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## I. INTRODUCTION

Antitrust authorities have been responding to the challenges posed by innovative markets, disruptive businesses and a fast-changing economy worldwide, and it has not been different with the Brazilian Administrative Council for Economic Defense (“CADE”).

Studying the impact of the digital economy on antitrust analysis and designing adequate responses has been an institutional priority for CADE in recent years. This article focuses on three topics that summarize CADE’s recent actions in response to the emergence of the digital era:

- Institutional strengthening;
- Domestic and international cooperation; and
- Advocacy

## II. INSTITUTIONAL STRENGTHENING

CADE understands that the main pillar of its effective enforcement of competition law and policy is its staff. Therefore, training and enhancing the capacity of its staff has been a major goal at the institution. In April this year, for example, we conducted an internal workshop on competition and the digital economy, with the participation of over 100 people who engaged in debates, case simulations, and sharing of experiences, on two main topics: (i) how the emergence of digital markets will affect competition enforcement in Brazil; and (ii) what CADE can do to adequately continue developing its functions in this new scenario.

CADE is also undertaking efforts to increase staff numbers. In recent years, the Department of Economic Studies (“DEE”), for example, has almost tripled in size. This year, CADE conducted a major process to recruit civil servants, which received more than three thousand applications. Of course our goal is to grow not only in numbers, but in quality. In the context of the digital economy, CADE has been aiming to enhance its in-house competence related to the digital market, in areas such as data science and information technology (“IT”).

We have also been working to consolidate and develop our analytical toolkit. For instance, we have recently published Guidelines for Remedies,<sup>2</sup> as well as Guidelines for the submission of data to CADE’s Economic Department.<sup>3</sup> We are also working on guidelines for fine calculation, as well as a manual for unilateral conduct analysis.

<sup>2</sup> Available in Portuguese at [http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias\\_do\\_Cade/copy\\_of\\_GuiaRemdios.pdf](http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/copy_of_GuiaRemdios.pdf).

<sup>3</sup> Available in Portuguese at [http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias\\_do\\_Cade/guia-para-envio-de-dados-ao-dee-do-cade\\_final\\_site.pdf](http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-envio-de-dados-ao-dee-do-cade_final_site.pdf).

The challenges posed by technological developments also represent an opportunity for competition enforcers to develop more effective tools in the fight against anticompetitive conducts such as cartels. This is the case with the “Brain Project” (or “Cérebro”), which uses data mining techniques to identify evidence of cartels, such as suspicious facts or behavioral patterns, and to provide relevant information in cases under investigation. The Cérebro interface consists of a platform that integrates public procurement databases and applies data mining tools and economic filters to identify possible patterns and measure the probability of cartels in public bids. CADE derived mathematical models from academic articles to create statistical tests for general use in a kind of reverse engineering process, as described by the 2019 OECD Peer Review on Brazilian Competition Law and Policy. This technology allows for the automation of analyses formerly conducted by investigators and case handlers. Some investigations have been started as a result of the Cérebro tool. This also reduces CADE’s reliance on leniency agreements to detect cartels.

Finally, CADE has been undertaking many empirical studies as a way to inform decision-making. For example, CADE has conducted a series of empirical studies on ride sharing apps and is working on *ex-post* analysis of mergers, as will be further mentioned in Section IV, below.

### III. DOMESTIC AND INTERNATIONAL COOPERATION

The second challenge relates to the need to coordinate competition enforcement, both domestically and internationally. At the domestic level, in Brazil, we have different bodies that regulate sectors that have significant interplay with competition policy in the digital economy, such as consumer protection, data protection, and the financial sector.

