

SUBSIDY TAKING - ECONOMIC AND COMPETITIVE ASPECTS OF DIGITAL PLATFORMS

Agency: Ministry of Finance

Sector: MF - Secretariat of Economic Reforms

Status: Active

Publication in the Official Gazette: 19/01/2024 [Access publication](#)

Opening: 19/01/2024

Closing: 18/03/2024

Grant number: 19995.000158/2024-38

Contributions received: 17

Responsible for the consultation: Alexandre Rebêlo Ferreira

Contact: 61 34121818

SUMMARY

The Secretariat of Economic Reforms of the Ministry of Finance aims, through this subsidy taking, to obtain contributions from society on the economic and competitive regulation of digital platforms in Brazil, questioning whether there should be changes in the competition law, whether new regulation is necessary, which aspects should be subject to regulation and how to coordinate state action to manage the issue.

ECONOMIC AND COMPETITIVE IMPACTS OF LARGE DIGITAL PLATFORMS

An important debate is underway in several countries on the economic and competitive impact of large digital platforms – including search engine providers, instant messaging, social networks and marketplaces (BM, 2021). These platforms have a significant influence on the organization and dynamics of contemporary markets, which are increasingly data-driven and dependent on digital means of intermediation to establish and develop.

This is a challenging topic that deserves a broad debate, including the definition of what characterizes a digital platform, at what market levels these platforms operate, and the adequacy of the existing legal and regulatory framework with regard to the defense of competition.

1. Context: the specificities of digital platforms

International experience indicates that digital platforms are increasingly important for the economy and, for this reason, deserve specific attention from the State. The change in work and consumption patterns during and after the Covid-19 pandemic (WB, 2021; Gonçalves, Coutinho & Kira, 2022) accentuated this scenario. This occurs, among other reasons, because of the characteristics of their business models, including the typical dynamics of two-sided markets (Rochet & Tirole, 2003), and the way in which platforms bring together and coordinate economic agents around their technological architecture (Gawer, 2014).

Such platforms control and process large databases with valuable information about people, including their consumption habits and customs, social networks, and purchase histories (Pereira

Neto & Renzetti, 2020). Platforms also make it possible for technology companies to have access to users' business data and have control of infrastructures and resources relevant to conducting business. It is these characteristics, in fact, that enhance their network effects, because as more users cross their interests in these relationship networks, the incentives for other users, both end and commercial, to also use them increase (Pfeiffer, 2019).

The business of companies that control large platforms can also be leveraged in different markets: the same company can own different platforms and applications that offer specific services, as a way to retain users' attention. These interconnected platforms can have their network effects mutually reinforcing as they are incentivized to cross-promote their respective uses, affecting the competitive logic in the markets in which they operate (Jacobides, Cennamo & Gawer, 2018). Similarly, in order to increase its market power, the same company may acquire smaller companies in other platform markets in which it does not yet operate, potentially expanding its portfolio power and undermining innovative entries (Kira, 2023a).

Some of the competition concerns that arise from these dynamics are already known in other more traditional markets, such as car manufacturing, credit cards, and even oil and gas. Interdependent relationships, however, are more complex and occur more dynamically in digital markets, creating structures that can be compared to ecosystems (Jacobides & Lianos, 2021). Platforms perform a complex combination of services – many of which have zero cost to the end user – and are also associated with the intensive use of data, designs of technological applications, and incentives that impact user behavior in a relevant way (Zingales & Lancieri, 2019), but not always evident to users and regulatory and antitrust bodies. These characteristics make it difficult to use traditional tools to identify possible anticompetitive conduct and anticipate the possible effects of merger acts.

As a consequence, concentration in digital platform markets has been increasing: few companies are able to affect competition and consolidate their dominant positions not only in the markets in which they operate, but also in various related services and products (HM Treasury, 2019). This diagnosis has motivated several jurisdictions to consider the legal responses and public policies necessary to deal with this scenario.

