

# TECHFREEDOM

LAW FOR A DYNAMIC FUTURE

**Comments of**

**TechFreedom**

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**In the Matter of**

*Public Consultation on Bill 2768/2022 (Brazil)*

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## INTRODUCTION

TechFreedom welcomes the opportunity to participate in the public consultation process with respect to Bill 2768/2022.<sup>1</sup> Founded in 2010, TechFreedom is a nonprofit, nonpartisan think tank based in the United States dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

While this is the first time TechFreedom has submitted a comment to an agency or legislative body of Brazil, TechFreedom has commented on significant competition issues in the United States over the past decade. For example, we recently provided comments on the U.S. Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”) Draft Revised Merger Guidelines<sup>2</sup> and the DOJ and FTC Request for Information on Merger Enforcement.<sup>3</sup>

### **I. Bill 2768/2022 and Public Consultation**

Bill 2768 is designed to regulate, supervise, and sanction the so-called digital platforms that offer services in Brazil. It proposes that Brazil’s National Telecommunications Agency issue rules governing the conduct of these platforms. According to the legislation, such regulation should, among other objectives, support fair competition, allow access to information, promote innovation and access to new technologies, and encourage interoperability and data portability. Platform services subject to regulation include online intermediation services, online search tools, online social networks, video sharing platforms, interpersonal communication services, operating systems, cloud computing services, and online advertising services offered by operators of these digital platform services. The legislation allows the agency to expand the category of platform services subject to regulation. A characteristic of most of these services is they enable or are associated with “multi-sided” markets.

A core concern of the legislation is the control of, or the holding of, an asset or group of assets that is “essential” to operating in the relevant digital markets and the refusal or potential

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<sup>1</sup> This comment was prepared in English and translated to Portuguese for purpose of submission. To the extent practicable, the English language version of this submission should be considered controlling.

<sup>2</sup> Comments of TechFreedom, In the Matter of Draft Merger Guidelines (Sep. 18, 2023), <https://techfreedom.org/wp-content/uploads/2023/09/Bilal-Sayyed-Merger-Guidelines-Comments-9-18-2023.pdf>.

<sup>3</sup> Comments of TechFreedom, In the Matter of Request for Information on Merger Enforcement (Apr. 21, 2022), <https://techfreedom.org/wp-content/uploads/2022/04/TechFreedom-Comments-Merger-Guidelines-April-21-2022.docx.pdf>.

refusal of a holder to grant access to such “essential” assets, either at all or on non-discriminatory concerns. An entity that provides the relevant digital services is considered “essential” if it had operating revenue of or in excess of R\$70 million for services provided to the Brazilian public. Such providers are, according to the proposed legislation, to operate in a non-discriminatory fashion, properly use data they collect through their business activities, and cannot refuse access to persons who use such digital platform services to supply goods or services to end users.

The proposed legislation gives the National Telecommunications Agency the right to impose accounting and functional “separation” on the captured digital platform service providers, and also gives it the right to remedy abuses of economic power. The legislation does not define economic power.

The public consultation sets out a series of factual, technical, and guidance questions for which the National Congress seeks input. Our comment responds to questions 9 (“is there a need for a public regulator, and if so, which regulator would be better able to implement the regulation?”), 13 (“to what extent do you believe that all the problems addressed in Bill 2768/2022 are already adequately addressed by competition law, by the Administrative Council for Economic Defense (“CADE”), within its existing authority?”) and 18 (“instead of pure ex ante regulation, would any other type of monitoring and/or regulation of digital markets make sense?”).

## **II. CADE Should Issue Guidelines That Set Out an Analytic Framework to Evaluate the Competitive Effects of Conduct in Platform Markets**

We believe that there is an alternative to ex ante regulation that would allow for greater flexibility in addressing anticompetitive conduct in the relevant markets, without unnecessarily or inaccurately condemning conduct that does not harm competition but merely excludes less efficient competitors, and that more carefully allows consideration of the long-term consequences of requiring access to so-called essential assets by firms who have not themselves invested in the provision or development of such assets.

As an alternative to the proposed legislation and ex ante regulation, CADE should develop Guidelines that set out an analytic framework to use in the evaluation of conduct in multi-sided platform markets. CADE has already promulgated Horizontal Merger Guidelines<sup>4</sup>; the

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<sup>4</sup> Administrative Council for Economic Defense, Guide for Horizontal Merger Review (July 2016), <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/GUIDE%20FOR%20HORIZONTAL%20MERGER%20REVIEW.pdf>.

release of Guidelines as described herein would not be novel or outside the scope of CADE's authority.

The Guidelines need not be, nor should be, limited to the evaluation of conduct by certain firms; they should be applicable to the evaluation of conduct by any firm operating in a multi-sided market. To the extent certain assets or facilities are deemed "essential," the same framework can apply to the evaluation of access restrictions or refusals to share on a non-discriminatory basis. Such Guidelines will provide a more flexible framework for the evaluation and weighing of the actual or potential effects of specific conduct in the relevant markets of concern.

