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Comments to the Brazilian Ministry of Economy's
consultations on Digital Platforms Regulation

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Summary

With the purpose of contributing with the Ministry of Economy’s consultations on the regulation of digital platforms (Consultations No. 1, from the Secretariat of Economic Reform of the Ministry of Economy, published in the National Gazette on January 19, 2024), I provide detailed explanation about the existence of both legal and economic reasons that justify not adopting new legislation, nor changing the legal framework in force to regulate digital platforms in Brazil.

First, I demonstrate that the Brazilian antitrust authorities, notably the Administrative Council for Economic Defense (henceforth “CADE”), already have the necessary legal powers and technical toolkit to address the potential competition concerns that arise in digital markets. Second, I emphasize that adopting an *ex ante* regulation of digital markets in Brazil in this moment is highly unrecommended, given the risks of stifling innovation and discouraging investments by digital companies to allocate resources towards the Brazilian economy with the aim of delivering superior products and services to consumers – an opposite effect of what antitrust policy pursues.

I. Introduction

Governments' debate on the regulation digital platforms to prevent violations of regulations pertaining to content moderation, competition, and data protection has been increasing. Legislative initiatives have been enacted or discussed in several jurisdictions, including the Digital Markets Act (henceforth "DMA") in the European Union, the Digital Markets, Competition and Consumers Bill (henceforth "DMCC") in the United Kingdom, the new Section 19a of the Competition Act in Germany (*Gesetz gegen Wettbewerbsbeschränkungen*, henceforth "GWB"), the Act on Improving Transparency and Fairness of Digital Platforms in Japan (henceforth "TFDPA"), the Fair Online Platform Intermediary Transactions Act in Korea ("Fair Platform Act"), among others.

Brazil does not depart from such discussion, especially with respect to the competition policy's standpoint. In a similar attempt of its foreign peers, the Brazilian Congress is currently discussing a bill to regulate digital platforms (Bill No. 2768/2022). Following public consultations promoted by the Brazilian Congress, I provided comments on the referred bill, having reasserted that (1) adopting *ex ante* antitrust regulation on digital markets in Brazil is not necessary at the moment, and would be troublesome, given the risks of hindering innovation, and making consumers worse off; and (2) yet, even if new regulation is to be adopted, the wording of Bill No. 2768/2022 needs reform.¹ The present call for contributions of the Ministry of Economy is, thus, timely, and constitutes another evidence of this same regulatory context.

On the one hand, those in favor of implementing specific rules to regulate *ex ante* digital platforms argue that the markets where they operate have unique characteristics that require a preventive intervention by authorities through the issuance of norms that govern businesses' practices. On the other hand, one cannot ignore that digital markets are very dynamic, and that incentives to innovation should not be impaired. Even those that sympathize with *ex ante* regulation recognize that. CADE's Department of Economic Studies (henceforth "DEE") conducted a thorough review of reports written worldwide on the matter, including reports issued by competition authorities from Australia, the Netherlands, Portugal, France, Germany, Mexico, the United Kingdom, Canada, India, Europe and Japan, in addition to non-governmental bodies, including the Stigler Center for the Study of the Economy and the State of the University of Chicago.² DEE found that the reports do not address certain relevant issues, and stated that deeper assessment on the following topics is required: (1) comprehending how creating a specific "digital markets regulator" would affect markets' competitive dynamics, and what would be the inherent risks of such approach, including private companies' influence over regulators; (2) delimitating the scope of work of a potential new regulator, given the risks of creating a "super-regulator" with excessive powers; (3) how to apply regulation on countries with

¹ See, for discussion, Rafael Parisi, "The Regulation of Competition in Brazil: Comments on the Digital Markets Law Bill (PL 2768/2022)", (The George Washington Competition & Innovation Lab, January 6, 2024), <https://www.gwucic.com/post/the-regulation-of-competition-in-brazil-comments-on-the-digital-markets-law-bill-pl-2768-2022-1>

² DEE, "Concorrência e mercados digitais: uma revisão dos relatórios especializados", (2020), <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2020/documento-de-trabalho-n05-2020-concorrencia-em-mercados-digitais-uma-revisao-dos-relatorios-especializados.pdf>

different stages of development; (4) the beneficial effects of price discrimination (reports focus only in the harmful effect, ignoring its potential pro-competitive impact); (5) several reports criticize the criterion currently deployed to assess predatory pricing, but they give no suggestions on what more adequate criterion would be; (6) although reports defend incorporating potential competition into the antitrust scrutiny, they lack proper guidance on how competition authorities could effectively do it in actual cases; and (7) even though the reports describe how digital markets can negatively impact innovation, they do not take into account the substantial investments digital platforms, especially dominant platforms, undertake in innovation, and how new regulation would affect these investments.