2. The International Debate

The issue and challenges related to the economic and competitive impacts of digital platforms have been addressed both through new legislative and regulatory initiatives *Ex ante* (OECD, 2021), as well as new antitrust approaches involving these markets, with the application of *ex post* (Botta & Wiedemann, 2019; Kira & Coutinho, 2021). There are a variety of ongoing regulatory solutions and experiments that involve both introducing arrangements with the flexibility to set custom rules for certain platforms (UK, 2023; Germany, 2021; Australia, 2023), regarding the definition of specific remedies, targeted at certain types of platforms or for certain sectors (South Africa, 2023; Australia, 2021; Canada, 2023). Initiatives adopted in other jurisdictions also include minimum rules to increase transparency (Japan, 2021), as well as the definition of guidelines for the application of antitrust law on certain types of platforms [\[1\]](#).

In 2022, the European Union adopted the *Digital Markets Act* (DMA), a specific legislation to regulate the so-called "*Gatekeepers*": digital platforms that constitute an important gateway between businesses and consumers with regard to the provision of "*core platform services*", or essential platform services. [\[2\]](#) These are services *online* with a wide range of use and which include search engines, social networks, video applications, messaging applications, and cloud computing services (CE, 2022). The introduction of new legislation was the result of a

deliberative process that sought to fill gaps in the application of competition protection rules and considered challenges such as the application of appropriate remedies to avoid excessive consolidation processes, in addition to timely action to sanction and prevent anticompetitive practices (Crémer et al, 2019).

In the case of DMA, the concern at stake, as the European Commission argues, is, on the one hand, to ensure a greater variety of online products and services for end and commercial users, as well as to ensure easier access to market services and offers, thus avoiding the anticompetitive effects resulting from its excessive concentration (CE, 2022). At the same time, the new rules seek to curb practices considered unfair and unfair in the segments in which *gatekeeper* platforms offer their services, preventing certain economic agents from being unduly discriminated against or privileged.

The analysis of competition and economic aspects becomes intricate also due to the dynamic and innovative nature of platform markets (United States, 2020). In this context, there is a marked pace of entry, with the frequent emergence of new companies in the markets, while those that previously dominated the digital landscape now face fiercer competition or have lost their prominent position. In fact, increased market concentration can sometimes be a result of the increased efficiencies provided by new and innovative business models, potentially bringing benefits to users. Therefore, part of the regulatory challenge lies in identifying problems accurately, seeking balanced and proportionate measures so as not to jeopardize such benefits.

The rapid pace of innovation also makes the timely implementation of laws and public policies challenging, as new frameworks can quickly become obsolete in the face of developing markets. In addition, the conditions of competition and business models vary between different types of platform services in different jurisdictions, as does the effectiveness of existing legal rules applicable to each type of platform services (e.g., competition rules, data protection and consumer protection).

Thus, it is imperative to deepen the understanding of whether, and to what extent, new regulatory frameworks are needed in this area and what is the role to be played by traditional competition law, which already has the task of preserving competition in all markets.

3. The Brazilian Debate

The discussion on regulation of digital platforms in Brazil has focused, in particular, on the themes of combating the dissemination of fake news, transparency, content moderation and remuneration of journalistic content used by digital platforms. The discussion of the economic and competitive aspects of the performance of the platforms has received comparatively less attention in the public debate, and also deserves this deepening.

In Brazil, the number of cases involving digital platforms that have reached CADE has increased significantly in recent years. Between 1995 and April 2023, 233 mergers were notified in digital markets, with approximately 26% related to online retail and 24% to the online advertising segment (CADE, 2023). There has been a sharp increase in the number of cases, especially since 2020, with the years 2021 and 2022 registering the highest volume of cases related to merger control. Of the total number of cases, 224 (equivalent to 96.1%) were approved without restrictions, while three cases were approved with restrictions (the remaining cases did not have a decision on the merits) (CADE, 2023). With regard to anticompetitive conduct, in the period from 2011 to April 30, 2023, 23 investigations related to digital platforms were initiated, mainly

involving exclusivity agreements and abuse of dominant position. To date, three cases have resulted in the signing of the Cease and Desist Agreement (TCC) (CADE, 2023).

