1. INTRODUCTION

First of all, I would like to express my most sincere and profound gratitude for the invitation to be a part of this presentation about Brazil, specifically CADE, regulation, and digital platforms.

I think that there are two questions that alarm not only CADE, but also other antitrust authorities, scholars, and lawmakers of the BRICS and the world: **How far can we go and how far should we go?**

These questions emerge in a scenario of the rise of big tech companies, such as Google, Amazon, Apple, Microsoft, and Facebook, which operate not only as intermediary platforms but also as goods and service providers in several markets. In fact, this rise has increased the concerns of possible economic damage brought by the concentrated structure of the digital economy.

A great number of policy reports and documents in the last years demonstrate that the main characteristics of the markets of digital platforms represent market failures. And these failures guarantee or foresee regulatory actions. The nature of intervention is to reach the market failures.

In addition, we have the ex-post antitrust application, mostly to evaluate if these strategic movements of the companies are changing purposefully to prevent or not competition. And there are urgent concerns regarding privacy and data protection.

On the global scenario, I can briefly say that:

- In 2020, the USA held an investigation into big techs, leading to the creation of several bills which now have bipartisan support.

- In January 2023, the DOJ filed a big new lawsuit against Google.

- In Europe, in 2023, the European Commission found Meta guilty for a set of violations on anticompetitive practices in the market of advertisements.

- In 2022, the European Parliament approved a law that regulates big techs in the competition field, which is called the Digital Market Acts (DMA). This new law brings a set of rules on how these platforms must operate, the new rules of the game for these digital markets.

- In fact, a series of competition cases were filed against big platforms in the last years. Often, they concentrate especially in the abuse of dominant position or monopoly s well as in possible anticompetitive mergers. This is a justification to propose ex ante regulation by the European Commission, which highlights that “the competition policy cannot solve alone all the systemic problems that can arise in the platform economy”.

- Cases against Amazon, Apple, Facebook and Google (the "GAFA”) were presented by the European Commission; the German Bundeskartellamt; the Competition and Markets Authority of the UK; the Korean Fair Trade Commission; the Competition Commission of India; and the Federal Trade Commission and the Department of Justice of the USA.

These are only a few examples, but in a short term, they demonstrate that the matter demands reflection from the authorities in face of the great influence of the digital platforms. Often, they concentrate especially in the abuse of dominant position or monopoly as well as in possible anticompetitive mergers.

It is the moment for a deep reflection in the world and, who knows, a moment of transformation. The actors in the legislative power are starting to create new laws to regulate the competition in digital platforms. More investigations are made by the competition authorities.

And, in the last years, many jurisdictions proposed some form of regulation ex ante to complement the existing ex post application.

2. DIGITAL PLATFORMS

Well, taking a step back, I understand that a point to align the expectative for my speech is that we understand that when I mention digital platforms, I am talking more in the sense of new strategies, business models different from the traditional methods used by big tech companies.

The monetisation through digital platforms is a big issue. There is a platform concept and logic that explains the success of the companies and the reason why it is so difficult to deal with antitrust in this matter.

3. WHAT IS A PLATFORM?

A platform is not a company, a brand, or a product. It is a business model or a business strategy different from the known resale strategy.

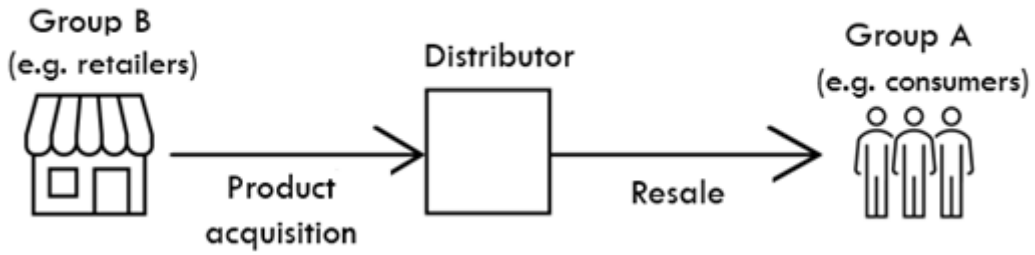
Platform is a strategy, a business model that is usually based on the intermediation of two agents that meet directly. You have someone that organises the intermediation but establishes a direct relation with the other group. Since the

platform is not a company, the company's strategic decision can be inside the platform or not.

