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ARTICLE

Brazilian Merger Policy in Digital Markets: What Can We Expect in 2025?

Juliana Oliveira Domingues

The Network Law Review is pleased to present you with a special issue curated by the Dynamic Competition Initiative ("DCI"). Co-sponsored by UC Berkeley and the EUI, the DCI seeks to develop and advance innovation-based dynamic competition theories, tools, and policy processes adapted to the nature and pace of innovation in the 21st century. This special issue brings together contributions from speakers and panelists who participated in DCI's second annual conference in October 2024. This article is authored by Juliana Oliveira Domingues, Professor of Law at the University of São Paulo, Former CADE Attorney General.

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Abstract: Brazil has engaged in extensive discussions regarding new approaches for reviewing mergers and acquisitions in digital markets. In 2024, the Secretariat for Economic Reforms at the Ministry of Finance (MF) introduced new proposals that reignited this debate. This article offers a brief history of these discussions and presents the reviews from 2024 while outlining expectations for 2025 in Brazil.

1. Introduction

The discussions surrounding competition and innovation over the past two decades have been exceptionally provocative, and it is important to incorporate the Brazilian perspective into this dialogue, particularly given the unique historical context of competition law in South American countries.

Brazil did not experience significant antitrust law enforcement until the mid-1990s. During that period, Brazil was undergoing a substantial economic

transformation, having dealt with price controls in the 1980s—a time when competition was largely ignored due to extensive state intervention in the economy.[1]

From the Brazilian perspective, particularly considering CADE's case law, there has been no evidence of over-enforcement related to digital markets. Since the implementation of Law 8884/94, an antitrust statute that coincided with Brazil's market opening and the economic changes driven by inflation control and trade liberalization, the Brazilian antitrust agency has consistently maintained a non-interventionist approach. This trend continues within digital markets, despite the transition from Law 8884/1994 to Law 12.529/2011.

According to Brazilian antitrust authority – the Administrative Council for Economic Defense (CADE) – approximately 84 percent of digital merger cases between 1995 and 2023 were assessed via its fast-track proceeding[2]. A significant portion of the cases reported to CADE were examined without significant competition concerns. CADE's case law illustrates that the competition authority embraces a model of "continuous regulatory dialogue" to offer ongoing guidance in dynamic market conditions.

Brazil has rapidly progressed in aligning with market regulations. It establishes itself as a prominent reference for antitrust enforcement in South America within a short timeframe. At the same time, authorities have adopted a more cautious approach to ensure that they do not impose unnecessary interventions in innovative markets.

Moreover, CADE has proposed the implementation of regulatory sandboxes to effectively address potential issues involving emerging Artificial Intelligence (AI)

[1] Past unsuccessful experiences, particularly during the 1980s, involved attempts to control prices, such as through price fixing, in a context of hyperinflation. For further details, se: BRAZIL. SENACON. Guia Prático de Análise de Aumentos de Preços de Produtos e Serviços. and DOMINGUES, Juliana Oliveira; GABAN, Eduardo M. *Antitrust Law*. 5th ed. São Paulo: Saraiva, 2024, p. 56. Additionally, refer to the BRAZIL National Consumer Secretariat's Technical Note No. 8/2020/CGEMM/DPDC/SENACON/MJ, available at: https://www.defesadoconsumidor.gov.br/images/SEI_MJ_-_11277339_-_Nota_T%C3%A9cnica.pdf. Accessed on December 16, 2024.

[2] CADE. DEE. (Department of Economic Studies). Cadernos do CADE. Mercados de Plataformas Digitais, 2023, p. 23. Available at https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/Caderno_Plataformas-Digitais_Atualizado_29.08.pdf.

technologies[3]. These sandboxes would facilitate the testing of such technologies within controlled environments, overseen by the relevant Brazilian authorities[4].

A significant challenge in the context of digital mergers is the definition of relevant markets. The ability to delineate or expand market boundaries will be a key factor to assessing market power and levels of concentration. Similarly, due to the innovative design of certain markets, the Brazilian authority is working to understand dynamic markets, as seen in the Naspers/Delivery Hero case.

2. A more dynamic approach: *Naspers/Delivery Hero* case

The novelty of specific business models, along with their potential to transform various industries and technologies, adds further complexity to market definition and competition analysis. For example, in the *Naspers/Delivery Hero* case (2018)[5], the online restaurant delivery segment posed unfamiliar challenges for the Brazilian competition authority, as the relevant markets had not been previously assessed by CADE.