This interplay between consumer protection, data protection, and competition policy is tight. As noted by the OECD, an increasingly important concern of merger control in the context of the digital economy is the accumulation of consumer data.<sup>4</sup> Personal data collected and processed by internet companies reveal a great deal about users’ preferences and characteristics. On the one hand, companies might use data to improve the design and features of their own platforms, or to better tailor the marketing of products and services according to the specific interest of their customers. On the other hand, such technologies allow the employment of highly sophisticated segmentation, like microtargeting or geotagging, which in turn makes it possible to restrict competition and prevent users’ access to certain goods or services based on their personal features. Additionally, CADE is aware of the risks that the exploitation of big data by companies may pose to the protection of other rights, such as the right to privacy. Therefore, CADE understands that the dynamics of digital platforms give rise to a close relationship between data protection, privacy and competition policy.<sup>5</sup>

In August 2018, Brazil enacted the Brazilian Data Protection Law (Law n. 13.709/2018, “LGPD”),<sup>6</sup> which regulates the treatment of personal data, defined as information relating to an identified or identifiable person, with the aim of protecting, among others, the fundamental rights of freedom and privacy.<sup>7</sup> The LGPD also introduces rights for personal data subjects *vis à vis* the controller<sup>8</sup> of its data, which includes but is not limited to the right to obtain (i) the confirmation of the existence of treatment; (ii) the access to the data; (iii) the correction of incomplete, inaccurate or outdated data; and (iv) the portability of data to another provider. In 2019, the Brazilian Congress approved a modification to the LGPD, creating the National Data Protection Authority (“ANPD”), which will be in charge of drafting guidelines for a national personal data and privacy protection policy. The LGPD will come into force in 2020. With the new Data Authority due to open, CADE understands the importance of working to shape a cohesive regulatory landscape, which will require intensive cooperation among the different authorities.

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4 Implications of E-commerce for Competition Policy – OECD Secretariat Background Note. June 6, 2018. DAF/COMP(2018)3. Apud (Lao, 2018b).

5 As presented in CADE’s replies to the internal questionnaire circulated within the BRICS Competition Authorities Working Group on the Digital Economy and published in the First Report “BRICS in the digital economy: competition policy in practice,” available at [http://www.cade.gov.br/ acesso-a-informacao/publicacoes-institucionais/brics\\_report.pdf](http://www.cade.gov.br/ acesso-a-informacao/publicacoes-institucionais/brics_report.pdf).

6 Available in Portuguese at: [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2015-2018/2018/Lei/L13709.htm](http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2018/Lei/L13709.htm).

7 According to article 1 of the LGPD.

8 According to article 5, item VI of the LGPD, controller is the legal or natural person, private or public, that is responsible for deciding on the treatment of personal data.

In this regard, CADE has been working hard on actions aimed at establishing closer cooperation with other bodies in Brazil's public administration. CADE signed a cooperation agreement with the National Consumer Secretariat ("SENACON").<sup>9</sup> The agencies committed themselves to exchange technical information and promote joint actions that guarantee effective consumer protection and the strengthening of competition. We are also working on creating channels for direct communication between both agencies and developing joint activities aimed at consumer education.

CADE also signed a Cooperation Agreement for the exchange of technical information and for the promotion of a closer relationship between CADE and the National Institute of Industrial Property ("INPI").<sup>10</sup> CADE and INPI committed themselves to provide technical subsidies for the analysis of administrative processes and to exchange information, knowledge, data, and documents, safeguarding the confidentiality of information. They also committed themselves to conduct studies, events, and seminars that relate to both intellectual property and antitrust.

Finally, as an example of a regulated sector, the Brazilian competition authority signed in 2018 a Memorandum of Understanding with the Central Bank of Brazil ("BCB"), the body responsible for the financial market. This document established a framework for interaction between the two different bodies in the analysis of mergers and in the investigation of possible violations of the economic order involving financial institutions under the BCB's supervision. This document was later developed into a joint normative resolution<sup>11</sup> that establishes, among other things, procedures to harmonize and render the enforcement activities of the respective bodies in merger review in the financial system more efficient. The act also provides for the sharing of information between CADE and the BCB for joint action in competition, as well as periodic meetings between the two bodies.

As digital markets are borderless, international cooperation becomes indispensable for consistent decisions, for example in the remedies applied worldwide by different jurisdictions to global players. CADE has been pursuing active cooperation with different actors in the international arena.