On one side there are people and companies that look for information, transactions, entertainment and on the other side the producers and service providers.

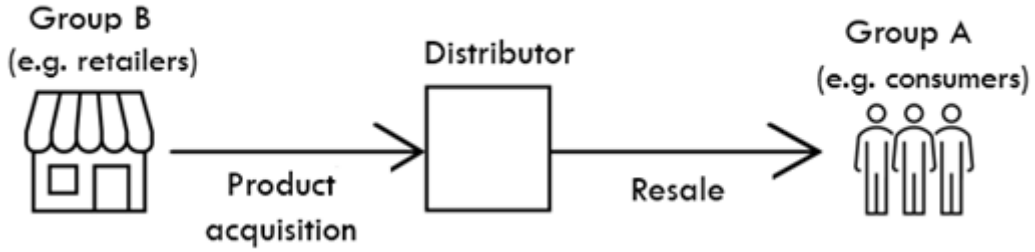
Let s explain it.

FIGURE 1

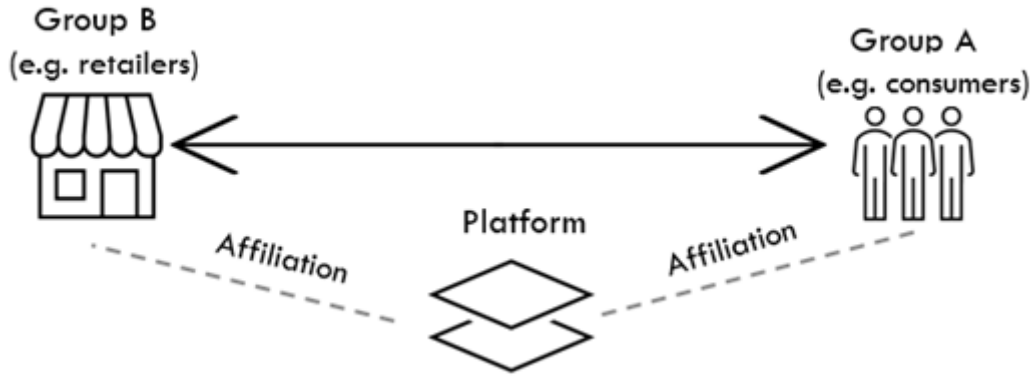


In the early 2000's, some authors of the industrial economy started to study business strategies that were different from the resale strategy, such as in figure 1. In the traditional economy, we have the figure of the retailer as the economic agent that buys the input from someone and resells to the market.

FIGURE 2



When we talk about a platform, the decision that the economic agent makes in the two sides of the platform affects directly the value that is taken from the platform. The price structure interferes in the volume of transactions.



Thus, to attract a minimum quantity in one side of the platform, you must also have a benefit to the other side. This is the main characteristic, meaning that , the network effect is indirect or cross-side. The attractiveness of the platform depends on the number of individuals on the other side. The more individuals you have on one side, the more you have on the other and this creates a snow ball.

This is the tendency of the demand on one side to the other which makes the digital markets potentially concentrated. This is the economic phenomenon that can explains why we have these structures of concentration in these markets, tending to monopoly.

What differentiates a platform is the direct contact between the two sides. The user of Spotify does not have a direct commercial relation with the artist or the producer. Spotify uses the resale model.

The OECD defines digital platform as "*an online platform is a digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who Interact through the service via the internet*" (OCDE, 2019).

The economic power of these platforms comes from these two different economic characteristics:

- The presence of strong economies of scale (decrease of marginal cost by the production of an additional unity of the product) and scope (decrease in the marginal cost by the offer of similar products)
- Direct and Indirect network effects;
- A feedback cycle based on data that strengthens even more the network effects;
- The formation of digital ecosystems (the leverage of market power means that the gatekeeper companies are capable of creating an ecosystem of services, which the users can get trapped, putting the change to another platform at a high cost)

These characteristics end up generating competition concerns:

- This creates an externality which is the lock-in effect: since the economic agent was the first to develop the platform idea in a specific market, he ends up locking in the market, closing it. Even if we have a new agent, with better technology, he won't be able to enter the market because someone arrived first and closed it.
- And another interesting effect is that the competition model discussed here ends up bringing the "winner takes all" model. That is, if in these markets there is a tendency to use only one service and the adoption of only one application becomes the standard, the competition in these markets happens when an economic agent brings another great innovation, such as WhatsApp, to which all the users have the desire to migrate. The winner takes all. The companies do not compete in the margins anymore, they compete to see who takes all.