The Organisation for Economic Co-operation and Development (OECD) organized the Global Forum on Competition in December 2020, where it discussed, among other topics, the main types of anticompetitive conducts that might occur in digital markets, the unique traits of these markets, and the strategies used by authorities across the globe to address these challenges.³ Following an extensive examination and consultation with several member organizations, including Brazil, the OECD concluded that "aggressive enforcement lacking economic theories of harm or failing to account for the risk of over-enforcement may ultimately inflict harm upon the very consumers it was intended to safeguard." Furthermore, the OECD found that the majority of countries concurred that effects-based analysis should be employed rather than outright prohibitions, and that "actions that discourage innovation should be avoided." The OECD additionally observed that although digital markets exhibit a unique combination of characteristics that may require some modification, the foundational theories that generate competition concerns in these markets are generally consistent with those that have been validated in any other market. As a result, the OECD concluded that "a fundamental reevaluation of abuse of dominance theories" is not required.

II. Sufficiency and adequacy of Brazil's current antitrust tools

By means of its antitrust authorities, notably CADE, Brazil has been actively addressing the market failures that may emerge in the digital economy, mitigating any concern of an alleged inactivity. Article 170 of the Brazilian Federal Constitution of 1988 stipulates that the "economic order" of Brazil shall be established on the foundation of "free enterprise" and regulated in accordance with the following principles: (i) national sovereignty; (ii) private property; (iii) the social function of property; (iv) free competition; (v) consumer protection; (vi) environmental defense; (vii) the mitigation of regional and social disparities; (viii) the endeavor to achieve full employment; and (ix) preferential treatment for small enterprises.

By virtue of Law No. 12,529/2011 (codified as the Brazilian Competition Act), the Brazilian System for Competition Defense (SBDC), comprising CADE and the Secretariat of Economy Monitoring of

³ OECD, "Abuse of Dominance in Digital Markets: Summary of Discussion", (OECD Global Forum on Competition, December 8, 2020), [https://one.oecd.org/document/DAF/COMP/GF\(2020\)8/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2020)8/en/pdf); See also OECD, "Abuse of Dominance in Digital Markets: Background note by the Secretariat", (OECD Global Forum on Competition, December 8, 2020), [https://one.oecd.org/document/DAF/COMP/GF\(2020\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2020)4/en/pdf).

the Ministry of Economy, was instituted. The law also entrusted CADE, a federal adjudicative agency associated with the Ministry of Justice, with the duty of ensuring adherence to the Constitutional principles that serve as the foundation of competition policy and law in Brazil. CADE executes its duties through three different fronts, namely: (1) merger control (commonly referred as the preventive, “market structure control” function); (2) anticompetitive conducts investigations (commonly called as “conduct control” function), and (3) its advocacy role. These roles are applicable to markets that are regulated by sectoral agencies (e.g., telecommunications, infrastructure, health) and to markets that are not.

With respect to digital markets, CADE has undertaken several merger reviews, and multiple investigations to determine whether anticompetitive practices exist in digital markets, as the Ministry of Economy’s call for contributions itself points out. Between 1995 and April 2023, CADE assessed 233 mergers involving digital markets. 96% of the cases (224) were approved without restrictions, while in only three cases (1.3%) CADE imposed any sort of restriction (the other cases were closed without a decision on its merits).⁴

With regard to merger control, the current turnover criterion for mandatory notification of transactions to CADE deserves revision. To the contrary to what this call for contributions suggests, the need for reform is not a result of a failure to capture non-notified mergers, but precisely the opposite: too many mergers are being notified, draining CADE’s resources with simple cases that should not be the focus of the Brazilian antitrust authority’s workload.

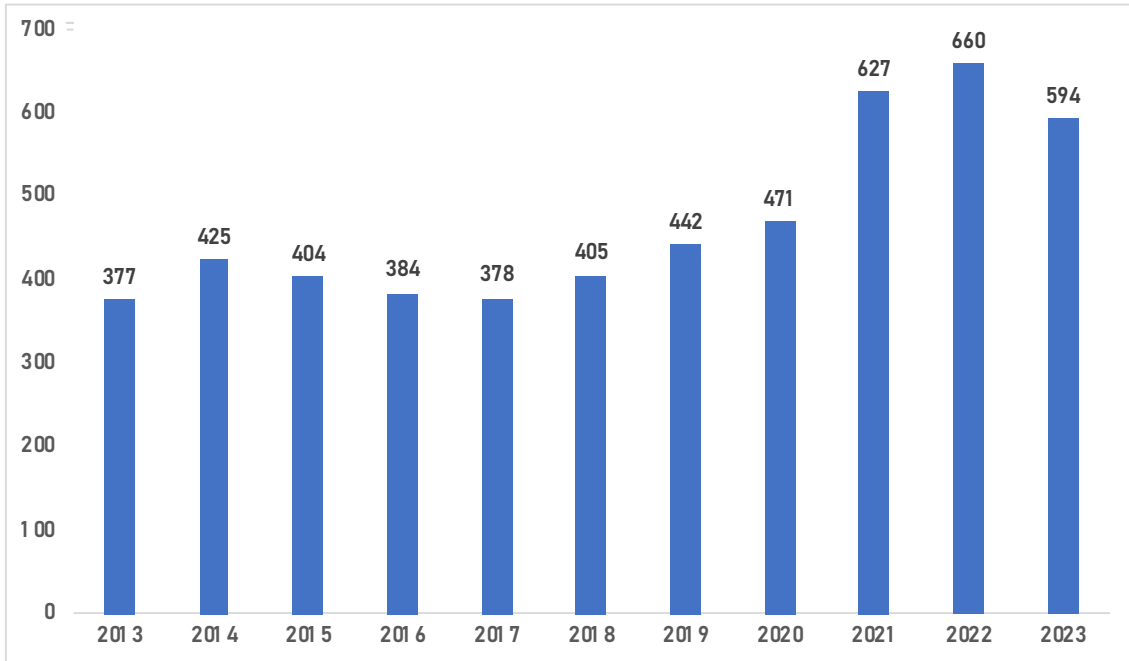
The current criterion (minimum turnover of R\$750 million for one of the economic groups involved in the deal, and minimum turnover of R\$75 million for the other group) was set twelve years ago, pursuant to the Joint Ministerial Ordinance No. 994, of May 30, 2012. As it goes without saying, Brazil faced severe inflation since then. Consequently, such thresholds are in real, economic terms significantly lower than in 2012. In fact, they have currently almost half of the value they had in 2012. According to the Brazilian Institute of Geography and Statistics (henceforth “IBGE”), the cumulated inflation from May, 2012, to January, 2024, amounted 96.16%. Hence, the figures of R\$750 million and R\$75 million in 2012 correspond currently to R\$1,471 million, and R\$147 million, respectively.⁵ Consequently, a higher number of simple, non-problematic deals have been notified to CADE in the last decade. CADE, by its turn, is facing the situation of having to dedicate its limited resources to assess a higher number of smaller, non-concerning transactions, while it should be focusing its resources in solving more complex cases. Corroborating this conclusion, data shows that 594 mergers were notified to CADE in 2023, an increase of 58% in comparison to the number of transactions that were notified in 2013 (the first full year with the current turnover thresholds in force):⁶

