1st BRICS + Digital Competition Forum

Rio de Janeiro,
November 24th-25th 2022

Organizing Team:

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Welcome Remark - Thursday, November 24th 2022

Mr. Rodrigo Vianna, Director for International Relations at the FGV Law School in Rio de Janeiro, highlighted the importance that the Law School places on themes around technology: one of its first research centers was the Center for Technology and Society. Since then, the Center has been involved in projects of high impact and in high-level events such as the BRICS+ Digital Competition Forum.

Mr. Nicolo Zingales, Professor at FGV Law School in Rio de Janeiro, presented the overall objective of the event: to bring together not only competition authorities from the BRICS Digital Working Group, but also those of a new wave of acceding countries who have officially requested to join the group and other countries who have been considering applying for membership. Furthermore, academics and civil society experts were invited to provide feedback on day 2 in order to promote a more inclusive dialogue on the ongoing work.

Mr. Alexey Ivanov, Director of the BRICS Competition Centre, pointed out that the digital economy is a constantly changing field and it keeps reinventing itself with new formats, business models, and mechanisms of organization. He also stressed the importance for both market participants and competition authorities to be adaptive to this changing world at a time of “perma-crisis”.

Mr. Luca Belli, Director of the Center for Technology and Society (CTS) at FGV Law school, welcomed participants as key partners in future discussions around digital governance in the BRICS and beyond. He stressed that the CyberBRICS project hosted at CTS has been the only project which regularly keeps track of digital governance in these countries.

Opening Speeches by Authorities

Mr. Alexandre Cordeiro, President of the Brazilian competition authority (CADE), expressed gratitude and satisfaction for the participation of many colleagues in this exercise and introduced the speakers of the first panel.

Mr. Andrey Tsyganov, Deputy Head of the Federal Antimonopoly Service (FAS) of Russia, began by illustrating the increasing Internet penetration and the growth of e-commerce in Russia. After that, he highlighted the priorities for competition policy in Russia, which is aimed at the pro-competitive development of markets in open and transparent business and regulatory environment for the reduction or elimination of barriers to market access both for consumers and business, increasing the degree of freedom of consumers and facilitation of investments and innovation, as well as promotion of non-discriminatory and equal treatment of market participants. It was stressed that the most important challenge is to find the balance between strict regulation and self-regulation, and between openness and confidentiality in digital markets.

He also showed a few instances in which FAS used warnings and settlements to address anticompetitive concerns without a strong punitive element, and a set of principles of self-regulation that was developed by FAS together with market participants. He welcomed more cooperation with partner countries to provide even more guiding policies and principles.

Mr. Rajinder Kumar, Director of Economics at the Competition Commission of India, emphasized the importance of the digital economy and mentioned two recent cases in which CCI has imposed penalties: the Google Android case and the Google Pay case. He also mentioned that CCI is presently investigating cases involving various digital platforms e.g. Apple, Amazon, Flipkart, WhatsApp, etc.

Opening Speeches by Authorities

Further, he drew attention to the Commission´s advocacy initiatives, pointing to a market study on e-commerce platforms, which generated more awareness about anticompetitive practices in digital platforms. He also mentioned that it is important to take into account the interrelationships within the ecosystem as there can be multiple interrelated relevant markets within an ecosystem, and to look beyond sales to assess the market power of enterprises.

Mr. Itumeleng Lesofe, Spokesperson for the Competition Commission of South Africa, explained that the Commission since March 2021 conducted a market inquiry on intermediation platforms, with a provisional report published in July 2022. The inquiry was done on the basis of new and amended competition law provisions that allow to make findings and order remedial actions without needing to establish an infringement of the competition rules. Inputs received by the authority from stakeholders, including from the BRICS, made clear that many areas of commonality exist.