Since the last BRICS Conference, in 2017, Brazil has been the main coordinator of the BRICS Working Group for the Digital Economy, which is co-chaired by Russia. The first meeting of the working group was held in 2018 in Brazil. On that occasion, BRICS representatives agreed that CADE would prepare a joint report regarding the digital economy, based on the answers provided by the five countries to a questionnaire drawn up by Brazil.

The report describes how CADE and the other BRICS countries are dealing with the challenges posed by the digital economy and was released at the BRICS Conference in September, in Moscow, Russia.<sup>12</sup> This was the first joint document of the BRICS authorities regarding the digital economy.

CADE also promoted an international conference on the digital economy: Designing Antitrust for the Digital Era, in July, 2019, where international experts and representatives of competition authorities were invited to discuss the challenges of the digital economy for antitrust enforcement. This Conference also hosted the second meeting of the BRICS Working Group on the Digital Economy, which was a valuable opportunity to reunite the BRICS antitrust authorities to discuss the digital market.

Another key factor in strengthening international cooperation in the digital economy was CADE's recent change of status to an associate member of the OECD Competition Committee. This places CADE in a more prominent position in discussions regarding international best practices, including competition authorities' approach to the digital economy. Within the OECD framework, CADE also participates in the Latin American and Caribbean Competition Forum, which aims at promoting dialogue, consensus building and networking among competition officials in the region.<sup>13</sup>

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9 Available in Portuguese at [http://www.cade.gov.br/aceso-a-informacao/convenios-e-transferencias/acordos-nacionais/sei\\_mj-6330054-acordo-de-cooperacao-tecnica.pdf/view](http://www.cade.gov.br/aceso-a-informacao/convenios-e-transferencias/acordos-nacionais/sei_mj-6330054-acordo-de-cooperacao-tecnica.pdf/view).

10 Available in Portuguese at <http://www.cade.gov.br/aceso-a-informacao/convenios-e-transferencias/acordos-nacionais/cade-e-inpi.pdf/view>.

11 Available in Portuguese at [https://www.bcb.gov.br/conteudo/home-ptbr/TextosApresentacoes/Ato%20normativo%20conjunto%205\\_12\\_2018%20limpa.pdf](https://www.bcb.gov.br/conteudo/home-ptbr/TextosApresentacoes/Ato%20normativo%20conjunto%205_12_2018%20limpa.pdf).

12 The Report is available at [http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/brics\\_report.pdf](http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/brics_report.pdf).

13 According to the 2019 Latin American and Caribbean Competition Forum website available at <http://www.oecd.org/competition/latinamerica/2019forum/>.

In particular, we believe that competition authorities might benefit a great deal from discussing cases which have been common to different jurisdictions.

In order to stimulate further debate, we raise some questions on the topic of domestic and international cooperation: To what extent do the policies applied by the different bodies related to the digital economy in the domestic arena need to be harmonious to be effective in their respective realms? What institutional mechanisms could be created to facilitate this harmonization? What could we learn from the international experience in this field? How can we create more effective institutional mechanisms for cooperation among antitrust authorities? While coordinating domestic regulation in the digital economy seems desirable, could we apply this same logic in the international sphere?

## IV. ADVOCACY

CADE has been giving special attention to enabling the development of an ideal environment for the emergence of disruptive businesses in the economy. Therefore, it is particularly important for CADE to have strategies to guarantee entry conditions in the market and to be vigilant about conduct leading to market foreclosure. This is achieved through enforcement of competition law, when anticompetitive conduct related to market foreclosure takes place, but also through advocacy work to guarantee regulation will not unduly restrict competition or entry.

CADE considers that competition advocacy is a crucial tool to guide the development of regulation and policies within other government branches. Coordination between different sector regulations and competition policy is a common challenge faced by competition authorities.<sup>14</sup> As we know, one of the main goals of regulation is to address market failures. In the case of taxi services, for example, two major market failures are information asymmetry and negative externalities. The former occurs because consumers do not have prior knowledge about the type and the quality of the service they will hire and have little ability to negotiate fares. This information asymmetry could encourage taxi drivers to take a route longer than necessary, charge abusive fares or drive an unsafe vehicle. The second failure occurs because the individual passenger transport market affects economic agents that are out of the market due to either traffic congestion or to air and noise pollution. Hence, free entry could be characterized as an example of the so-called “tragedy of the commons”: free access to the resource (i.e. the taxi market), could cause an accumulation of negative externalities that would end up harming that very resource.