In this comment, TechFreedom sets out a framework for the analytic steps such Guidelines could follow. We recognize that platform markets, especially multi-sided markets, have certain characteristics that may impact the strength and likelihood of both pro- and anti-competitive effects; we summarize those first.

### **III. Overview of Digital Platforms and Characteristics of Multi-Sided Markets**

Many firms operate with a digital component. For example, many formerly brick-and-mortar retail firms now offer an online ordering and service component. Somewhat informally, firms characterized as digital platforms can be defined as software-based businesses that provide services to multiple participants (consumers or other businesses) and often operate in multiple markets, both digital and non-digital. The markets of significant interest to regulators and enforcers are thus multi-sided markets. Multi-sided markets are found in a variety of industries, and are not a function of digitalization; commercial radio and over-the-air television services are multi-sided markets, with listeners or viewers on one side, and advertisers on another. What follows is consistent with the operation of both digital-based and non-digital based platforms.

Firms operating platforms may do business in several related markets. Markets in which platform firms operate may have several adjacent and often complementary markets. Platforms serve one or more distinct customer or user groups and allow for interaction between customers or customer groups. An important function of platforms is to attract both groups of customers in sufficient numbers or in a suitable balance to capture the value of positive (direct or indirect) network effects and to minimize negative network effects. Some—but not all—platforms operate "multi-sided transaction platforms" that facilitate transactions or other types of interactions between distinct groups of users. Some multi-sided transaction platforms offer multi-sided marketplaces. In some or all of their offerings, platforms may compete with non-platform firms. In many cases, other firms build their business "on top" of a platform's software.

Owners of platforms may be vertically integrated in input (upstream) and/or output (downstream) markets and provide platform services to itself as well as to others. Thus, a platform may also compete directly with its own customers by offering the same or similar products or services on its platform as its customers. The owner or operator of a platform, that also serves as a multi-sided marketplace may integrate and sometimes also be a “user”—typically a seller or content supplier—on one side of the platform, in addition to operating the platform itself.

Two common features of multi-sided platforms are relevant to inquiries into whether a firm operating a platform has market power. The first is “multi-homing,” which occurs when a platform user connects to multiple platforms simultaneously or in relatively quick succession. For example, a consumer is multi-homing if she uses multiple ride-sharing apps in deciding whether to book a ride. Firms operating platforms may have an incentive to limit multi-homing, either through conduct that limits the ability of rivals to compete, or through acquisition of competing platforms. Multi-homing can occur on only one side of a platform or can occur on multiple sides. In the ride-sharing example, if both riders and drivers use multiple platforms, then both sides are multi-homing, whereas if drivers tend to use a single platform, then only riders are multi-homing. The second is “switching costs,” which refers to the cost platform users must bear in switching from one platform to another. Switching costs are lower when platforms are interoperable. All else equal, lower switching costs imply that a firm operating a platform has less ability to exercise market power or obtain and maintain monopoly power. Firms generally have an incentive to increase switching costs.

We use the term “market power” rather than “economic power.” Market power is necessary for a firm’s unilateral conduct to limit competition, by, for example, unilaterally restricting output. A firm is generally considered to have market power when it can profitably raise price above what would occur in a competitive market by restricting output or innovation below competitive levels.

CADE focuses its analysis of the competitive effects of mergers on the exercise or attainment of market power:

A priori, we cannot determine whether a transaction is beneficial or harmful. Therefore, a case-by-case review approach is necessary, taking into account specific productivity gains associated with the transaction and potential

negative effects resulting from a probable increase of market power. It regards a non-negative net effect condition on the economic welfare of customers.<sup>5</sup>

Neither market structure nor firm size is a strong proxy for market power or the intensity of competition. Thus, the Guidelines we advocate should incorporate a market power principle to distinguish conduct that is not harmful and that is competitively benign from conduct that may be anticompetitive. For example, Guidelines could incorporate the following principle:

Unjustified exclusionary conduct should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. For simplicity of exposition, these Guidelines generally refer to all of these effects as enhancing market power. Conduct illegally or unjustifiably enhances market power if it is likely to encourage one or more firms to raise (or slow a decrease in) price (adjusted for quality), reduce output, diminish or slow innovation, or otherwise harm customers (at any level of distribution) *as a result of diminished competitive constraints or incentives without any offsetting efficiency benefit or rationale*. Unjustified exclusionary conduct may enhance market power if it allows or enhances the ability of a firm to exclude, in part or in full, actual or potential rivals or trading partners from one or more relevant markets; however, under certain conditions, acting on an incentive to exclude one or more rivals is consistent with pro-competitive effects, and the welfare effect may be positive.