If the company has access to key inputs (such as data, infrastructure, and many stable users) the result leverages its market power in other markets. Thus:

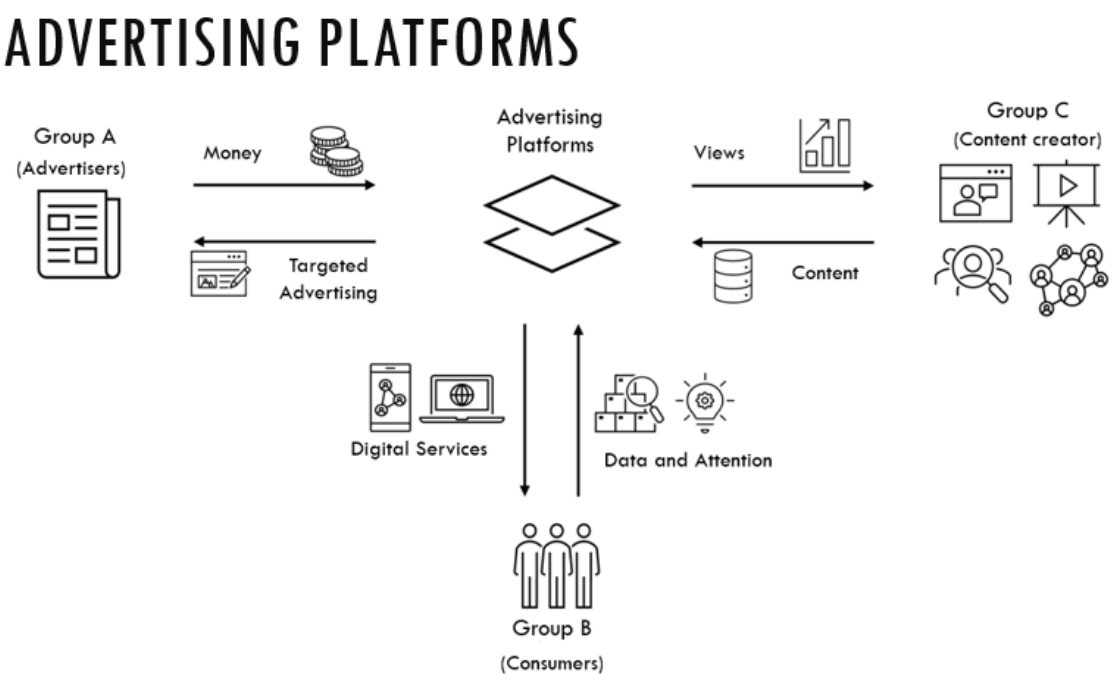
➢ the cost of switching platforms ends up being very high;

➢ the exit cost is also very high.

According to the German commission for the "Competition Law 4.0": "The combination of dominance on the platform market with a gatekeeper position and rule-setting power gives rise to the risk of distorted competition on the platform and the expansion of market power from the platform market to neighbouring markets. In view of the strong steering effect that platforms can exert on their users' behaviour, the often rapid pace of development on digital markets and the importance of first-mover benefits, non-intervention or late intervention against abusive behaviour typically comes at a very high price."

4. Why are data important?

- Why are data important for digital platforms? The data has two functions: they serve as input so that a platform can make money selling, for the most part, advertisements. At the same time, the user data allow for the platforms to personalise the products offered and improve the service quality and experience offered to the user.
- The data collection most common are: primary, the user gives the data, and third-part-tracking—when we enter a website, for example, there are plug-ins that collect data for a third party.
- Can we affirm that the user pays with data?



The core business is the ad targeting and for that they need our data and our attention. Attention creates ads. The users data and attention are caught. To spend time, we want content. What differentiates all companies is not the format but the content that they offer for our attention. Google offers a search service. It is an exchange, we give attention and they offer content. They monetise on advertisements.

There is also a debate if the new digital economy is a new form of natural monopoly. If it is, what is the solution? Regulation.

5. ANTITRUST IMPLICATIONS

The situation is a challenge to jurists and economists for the development of analytic and regulatory tools applicable to markets in constant and rapid evolution.

