



# BRICS

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The enhancement of the Brazilian Competition Authority (“CADE”)’s capacities to deal with the challenges arising from the digital era has been on CADE’s agenda in the past years. This is reflected in CADE’s work both in the national and international domains.

Here, we will focus on the international arena – specifically, on the recent release of the report by the BRICS<sup>2</sup> Competition Authorities’ Working Group on Digital Economy (“Working Group”): “*BRICS in the digital economy: competition policy in practice*”<sup>3</sup> (the “Report”), which took place last September during the sixth International Competition Conference of BRICS, in Moscow.

## I. BRIEF CONTEXT

The BRICS acronym, initially encompassing Brazil, Russia, India, and China (“BRIC”) dates back to the early 2000s, when these countries were referred to by financial markets as promising emerging economies. The first meeting among foreign ministers of these countries took place in 2006 and, as of 2009, the meetings started to happen on an annual basis. The BRIC became a cooperation mechanism in areas with the potential to concretely benefit the countries’ people.<sup>4</sup>

Competition policy was identified as one of these areas for cooperation. In 2009, the BRIC countries organized the first international conference on competition. Since then, this meeting has been taking place every two years, with each country alternating the hosting of the event.<sup>5</sup> In 2011, South Africa joined the group, and the BRIC became BRICS.<sup>6</sup>

In November 2017, CADE hosted the fifth BRICS International Competition Conference in Brasília. At the time, the competition authorities of Brazil, Russia, India, China, and South Africa (the “Competition Authorities”), aware of the pressing challenges emerging from digital markets, decided to create a working group to channel joint efforts to share experiences and cooperate for the enhancement of their respective competition policies concerning the digital economy.

<sup>2</sup> Acronym for the co-operation established between Brazil, Russia, India, China, and South Africa.

<sup>3</sup> 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).

<sup>4</sup> As described at <http://www.itamaraty.gov.br/pt-BR/politica-externa/mecanismos-inter-regionais/3672-brics>.

<sup>5</sup> In 2009, the first International Competition Conference (ICC) took place in Russia; in 2011, China hosted the II ICC; in 2013, it was India’s turn. In 2015, South Africa hosted the event and, in 2017, the V ICC took place in Brazil. In 2019, the VI ICC was hosted by Russia. This information is described at <https://brics-icc-2019.org/en/>.

<sup>6</sup> As described at <http://www.itamaraty.gov.br/pt-BR/politica-externa/mecanismos-inter-regionais/3672-brics>.

This event marked the creation of the BRICS Competition Authorities Working Group on the Digital Economy, having Brazil as its main coordinator and Russia as co-chair since 2018. The main goals of the Working Group consist in: (i) sharing of experiences of the BRICS countries in the fight against anticompetitive practices in the digital economy; (ii) examination and discussion of cases related to the fight against new types of cartels; (iii) consideration of mergers and acquisitions in the digital age; and (iv) the development of new mechanisms to support the enforcement against anticompetitive practices in light of the digital economy.<sup>7</sup>

The first meeting of the Working Group was held in Campos do Jordão, Brazil, in October 2018. This meeting was attended by Brazil, Russia, India, and South Africa. As a starting point for closer cooperation in competition enforcement, the group decided to prepare a questionnaire to share the ongoing practices and challenges faced by the Competition Authorities in the context of the digital economy.

As the authorities shared their replies, the Working Group decided to produce a report based on the answers to the questionnaire, with the aim of consolidating the different practices and views within the BRICS countries on the challenges posed by the digital economy to competition enforcement. This process was led by CADE as main coordinator of the Working Group.

Subsequently, the second meeting of the Working Group took place in July 2019 in Brasilia, with representatives from all BRICS countries. Then, the Working Group had the opportunity to discuss its activities, which included the release of the report in the subsequent BRICS International Competition Conference in Russia.

Accordingly, in September 2019, the BRICS Competition Authorities Working Group on the Digital Economy launched the first Report of the authorities on digital economy during the sixth BRICS Competition Conference, under the leadership of CADE as Chair, and of the FAS of Russia as Co-Chair of the Working Group.

In short, the Report provides an overview of the state of the art of competition policy and enforcement practices in Brazil, Russia, India, and South Africa *vis-à-vis* digital markets. As described in the Report, China did not participate in this release due to institutional reforms that were concluded in 2018 in the competition field, but plans to contribute to future reports. This publication represented an important moment for the strengthening of the cooperation among the BRICS countries.

As noted in the Report itself, the Report is a descriptive work, and thus does not provide normative conclusions, or have any binding effects for the Competition Authorities. Additionally, the Report does not attempt to propose a homogeneous plan of action in the enforcement of competition policies across the BRICS countries. On the contrary – as explained in the introduction of the Report, it relies on the richness of the different approaches and experiences in the enforcement of competition policy in the digital economy in the BRICS countries to explore common challenges and bring possible insights to each Competition Authority.