#### **A. Potential Competitive Harms**

A firm operating a platform can harm competition in the platform market or the adjacent user markets. It can do so in the same ways that any business can harm competition: by entering into anticompetitive agreements; by monopolizing or attempting to monopolize, including by acquiring nascent or potential competitors; or by undertaking acquisitions that eliminate or substantially lessen competition. The presence of direct<sup>6</sup> and indirect<sup>7</sup> network effects may make it difficult for a new entrant offering a competitively superior product to enter, expand, and successfully provide a competitive alternative to an incumbent platform.

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<sup>5</sup> Administrative Council for Economic Defense, Guide for Horizontal Merger Review (July 2016) at 8, <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/GUIDE%20FOR%20HORIZONTAL%20MERGER%20REVIEW.pdf>.

<sup>6</sup> Direct network effects exist when a single user's desire to use a network is a function of the number or identity of users *from the same set of users* who also use the network.

<sup>7</sup> Indirect network effects are a feature of multi-sided platforms. Such effects exist when the demand for the network for a user from one set of users is a function of the number and identity of users *from a different set of users* who also use the network.

A firm operating a platform that also serves as a multi-sided marketplace may integrate and sometimes be a “user”—typically a seller or content supplier—on one side of the platform, in addition to operating the platform itself. Such integration, on its own, typically does not necessarily harm competition and may be procompetitive, in that the platform provider offers a competitive alternative to third-party sellers or content providers using the platform.

However, in some circumstances, a firm that both operates the platform and competes in an adjacent market may have the incentive and ability to exclude a competitor, in full or in part, sufficient to harm competition.<sup>8</sup> Different theories of harm require analysis of the competitive conditions in the various relevant markets. A firm operating a platform may harm competition in the “core” platform market by engaging in anticompetitive conduct that may either (a) limit the ability of a rival platform to compete, or (b) prevent a firm in an adjacent market from growing or achieving scale, if the firm in the adjacent market is or may in the future become a competitive threat in the core platform market. An investigation of this theory of harm would typically require analyzing current and/or anticipated future competitive conditions in the core platform market.

A firm operating a platform may also harm competition in an adjacent market directly: for example, by engaging in anticompetitive conduct to acquire or maintain market power in that market, or by entering into agreements that restrain competition and harm consumers in the adjacent market. An investigation of this theory of harm would typically require analyzing current and/or future competitive conditions in the adjacent market, which may differ from competitive conditions in the core “platform” market.

If the firm operating the platform is vertically integrated—if the platform acts as a seller or content provider on the platform it operates—a rival may be a customer of the platform rather than the operator of a separate, competing platform. In this context, an evaluation of the conduct should assess whether harm to an unintegrated rival is connected to harm to competition, and therefore whether and how the digital platform’s conduct affects consumer welfare. This may be shown by evidence that the firm operating the platform has raised its unintegrated rival’s costs, with the effect that competition in the market in which the

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<sup>8</sup> See, e.g., Thomas G. Krattenmaker and Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 Yale Law Journal 209 (1986); Steven C. Salop and David T. Scheffman, *Raising Rivals’ Costs*, 73 Amer. Econ. Rev. 267 (1983); and Susan Athey and Fiona Scott Morton, *Platform Annexation*, 84 Antitrust Law Journal 677 (2022). See also the theories of harm regarding mergers of firms offering complementary products in the 2020 DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION VERTICAL MERGER GUIDELINES and the Federal Trade Commission’s COMMENTARY ON VERTICAL MERGER ENFORCEMENT (DECEMBER 2020).



unintegrated rival competes is reduced, or through some other coherent economic theory of harm.

## **B. Potential Competitive Benefits**

Platforms can create economic benefits by reducing transaction costs, i.e., by facilitating transactions between actual and potential trading partners. In some cases, platforms, by creating a market, enable transactions to occur that otherwise would not have occurred. In other cases, platforms disrupt existing marketplaces by enabling the sale of goods, services, and content at lower prices and/or higher quality or in a more innovative way. They may also allow customers to find goods, services, and content they would not otherwise have been able to find. The popularity of many large so-called digital platforms is likely related to these benefits.

Conduct such as vertical integration—which can occur via entry, merger, or contract—may appear to be restrictive, but also can offer procompetitive benefits. Such practices can *improve* competition by, for example, reducing transaction costs, eliminating double marginalization, and otherwise aligning companies' incentives in a way that benefits consumers.

Digital platform markets often involve economies of scale. Such markets may be most efficiently organized with just a few large operators. Acquisitions of competing platforms or assets used to create, operate, or expand platforms, exclusive contracts with users, or other actions that increase the volume of business flowing through a platform can allow the platform to benefit from scale economies and become a lower cost or otherwise more efficient competitor.