While regulation helps to minimize these market failures, it can also generate high social costs. The establishment of fixed fares may prevent discounts and, consequently, price competition. The limitation of taxi licenses inhibits the entry of new drivers, which may cause supply shortage and, consequently, a weakening of the market. In this context, disruptive innovations come into play, as they have the potential to fix market failures and address regulatory concerns in several markets. When a disruptive innovator enters the market, it can break monopolies and match supply and demand more efficiently. However, disruption can also render much conventional regulation outdated. CADE has been playing an active role in advocating that conventional regulation should not be directly transferred to disruptive businesses, which could offset many of the benefits generated by innovation, or impose unnecessary barriers to new entrants.

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<sup>14</sup> In Brazil, regulatory and competition authorities work separately and are autonomous from each other in their decisions. In the financial sector, mergers are subject to review by both CADE and the regulatory authority - the BCB. Both authorities signed a Memorandum of Understanding in 2018 that clarifies the competencies and how the cooperation will take place between the authorities. In mergers, both CADE and the BCB will take their own decision, independently and according to the respective procedures. The one exception applies to cases that pose a potential systemic risk to the financial sector, in which the BCB will inform CADE about systemic risks and CADE will decide based on the reasoning provided by the regulatory authority. CADE continues to be the sole authority in charge of conducting investigations of anti-competitive conduct according to the Brazilian Competition Law. This notwithstanding, CADE will consult with the BCB before rendering a final decision, especially with regard to the imposition of sanctions.

One example is CADE's work in the ride-sharing or individual passenger transport market. In 2015, CADE's Department of Economic Studies published two studies: "The market for individual passenger transportation: regulation, externalities and urban balance,"<sup>15</sup> and "Post entry rivalry - the immediate impact of Uber's app on taxi rides."<sup>16</sup> The goal was to assess the main implications of ride-sharing platforms for both the individual transportation market and urban planning in Brazil. The main findings showed that ride-sharing online platforms could be a viable solution not only to market failures in the transportation sector, such as asymmetry of information, but also to urban problems, such as traffic jams and high rents in the core areas of big cities. In 2018, the DEE published the updated version of the previous studies, entitled "Competition effects of the sharing economy in Brazil: Has Uber's entry affected the cab-hailing app market from 2014 to 2016?"<sup>17</sup> This paper argues that in order to bring more benefits to consumers in terms of innovative services, improved quality and security, lower prices and more options, it is necessary to orient the debate towards a gradual deregulation of taxi services, especially concerning issues related to barriers to entry and pricing freedom.

## V. FINAL REMARKS

CADE has been aware of the challenges raised by the digital economy and has been actively seeking to respond adequately to them. As discussed above, this has been done through the enhancement of its staff, through seeking domestic and international cooperation, and through continuous advocacy work.

In this endeavor, many questions are raised, without clear-cut answers. We are attentive to the fact that this work will require constant engagement and self-reassessment, as well as openness to enhance our strategies. Therefore, CADE is eager to debate and refine them with other antitrust authorities, academics, and practitioners in the international arena.

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15 CADE's Working Paper 01/2015, available at <http://en.cade.gov.br/topics/about-us/dee/working-paper-001-2015.pdf>.

16 CADE's Working Paper 03/2015, available at <http://en.cade.gov.br/topics/about-us/dee/working-paper-003-2015.pdf>.

17 CADE's Working Paper 01/2018, available at [http://en.cade.gov.br/topics/about-us/dee/working-paper-uber\\_01-2018.pdf](http://en.cade.gov.br/topics/about-us/dee/working-paper-uber_01-2018.pdf)



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