

CADE ENTERS DEBATE TO DEFINE REGULATOR FOR DIGITAL PLATFORMS

On October 10, 2024, the Secretariat for Economic Reforms of the Brazilian Ministry of Finance (SRE/MF in English) presented the results of the public inquiry launched in January and concluded in May this year, along with the report containing its recommendations focused on the economic and competition regulation of digital platforms.

The purpose of the public inquiry was to gather inputs and suggestions for possible amendments to the Brazilian Antitrust Law, in order to assess the need for a new regulatory framework focused on digital platforms. In total, the inquiry had participation from more than 70 entities and about 300 inputs. The SRE/MF study also gathered international experiences from 10 other jurisdictions and conducted an economic analysis of the specificities of digital platform operations in Brazil.

The report proposed two sets of recommendations: (i) reform of the Brazilian Antitrust Law to include new legal provisions for promoting competition in the case of platforms with systemic relevance (a concept detailed below), with the aim of promoting contestability and ensuring governance parameters, freedom of choice for users, and transparency; and (ii) implementation of adjustments to the antitrust policy when applied to platforms in general (with a non-statutory reform of the legislation) to enhance the promotion of competition in digital markets.

a. Summary of the SRE/MF report

On one hand, the report highlighted the importance of digital platforms for the global and Brazilian economies, emphasizing the need for Brazil to take advantage of the opportunities offered by the platforms. The report also acknowledged the network effects of the industry, which operates with multi-sided business models and relies heavily on data collection and processing tools. On the other hand, the report recognized the criticisms made by various stakeholders regarding potential limitations of the antitrust policy in addressing certain dynamics of digital platforms, in both structure and conduct controls.

The report concluded that Brazil faces the challenge of balancing the growth of digital platforms with the need to ensure a competitive environment for the economy, and that there is a mismatch between the dynamics involving platforms and the current legal framework. The report sought possible regulatory responses from the international landscape, beyond the European DMA (Digital Markets Act).

b. Legal changes for the designation of platforms with systemic relevance and their obligations

The report emphasized the need for a preventive regulatory approach to complement the current Brazilian Antitrust Law. The proposal includes the creation of new legal provisions that would allow the Brazilian Antitrust Authority (CADE in Portuguese) to designate platforms with systemic relevance based on qualitative and quantitative criteria. Due to their size, user base, and role in multi-sided markets, these platforms would have specific obligations, including prior notification of merger filings and the duty to inform end users about relevant commercial information and changes to terms of use.

c. Legal changes for the creation of a specialized regulatory unit within CADE

The legal amendment would grant CADE authority to undertake regulatory activities. The adoption of the proposal would involve the creation of a specialized unit within CADE to manage the designation process, monitor digital markets, establish and monitor obligations imposed on market agents, and investigate possible violations of these obligations. This unit would collaborate with other regulatory agencies such as the National Agency of Telecommunications (Anatel) and the National Data Protection Authority (ANPD) to ensure sector-specific compliance.



d. Non-statutory change for the creation of a specific procedure for merger filings involving digital platforms

Among the proposed non-statutory changes, the report offers the possibility of adopting an ordinary procedure for transactions involving digital platforms with a large user base. This change would involve revising the notification form to include specific questions related to the platforms' business models, allowing the identification of network effects and the assessment of damage specific theories for platforms.

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