Firms that operate platforms may engage in conduct or enter into various agreements that generate efficiencies and benefit platform users or are otherwise justified. For instance, certain conduct and agreements may enable the platform to better satisfy user preferences, including conduct that benefits one set of users but potentially harms another, to reduce transaction costs between users, to reduce double marginalization, or otherwise to enable firms to offer goods or services that are cheaper, more valuable, or brought to market faster than would otherwise be possible. Accordingly, conduct that produces anticompetitive effects in one market (or one side of a multi-sided market) may nevertheless be justified on the ground that it is procompetitive in another market (or the other side of an multi-sided market) because it involves, for example, greater efficiency or enhanced consumer appeal. This is competition on the merits, rather than predatory or exclusionary behavior.

There are certain types of unilateral conduct in which a firm operating a platform might engage in that, without more, will tend not to harm competition and/or will tend to produce

efficiencies. These include (1) vertical integration by entry; (2) product design decisions; and (3) above-cost price reductions. These categories of behavior are typically competitive responses and attempts to deliver value to consumers.

Other conduct may plausibly have mixed effects, such as contractual arrangements between a platform and another firm that provides a complementary product or service. Such vertical restraints can yield an anticompetitive effect, but they also have the potential to create efficiencies, such as allowing firms to streamline production, inventory management, or distribution, or create innovative products in ways that would have been difficult to achieve without a contractual arrangement that includes restrictive terms.

### **C. Special Factors in Competitive Effects Analysis of Platform Markets**

Each platform business is different, as are the markets in which such businesses compete. Nevertheless, some factors are present in many platform markets, whether digital or not, and these factors may be relevant to the competitive impact of the conduct of digital platforms.

#### **1. Data**

Although the use of data to make competitive decisions is not unique to firms operating platforms, firms that operate platforms often have access to very large data sets. The competitive significance of data may vary significantly from one case to another in light of the nature of the relevant market or markets; the nature of relevant business models in those markets; and the source, content, nature, breadth, utility, and availability of competitively significant data.

Consistent with the foregoing, the utility and competitive significance of data may vary by market, by time, and by characteristics specific to the data. Different data or data sets may have different and varied characteristics. Some data may be ubiquitous, easily replicable, readily substitutable, or of limited or transitory value. Other data may provide significant and hard-to-replicate competitive advantages for the firms that own or control it. A need for data may impede expansion or entry of an actual or potential competitor, particularly when there are few or no commercially available alternatives to the data, and when access to such data is competitively important in some way. Alternatively, access to data may allow a platform operator to enter new markets; entry should be viewed as pro-competitive.

Data may be competitively significant for one or more reasons, including the nature (e.g., historical, real-time, etc.), breadth and depth (e.g., varied, voluminous, etc.), utility (e.g., basis for better analytics or new products and services, etc.), and availability (e.g., costly, time-intensive, and hard-to-replicate alternatives, etc.) of the data. The process by which a firm operating a platform collects, uses, and shares data may also inform the antitrust analysis.

However, the analysis of competitive effects of conduct (including acquisitions) should consider whether the relevant data is easily replicable and/or whether rivals or entrants can compete effectively without the data.

In markets where data or data-derived products and services is a key differentiator, a firm's access to a distinctive or competitively significant data set (or to large amounts of competitively significant data) may allow it to protect its position in a market. Evidence that a firm operating a platform selectively denies rivals access to data to deny smaller rivals efficient distribution channels or sufficient sales to operate at sufficient scale is relevant to competitive effects analysis. Similarly, agreements that prohibit customers from sharing data are relevant to a competitive effects analysis. They are not determinative of the competitive effects of the conduct, however, and may be justified for reasons related to information security, device security, and privacy considerations.

In some cases, particularly cases involving mergers or acquisitions, there may be a relevant market for certain types of data or for access to certain types of data. Anticompetitive transactions or other practices that affect such markets may substantially lessen competition or may constitute anticompetitive conduct.

A platform owner that also operates business units that compete with other users of the platform may, by virtue of owning the platform, obtain competitively sensitive information from these users. The access and use of such information by a platform owner's business units that compete with other users, including any related agreements providing for the transmission of such data by platform users, may result in reduced competition that harms consumers. But there may also be efficiencies associated with the use, collection, and maintenance of that data.

## **2. Network Effects & Multi-Sidedness**

The existence, scope, and strength of direct and indirect network effects are factual questions relevant to the competitive effects analysis. Network effects exist on a continuum, where at one endpoint on the continuum any indirect network and feedback effects are strong and at the other endpoint the effects are weak. The strength and degree of direct or indirect network effects may be different on different sides of a firm's platform, and the network effects may be positive or negative.

An evaluation of the competitive effects of enhanced scale and scope should be mindful that the degree and nature of network effects can change, sometimes rapidly, in response to a new technology or business model. An evaluation of the effects of certain conduct should take account of information regarding the presence and strength of network effects. The presence of network effects does not insulate a firm operating a platform from scrutiny

under the competition laws, and a firm that benefits from positive (direct or indirect) network effects may still be found to have engaged in conduct in violation of competition law.