The literature suggests that the insufficiency or inadequacy of traditional antitrust tools for digital markets may limit the effectiveness of such interventions, since such tools may not be attuned to the competitive dynamics and particularities of the business models of digital platforms (Coyle, 2019; Argentesi et al., 2021). In this regard, concerns arise that relevant anti-competitive issues may go unnoticed by antitrust authorities due to inadequate notification criteria. Moreover, even in cases that do reach the authorities, there are fears that standard antitrust law enforcement, without adaptations, will be unable to identify and correct problems related to barriers to entry and the promotion of effective competition in digital markets (HM Treasury, 2019).

In fact, recent studies, based on empirical analyses of CADE's jurisprudence, point to risks related to the use of traditional case analysis tools and procedures for digital platforms (Kira, 2023a; Kira, 2023b; Canales et al., 2023). Research also indicates the need to adapt and revise theories of harm when applied in cases of merger acts (Zingales & Renzetti, 2022) and in anticompetitive conduct (Kira & Coutinho, 2021; Fernandes, 2022) involving these agents. In addition, there are studies that highlight the need to develop new legal tests that reflect competition concerns more typical of digital platforms, such as the preferential treatment of certain products or services (Binotto & Deluca, 2023).

Given this scenario, the decision on an eventual improvement of legislation and application of antitrust laws, or the introduction of new economic regulation specific to digital platforms, in Brazil, should be preceded by a broad debate on the problems and limitations that are sought to be addressed. The institutional challenge in dealing with this theme, recognized by the literature (Gonçalves, Coutinho & Kira, 2022; Lancieri & Pereira Neto, 2022), highlights the need for a strategic approach that includes not only antitrust legislation. The complexity of issues related to digital platforms also underscores the importance of an in-depth reflection on how the competencies to act are distributed. Dialogue and collaboration among the various stakeholders are key to reducing overlapping agencies and moving towards an eventual precise state regulatory response, with appropriate mechanisms and tools.

4. Request for Comments

In view of this context, the Secretariat of Economic Reforms aims, through the present subsidy taking, to obtain contributions from society on the economic and competitive regulation of digital platforms in Brazil, questioning whether changes in the competition law are necessary, whether new regulation is necessary, which aspects should be subject to regulation and how to coordinate state action to manage the issue.

To this end, a list of questions was prepared to guide those interested in contributing to this discussion. In any case, interested parties are encouraged to submit additional comments on topics that were not the subject of specific questions.

[1]Also noteworthy are cases such as the adjustments in procedures for the notification of mergers and acquisitions in Turkey (2022), changes in competition law guidelines in Singapore

(2021), complementary rules in China (2022), and the competition guidelines for digital platforms in South Korea (2022).

[2]Such services are defined in the DMA as: (i) Online intermediation services; (ii) Online search engines; (iii) Social media services; (iv) Video-sharing platform services; (v) Instant messaging services; (vi) Operating systems; (vii) Web browsers; (viii) Virtual assistants; (ix) Cloud computing services; and (x) Online advertising services, including any advertising network, advertising exchanges or other advertising intermediation services, provided by a company that provides any of the essential platform services described above.

The complete list of references can be found in the downloadable file at the bottom of the page.

CONTENT

Guidelines:

When referring to one or more platforms, throughout the answers, indicate the services provided by them, as well as the different markets affected and the types of users affected (e.g. end consumers and/or companies at different stages of maturity that depend on the Platform).

Present data and evidence to support the arguments, indicating, when possible, legislative, regulatory and international practices that can serve as a reference for Brazil.

I. Objectives and regulatory rationale

1. What economic and competitive reasons would justify the regulation of digital platforms in Brazil?

1.1. Are there different reasons for regulating or not regulating different types of platforms?

1.2. To what extent does the Brazilian context approach or differ from the context of other jurisdictions that have adopted or are considering new regulations for digital platforms? Which cases, studies, or concrete examples in Brazil would indicate the need to review the Brazilian legal-regulatory framework?