In regards to the repression of anticompetitive conducts, the digital era brings new challenges related to the examination of new types of antitrust violations, such as:

- ➢ collusion through algorithms,

- ➢ refusal to contract and refusal to access data,
- ➢ tying sale in the digital market, margin squeeze,
- ➢ compulsory free-riding,
- ➢ discriminatory leverage, in addition to the use of a set of cross data with illegal objectives
- ➢ We have difficulties to adapt antitrust tools to zero-price markets, self-preference, and leveraging.
- ➢ Discussion on the abuse of dominant position;
- ➢ Discussion on killer acquisitions.
- ➢ And the antitrust remedies? How to monitor them?

6. CASE EXAMPLES

Each one of these cases have a different level of complexity.

- ➢ Google Shopping was found guilty in 2017 in the European Union (which brought the question of the neutral algorithm, without favouring their own services), signed an agreement in the USA, and was assessed at CADE.
- ➢ The Facebook case in Germany. Facebook was found guilty for data overuse (excessive data collection), without giving options to the user, with the following objective: Facebook generates a service to the user which is necessarily based on the data collected inside the Facebook platform and the data collected in pages of third parties. But when Facebook collects these data in pages of third parties, it also collects these data to target advertisements inside Facebook or Instagram. So the advertisements are targeted at you not because of the data that you gave to the Meta group but the data collected in WhatsApp, in Facebook, or in other platforms of the group. So the authority decided that Facebook could not offer the user only one service solution that involves the collection of data in all of its platforms. And

this is a case that involves a little of antitrust and data protection. A big part of the decision uses the reasoning of the general data protection law of the European Union. From the moment we have a gatekeeper that starts to defy this law, we will have an abusive conduct.

In the USA, Facebook is answering a lawsuit opened by the FTC for killer acquisitions. The thesis is that Facebook bought throughout the last 20 years many companies that were new competitors with the objective of stopping these businesses. Although some of these acquisitions were analysed by the FTC, because individually they did not raise antitrust concerns, its strategy to eliminate competitors causes a competition problem.

- In Brazil, we have an open lawsuit against Apple on the IAP – Apple In-App Payment Solutions (Epic games – Fortnite).

6.1. IFOOD

In February, CADE signed an agreement with iFood regarding exclusivity in the marketplace of online food delivery.

The measures provided in the Cease and Desist Agreement has the objective to foster competition and facilitate the access of other app companies in the sector.

The agreement is related to an administrative proceeding that examines possible violation of the economic order in the Brazilian online food market.

According to the investigations, there are evidences that iFood was abusing its dominant position in the market, imposing exclusivity agreements to the restaurants part of the platform, and other practices that would have the same effect. Such conduct made difficult the entry or permanence of competitors in the market and would have excluding effects.

To foster competition and the entry of other applications in this sector, the Cease and Desist Agreement signed with iFood includes provisions that impede or restrain exclusivity obligations in contracts signed between iFood and partner restaurants. CADE's Cease and Desist Agreements have proven to be especially beneficial to dealing with unilateral conducts as they immediately halt the practice.

Details of the agreement

To address competition concerns raised by the practice, the Cease and Desist Agreement forbids exclusivity clauses—and contractual measures which could result in exclusivity—with restaurant chains of over 30 units. This measure is necessary because these brands work with an enormous number of orders, they are strategic to the portfolios of online food delivery marketplaces.

Additionally, the agreement sets ceilings for iFood at local and national levels for chains with less than thirty restaurants.

At the national level, the application's volume of businesses bound by exclusivity deals cannot surpass 25% in gross merchandise value (GMV). At the local level, in municipalities of more than 500 thousand inhabitants, the number of exclusive restaurants cannot exceed 8% of the platform's listed active establishments.

Moreover, iFood's exclusive dealings with chains of less than 30 restaurants must last for a period no longer than two years and must be followed by an "exclusivity quarantine". It means that the partner cannot sign a new exclusivity deal with iFood for an entire year from the end of the exclusivity contract.

This measure can be disregarded in up to 50% of the contracts with exclusivity provisions, contingent on a performance goal. Namely, while the exclusivity clause is in force, iFood's investment in the partner's business must

increase the company's revenue by a minimum of 40% above the growth of the food delivery market in the previous year.