Strong indirect network effects may make it more likely that an incumbent platform operator can profitably and effectively engage in anticompetitive or exclusionary conduct. In these circumstances, a new entrant platform must attract sufficient customers on both sides of the platform to create value, and indirect network effects operating across customer groups can make entry more challenging.

Multi-sided platforms can benefit from feedback effects. Indirect network effects can sometimes be self-reinforcing. If indirect network effects are positive in multiple directions, then these effects can build upon one another. Using the example of a computer operating system, more consumers lead to more software applications, and more software applications lead to more consumers, yielding a “virtuous cycle” of growth for the platform. Feedback effects can also be negative, in that losing users on either side can lead to a “vicious cycle,” whereby the platform’s scale decreases quickly.

The nature of competition may be different on each side of a multi-sided platform. A competition agency should consider whether competition on one side of the platform makes it less likely that a platform can engage in anticompetitive or exclusionary conduct on other sides of the platform. In assessing conduct directed only or primarily at one side of the platform, a competition agency should consider the degree of competition on other sides of the platform, and any other competitive constraints on the platform.

### **3. Non-Price Competition**

Anticompetitive effects may manifest themselves as price or non-price effects, or both. Non-price effects include, among other things, effects on output, quality, variety, and innovation. A violation of law may be based on actual or anticipated price effects only, actual or anticipated non-price effects only, or both.

In some matters involving platforms, effects on non-price competition may be especially important because price effects may be difficult to detect or measure. Firms operating a platform may provide a product or service to one set of users at a nominal price of zero, which does not change over time. In this context, in detecting whether such users have been harmed, it may be appropriate to focus the competitive effects analysis on non-price effects.

Even when a product or service is provided for a nominal price of zero, effects on competition and welfare may manifest, in whole or in part, in changes in output, variety, the rate of innovation, and/or quality (including terms of service to users and businesses, or privacy

and data security practices). It may be appropriate to challenge practices or transactions that harm consumers solely through such non-price effects.

With regard to effects on output, a practice may harm or be reasonably likely to harm competition even when market-wide output is increasing over time (or when nominal price is declining or unchanging). The relevant comparison is between the actual or anticipated effects of the challenged conduct and actual or anticipated scenarios where the conduct has not occurred or does not occur. Such actual or anticipated scenarios where the challenged conduct does not occur may also involve market-wide output increasing.

An evaluation of conduct should consider how a challenged practice or transaction affects or may affect innovation, compared to an alternative in which the practice or transaction did not occur. Markets in which platform businesses compete—when competitively healthy—may be characterized by intense innovation. Accordingly, effects on innovation may be, and in some instances must be, a significant focus in matters involving technology platforms.

Anticompetitive effects on innovation could take the form of a reduced incentive to continue existing product development efforts or reduced incentives to develop new products. A competitive effects analysis should also consider whether the practice or transaction enables or may enable innovation to occur that would otherwise not take place. Both incumbents and entrants, and likewise both large firms and small firms, engage in innovation that increases welfare. As in the analysis of effects on other factors relevant to competition, the focus should be on both firm-specific and market-wide effects on innovation. Effects on individual firms' incentives and abilities to innovate are a part of market-wide effects.

The analysis of effects on innovation may include both quantitative and qualitative evidence. Reliable quantitative evidence regarding how a business practice affects innovation may not be available or of limited utility. Quantitative evidence should not be necessary to determine that a firm's conduct has produced harm to innovation.

#### **4. Monetizing Platforms and Business Models**

Firms operating platforms may use different business models and may monetize their products and services in various ways. This may include earning revenue through the sale of advertising, or by charging fees to users on one or more side of the platform for access to the platform. Some platforms may use a mix of strategies to earn revenue, including charging fees to users and selling advertising opportunities.

Firms operating platforms can experiment with different approaches to earn revenue. They may change their approaches over time for various reasons, such as responding to new competitive conditions and expanding their product or service offerings. Innovation in

business models may be as valuable as innovation in technology, but just as it may benefit consumers, it may also harm them. It may be appropriate to investigate such changes to determine whether they reflect or are part of a firm's effort to impair the competitive process. For example, it may be appropriate to investigate whether a firm's change to its approach to earning revenue is a mechanism through which the platform can raise the cost of using a competitor's platform.

#### **IV. Guidelines Should Adopt a Burden-Shifting Approach to the Analysis of Conduct in or for Platform Markets**

Because conduct may have both procompetitive and anticompetitive effects, TechFreedom recommends that CADE promulgate Guidelines that adopt a burden-shifting approach to the analysis of the competitive effects of conduct by allegedly dominant firms operating in platform markets or those companies holding or operating "essential" assets.