This situation required analysis based on market tests and projections regarding the potential entry of new competitors. Although CADE ultimately approved the merger, the authority chose to monitor the future transactions of the acquiring parties due to the uncertain dynamics of the market and their dominant position within the segment. In its evaluation, the Brazilian antitrust authority adopted a dynamic approach, focusing on future and potential competition rather than sticking to a static perspective.

In recent years, the authority has generally taken a conservative approach, which entails refraining from market intervention in situations of uncertainty.

[3] One interesting approach to addressing the competitive risks associated with pricing algorithms used by small and medium-sized companies is the development of regulatory or antitrust sandboxes. This enforcement strategy has primarily been discussed in relation to pricing algorithms because these tools can offer significant pro-competitive benefits, such as more efficient and dynamic pricing. However, they can also pose competitive risks, particularly due to machine learning techniques that are still not well understood by regulatory authorities. See CADE. Presentation of CADE's contribution, within the scope of competition law, on bill 2,338/2023, which provides for the use of artificial intelligence, and nine other bills that are being processed in the appendix. Available at: https://cdn.cade.gov.br/Portal/assuntos/noticias/2024/Contribui%c3%a7%c3%a3o%20CADE%20PL%202338_final.pdf

[4] CADE. "Cade apresenta contribuições ao projeto de lei que trata de inteligência artificial". Available at: https://www.gov.br/cade/pt-br/assuntos/noticias/cade-apresenta-contribuicoes-ao-projeto-de-lei-que-trata-de-inteligencia-artificial.

[5] CADE. Merger case No. 08700.007262/2017-76. Naspers Limited, Rocket Internet SE, and Delivery Hero AG. Judged on March 2018.

Nevertheless, the Brazilian judicial system has undergone a tumultuous journey. It is essential to recognize that the decisions rendered by CADE are administrative and frequently subject to judicial review.

3. The Brazilian Legal System particularities

From a judicial perspective, one debated issue is the tendency of judges to overlook insights derived from the dynamic capabilities' framework. Discussions about the courts often highlight a gap in the basic understanding of the economic analysis of law and a mindset that shows little appreciation for consequentialism. It is essential to consider how the courts interpret agency decisions. In Brazil, there is a significant disparity between the number of antitrust cases under judicial review and those currently being investigated by the Administrative Council for Economic Defense (CADE). By the end of 2024, there were over one thousand CADE decisions being reviewed in various courts across different states in the country, with some cases dating back more than a decade.

It is important to highlight a turning point that emerged in March 2024, following several productive meetings involving key officials, including the Minister of the Attorney General's Office. PFE-CADE began an official and more strategic collaboration to enhance litigation efforts with support from the Federal Attorney General's Office. As a result, all cases in Brazil started to be handled simultaneously with other PGF bodies, combining their expertise to improve outreach at regional offices and enhance operational efficiency[6].

However, a significant challenge exists: Brazilian courts may lack the technical expertise necessary to adequately address regulatory and antitrust matters. This shortcoming raises concerns about their ability to effectively deal with issues related to innovation and dynamic competition. Thus, it is essential to develop strategies to bridge this gap, particularly in developing countries.

[6] PFE-CADE plays a pivotal role in judicial actions, particularly in meetings with judges, identifying priority cases, and proactively defining legal arguments and procedural strategies for the agency's core activities. This is in line with §1 of Article 2 of Ordinance No. 530/PGF/AGU. [...] Additionally, the agency's transition to align its operations with PGF and AGU regulations is critical. This change enables PFE-CADE to leverage the organizational and personnel resources of other PGF entities, enhancing its contentious actions within CADE processes. This integration contributes to i) improve outreach and effectiveness, ii) enhance procedural expertise, iii) closer relationships with judges and courts, and iv) develop better tools for procedural control and management. See: CADE. PFE-CADE. Boletim Informativo 4a Edição, 2024, p. 37. Available athttps://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/Boletim%20PFE_Cade/12.04.2024%20-%20Boletim%20PFE-CADE%20-%20N.1.2024.pdf,

For instance, my initial approach as CADE's Attorney General involved fostering close collaboration with the Superior Courts. This was achieved by organizing meetings, courses, and seminars tailored for key decision-makers within the judiciary. Additionally, federal attorneys have encountered significant knowledge deficits in competition law, which were addressed through classes offered at the School of the Attorney General's Office (EAGU), including programs aimed at combating bid rigging in public procurement.[7].