⁴ Brazil, Consultations No. 1, from the Secretariat of Economic Reform of the Ministry of Economy Ministry of Economy, (January 18, 2024), <https://www.gov.br/fazenda/pt-br/assuntos/noticias/2024/janeiro/arquivo/tomada-de-subsidios-sre-plataformas-digitais-8012024-1.pdf>.

⁵ IBGE, IPCA Inflation Calculator (accessed February 13, 2024), <https://www.ibge.gov.br/explica/inflacao.php>.

⁶ CADE, Annual Reports (accessed February 13, 2024), <https://www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes-institucionais/anuarios-do-cade>.

Figure 1: No. of mergers notified to CADE per year⁷



A more concerning factor is the fact that CADE has been increasingly deploying resources in fast-track cases-that do not come even close to triggering concerns- *vis-à-vis* cases that go through the non-fast proceeding. In addition to consuming CADE’s limited resources, the current turnover threshold increases companies’ costs by requiring them to notify non-problematic mergers and to wait for the antitrust authority’s approval before closing the transaction.⁸ Fortunately, the fact that CADE has been able to efficiently analyze mergers in shorter timeframes partially mitigates these costs. In 2022, CADE took on average 34.5 days to review a merger, taking an average of 21.4 days to analyze fast-track cases, and 125.6 days to decide on non-fast track cases. In 2023, the agency took only 21.5 days to analyze cases on average (a 38% decrease in comparison to the previous year), 12.6 days to conclude fast-track cases and 116.7 days to conclude non-fast track cases⁹. In addition to what the historical data shows, CADE’s has been developing further initiatives with the goal of expediting the time required for merger review. An example is the recent creation of an electronic system to standardise and to facilitate merger

⁷ For 2017, the graph shows the number of merger investigations concluded by CADE, given that no public registries on the number of notified deals were found.

⁸ Valor Econômico, “Cade deve atualizar critérios de faturamento, diz estudo”, (September 28, 2023), <https://valor.globo.com/legislacao/noticia/2023/09/28/cade-deve-atualizar-criterios-de-faturamento-diz-estudo.ghtml?GLBID=14f2d572c0a74e4b4e7ecd344904963e64f73756962796447764478665370425f71424436576e58586137783446416b57355333796c707933344a574f4b78456a634a69655442683345437458396a4f5663796a6430766e347179364667655741705f62496b413d3d3a303a7532316e6a7764696d6f676c7663326e626c7030>.

⁹ CADE, Annual Reports (accessed February 13, 2024), <https://www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes-institucionais/anuarios-do-cade>.

forms' filing by parties ("e-Notifica" system).¹⁰ It should be noted that the Brazilian Congress raised this same concern within the enactment of the Law No. 12529/2011 and saw on the turnover notification criterion an issue of the previous antitrust act that had to change. According to the legislative discussions pertaining to the Bill No. 3937/2004, which resulted in the current Brazilian Competition Act, the previous antitrust statute, Law No. 8884/94, had to be adjusted, given that with the notification criteria in force back then, there was "a very large number of merger notifications that have no impact on competition".¹¹

Similar discussion took place in Turkey, where the same turnover thresholds were in force from 2013 to 2022, when the Turkish Government decided to adjust them in attention to the high inflation rates of the Turkish Lira (TRY) in such period.¹² We suggest that authorities take an analogous approach in Brazil, increasing the minimum turnover requirements, so that CADE can shift its resources from simpler deals to more complex transactions that certainly require more attention. It is worth highlighting that this issue is not exclusive of digital markets and applies to deals pertaining all industries, consider that the current turnover thresholds do not make any distinctions with the different sectors of the economy. CADE has the expertise, legal powers and technical toolkit to conduct merger investigations, including in digital markets. But, considering that resources are limited, it goes without saying that resources should target the most complex, problematic cases, instead of the simpler ones.