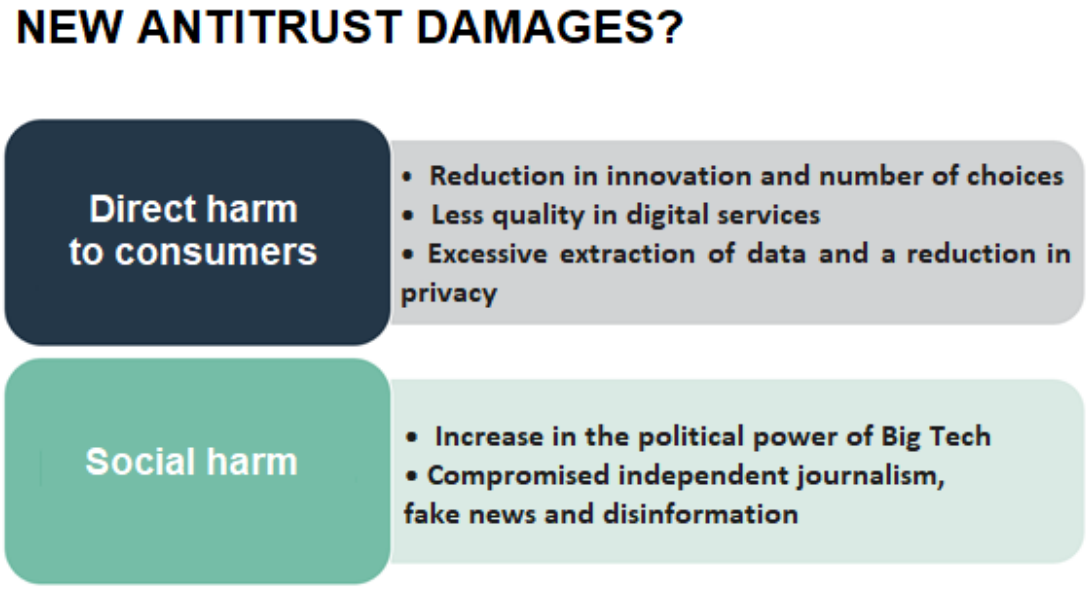
Supplementary measures

Amongst other obligations, the Cease and Desist Agreement prohibits clauses known as most favoured nation - MFN, when the supplier would be linked to the lowest market price to be offered to the dominant agent. Moreover, it precludes clauses that forbid partners from offering promotions in competing platforms or mentioning other food delivery services in advertisement actions entirely paid for by that service and conducted outside the iFood platform.

The agreement also prohibits iFood from executing contracts that impede restaurants from contracting with other platforms after the end of the exclusive dealing; from offering incentives or discounts to keep most of a partner's delivery business bound to iFood; from offering specific partners discounts based on volume increases, in an individualised manner.

The application of the Cease and Desist Agreement lasts 54 months and compliance with obligations will be supervised by a control agency approved by Cade.

7. NEW ANTITRUST DAMAGES?



The loss in a traditional analysis is a decrease in supply, an increase in prices, a reduction in innovation (quality/price). The price we pay in platforms are our data. The first approach is an overcharge from the consumer.

8. JUSTIFICATIONS EX-ANTE ADJUSTMENT

In the last 5 years, this scenario has led to the growth of reports from foreign authorities, research centres, academia on the digital economy saying, in short, that antitrust investigations are slow, highly costly, in the end we do not know whether there has been damage or not, we have not been able to measure with respect to price and even when the antitrust authority condemns, remedies are difficult to monitor. From this, the debate broadens and we see that this transcends the antitrust debate.

Here we talk about Regulation.

Given all this background, the discussion of why ex ante regulation of digital platforms is necessary tends to focus on the fact that competition law enforcement does not seem to efficiently and quickly address the competitive challenges that have arisen.

In the document “ex-ante regulation and competition in digital markets of 2021”, the OECD brought two important points that justify this discussion:

1) The first refers to market failure in digital platform markets due to the fact that platforms have consolidated positions of market power. This perception takes into account that the economic structure of digital markets is outside the scope of competition law enforcement, that is, the particularity of these digital platforms and their performance tend to bring dominance or monopoly and traditional tools would be less effective in reaching satisfactory results.