## II. STRUCTURE OF THE REPORT

The Report provides, firstly, a brief introduction to the background of its release. Subsequently, it presents an overview of the digital landscape in each of the BRICS countries, followed by a description of the institutional and legal framework for competition policy in each BRICS jurisdiction. The document then describes competition enforcement practices involving digital markets in Brazil, Russia, India, and South Africa on selected topics, such as: market power assessment, innovation and dynamic competition, the acquisition of entrants by incumbents, barriers to entry, algorithmic pricing, and big data.

Successively, the publication presents examples of how the Competition Authorities have been making use of technology and data tools to support enforcement activities. The Report also lists some of the main challenges identified in competition enforcement in the digital economy.

In order to give concreteness to the discussions, the publication also presents selected cases that exemplify the Competition Authorities' recent experiences with the digital economy. The Report then concludes with final remarks. The full replies of the Competition Authorities to the questionnaire circulated among the Working Group in 2018 was also made available.

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<sup>7</sup> As described at <http://www.bricscompetition.org/upload/iblock/ee2/BRICS%20Working%20Groups.pdf>.

### III. MAIN CHALLENGES FOR CADE IN THE DIGITAL ECONOMY

The Report identified some of the main challenges reported by the Competition Authorities in their enforcement of competition policy in digital markets. They include exclusionary practices related to data concentration from incumbents, possible limitations to multi-homing; adoption of MFN clauses or discriminatory treatment based on users' data and profiling technologies; algorithmic collusion and vertical restraints in e-commerce.<sup>8</sup>

For CADE, as stated in the Report, one of the main challenges in competition enforcement in digital markets consists in determining how to intervene in highly dynamic markets. This includes, as CADE stated in the Report, finding a balance between the need to intervene in order to protect competition and consumers on the one hand and the risk of hampering innovation or creating unintended exclusionary effects, on the other.<sup>9</sup>

It also includes, as stated in the Report, an estimation of the long-run effects of competition policy intervention and the design of measures that are fit for the specificities of the digital economy in the context of high-technology markets and innovation.<sup>10</sup>

Other aspects that challenge antitrust enforcement in the digital economy include particular pricing dynamics of digital platforms that often provide services and products to one side of the market at a monetary price of zero. CADE also mentioned that multi-sided markets present challenges for the traditional tools used for the definition of the relevant market and for the assessment of market power, such as market share, marginal costs, or the SSNIP test. CADE also mentioned that the fact that platforms operate simultaneously with different interdependent customer groups make the review more complex.<sup>11</sup>

CADE also points out that with the rise of the digital economy, new ways are emerging through which abuses of dominance might take place. Examples mentioned by CADE relate to concerns about data concentration and its effects on competition and barriers of entry, as well as the adoption of clauses which might unduly restrict competition.<sup>12</sup> In this sense, CADE investigated the adoption of Most-Favored-Nation ("MFN") clauses or parity clauses by online travel agencies ("OTAs") operating in Brazil (Booking.com, Expedia, and Decolar.com). These parity clauses aimed at guaranteeing that the companies offered more advantageous conditions (which included prices, room availability, as well as other services) to customers, in comparison to those offered by hotels in their own sales channels (both online and offline), or in competing companies' platforms. Following its investigation, CADE concluded that these MFN clauses limited competition in the market, homogenizing the final price offered to the customer; and hindered the entrance of new players.<sup>13</sup>

The companies investigated negotiated a Cease and Desist Agreement ("TCC" in its acronym in Portuguese) with CADE, by which they committed to cease using broad parity clauses in their commercial relations with accommodation providers. Therefore, they cannot prevent them from making better offers in their offline sales channels (check-in counters, physical travel agencies, and call-centers). Also, they cannot demand parity in relation to the prices charged by other online travel agencies.

On the other hand, CADE understood that parity clauses in accommodation providers' online sales channels were reasonable, in order to mitigate free-rider effect in online hotel reservations. CADE understood that, in the long term, the possibility for sellers and buyers negotiating independently after connecting through the OTAs could harm the latter and harm consumers even more.

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8 BRICS Competition Authorities' Working Group on Digital Economy. *BRICS in the digital economy: competition policy in practice*. Page 28. 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).

9 BRICS Competition Authorities' Working Group on Digital Economy. *BRICS in the digital economy: competition policy in practice*. Annex I, Brazil's Replies to the Questionnaire. Page 82. 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).

10 BRICS Competition Authorities' Working Group on Digital Economy. *BRICS in the digital economy: competition policy in practice*. Annex I, Brazil's Replies to the Questionnaire. Page 82. 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).