Critics of the current turnover criterion suggest that some digital companies, although important for the markets where they operate, do not earn high revenue and, thus, could fall outside the thresholds that the Competition Act currently prescribes. Hence, they argue that authorities should other criterion not related to revenue, such as the transaction value. However, this parameter is also not immune to criticism. One can flag three important issues. First, creating such criteria would require authorities to draw a line to decide what an adequate cap for transaction value is. This decision could be problematic, considering that "there is a fine line between introducing a transaction value threshold which is too low and captures too many transactions and one which is too high and does not capture enough"¹³. Second, mergers often do not encompass a high transaction value, despite being relevant for the competitive landscape of a certain market. For instance, joint ventures or other types of associative agreements commonly do not involve one of the parties paying the other and would fall outside the transaction value parameter. Third, some transactions are designed and materialized via alternatives

¹⁰ CADE, "Cade desenvolve sistema que automatiza notificação de atos de concentração", (November 16, 2023), <https://www.gov.br/cade/pt-br/assuntos/noticias/cade-desenvolve-sistema-que-automatiza-notificacao-de-atos-de-concentracao>.

¹¹ Brazil, Bill No. 3937/2004, (July 7, 2004), https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=233311&filename=PL%203937/2004.

¹² White & Case LLP, "Significant Changes to the Turkish Merger Control Rules and Procedure", (March 8, 2022), <https://www.whitecase.com/insight-alert/significant-changes-turkish-merger-control-rules-and-procedure>.

¹³ Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, "Competition Policy for the Digital Era", (2019), <https://data.europa.eu/doi/10.2763/407537>, p. 114.

types of payment that may make a proper assessment of transaction value difficult, including debt transferring and stock trades.

Another suggestion by the ones that advocate for legislative reform would be to adopt different criterion depending on the sector or on the characteristics of the markets involved in the transaction. In this sense, specific criterion could be adopted only to digital companies, and not to the other sectors of the economy. Although in theory this definition could sound legit, in practice this approach would be a very challenging task, considering the discretion that one may adopt to define a firm as belonging to a certain sector or to characterize markets in a certain way, leading to the existence of gray areas that would affect legal certainty.¹⁴

Therefore, within the existence of doubt on what a more adequate criteria would be, a change in the current legislation in this regard seems foolhardy. Even considering the limitations of the possible criterion, including turnover and transaction value thresholds, the Brazilian Competition Act in force allows CADE to request the filing of any merger that does not meet the current turnover thresholds within one year of their closing (see Article 88, §7º).

Ex post (post-consummation) merger control is highly discouraged, given the known difficulties in pursuing “deals to be undone” once merging firms already started integrating its businesses. Law No. 8,884/1994 – the previous, no longer in force Competition Act – demonstrated that and the new, current act gladly corrected this issue by instituting the *ex ante* merger control regime as a rule. Be that as it may, some mergers have been gaining public awareness very easily and quickly, often even before the end of the negotiations, allowing CADE to act promptly in a way to mitigate concerns, as it occurred in *Facebook/Cielo*.¹⁵ However, the application of Article 88, §7º, remains an exceptional tool. CADE deployed such initiative in only three cases from 2013 to 2023, namely, in *Guerbert/Mallinckrodt*¹⁶, *SM/All Chemistry*¹⁷, and *Sacel/Prosegur*^{18, 19}.

As regard anticompetitive conducts, from 2011 to April, 2023, CADE initiated 23 investigations against digital platforms, notably pertaining to exclusivity agreements and other types of abuse of dominance. Notable illustrations consist of the following:

¹⁴ Id.

¹⁵ CADE, APAC No. 08700.002871/2020-34 (Cielo S.A. e Facebook Inc.) <https://www.gov.br/cade/pt-br/assuntos/noticias/cade-revoga-suspensao-de-parceria-entre-facebook-e-cielo-para-pagamentos-por-whatsapp>.

¹⁶ CADE, APAC No. 08700.009828/2015-3210 (Guerbert Produtos Radiológicos Ltda. e Mallinckrodt do Brasil).

¹⁷ CADE, APAC No. 08700.006355/2017-83 (SM Empreendimentos Farmacêuticos S.A. e All Chemistry do Brasil Ltda.).

¹⁸ CADE, APAC No. 08700.005079/2019-06 (Sacel-Serviços de Vigilância e Transporte de Valores Eireli e Prosegur Brasil Transportadora de Valores e Segurança S.A.).