   This is a justification to propose ex ante regulation by the European Commission, which highlights that “the competition policy cannot solve alone all the systemic problems that can arise in the platform economy”. It includes the control of private gatekeepers to access markets as well as clients and information (European Commission, 2020).

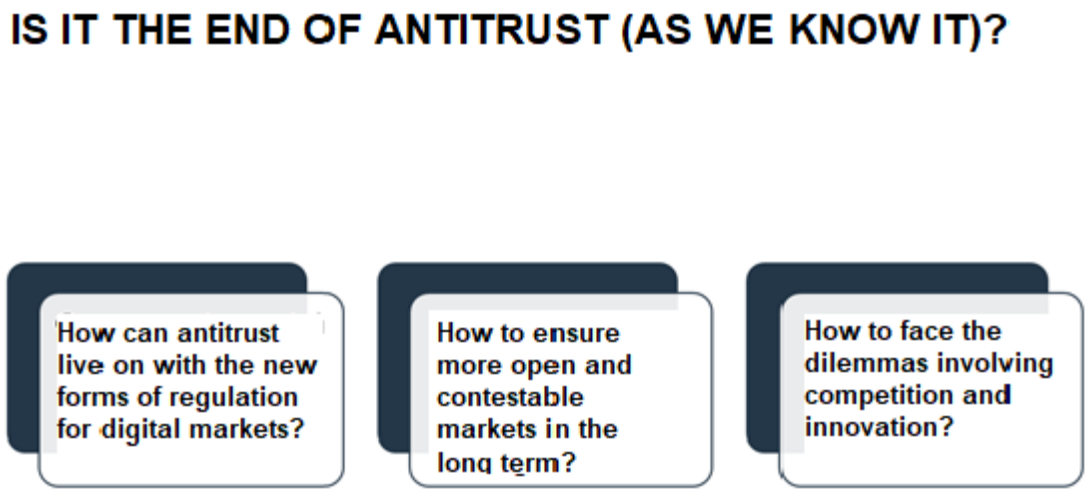
   The United Kingdom, through the UK Digital Markets Task Force and previous studies has brought the view that existing competition laws are not, by themselves, sufficient to address these challenges”

2) On the other hand, the perception of the US shows us that there are flaws in the inspection itself. There is a perceived lack of effectiveness of competition law enforcement to fully address competition issues posed by digital platform markets. In this field, a legal change would be necessary to expand the traditional competition tools focused on competition based on prices and consumer welfare.

In fact, there is a consensus about the need for ex ante regulation as complement to the application of the antitrust law in order to provide elements for a quick and effective action from authorities. Debate points can be focused on the particularities of each jurisdiction, whether they want separate ex ante regulation of antitrust or not, whether new competition law instruments are needed or simply an adaptation of existing competition law instruments.

Regulation seems interesting because we do not have a view of effects over time

9. Is it the end of antitrust as we know it?



So, is that the end of antitrust as we know it? Will it all become Regulation? Will antitrust be able to correct all these enforcement failures? What is our role in it? Those questions remain.

10.REGULATIONS ALREADY IMPLEMENTED

What are the arguments for regulatory initiatives? According to OECD, the arguments presented fall into two broad categories.

1 - The first refers to market failure in digital platform markets due to the fact that platforms have consolidated positions of market power.

2 - The second set of arguments is related to the perceived lack of effectiveness in the application of competition law enforcement to completely resolve the competition problems posed by digital platform markets.

There are still numerous doubts about how antitrust law should be applied in the digital economy, and it is questionable whether the antitrust authorities have the necessary tools to curb the abuse of a dominant position by agents operating in these markets.

In the last years, many jurisdictions proposed some form of ex ante regulation to complement the existing ex post application. Of course, each country has its own particularities, level of regulatory maturity and each story will generate a regulatory proposal and different legislative changes.

If we face a common problem, in which several solution scenarios are presented, we have a wicked problem for the jurisdictions in the first place, but the dialogue and sharing of experience greatly aggregate a lot to improve our actions.

11.Market failures / Competition and Regulation

An important point made by the OECD in its 2021 study is that competition law and regulation are often presented as alternative approaches to governing competition and addressing market failures. And a major distinction between the two relates to their coverage of market failures:

a) Competition law aims to prevent the illegitimate acquisition of market power and, where market power has already been accumulated, to control its exercise, so that the typical benefits of competition – lower prices, greater choice, higher quality – are fully carried out (Dunne, 2015 [38]).

b) Regulation, on the other hand, can address a much broader set of concerns than competition law, and often goes beyond simply addressing market failures strictly

understood as the market's inability to be as efficient as it could be. There may also be alternative grounds for regulation, such as distributive justice, geographic consideration, and rights protection. As a result, justifications other than market failure often support the adoption of regulation but not competition law.

