

Report from Latin America

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Brazil's Antitrust Authority (CADE) has consistently listed unilateral conduct cases, including those in digital markets, as an enforcement priority during the last few years. Other recent policy developments have also raised the expectation of relevant developments, but the number and the status of digital cases are yet to match the statement and no significant developments were seen in the last year. In parallel, proposed regulations for digital markets have emerged during this time in the Brazilian Congress, also with limited developments.

⁶ See Cofece, “Cofece emplaza a empresa por probables prácticas anticompetitivas en el mercado de servicios de publicidad digital” (Press Release, COFECE-037-2023, 2023) <<https://www.cofece.mx/cofece-emplaza-a-empresa-por-probables-practicas-anticompetitivas-en-el-mercado-de-servicios-de-publicidad-digital/>>.

⁷ See Cofece, “Cofece emite recomendaciones para promover el proceso de competencia y libre concurrencia en los servicios de recepción de pagos con tarjeta” (Press Release, COFECE-041-2023, 2023) <<https://www.cofece.mx/cofece-emite-recomendaciones-para-promover-el-proceso-de-competencia-y-libre-concurrencia-en-los-servicios-de-recepcion-de-pagos-con-tarjeta/>>.

⁸ See Cofece, “Cofece identificó barreras a la competencia en el mercado de procesamiento de pagos con tarjeta” (Press Release, COFECE-025-2023, 2021) <<https://www.cofece.mx/cofece-identifico-barreras-a-la-competencia-en-el-mercado-de-procesamiento-de-pagos-con-tarjeta/>>.

⁹ See Cofece, “Cofece en números 2023”/ “Cofece in 2023” (Publications in Competition Culture, Accountability, 2024) <https://www.cofece.mx/cofece-en-numeros-2023/>

¹⁰ See Cofece, “Cofece buscará abonar a la discusión sobre la propuesta de reforma constitucional en lo concerniente a la política de competencia” (Press Release, COFECE-005-2024, 2024) <<https://www.cofece.mx/cofece-buscará-abonar-a-la-discusion-sobre-la-propuesta-de-reforma-constitucional-en-lo-concerniente-a-la-politica-de-competencia/>>.

Investigations

According to CADE's internal documents the agency launched at least 24 unilateral conduct investigations in digital markets between 1995 and 2024.¹¹ No guilty finding has been issued so far.¹² Resource limitations and the challenge to build cases with substantial evidence and sophisticated economic and legal analysis largely explain the long investigative timelines. Some internal controversy on the correct investigative standards and enforcement policy regarding Big Techs may have also slowed the speed of these cases. In June 2022, CADE's investigative arm, the General Superintendence (GS/CADE), established a separate unit to focus exclusively on unilateral conduct cases, which over the past year shelved numerous complaints found to have not submitted enough evidence of a violation. The unit is investigating all digital cases ongoing before CADE, including the ones discussed in this section.¹³

In March 2021, GS/CADE issued an injunction fully or partially prohibiting the exclusivity iFood, Brazil's largest food delivery platform, required from restaurants, and in February 2023 iFood agreed to limit the use of exclusivity clauses as well as not to include Most Favoured Nation (MFN) clauses in its agreements with restaurants.¹⁴ CADE will monitor compliance with the settlement terms until August 2027.

A second case against iFood and its subsidiary that offers food vouchers, follows a complaint filed in March 2022 by the Brazilian Association of Workers' Benefit Companies, claiming that iFood engaged in exclusionary practices against benefit voucher competitors and favoured its subsidiary, iFood Benefícios, on the platform.¹⁵ The investigation is ongoing at the General Superintendence and CADE's Economic Department is currently carrying out a market inquiry on the alleged discrimination against competitors.

Other cases against Big Tech pending review before CADE include the 2022 inquiry against Facebook and Google¹⁶ in relation to the Jedi Blue Deal, an agreement that allegedly carved up part of the online advertising market, and the 2022 inquiry against Apple¹⁷ based on a complaint by Mercado Libre, one of

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the leading digital marketplaces in Brazil, which argued that Apple abuses its dominant position in the app distribution market for iOS devices by imposing the use of Apple's own payment processing system and prohibiting the distribution of third-party digital goods and services through its app.

¹¹ See CADE, *Digital Platforms Market* (2021) 102–105 <<https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cademos-do-cade/plataformas-digitais.pdf>>. According to CADE's Department of Economic Studies, there have been at least 16 investigations between 1995 and 2020 (102). The writers, in their research, have identified at least other 6 investigations opened since 2020. See Administrative Inquiries No 08700.004136/2020-65, 08700.004588/2020-47, 08700.004095/2020-15, 08700.006751/2022-78, 08700.001797/2022-09 and 08700.009531/2022-04.

¹² The Administrative Inquiry No 08700.005679/2016-13 was concluded with a *nolo contendere* settlement in which the parties agreed to cease the use of MFN Clauses by Online Travel Agencies. So far, CADE closed four investigations against Google due to lack of evidence (Administrative Proceedings No 08012.010483/2011-94, 08700.005694/2013-19 and 08700.009082/2013-03 in June 2019 and Administrative Inquiry No. 08700.003211/2016-94 in September 2022). Four other cases are still ongoing (Administrative Inquiries No 08700.003498/2019-03, 08700.002940/2019-76 and 08700.006751/2022-78, and Preliminary Proceeding No. 08700.003089/2023-85). In 2020, CADE sent Requisitions for Information to Big Tech players targeting transactions over the past 10 years potentially reportable and/or that should be reviewed even if outside the mandatory filing thresholds (Market Monitoring No 08700.002785/2020-21). Under Merger Case Investigation No 08700.002871/2020-34, CADE issued an injunction, revoked a week later, suspending WhatsApp/Facebook's payment and transfer service in Brazil, in the context of an of its assessment of a partnership with one of the main Brazilian payment service providers, Cielo. In January 2023, GS/CADE found that the partnership was not subject to mandatory notification and dismissed the investigation.