¹⁹ Bruno Renzetti, and Carolina Saito da Costa, “Comentários ao Artigo 88, §7º, da Lei Nº 12.529/2011”, (March 28, 2023), <https://ssrn.com/abstract=4403168>

- *Google Adwords*²⁰: In this case, CADE reviewed Microsoft's (plaintiff) claim that Google had abused its dominant position by imposing abusive clauses in agreements with advertisers that prevented them from transferring data from Google's platform to competing platforms, including Microsoft's Bing. According to the plaintiff, such alleged conduct was restricting competition by preventing multi-homing. However, the Tribunal of CADE rejected the claim and dismissed the case due to lack of evidence that Google had impaired competition. CADE conducted an in-depth review of the agreements governing the relationship between competing platforms and advertisers, and concluded that the clauses of Google's contracts had reasonable commercial rationale and were no different from the clauses other platforms had with their commercial partners. In addition, CADE adopted an effects-based approach and found no evidence of negative effects of Google's action in the market.
- *Google Shopping*²¹: this investigation assessed whether Google was favoring its own shopping platform (Google Shopping) by displaying it in privileged positions (e.g., first page; top position; graphical emphasis) in search results in detriment of rivals' shopping platforms, including Buscapé and Bondfaro (the plaintiffs). CADE found that the practice presented efficiencies and found no evidence of harmful effects to competition, and dismissed the case. CADE also rejected the plaintiffs' claim that Google had engaged in other anticompetitive behaviors, including (1) refusal to supply (refusal to allow competitors to place their price-comparison engines on Google's platform); (2) tying (allowing rivals' price-comparison engines to appear on Google's platform only if such competitors provided strategic information on their services); (3) predatory innovation (changing technical elements to restrict competition). CADE's Tribunal asserted the likelihood of hindering innovation if the investigated practice was prohibited, and that type-one errors (false positives) were very likely in this case.
- *Bradesco/Guiabolso*²²: In this investigation, CADE assessed whether the bank Bradesco had deliberately prevented clients of the platform Guiabolso from sharing financial information. According to the plaintiff, this practice was preventing the development of a new, innovative service of sharing consumers' financial data at their own discretion to provide them customized solutions. The case was concluded with the execution of a Cease-and-Desist Commitment (TCC) between CADE and the defendant.
- *Online Travel Agencies' MFN clauses*²³: CADE investigated whether certain online travel agencies (OTAs), including Expedia, Decolar.com, and Booking.com, were imposing most-favored nation clauses (MFNs) in its agreements with hotels, forbidding them to offer cheaper

²⁰ CADE, Administrative Proceeding No. 08700.005694/2013-19, Rapporteur Commissioner Mauricio Bandeira Maia, ruling on June 25, 2019.

²¹ CADE, Administrative Proceeding No. 08012.010483/2011-94, Rapporteur Commissioner Mauricio Bandeira Maia, ruling on July 2, 2019.

²² CADE, Administrative Proceeding No. 08700.004201/2018-38, TCC signed on October 7, 2020.

²³ CADE, Administrative Inquiry No. 08700.005679/2016-13, case closed on July 28, 2021.

prices in other sales channels, including the hotel's own websites. The case also resulted in the execution of a TCC, whereby the defendants agreed to stop adopting MFNs.

- *iFood/food delivery exclusivity clauses*²⁴: in this ongoing investigation, Rappi, a digital marketplace that unites supermarkets and restaurants to consumers, claims that its rival iFood is abusing its dominant position by forcing exclusivity over restaurants. According to the plaintiff, this conduct is impairing Rappi's ability to expand into the market, preventing clients to do business with the platform. CADE and the defendant executed a TCC, whereby iFood committed to limit the use of exclusivity agreements with restaurants upon to certain, pre-established caps in each major Brazilian city, and to time deadlines. The compliance to such commitments is still ongoing.
- *Gympass/fitness gyms platform exclusivity clauses*²⁵: similarly, in this investigation CADE assessed whether Gympass, a company that bundles different gym memberships into a single subscription, was obliging gyms to remain exclusive to it, preventing them from being available to competing platforms. The case also resulted in a TCC.

Despite this record of activity, it is crucial to emphasize that Brazil does not uphold registries of cases concerning abuse of dominance that led to sanctions to digital platforms. This stands in stark contrast to the situations in other legal systems, including Europe. In attention to the topics the Brazilian Ministry of Economy's call for papers mentioned, two noteworthy conclusions can be inferred from these facts:

1. The lack of *ex ante* regulation on digital platforms in Brazil has not prevented CADE from carrying its lawful mandate to investigate digital markets, indicating that no legislative reform is required in this regard;
2. The extensive enforcement record provides support for the argument that the regulation of digital markets ought to be moderated, considering that (i) there was no evidence so far of market failures in digital markets that justified CADE to impose sanctions in actual cases; and (ii) digital platforms often generate procompetitive effects, instead of harmful effects to social welfare.

With respect to the criterion for concluding that a firm is dominant in a given market, Article 36, §2º, of the Brazilian Competition Act, establishes that “[a] dominant position is presumed whenever a company or group of companies is capable of altering unilateral or coordinating conditions or when it controls 20% (twenty percent) or more of the relevant market, and this percentage may be by CADE for specific sectors of the economy.” This wording enables CADE to duly identify market power in any industry, including in digital markets. More importantly than the 20%-market share threshold, which could be considered as being debatable, given that other jurisdictions adopt different thresholds

²⁴ CADE, Administrative Inquiry No. 08700.004588/2020-47, TCC signed on February 8, 2023.