The Guidelines, as applied, should identify conduct that has the actual or potential effect of reducing market-wide output, quality, or innovation, and/or increasing firm or market-wide prices as compared to an alternative in which the conduct did not occur. The Guidelines should not condemn conduct that is procompetitive or that is competitively neutral. The Guidelines must balance concerns about overenforcement and underenforcement, and *should strive to minimize the sum of Type 1 errors (overenforcement) and Type 2 errors (underenforcement)*.

The Guidelines should follow a structured but flexible analytic framework to identify the competitive effects of conduct (including acquisitions) by technology platforms. They should recommend challenging or finding illegal only that conduct that has demonstrable anticompetitive harms not outweighed by specific, cognizable, and verifiable procompetitive benefits. When required to balance harms and benefits, CADE, as the relevant enforcement agency, should consider whether the firm operating the platform could achieve similar benefits through less restrictive or exclusionary alternatives. In evaluating whether any anticompetitive harms outweigh any anticompetitive benefits, the focus must be on the state of competition with, as compared to without, the practice under review.

To avoid determining competitive effects by characterization of conduct, the analytic framework of the Guidelines we suggest should consist of 3–6 steps, set forth below.

1. The Guidelines should require CADE to identify a plausible basis for alleging the conduct has had or will have an anticompetitive effect. It should identify the significance, magnitude, and likelihood of that effect.
  - Conduct that may be benign or procompetitive when engaged in by a firm—even a firm operating a platform—that does not possess significant market power, may

have an anticompetitive effect when engaged in by a platform with significant market or monopoly power.<sup>9</sup> CADE must demonstrate that the firm operating the platform has market power or monopoly power in the relevant market; market power and monopoly power may be demonstrated by either or both of direct and indirect evidence.

- An asset or means of distribution cannot be deemed essential if the firm alleged to control that asset or facility does not have *monopoly power* in the relevant market. The analysis of monopoly power must consider the durability of that monopoly power, including the ability of a firm to exclude others, and the ability of another firm to replicate, “leap-frog” or otherwise find an alternative to the allegedly essential facility. Monopoly power is different than market power, and it requires an ability to exclude competition over the long-term.
  - Anticompetitive effects may manifest themselves in price effects, non-price effects, or both. Non-price effects include, among other things, effects on output, quality, variety, and innovation. An enforcement action may be based on actual or anticipated price effects only, actual or anticipated non-price effects only, or both.
  - Harm to rivals must be connected to harm to competition to support an enforcement action.<sup>10</sup> Conduct by a platform that harms a rival or a third party (or a group of similarly situated rivals or third parties) is typically insufficient *by itself* to support a challenge to the practice. Such harms may be part of a body of evidence that supports a challenge to the practice, however, as harm to a rival can be consistent with a viable theory of harm to competition.
2. If CADE makes the requisite showing of harm, the firm operating the platform may rebut this showing by establishing that its existing or threatened future market power or monopoly power is not durable.

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<sup>9</sup> Issues that can arise in cases featuring digital platforms that may inform an analysis of relevant markets and market power include (i) whether, and to what extent, firms that offer goods and/or services for sale through brick-and-mortar outlets compete with firms that offer goods and/or services for sale online; (ii) whether a single platform’s marketplace can constitute a relevant market; and; (iii) whether platform users face unreasonably high costs to switch to a competing platform, effectively locking them in to use the dominant platform.

<sup>10</sup> Harm to a competitor can be associated with harm to competition, particularly in concentrated markets with few rivals. For example, if the conduct at issue effectively raises the rival’s costs, thereby enabling the platform profitably to raise price and/or reduce quality compared to an alternative in which the conduct did not occur, it may be anticompetitive. Harm to rivals also can be the product of competition on the merits. For example, a linear, non-predatory price reduction that has the effect of transferring sales from a rival to the price cutter may harm the rival but is consistent with competition on the merits. Competition on the merits—even when practiced by a firm with market power—can harm rivals without harming the competitive process.