12.Legislative Scenario

In Brazil, in November 2022, Bill 2768/2022 was presented to Congress by Deputy João Maia (PL-RN). It intends to tackle the operation of digital platforms that offer services to the Brazilian public.

Deputy João Maia states that the proposal is focused on mitigating the market power of large digital platforms - those with annual operating revenue equal to or greater than R$ 70 million, called in the project "holders of essential access control power".

This project gives the National Telecommunications Agency (Anatel) the power to regulate the functioning and operation of digital platforms operating in Brazil. The text also creates a fee to be paid by large companies in the sector. The proposal is pending in the Chamber of Deputies.

Digital platforms include search engines, social networks, cloud computing and email services, video sharing platforms, among others. All of them are now considered Value Added Service (SVA), under regulation, inspection, and sanction by Anatel.

According to the text, the agency will be able to: issue rules regarding the operation of digital platforms; deliberate administratively on the interpretation of legislation, including omitted cases; arbitrate conflicts of interest involving platforms or professional users (use networks to provide goods or services to end users); and repress infringements of user rights.

It may also exercise control, prevention and repression of unrenewable committed by digital platforms, subject to the competences of the Administrative Council for Economic Defense (CADE). The new rules are in the General Telecommunications Law.

13.Legislative Procedures

Regarding the procedure, it is important to be aware that in Brazil, a bill may be presented by any deputy or senator, committee of the Chamber, Senate or Congress, by the President of the Republic, by the Attorney General of the Republic, by the Federal Supreme Court, by superior courts and also by citizens.

The bills start being processed in the Chamber, with the exception of those presented by senators, which will start at the Senate. The Senate works as a reviewing House for projects initiated in the Chamber and vice versa.

Obs.: The Senate works as a reviewing House for projects initiated in the Chamber and vice versa. Likewise, if a Senate bill is changed by the deputies, it goes back to the Senate. The House where the project started gives the final word on its content, and may or may not accept the changes made in the other House.

Projects are distributed to committees according to the subjects they deal with. In addition to the merit committees, there are other two that can review merit and/or admissibility. In the case of this project, it will be analysed conclusively by the Economic Development, Industry, Commerce and Services commissions; Science and Technology, Communication and Informatics; Finance and Taxation (financial and budget adequacy analysis); and Constitution and Justice and Citizenship (constitutionality analysis).

Most bills are processed in a conclusive manner, which means that, if they are approved in the committees, they go to

the Senate without having to go through the Plenary. However, if 52 deputies appeal, the project goes to the Plenary.

14.CONCLUSION

We see legislative proposals of this nature are a real trend and have gained prominence in several jurisdictions, such as the approval of the *Digital Markets Act* by the European Parliament in July 2022.

There are other relevant proposals — which differ substantially from the DMA — under discussion in the United Kingdom and in the United States Congress (in particular the American Innovation and Choice Online Act —Aicoa), in addition to a new chapter of the German competition law that is already being applied (§19 of the *Gesetz gegen Wettbewerbsbeschränkungen* — GWB).

The bases of these proposals were discussed in reports and in technical studies produced by governments and groups representing the civil society and the academy that identified sensitive competition problems in markets such as social networks, search engines, *marketplaces*, app stores and others.

As the diagnoses cannot be completely identical in each jurisdiction, the regulatory toolboxes proposed as a solution vary significantly. Therefore, before facing a debate in Brazil, one should understand what are the differences in the regulatory models discussed.

More specifically, I think it is relevant to dismiss the idea that there is a single regulatory architecture *ex ante* for digital platforms.

I understand that a common point in all regulations is that the proposals converge that antitrust intervention *ex post* could be complemented (and not replaced) by regulatory regimes *ex ante*.

The situation in Brazil is that we must be aware of the cost of regulation, including a possible inhibition of innovation. The

model that Brazil chooses to adopt for this type of regulation will guide the country's development in this market. That is the reason why the agencies and the Brazilian Congress have to be very attentive.