²⁵ CADE, Administrative Inquiry No. 08700.004136/2020-65, TCC signed on December 1, 2022.

(for instance, both the European Union and the United Kingdom adopt a 30%-market share threshold), the first part of the referred provision has solid economic foundation, and is aligned with the definition of market power, leaving room for CADE to define a company as being dominant even if the 20%-market share threshold is not met (“ability of altering market conditions unilateral or collectively”). In addition, the last part of the provision also allows discretion for CADE to alter the 20% threshold to other market share level whenever it sees necessary for specific sectors. Therefore, the current legislation does not require alteration to identify market power of digital platforms.

Likewise, as regards investigating anticompetitive conducts, Articles 36 and 37 of the Brazilian Competition Act already grant CADE the powers to capture all conducts that may harm competition in digital markets, including (1) discrimination (with or without the use of algorithms); (2) impediments to interoperability between platforms; (3) unreasonable use of data to engage in anticompetitive behavior; (4) favoring a platform’s own product in detriment of products from competitors (commonly referred as “self-preferencing”); among others. In fact, CADE has already investigated alleged occurrences of these conducts in digital markets, as highlighted above. Article 36 of the Competition Act stipulates that “any act, regardless of fault, and regardless of its form, that produces or can potentially produce the following effects shall constitute an infringement to the law: (1) limit, or harm competition; (2) dominate a relevant market, except when this dominance derives from a higher efficiency of the firm over its rivals; (3) arbitrarily elevating profits; and (4) abuse of a dominant position”. Moreover, Article 37 provides a mere suggestive, and not a comprehensive list of conducts that shall be deemed illegal from an antitrust perspective. These provisions demonstrate that the Brazilian current statute lacks the need for change in order to identify, and to act on unlawful practices that digital platforms should commit.

The Brazilian Competition Act grants CADE the legal foundation of its mandate, but CADE’s analytical methodology is a process of continuous learning and development. Methodologies are tested, refined and improved at the extent that the authority builds up on its knowledge capabilities. Despite what the call for contributions suggests, considering the broad provisions of the Brazilian Competition Act, CADE has sufficient discretion to polish its analytical framework without the need for changing the law. Therefore, even if one considers that the assessment toolkit used for traditional (brick-and-mortar) markets needs to be altered to investigate digital markets, no new regulation is required to proceed with such alteration. CADE’s case law is an evidence that the antitrust authority already possesses the legal powers and deploys the analytical tools to execute its legal mandate.

In accordance with its advocacy obligations, CADE has conducted a number of studies concerning digital markets, provided dissenting opinions on legislative proposals, and coordinated a number of awareness-raising events concerning the relationship between the digital economy and competition policy in Brazil. CADE has also actively participated in the international agenda, having issued

contributions to OECD meetings, worked jointly with BRICS countries to issue reports on the digital economy, among other initiatives.²⁶

In addition to the antitrust authorities' role, digital markets are subject to the regulatory oversight of other governmental bodies within their scope of action. In this regard, consumer protection authorities have the power to intervene whenever digital platforms engage in unlawful behavior, pursuant to Law No. 8,078/1990 (the Brazilian Consumer Protection Code). Likewise, the Data Protection Agency (ANPD), governed by Law No. 13,709/2018 (the Brazilian Data Protection Act), the Brazilian Securities Commission (CVM), and the Brazilian Central Bank (BACEN), also have regulation that impact digital platforms' business.

Moreover, Brazil has eleven sectoral regulatory agencies, including the Telecommunications Agency (ANATEL). Although, the regulatory agencies and CADE have complementary, yet distinct jurisdictions, by virtue of Law 13,848/2019, given their profound expertise in their specific sectors, the coordination between antitrust authorities and sectoral agencies plays a vital role in fully securing the effectiveness of competition policy and fostering an environment of unrestricted trade in Brazil. Current levels of such collaboration are high and needs to be increasingly encouraged. The same to collaboration with foreign antitrust agencies in actual cases, and in international forums, including the OECD, and the International Competition Network (ICN).

Combination of both anticompetitive investigations and merger control is important for enforcing competition policy in Brazil. These functions have different natures: one is prospective, prognosis (merger control), while the other is repressive (conduct cases). They are appropriate and sufficient to allow CADE to act when required to remedy a market failure while not risking diminishing innovation. They are also flexible enough to identify economic agents that are abusing their dominant positions, as well as situations that may lead to an increase of market power that harm consumers.

The adoption of *ex ante* norms similar to the DMA in Brazil fails to take into account the country's legal framework singularities, as well as the institutional design that has allowing CADE to successfully exercise its mandate. The DMA, DMCC, and the new Section 19a of the GWB, the TFDPA, and the Fair Platform Act in Korea, diverge in a range of aspects, including in terms of attributing either an *ex ante* or an *ex post* nature to some obligations.²⁷ This shows that there is no consensus on what the best approach is, and that there is no indication that these approaches will work. Brazil should prioritize an effects-based instead of *ex ante* regulation. This is the movement that has been occurring in the country with respect to unilateral conduct (not collusive, such as cartels, which are analyzed by its form without

²⁶ See CADE, "BRICS in the Digital Economy: Competition Policy in Practice", (September 18, 2020), <https://www.gov.br/cade/en/matters/news/cade-releases-report-on-digital-economy-during-the-vi-brics-competition-conference>; and CADE, "BRICS in the Digital Economy: Competition Policy in Practice, 2nd Report by the Competition Authorities Working Group on Digital Economy", (February 2, 2024), <https://www.gov.br/cade/pt-br/assuntos/noticias/cade-lanca-segundo-relatorio-sobre-economia-digital>.