- Ease of entry or ease of significant or material expansion by a firm acting unilaterally, or jointly, in a bona-fide joint venture, will often defeat a claim of future harm associated with existing market or monopoly power.
3. Alternatively, the platform operator may identify efficiencies or procompetitive benefits linked to the conduct. The platform operator should have the burden of showing the significance, magnitude, and likelihood of the procompetitive effect.
    - Whether such a justification for conduct is convincing will depend upon facts specific to the conduct or transaction under review or consideration.
    - CADE should evaluate any efficiency claim to determine whether it represents a non-pretextual claim that the conduct is a form of competition on the merits: perhaps it involves or creates, for example, greater efficiency or enhanced consumer appeal, or a lower cost structure. Conduct that is reflective of a “lower cost structure” is typically competition on the merits.
    - The evaluation of the essential nature of an asset or facility should consider whether forced sharing of the asset may diminish the incentive to innovate or invest in assets or facilities otherwise deemed to be essential.
    - The identification of efficiencies or other procompetitive benefits is not sufficient to rebut a claim (and proof) of exclusionary or predatory conduct, but in the presence of durable monopoly power, cognizable efficiencies are necessary to rebut proof of exclusionary or predatory conduct.
    - If the respondent offers procompetitive justifications for its conduct, the claimed benefits must be related to the conduct under review, i.e., “conduct-specific,” in addition to being verifiable and cognizable. The general economic benefits the platform has created will typically not be relevant to the determination whether the conduct is anticompetitive. Rather, the platform must explain and show, with evidence, how *the specific conduct at issue* benefits (or does not harm) competition.
  4. If market power or monopoly power is durable and that there is a plausible basis (and credible evidence) for both the harm alleged and for non-pretextual procompetitive justifications for the conduct, the platform operator must show that there is no reasonable less restrictive alternative that would allow the relevant efficiencies to be obtained. Such alternatives must be practical, not merely theoretical.
  5. If the platform operator makes such a showing, CADE should determine, and be prepared to prove that, on balance—on “net”—the conduct is harmful or beneficial to competition. This is consistent with CADE’s approach to the evaluation of mergers.
    - CADE should compare the likelihood and magnitude of anticompetitive effects with the likelihood and magnitude of efficiencies to determine the likely or actual



overall effect. As the expected harm of the conduct or agreement increases, the required offsetting benefits should also increase.

- In analyzing harms and benefits, it is necessary to consider the scope and strength of the evidence of actual or likely effects. Mere assertions of potential affects or a business justification are insufficient. However, neither CADE nor the platform operator must identify and weigh each anticompetitive and procompetitive effect with specificity and precision. Such analysis may not be possible or efficient in an individual investigation.
6. Where remedies are required, they should be designed to: (i) address the competitive harm from the conduct or transaction; (ii) fit the facts of the case and characteristics of the relevant market, which requires a close and logical nexus between the theory of harm and the remedy; (iii) focus on preferred and time-tested approaches, though novel remedies may be appropriate in some contexts; and (iv) preserve efficiencies to the extent such efficiencies are consistent with effective relief. The party proposing the remedy has the burden of showing the remedy meets these criteria.
- Remedies should preserve or restore competition and prevent or correct the exercise of market power that has resulted in harm to competition. To the extent possible, remedies should preserve efficiencies associated with the prohibited conduct, where such remedies are consistent with effective relief. Remedies that may be appropriate include: (i) divestiture or separation; (ii) a prohibition on, or pre-consummation notice of, mergers or acquisitions; (iii) compulsory licensing, including the licensing of data sets or intellectual property; (iv) interoperability requirements; (v) non-discrimination requirements; (vi) corrective actions; and (vii) monetary equitable remedies.

The proposed approach is a competitive effects analysis, not simply a reasonableness analysis. In considering the benefits and harms associated with certain conduct, it is similar to the competitive effects analysis described in CADE's Guides for Horizontal Merger Review.

## **V. Key Principles of a Competitive Effects Analysis in Platform Markets**

Analyzing the competitive effects of conduct affecting platform markets is a fact-specific process through which CADE, guided by its experience, can apply a range of existing tools—analytical tools—to the available evidence. The competitive effects analysis should be focused on and limited directly on how the conduct (including acquisitions) may affect price, output, quality, and innovation.<sup>11</sup> The analytic focus of this inquiry must be on the actual or

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<sup>11</sup> When CADE can identify and analyze conduct based on factors other than price, output, and innovation that, based on factual analysis, are important competitive variables, the effect of firm conduct on such factors

reasonably likely effects of the conduct, not its label. Although characterizing a platform as an “essential facility” or a platform’s conduct as “an exclusive deal,” a “refusal to deal,” a “product design decision,” or “self-preferencing” may be helpful in identifying relevant prior agency law or whether the conduct is engaged in by market participants without market power, such labeling should not be the focus of the inquiry.

The Guidelines’ analytic framework should consider effects on each class of platform participants that are proximately affected by the conduct under review, including in markets upstream or downstream, or operating in a complementary relationship to the relevant market, and with respect to both inputs and intermediate and final products or services. As part of this analysis, CADE should consider the nature of the relationship and interaction among the different sides (or different sets of users) of the platform, if a firm is operating a multi-sided platform business.

The analysis of the potential anti- and procompetitive effects of the conduct at issue should include, where possible, both short-term and long-term effects. A firm’s effort to prevent a nascent technology or nascent competitor from maturing into a viable competitive alternative to an existing platform or platform market constitutes a valid theory of harm even if the process of maturation may take some time or is uncertain. Similarly, the fact that any benefits caused by the conduct may not accrue in the near term should not preclude a determination that such benefits are procompetitive or welfare enhancing. Competitive conditions in a market or industry may change over time. Meaningful competitive constraints may emerge in a platform market that currently lacks such constraints; and conversely, the existence of meaningful competition today does not necessarily mean that such competition will, or is likely to, persist in the future. Such facts, if available, are germane to the evaluation of the complained of conduct. The evidentiary standard required to show anti- or procompetitive effects should be symmetrical.

