate all relevant market features and players.

Platforms are usually national in scope due to their offerings in the entire Brazilian territory.

Law stated - 26 julho 2024

'Killer' acquisitions

How has the competition authority in your jurisdiction addressed concerns surrounding 'killer' acquisitions in digital markets?

In 2020, CADE launched a [market inquiry](#) asking companies working in digital markets for various pieces of information on transactions undertaken in the past 10 years. The inquiry is ongoing.

In 2022, CADE initiated an [informal inquiry](#) into enterprise software vendor Linx (controlled by financial technology solutions StoneCo) following a complaint by credit and debit card operator Cielo. According to Cielo, Linx abused its dominance in the market for enterprise management software, reached via several 'killer acquisitions', to dominate the market for credit and debit card operation. The investigation was closed in 2023.

In 2023, CADE's Tribunal ordered 123 Milhas to notify the [acquisition of its rival MaxMilhas](#) (both are digital platforms for the purchase and sale of airline miles). Even though the transaction did not meet the threshold for mandatory filing, the Tribunal found that CADE should conduct a review as the merger could result in a significant concentration in the market for digital platforms for airline miles.

Law stated - 26 julho 2024

Substantive assessment

What factors does the competition authority in your jurisdiction consider in its substantive assessment of mergers in digital markets?

Most cases involving digital markets followed the same review standards applicable to traditional industries. CADE has been cautious about incorporating non-competitive objectives in its analysis. For example, it approved a [joint venture](#) to develop a sustainability platform with the aim of standardising sustainability metrics. CADE reviewed the deal based on competition-specific criteria; that is, whether there would be discrimination or exclusionary effects resulting from the imposition of sustainability standards or access to sensitive information from competitors.

Law stated - 26 julho 2024

Remedies

How has the competition authority in your jurisdiction approached the design of remedies in mergers in digital markets?

While CADE generally indicates a preference for structural rather than behavioural remedies, CADE has resorted to extensive behavioural remedies and complex monitoring conditions in several mergers in traditional industries.

In [ClickBus/J3](#), CADE conditioned the merger to behavioural remedies aimed at addressing concerns with a vertical integration between ClickBus' activities as an online platform that sells bus tickets with J3, a company active in the market for global distribution services

(intermediation services between online platforms and bus travel operators to manage the portfolio of bus travels).

In [Viação Águia Branca/JCA](#), CADE analysed a joint venture between two bus travel companies that aimed to create a digital platform to provide bus travel services, named BusCo. CADE noted that BusCo had a 'dual nature': on the supply side, it offered B2B solutions for bus travel companies to reduce costs and originate customers (the market for strategic operation of bus travel), while on the demand side it offered B2C solutions for passengers (the market for bus travel services). The merger was conditionally approved with the imposition of remedies due to the high concentration in the market for bus travel services on routes where Viação and JCA horizontally overlapped; the risk of coordination between Viação and JCA; and the risk of exchange of sensitive information.

The [constitution of a joint venture](#) among Brazil's top five banks to create a new credit bureau was approved conditional on several non-discrimination obligations that would secure access to the banks' credit data to third-party credit bureaus, as well as enable clients to provide data to more than one bureau.

Law stated - 26 julho 2024

UPDATE AND TRENDS

Recent developments and future prospects

What are the current key trends, legislative and policy initiatives, recent case law developments and future prospects for the enforcement of competition law in digital markets in your jurisdiction?

There is increasing interest from the Federal Competition Agency (CADE) in discussing competition enforcement in digital markets. CADE has been promoting events and sponsoring staff reports to create knowledge and keep up to speed on discussions in foreign jurisdictions.

In real-world cases, CADE has taken a careful approach, avoiding speculative theories of harm. Instead, CADE has conducted detailed investigations to collect extensive market data before issuing a decision. Under this approach, CADE has shown concerns about avoiding undue intervention that could chill innovation.

In any event, there are ongoing discussions in Congress involving Bill of Laws proposing ex ante regulation of digital platforms. In April 2024, CADE submitted a [contribution](#) to a public consultation on the regulation of digital platforms organised by the Ministry of Finance, defending the need for ex ante regulation to complement the Competition Law and expanding its mandate by including a unit dedicated to digital markets.

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