An additional initiative was the establishment of a cooperative relationship with the National Council of Justice – an institution that aims to improve the work of the Brazilian Judiciary –, culminating in a recommendation to enhancing the understanding of competition law and its implications[8].

Despite the seemingly foundational nature of these efforts, advancing discourse surrounding competition and innovation—especially within dynamic market contexts—necessitates comprehensive education for members of the judiciary and the Brazilian justice system regarding the role of CADE, the legal framework governing antitrust (Law 12,529/2011), and the various violations of the economic order. In many cases, a return to fundamental principles is necessary to promote a more proactive agenda that encompasses competition and innovation[9].

4. A new "wave" in Brazil

When discussing CADE's analysis of issues in the digital economy, it becomes clear that the authority tends to be risk-averse when addressing multi-sided and dynamic industries. While many cases do not reach concentration levels that would necessitate antitrust scrutiny, it is critical to find a balance.

This balance should ensure that antitrust enforcement effectively addresses competitive concerns without imposing excessive burdens or restrictions on digital platforms.

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[7] AGU. EAGU. Trilhas de Cartel em Licitação. Available at https://eva.agu.gov.br/course/index.php?categoryid=83.

[8] CNJ. Recommendation 135 from September 12, 2022. Available at: https://www.stj.jus.br/internet_docs/biblioteca/clippinglegislacao/Rec_135_2022_CNJ.pdf

[9] The National Council of Justice (CNJ) has established the National Innovation Plan in the Judiciary through Ordinance No. 379/2024. The primary goal of this document is to promote, guide, and support the implementation of the National Innovation Management Policy, which was outlined in CNJ Resolution No. 395/2021. This initiative aims to enhance the modernization and efficiency of the judicial system while strengthening the culture of innovation within its institutions.

Additionally, the emergence of a global movement aimed at reevaluating the methods and criteria for reporting mergers has drawn increased attention to these discussions in Brazil over the past year. The current administration is considering amendments to the competition law in Brazil to address perceived issues in the digital economy[10]. The Ministry of Finance (MF) released a report outlining its proposals.

The Secretariat for Economic Reforms (SRE from MF) report follows discussions regarding the regulation of digital markets and the technology sector, both internationally and within Brazil. The SRE/MF supports proposals aimed at improving the SBDC, including those already under consideration by the Brazilian government and Congress.

The main areas of the identified concerns include: (1) exclusivity and self-preferencing practices, (2) charging abusive prices to enter digital ecosystems, (3) excessive prices charged due to monopolistic positions, (4) killer acquisitions and leverage practices, among others.

Besides, the Ministry of Finance prepared a benchmarking study involving ten other jurisdictions. There was a public call for contributions that opened and closed in 2024. Notably, this call received 301 contributions from 72 participants with diverse backgrounds, with the most participants based in US, as illustrated in the graphic below:

[10] BRAZIL. Ministry of Finance. Available at: https://www.gov.br/fazenda/pt-br/central-de-conteudo/publicacoes/relatorios/sre/relatorio-plataformas-consolidado.pdf



The document comprises one hundred pages and primarily addresses the limitations of the Brazilian Competition Act (in Portuguese, known by the acronym LDC). Key topics include: (1) challenges in identifying market power, and (2) constraints related to the revenue (gross turnover) criteria for transactions submitted to CADE, particularly due to existing thresholds.

The document highlights several gaps in antitrust practice in Brazil, resulting from difficulties in incorporating and applying emerging theories of harm. It notes the infrequent application of preventive measures and the limited use of residual jurisdiction to evaluate mergers that do not satisfy the revenue (gross turnover) criteria.

Additionally, certain conclusions are identified as “general problems” inherent in antitrust systems and practices. These issues include the lengthy and costly nature of investigations, the necessity for clarity in the application of new theories of harm, and the use of traditional methodologies for digital platforms. The document also emphasizes the challenges associated with designing and monitoring effective remedies.

In response to these challenges, the document from the Ministry of Finance proposes the establishment of new rules that integrate traditional antitrust law with economic regulation. Effectively implementing these new powers necessitates

building capacity within the antitrust agency, and it was recommended to create a specialized unit focusing on digital markets within CADE[11].

5. The "short-blanket" dilemma and the cooperation bridges

The multi-billion-dollar question is: where will this budget come from? Establishing new capacities and creating a new unit within CADE will require additional funding, and so far, there has been no explanation of how to implement many of the proposed initiatives.