II. Sufficiency and adequacy of the current model of economic regulation and defense of competition

2. Is the existing legal and institutional framework for the defense of competition - notably Law No. 12,529/2011 - sufficient to deal with the dynamics related to digital platforms? Are there competition and economic problems that are not satisfactorily addressed by the current legislation? What improvements would be desirable to the Brazilian System for the Defense of Competition (SBDC) to deal more effectively with digital platforms?

3. Law No. 12,529/2011 establishes, in paragraph 2 of article 36 that: "A dominant position is presumed whenever a company or group of companies is capable of unilaterally or coordinated changes in market conditions or when it controls 20% (twenty percent) or more of the relevant market, and this percentage may be changed by CADE for specific sectors of the economy." Are the definitions of Law 12,529/2011 related to market power and abuse of dominant position sufficient and adequate, as they are applied, to identify market power of digital platforms? If not, what are the limitations?

4. Some behaviors with potential competitive risks have become relevant in discussions about digital platforms, including: (i) economic discrimination by algorithms; (ii) lack of interoperability between competing platforms in certain circumstances; (iii) the excessive use of

personal data collected, associated with possible discriminatory conduct; and (iv) the leverage effect of a platform's own product to the detriment of other competitors in adjacent markets; among others. To what extent does the antitrust law offer provisions to mitigate competition concerns that arise from vertical or complementarity relationships on digital platforms? Which conducts with anticompetitive potential would not be identified or corrected through the application of traditional antitrust tools?

5. Regarding the control of structures, is there a need for some type of adaptation in the parameters of submission and analysis of merger acts that seeks to make the detection of potential harm to competition in digital markets more effective? For example: mechanisms for reviewing acquisitions below the notification thresholds, burden of proof, and elements for analysis - such as the role of data, among others - that contribute to a holistic approach to the topic.

III. Design of a possible regulatory model for pro-competitive economic regulation

6. Should Brazil adopt specific rules of a preventive nature (ex ante character) to deal with digital platforms, in order to avoid conduct that is harmful to competition or consumers? Would antitrust law - with or without amendments to deal specifically with digital markets - be sufficient to identify and remedy competition problems effectively, after the occurrence of anticompetitive conduct (ex post model) or by the analysis of merger acts?

6.1. What is the possible combination of these two regulatory techniques (ex ante and ex post) for the case of digital platforms? Which approach would be advisable for the Brazilian context, also considering the different degrees of flexibility necessary to adequately identify the economic agents that should be the focus of any regulatory action and the corresponding obligations?

7. Jurisdictions that have adopted or are considering the adoption of pro-competitive regulatory models - such as the new European Union rules, the Japanese legislation and the United Kingdom's regulatory proposal, among others - have opted for an asymmetric model of regulation, differentiating the impact of digital platforms based on their segment of operation and according to their size. as is the case with gatekeepers in the European DMA.

7.1. Should Brazilian legislation that introduces parameters for the economic regulation of digital platforms be symmetrical, covering all agents in this market or, on the contrary, asymmetric, establishing obligations only for some economic agents?

7.2. If the answer is to adopt asymmetric regulation, what parameters or references should be used for this type of differentiation? What would be the criteria (quantitative or qualitative) that should be adopted to identify the economic agents that should be subject to platform regulation in the Brazilian case?

8. Are there risks for Brazil arising from the non-adoption of a new pro-competitive regulatory model, especially considering the scenario in which other jurisdictions have already adopted or are in the process of adopting specific rules aimed at digital platforms, taking into account the global performance of the largest platforms? What benefits could be obtained by adopting a similar regulation in Brazil?

8.1. How would Brazil, in the case of the adoption of an eventual pro-competition regulation, integrate itself into this global context?

IV. Institutional arrangement for regulation and supervision

9. Is it necessary to have a specific regulator for the supervision and regulation of large digital platforms in Brazil, considering only the economic-competitive dimension?

9.1. If so, would it be appropriate to set up a specific regulatory body or to assign new powers to existing bodies? What institutional coordination mechanisms would be necessary, both in a scenario involving existing bodies and institutions, and in the hypothesis of the creation of a new regulator?

PARTICIPATE!

To participate, you must be logged in to the portal.