²⁷ Victor Oliveira Fernandes, "Lost in translation? Critically assessing the promises and perils of Brazil's Digital Markets Act proposal in the light of international experiments", (Computer Law & Security Review, Volume 52, 2024), <https://www.sciencedirect.com/science/article/pii/S0267364924000049>.

the need of estimating its effects) and enacting a dubious *ex ante* regulation on digital platforms would contradict this trend.²⁸ The fact that we do not know yet if the regulations of other jurisdictions will serve the best interests of consumers, the best approach is to study more thoroughly the examples of other jurisdictions before enacting a law in Brazil that can be ineffective to its purpose of preserving competition, in addition to raising costs for companies, and to decreasing product innovation. In this moment, the risks of adopting a new regulation are higher than the risks of waiting to eventually design better rules (if required) in the future. The benefits of adopting analogous regulation in Brazil in this moment are very questionable, especially vis-à-vis the acknowledged risks.

In conclusion, there is no need for the creation of a new body, nor legislative changes to regulate digital platforms from an economic and competition standpoint. CADE's large experience in conducting investigations in the digital markets, including its investigations on merger control and on anticompetitive practices, allied with the legal powers the current Brazilian legal framework confers to the antitrust authority in Brazil, demonstrates that the legislation in force and the toolkit available at the moment are enough to mitigate competition concerns related to digital platforms in Brazil.

III. The risks of adopting digital platforms *ex ante* regulation in Brazil

Innovation plays a central role in markets' competitive landscape. Investments in the development of newer products and services, and more efficient production processes are the driver for companies to obtain legit competitive advantage over its rivals and thrive. Digital markets are highly innovative. Technology companies worldwide have been playing an increasingly greater role in the economy. They have been leading investments in research and development (R&D), engaging with collaboration with governments to assist in public policies, hiring considerable workforce, including skilled workers, and have been pioneering research initiatives. The Brazilian economy is a proof of that.

With a population of about 220 million people and with the world's fifth largest territory, Brazil has been developing a vibrant and emerging tech sector. The country represents 36.5% of all Latin American information technology market and occupies the 12th position in the worldwide ranking.²⁹ Several segments are steadily increasing, as is the of artificial intelligence (AI), which attracted investments of R\$1 billion in Brazil in 2023 (an increase of 33% in comparison to the previous year).³⁰ The technological boost in the country derives from the commitment of both public policies and private sector's initiatives. Examples from the government's side include the National Plan for the Internet of Things (Decree No. 9,854, of June 25, 2019) and the Brazilian Strategy of Digital Transformation ("E-Digital").³¹

²⁸ See, for discussion, Ademir Pereira Junior, "Regulação de plataformas digitais e falhas do PL 2768", (February 2, 2024), <https://www.jota.info/opiniao-e-analise/artigos/regulacao-de-plataformas-digitais-e-falhas-do-pl-2768-02022024>.

²⁹ International Trade Administration, "Brazil - Country Commercial Guide", (accessed on February 23, 2024), <https://www.trade.gov/country-commercial-guides/brazil-ict-information-and-communications-technologies-and>.

³⁰ Id.

³¹ Brazil, "Estratégia Brasileira para a Transformação Digital", (2018), <https://www.gov.br/mcti/pt-br/centrais-de-conteudo/comunicados-mcti/estrategia-digital-brasileira/estrategiadigital.pdf>.

With respect to the private sector, Google, TikTok, and Huawei are among the companies that have recently made public its intentions to deploy significant invests in Brazil in the near future in areas ranging from cable infrastructure, cloud services, developing scientific research initiatives and fostering entrepreneurship.³² Stimulating investments in industry-academic research is key in Brazil, considering that the country has lower levels of this type of cooperation in comparison to countries like France, Germany and Korea – these last two countries only now propose *ex ante* regulation on digital platforms, as mentioned earlier.³³ It is worth noting that the investments in Brazil are not exclusive from large multinational companies. In fact, between 2016 and 2022, the number of “unicorns” (start-ups worth more than \$1 billion) have gone from zero to 35 in Brazil, and several other Brazilian companies are on the verge of reaching this status.³⁴ Moreover, there are a number of local digital platforms that play a relevant role in the Brazilian economy, a factor that certainly differentiates Brazil from other countries, including from nations that are proposing *ex ante* regulation on digital platforms. After investing over R\$19 billion in Brazil in 2013, Mercado Livre, company ranked at the Top10 most innovative firms in the country, has recently announced that will place more investments in Brazil, with focus in its e-commerce distribution chain, and its electronic payment system.³⁵ Similarly, Magazine Luiza, another important firm in the Brazilian retail sector, communicated new investments focused on technology, including cloud services.³⁶ Importing into Brazil foreign prototypes of regulation would ignore the specificities of the Brazilian digital economy.