11 BRICS Competition Authorities' Working Group on Digital Economy. *BRICS in the digital economy: competition policy in practice*. Annex I, Brazil's Replies to the Questionnaire. Page 82. 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).

12 BRICS Competition Authorities' Working Group on Digital Economy. *BRICS in the digital economy: competition policy in practice*. Annex I, Brazil's Replies to the Questionnaire. Page 82. 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 Available at <http://en.cade.gov.br/press-releases/booking-decolar-and-expedia-reach-cease-and-desist-agreement-with-the-brazilian-administrative-council-for-economic-defense>.

CADE also pointed out in its Report that the dynamics of digital platforms give rise to a close relationship between privacy and competition policy, which brings coordination challenges due to the relationship between competition policy and other regulations, such as data protection legislation, that are each carried out by different authorities in Brazil. As mentioned in the Report, Brazil recently enacted the Brazilian Data Protection Law (Law N. 13.709/2018 – or “LGPD” in its acronym in Portuguese) which regulates the collection and treatment of personal data, defined as information relating to an identified or identifiable person. The LGPD introduces rights for data subjects, including the right to obtain information regarding the processing of data, the right to access, to rectify and delete data, and the right to data portability, which ensures users the right to transfer data across different providers of services and products.<sup>14</sup>

In 2019, the Brazilian Congress approved the law that created the National Data Protection Authority (“ANPD,” in its acronym in Portuguese). This newly created authority will be in charge of drafting guidelines for the National Personal Data and Privacy Protection Policy. This Law will come into force in 2020. Similarly, consumer protection laws are enforced by Senacon (the National Secretariat for the Consumer), and regulated by the Consumer Protection Code. Therefore, in the coming years, CADE will, together with the authorities of related policy realms, have the task of promoting the cohesive enforcement of competition law in light of other related policies in cases involving the digital economy.

## IV. MAIN FINDINGS IN COMMON

Firstly, as contained in the Report, the process of drafting the document revealed that the Competition Authorities are committed, within their own agendas, to a constant self-assessment on whether their respective competition laws and policies are continue to be fit for task in a fast-paced digital economy.

Some authorities, such as the Russian FAS, have been keener to bring about changes to the existing framework through amendments to current laws. Others, such as the Indian CCI, are evaluating proposals to change the existing analytical tools. And still others, such as CADE, are further assessing possible adaptations to the existing competition laws and policies for the digital era.

That said, the Competition Authorities converged, in general, on the opinion that, so far, the respective legal framework has been providing enough room for adaptation. In this sense, the Competition Authorities have been able to respond to the challenges posed by digital markets on a case-by-case basis. These include, for example, analysis of multi-sided business models based on zero-price offers. Cases in the digital economy have also been bringing issues such as privacy, consumer choice, and dynamic competition to the attention of Competition Authorities. On the other hand, the Competition Authorities also acknowledge there are challenges that might eventually need to be addressed through changes to the respective existing legal framework, such as the accountability of types of anticompetitive conduct involving pricing algorithms.

The Report also describes another point of convergence – the need for increased cooperation, both in the domestic arena and in international fora, in light of the multifaceted and global nature of the digital economy. On the domestic level, as the digital economy affects different policy dimensions, such as privacy, consumer protection, and competition, the often different authorities responsible for each area need to co-operate in order to build cohesive and effective policies. The borderless nature of digital economy, in turn, calls for increased international co-operation, especially in the design of remedies that will potentially affect various jurisdictions.

The Report also points out that, as a non-exhaustive work, there are important subjects that were not covered in-depth in this publication. These include, for example, intellectual property rights and their interplay with competition policy in the digital economy, insights from behavioral economics, and the effect of conglomerates and potential competition. The design of effective remedies, including the most adequate realms to address concerns arising from the digital economy (regulatory or competition) are also on the agenda for future discussion among the Competition Authorities.

Finally, as described in the Report, another area for possible future joint work within the BRICS Competition Authorities Working Group on the Digital Economy relates to the importance of empirical evidence as the basis for policy and decisions in individual cases. These include *ex post* analysis, market studies, and competition assessment of public policies, which provide empirical evidence to enhance and support decision-making in the competition domain.

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<sup>14</sup> BRICS Competition Authorities' Working Group on Digital Economy. *BRICS in the digital economy: competition policy in practice*. Annex I, Brazil's Replies to the Questionnaire. Page 94. 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).

With the release of the Report, CADE, as the main coordinator of the Working Group, hopes to stimulate debate on the issues covered in this first publication and remains open to further discuss the development of competition law and policy in the digital era with academics, practitioners, and other competition authorities worldwide.



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