In terms of specific cases, attention was brought to a case against Facebook concerning the foreclosure of a potential rival in the WhatsApp platform, drawing analogies with concerns of “killing acquisitions”- which was an important factor leading to a reform of notification thresholds for merger control. Reference was also made to Google/Fitbit and the Webuycars mergers, analyzed by the Commission, to show that it plays an active role to ensure that digital markets remain competitive and contestable.

Mr. Gustavo Augusto, Commissioner of CADE, shared his appreciation for the work done by BRICS and the organization of the event, seeing it as a suitable forum for sharing current and future approaches to digital markets.

Opening Speeches by Authorities

He also shared the impression that the days of “no intervention” are gone, and that pressure is being made on authorities to do more precisely because they have done a good job so far. He pointed to the benefits of digital markets and the importance of cooperation on compliance remedies, as it is not feasible for authorities to be effective just on their own- especially because they do not have the resources, personnel, and expertise that large technology companies have (similar to what happened with telecoms in the past): compliance frameworks must involve cooperation with those companies. And a first major point for cooperation is to have a common understanding of what is harmful to competition.

Mr. Wang Lile, Director of the Second Department of Anti-Monopoly Enforcement, State Administration for Market Regulation, P.R.China, which is the department responsible for antitrust review of Concentration of Undertakings, shared personal views and experience on concentration review.

He first pointed to the important amendment of the anti-monopoly law to deal with the particularities of the digital economy, quoting the article that defines the goals, an article that defines monopolistic practices, and an article that allows the authority to challenge mergers which do not meet the notification thresholds.

Furthermore, the authority released in June 2022 a draft version of revised provisions for notification of concentrations, adding a threshold for notification of acquisition by large firms, and in June 2022 a draft version of revised provisions on the review of concentrations, which includes data divestment in structural remedies, no reduction of interoperability in behavioral remedies, etc. It was stressed that M&A is a very important aspect for the healthy development of the platform economy.

Opening Speeches by Authorities

Mr. Rodrigo Luchinsky, President of the Argentinian competition authority, National Commission for the Defense of Competition (CNDC), reported about three major ongoing cases of the Commission in digital markets: first, the case involving WhatsApp´s privacy policy update, based on premise that users may not exercise a reasonable degree of control over how their data is used by Meta.

Here, the Commission issued an interim measure prohibiting the update which was recently upheld by the Court of Appeals. Second, a case involving Google Pay was initiated in October 2022, focused on whether Google´s requirement to use Google Pay and to accept certain other conditions is an abuse of dominance. Finally, a third case involves an alleged exclusionary practice by electronic payment service providers against fintech firms. He first pointed to the important amendment of the anti-monopoly law to deal with the particularities of the digital economy, quoting the article that defines the goals, an article that defines monopolistic practices, and an article that allows the authority to challenge mergers that do not meet the notification thresholds.

Mr. Mahmoud Montaz, Chairman of the Egyptian competition authority, expressed appreciation for the BRICS + formula and discussed three cases recently handled by the authority. First, an acquisition of a share in the food delivery market which despite the small share of another company (16%) would create a situation of material influence, whereby every new investment by the target firm would require the approval of the acquiring company, and whereas a condition for the approval it was requested that the acquired company leaves two markets (Egypt and Latin America).

Opening Speeches by Authorities

Second, a case involving the use of MFN clauses, whereby the authority found that both narrow and wide clauses were problematic. Third, a case involving an acquisition by Uber of Kareem, both of which were major players in the ride-sharing market, as a result of which a remedy was imposed that required data sharing, and which proved to be effective to help maintain an entry into the market. Mr. Montaz concluded by pointing to the promise of conducting joint investigations with other countries, without the exchange of confidential information.

Mr. Farruk Karabaev, Chairman of the Uzbekistan competition authority, commented on recent developments in digital markets starting from the legislative front, and noting, in particular: the adoption of a law on e-commerce in September 2022; a draft law on competition which has passed the first reading in Parliament in November; and the regulation on licensing of crypto assets exchange platforms, adopted in August 2022.