Additionally, the creation of a forum for cooperation between the antitrust authority and other federal agencies – including direct public administration bodies and regulators like the National Data Protection Authority (ANPD) – has been proposed. This idea seems more feasible. On multiple occasions, I advocated for this topic during my time as the National Secretary for Consumer Affairs[12], considering an innovative agenda focused on consumer protection in digital markets during the pandemic.

The official document also proposed further measures stemming from adjustments in soft law: (1) a review of CADE's guidelines, directives, and practices to continuously improve the identification and evaluation of competitive risks associated with digital platforms, including the incorporation of network and ecosystem analyses; and (2) a revision of CADE's merger filing form to include topics specific to digital markets. The document emphasized the importance of utilizing CADE's prerogative to require the filing of mergers whenever they pose potential

[11] Axis 1 of the document proposes legislative changes to enhance competition among systemically relevant platforms. It includes the creation of a process for CADE to designate platforms as "systemically relevant" based on specific qualitative and quantitative criteria. Key points of the proposal are: 1. Qualitative Criteria: Designating factors include a platform's role in multi-sided markets, market power from network effects, vertical integrations, and access to extensive personal data. 2. Revenue Thresholds: Minimum revenue criteria will be established globally and in Brazil, exempting companies below these thresholds from the designation. 3. Obligations for Designated Platforms: These platforms will be required to file mergers with CADE in advance and provide transparency to users about critical commercial information. 4. Investigative Procedures: CADE will have a defined procedure to investigate designated platforms and impose specific obligations on them. 5. Specialized Unit: A new unit within CADE will monitor digital markets, designate relevant platforms, enforce obligations, and investigate violations. This proposal is aimed at promoting fair competition in the digital market.

[12] See: DOMINGUES, Juliana Oliveira; BONELLI Silva, Alaís Aparecida; NASCIMENTO Silveira, Mariana. Dados e vantagem competitiva: articulação entre as autoridades nacionais. Revista de Direito, Inovação, Propriedade Intelectual e Concorrência, v. 7, p. 79-99, 202, and DOMINGUES, Juliana Oliveira; BONELLI DA SILVA, Alaís Aparecida; SOUZA, Henrique M. de A. Inteligência artificial nas relações de consumo: reflexões à luz do histórico recente. In: VAIZONF, Rony; GUTIERREZ, Andriei. Inteligência Artificial: Sociedade, Economia e Estado. 1 ed. São Paulo: Revista dos Tribunais, 2021.

risks to competition, even if they do not meet the formal criteria for mandatory merger filing (Article 88, Paragraph 7 of the LDC).

According to the report, this approach is especially important in cases involving vertical integration between digital platforms or situations that indicate access to a larger volume of data relevant to competition concerns.

6. 2025: What to expect?

Among the proposals outlined in the Ministry of Finance report, the most likely change to occur in 2025 is the adjustment of the criteria for mergers notifications in Brazil. The current (threshold) criteria have remained unchanged since 2012, and CADE recently reported a record number of notifications in 2024[13], many of which may have been unnecessary. It is now the responsibility of the current government to advocate for an update that aligns these criteria with market realities.

The recommendation to foster collaboration with regulatory agencies such as ANATEL, ANPD, and the National Secretary for Consumer Protection (Senacon) to establish specific obligations tailored to technical and sectoral needs is very important. However, it is important to recognize that this initiative depends more on the regulators than on the government. Creating a collaborative forum that includes CADE, ANATEL, ANPD, and Senacon to discuss digital markets will facilitate information sharing and optimize resource utilization.

This practical solution could potentially be implemented by 2025. Within the government, discussions are underway to enhance the merger notification form by incorporating a specific focus on digital platform business models, like the approach outlined in the United Kingdom's Digital Markets, Competition and Consumers Act 2024. Additionally, efforts to update CADE's analytical tools to include network and ecosystem analysis for a more comprehensive assessment of competition dynamics among digital platforms are already progressing and have been a concern for several years within CADE's Department of Economic Studies.

In the context of digital transformation, it is essential to establish a regulatory environment that encourages innovation while safeguarding the principles of economic freedom. The relationship between competition and innovation is well documented, highlighting that "competition drives innovation." Therefore, regulatory frameworks should be designed to enhance competitive dynamics. This

[13] CADE sets record of merger notifications in 2024. Available at: https://www.gov.br/cade/en/matters/news/cade-sets-record-of-merger-notifications-in-2024.

approach not only fosters technological advancements but also ensures that the market remains vibrant and responsive to changing consumer needs.