¹³ See Administrative Inquiry No 08700.004588/2020-47.

¹⁴ In September 2020, Rappi, a Colombian food delivery platform, filed a complaint claiming that iFood abused its dominant position, engaged in market foreclosure, imposed vertical restraints, and had no plausible justification for the exclusivity required from key restaurants. In December 2020, the Brazilian Association of Bars and Restaurants filed a similar complaint, which was incorporated into the same case. See Settlement Request No 08700.005597/2022-17.

¹⁵ In October 2022, GS/CADE recommended the investigation to be dismissed due to lack of evidence. In January 2023, the investigation was reopened by a decision of CADE's Tribunal and the case was remanded to GS/CADE. See Administrative Inquiry No 08700.001797/2022-09.

¹⁶ See Administrative Inquiry No 08700.006751/2022-78.

¹⁷ See Administrative Inquiry No 08700.009531/2022-04.

Then, in May 2023, CADE opened a preliminary investigation against Google, Facebook (Meta), and Telegram¹⁸ for alleged abuse of dominant position following complaints that Google and Meta used Google, YouTube, Facebook, and Instagram platforms to lead a campaign against Bill No 2630/2020 (Fake News Bill),¹⁹ to deter the dissemination of fake news and hold digital platforms responsible for monitoring published content. Although the relevant market definition and the theory of harm are not entirely clear in the complaint sent by Congress, the allegation is of anti-competitive conduct. There were no relevant developments in the investigation since it was opened.

This case seems to reflect the view of the current administration, which seeks to regulate and bring greater accountability to Big Tech, and it underlines the view that these companies abuse their market power in different ways. However, the political component that underlines the investigation could render the competition discussion secondary to an extent. Google's campaign against the Fake News Bill was also being investigated by the Supreme Court in Brazil until June 2024, when Justice Alexandre de Moraes closed the inquiry due to lack of evidence of a wrongdoing.

Ex-ante Regulation

There are generally both costs and benefits to *ex-ante* rules that define prohibited or restricted practices. On the one hand, such regulation can provide greater certainty to market participants in dynamic markets, as well as prevent prospective harm to consumer welfare, reduce barriers to entry and innovation, and consider risks and limitations of enforcement, including the ability to detect and then effectively remedy activities that threaten competition.

On the other, it can prove too inflexible, potentially inadvertently preventing legitimate competition, entrenching large incumbents, inhibiting investment in new or improved business models and technologies, and generally chilling innovation.

To that end, caution with respect to any presumption of illegality is critical, particularly in Brazil,

where CADE has reviewed few cases involving digital platforms, did not carry out in-depth substantive assessments and did not reach a guilty finding yet. In some cases, it executed settlements that limited the use of contractual terms that raised potential concerns, thereby avoiding the long investigative timeline.

Against this backdrop, the discussion on the need for *ex-ante* regulation in the digital markets has advanced within the Government and the Brazilian Congress.

Bill 2768/2022 pending review in Congress is inspired by the European Union's *Digital Markets Act 2022* and introduces *ex-ante* regulation and monitoring of "gatekeepers", which the Bill establishes as players with Brazilian revenues of at least BRL 70 million. Under the Bill, ANATEL (Brazilian National Telecommunications Agency) will be the sector regulator, and CADE remains responsible for merger review and the investigation of anti-competitive conduct in the digital market.

The proposal as it stands raises some concern, particularly because many of its terms are ambiguous and it sets forth controversial criteria such as the definition of gatekeepers based on revenues. Some also take the view that it offers minimal additional value to the existing Brazilian legislation, as the defined obligations and violations are generic and could be already addressed under the Antitrust Law.

From January through May 2024, Brazil's Ministry of Finance also carried out a thorough public consultation²⁰ on the need for *ex-ante* regulation of digital platforms in Brazil. The focus is to evaluate whether there is a need for additional regulation specific to digital platforms that existing regulatory framework does not already address and to what extent CADE can offer responses to anti-competitive

¹⁸ See Preliminary Proceeding No 08700.003089/2023-85.

¹⁹ Under the Fake News Bill, application service providers will be responsible for actively taking measures to protect society against the spread of misinformation, which include banning inauthentic or automated accounts, keeping track of massively sent messages, and labelling fake news content. Despite a swift review by the Senate, the Bill faced stiff opposition in the House of Representatives. In June 2024 the President of the House of Representatives established a group to revise the Bill, while the Communication Commission stated its intent to present another Bill of Law covering the same scope.

²⁰ See *Subsidy Taking – Economic and Competitive Aspects of Digital Platforms* <<https://www.gov.br/participamaisbrasil/concorrencia-plataformas-digitais>>.

practices involving digital platforms. Approximately 300 stakeholders filed contributions, including CADE and ANATEL.

Expected Developments and Challenges

CADE's approach to cases in the digital markets is no different from those of other jurisdictions, which is reassuring since the types of competitive issues that appear before antitrust agencies are similar.

Enforcement has been slow, though, which is at least partially explained by the complexity involved in many of these cases.

The level of awareness and debate concerning the issues posed by digital markets is unique, and its social and economic relevance is increasingly high. This leads to the filing of complaints from different players and to a greater expectation for effective responses from CADE. It also inevitably led to Congress' and other agencies' involvement in the discussion on the need for *ex-ante* regulation. It is yet to be seen if these initiatives will lead to concrete changes to the current landscape.