The proposed draft law on competition includes special provisions which link platforms to direct or indirect network effects and create special rules for platforms that exceed a turnover of $3 million in the last financial year and more than 50.000 users per month, including a prohibition against pre-installation or raising difficulty in the installation of other applications or change default settings in operating systems and limiting the ability of any end user to easily unsubscribe from digital platforms core services.

Advancements and commonalities in BRICS approaches to digital markets

Mr. Ricardo Castro, Deputy Chief Economist at CADE, introduced the session by explaining that its main goal was to collect comments and feedback on the second draft of the report by the BRICS Digital Economy Working Group. He commented on the fact that the second draft already showed much progress from its first version, presenting more concrete cases and suggestions rather than only descriptions of each BRICS country scenario.

Mr. Eduardo Pontual Ribeiro, Professor of Economics at the Federal University of Rio de Janeiro (UFRJ), and Ms. Svetlana Golovanova, Professor of Economics at National Research University Higher School of Economics in Nizhny Novgorod presented their work on multi-sided platforms, highlighting the key features of these platforms that antitrust authorities must take into account when investigating and enforcing the law.

Their work stems from a meeting of the BRICS Digital Economy Working Group meeting in Moscow and it already shows its results - since then, the quality of analysis held by competition authorities increased, since they started adopting new approaches and tools of economic analysis.

The research also aimed at observing how new concepts such as the idea of network effects are being applied in practice by antitrust authorities, especially in the BRICS countries, where such authorities usually do not have a long tradition in dealing with digital platforms. The results show that the authorities of BRICS countries stood up to the challenge and were able to incorporate the new business models into their actions.

Mr. Nicolo Zingales presented an overview of the draft report. The point was not only to see what has changed since the last report in the five jurisdictions but also to present some international trends that have been observed.

Advancements and commonalities in BRICS approaches to digital markets

He identified that there is a need to create a common vocabulary of important terms of the field (such as digital platforms, ecosystems, etc). Mr. Zingales also presented important trends of convergence and divergence between the BRICS countries regarding their current competition legislation, how they define terms that are dear to the field, and to how the competition authorities deal with a series of challenges posed by digital platforms.

Mr. Andrey Tsyganov praised the report and pointed out that, in recent years, BRICS competition authorities have prepared several documents and guidelines focusing on the specificity of anti-monopoly regulation on digital markets. This shows not only the willingness of these authorities to discuss this new reality, but also enhances their quality of analysis of specific cases.

He presented an overview of the Russian "Principles of interaction of digital markets participants", which define fundamental guidelines for the establishment of open, clear and nondiscriminatory conditions according to which business must occur in these markets. He proposed that these Principles could be incorporated into the BRICS space, adding contributions by the other competition authorities and Academia, through the means, for instance, of a Joint Statement of the Leaders of BRICS Countries Competition Authorities. He also suggested that another product could be to develop a glossary of key terms and a common understanding of theories of harm.

Mr. Shri Rajinder Kumar stressed the importance of international cooperation, especially when dealing with issues revolving around Big Techs. He presented an overview of the Google Pay case in India and of recent legal developments including proposed amendments in Competition Law in India.

Advancements and commonalities in BRICS approaches to digital markets

Mr. Itumeleng Lesofe welcomed the effort to create a common vocabulary, in particular for defining a “leading platform”, considering the relevance of the term in designing remedies. He also called for international collaboration and joint participation in global transactions as a means to allow competition authorities to formulate remedies that could be applied in a similar manner across multiple jurisdictions.

Mr. Wang Lile responded by discussing the challenges of antitrust review and enforcement in the digital economy, including defining relevant markets, examining killer acquisitions, calculating market shares, and improving remedies for M&As. By exemplifying small enterprises’ intention to receive funding through an exit mechanism as a difficult-to-identify merger and the gaming industry as a multilateral market including players and developers, as well as data ownership as a solution to reconciling a potential conflict between data protection and antitrust.