In a recent review, the OECD posited that “Brazil has made significant progress over the past two decades in modernizing its policies and institutions to support R&D and innovation”.³⁷ Yet, there is plenty more room for development. According to OECD, despite being Latin America’s top spender, Brazil spends less than most of OECD member countries in R&D: it spent 1.3% of its gross domestic product (GDP) in 2017, while China invested approximately 2.5% of its GDP. Moreover, in comparison to its peers, the participation of the private sector in R&D investments is low in Brazil: it

³² See Forbes, “Google reafirma compromisso com Brasil e prevê R\$6bi em investimentos”, (June 14, 2022), <https://forbes.com.br/forbes-tech/2022/06/google-reafirma-compromisso-com-brasil-e-preve-r-6-bi-em-investimentos/>; Techloy, “TikTok expands its creator program to Brazil, Japan, and South Korea”, (September 14, 2023), <https://www.techloy.com/tiktok-expands-revamped-creator-fund-to-more-countries/>; and Valor Econômico, “Fatecs fazem parceria de inovação com Huawei”, (February 15, 2024), <https://valor.globo.com/empresas/noticia/2024/02/15/fatecs-fazem-parceria-de-inovacao-com-huawei.ghtml>.

³³ OECD (2020), “Going Digital in Brazil”, OECD Reviews of Digital Transformation, OECD Publishing, Paris, <https://doi.org/10.1787/e9bf7f8a-en>.

³⁴ Forbes “Dez startups brasileiras que podem se tornar unicórnios”, (March 6, 2023), <https://forbes.com.br/forbes-money/2023/03/dez-startups-brasileiras-que-podem-se-tornar-unicornios/>.

³⁵ See Exame, “Mercado Livre vai investir R\$19 bilhões no Brasil em 2023”, (March 16, 2023), <https://exame.com/invest/mercados/mercado-livre-vai-investir-r-19-bilhoes-no-brasil-em-2023/>; and Valor Econômico, “Veja as dez empresas mais inovadoras do país”, (August 1, 2023), <https://valor.globo.com/inovacao/noticia/2023/08/01/veja-as-dez-empresas-mais-inovadoras-do-pais-no-ranking-valor-inovacao-brasil-2023.ghtml>.

³⁶ Exame, “Magazine Luiza terá aumento de capital privado de R\$ 1,25 bi — com R\$ 1 bi garantido pelos Trajano”, (January 24, 2024), <https://exame.com/insight/magazine-luiza-familia-trajano-e-btg-pactual-vaocolocar-r-125-bi-no-caixa-da-varejista/p>.

³⁷ OECD (2020).

represents less than half of the total of investments, while in OECD economies businesses are the main source of R&D expenditure, with an average contribution of 62%.³⁸ Analyzing the main difficulties companies face in Brazil, a report by the World Bank highlighted the country's "unpredictable regulatory and legal system", among other factors that impose substantial costs on businesses and constitute the so-called "Custo Brasil" (Brazil Cost).³⁹ An erroneous regulation of the digital economy would put brakes on the progress that Brazil has been making.

IV. Conclusions

Therefore, considering the procompetitive effects that arise from digital platforms, it is imperative to exercise prudence when regulating digital markets in order to mitigate potential concerns. Inadequate regulation is foolhardy because it diminishes innovation. In essence, the utmost caution is necessary. Digital platforms and the markets where they operate are not identical, thus, creating *ex ante* rules to different digital markets is perilous. *Ex ante* regulation is suited to govern similar businesses, as it occurs with sectoral agencies' norms (e.g., ANATEL issues rules for telecommunications providers; ANTAQ govern port operators). But this is not the case of digital markets. The industry comprises a range of different businesses operations (e.g., social media is different to cloud computing services, which is different to search engines) that operate in markets with different characteristics. In case a regulation is to be put into force, not only the size of companies should be considered. More importantly, the characteristics of the markets where each economic agent operates needs to be taken into account. Market structure and its players, level of product differentiation, entry barriers, consumer behavior, switching costs, possibility of interoperability, are relevant characteristics to be examined. For instance, due to the absence of substantial entry barriers, the risk of market tipping may be high in some digital markets but low in others. Digital markets call for a case-by-case assessment to determine whether there are concerns with respect to a specific platform or to a business conduct.

CADE is well equipped to continue to act on the competition concerns that may arise in the digital markets, and the current Brazilian legal framework grants the antitrust authority the powers, and the discretion to do so, while enabling CADE freedom to refine its analytical methodologies.

Antitrust policy is about identifying market failures and addressing them. That is why more importantly than implementing specific rules to *ex ante* regulate digital markets is to investigate them through the lens of dynamic competition. Neither legislative alteration nor creating another regulator are required measures for that. Adopting an effects-based approach, instead of outright prohibitions is crucial for considering such dynamic approach to competition that the Brazilian digital sector requires.

Thank you for your consideration.

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³⁸ Id.

³⁹ World Bank, "The Brazil Competitiveness and Inclusive Growth Lab Report", (March 15, 2018), <https://www.weforum.org/publications/the-brazil-competitiveness-and-inclusive-growth-lab-report/>.

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