Neither CADE nor platform operators or participants in platform markets should be required to construct a hypothetical alternative marketplace or otherwise show with specificity how competition would have occurred had the alleged dominant firm or monopolist not engaged in the putatively anticompetitive conduct, nor to determine whether the conduct is anticompetitive. The focus of the inquiry is only on the connection between the conduct under review and any harms and benefits it may produce, in comparison to competition absent the conduct.

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can be incorporated into the competitive effects analysis. However, CADE should proceed cautiously in expanding the relevant factors for competitive effects analysis and should do so on a case-by-case basis.

Nascent or potential competition may be important in platform markets, or, more generally, in dynamic markets—markets characterized by rapid change or its potential. Accordingly, the Guidelines should attend to conduct that excludes or harms nascent or potential competitors, including acquisitions that remove a nascent competitive threat. However, they must also recognize that competition law should not condemn competition on the merits even when that competition harms a nascent or potential competitor.

The Guidelines should not require a showing that a new entrant is offering a competitively superior alternative to an incumbent provider in order to show harm from exclusionary or predatory conduct or in conjunction with a merger; the focus of the analysis should be on whether the firm operating a platform has engaged in conduct that harms competition, such as by foreclosing a probably new entrant from key distribution channels or key customers such that the probable entrant's costs are raised and the incumbent faces less disciplining competition to the detriment of consumers.

A firm operating a platform may take actions, including a merger, to prevent or limit its rivals' ability to capture the benefits of direct or indirect network effects. If this is a harm to competition and not just a competitor, the Guidelines framework should allow the evaluation and weighing of that harm against any direct or indirect network efficiencies gained from the conduct. Efficiencies or other economic benefits that are inextricably linked to the merger or post-merger conduct should be evaluated together in analyzing the competitive effects of the merger or conduct. Similarly, mergers or post-merger conduct that deprives rivals of platform participants on one side of the market but increases the merging parties' number (or quality) of platform participants on the other side of the market, must be evaluated together with respect to benefits and harms.

The ability to self-preference is a function of being vertically integrated. Vertical integration can be, and is often, efficient. Guidelines should be clear that self-preferencing in the absence of market power is not likely to harm competition, and that self-preferencing, even when accompanied by market power is not necessarily anticompetitive. Self-preferencing may support entry into new markets; the proposed Guidelines should not discourage entry.

Guidelines should identify a description of non-routine markets in which competition may be affected; this includes standard single-product or service markets, cluster markets, bundled product markets, and one-stop shops, but also markets for innovation (or research and development), markets for a future good, and technology markets.

## CONCLUSION

Ex ante regulation of the digital sector of Brazil's economy is an unnecessary step for the proper oversight of these markets, and it may have unforeseen negative effects. A better approach is to rely on competition law to prevent, punish and remedy anticompetitive conduct. Brazil's Competition Law provides sufficient authority to do so. CADE, a well-regarded competition authority by its peers and by experienced competition lawyers,<sup>12</sup> has a long history of evaluating the competitive effects of conduct by firms operating platforms and operating in platform markets.<sup>13</sup> CADE has experience evaluating how conduct or mergers may affect privacy and data protection considerations.<sup>14</sup> Developing and promulgating agency enforcement guidelines that provide an analytic framework for the evaluation of single-firm conduct by technology platforms operating in digital markets is a better alternative than the adoption of the more regulatory framework proposed in Bill 2768/2022. Guidelines are preferred to revisions to the existing legislative and statutory framework because they are likely more flexible and would avoid condemnation of innovative and beneficial conduct.

The legislature should not adopt Bill 2768/2022; rather than upset the existing framework for reviewing, challenging, and addressing anticompetitive conduct in digital markets, it should charge CADE with preparing Guidelines that set forth the analytic framework and relevant standards for the evaluation of the competitive effects of conduct in platform markets.

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Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_

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TechFreedom

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<sup>12</sup> See Conselho Administrativo de Defesa Economica, *CADE Receives 4 Stars in International Ranking* (Nov. 1, 2022), <https://www.gov.br/cade/en/matters/news/cade-receives-4-stars-in-international-ranking> (ranking 9th among competition agencies reviewed. CADE is routinely ranked within the top ten competition agencies in the world).

<sup>13</sup> Conselho Administrativo de Defesa Economica, *Mercados de Plataformas Digitais* (Agosto, 2021), <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/plataformas-digitais.pdf>.

<sup>14</sup> Victor Oliveira Fernandes, Commissioner, CADE, *Privacy Harms in Platform Mergers: Lessons from Brazil*, CPI Columns, Latin America (July 2022), <https://www.competitionpolicyinternational.com/wp-content/uploads/2022/07/LatAm-Column-July-2022-Full.pdf>.

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