He stressed the distinctive nature of dynamic competition in the digital economy. He also proposed further study topics on the way to striking an effective balance between regulation and development across different jurisdictions.

EcoAntitrust: Presentation of the Project by the BRICS Centre & IIASA

Ms. Patricia Sampaio, Professor at FGV law school in Rio de Janeiro, introduced the session remembering the importance of economics for antitrust law and policy, but also emphasized the increased role of psychology and the emerging relevance of biology, as demonstrated by the project presented in the session.

Mr. Alexey Ivanov presented the EcoAntitrust project from a legal perspective, emphasizing the need for competition authorities to understand the cycles of evolution of ecosystems and be more like gardeners, than mechanics.

Ms. Elena Rovenskaya, Program Director at the International Institute of Advanced System Analysis (IIASA) presented the EcoAntitrust project from a biological perspective, illustrating the parallel between the complex and adaptive nature of natural ecosystems and digital platform ecosystems.

Mr. Paulo Furquim, Professor of Economics at Insper, commented on the EcoAntitrust project, acknowledging that while economics is used to interpret reality, mainstream economics is insufficient to deal with complex systems, and even more when it comes to digital ecosystems. Some critics, like Giovanni Dozi and Sidney Winter from the evolutionists and David Teece and Jordan Teece from strategy, were already pointing that out.

However, the EcoAntitrust project departs from mainstream economics (and from other works in this area, such as the Stigler Report) with a proposal for a new paradigm, which is based on physics, mechanics, and thermodynamics.

Interestingly, this is in line with the more recent thinking of the late Ronald Coase, one of the beacons of law and economics.

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The challenge is how to operationalize this framework: the reason why economics is used is that it has predictive power and decision-supporting tools, such as the HHI index for instance. He also praised the project for not taking a side on whether the approach should be more or less interventionist. In ecology, there are random mutations and selections, but in digital platform ecosystems, there are a lot of intentional changes happening in reality.

Mr. Tembinkosi Bonakele, Former Chairman of the South African Competition Commission, recognized the contribution of the project in offering a new path to tackle the worrisome concentration in the global digital economy.

He pointed to the difficulty with traditional tools to appreciate antitrust issues arising from the connection of different markets, such as electric cars, rocket launchers, cryptocurrencies, and communication platforms.

The impact across products and services is easier and faster in the digital environment, and therefore calls us to embrace this new paradigm. What still needs to be discussed is what ought to be the goal of the antitrust enterprise.

Mr. Caio Mario Pereira Neto da Silva, Professor at FGV law school in São Paulo, focused on the insights developed from the EcoAntitrust work, and whether there are limits to the use of metaphors. The first observation is that digital ecosystems influence each other, much like in nature, and therefore there should be more focus on the interdependence of intervention.

EcoAntitrust: Presentation of the Project by the BRICS Centre & IIASA

The second point is about the limit of applying ecosystem thinking to an environment where the intentionality of the ecosystem orchestrator is crucial. A related point is that gardeners aim to control the growth of their garden ecosystems, which in some way is antithetical to some of the biggest insights given by ecosystem theory. action in the global digital economy.

Mr. Alexey Ivanov concluded by thanking for the comments and contending that the combination of organic with artificial is not uncommon in environmental planning, and this is analogous to what a gardener would do with regard to business ecosystems, particularly if the goal is to achieve sustainability. He also pointed out that there is a lot of underrated intentionality in natural evolution.

Workshop: Feedback and Discussion on Day 1 - Friday, November 25th 2022

Mr. Nicolo Zingales and Mr. Alexey Ivanov welcomed participants and expressed gratitude for the insightful discussion on day 1, explaining that the goal of the first session of day 2 is precisely to continue this discussion by allowing more participants to comment.

Ms. Elena Rovenskaya responded to the comments received by discussants on day 1: first of all, reinforcing the point that there is a lot of intentionality in natural evolution that is related to the increase of the offspring; second, regarding causality, it is acknowledged that we should rethink the whole concept because of complex causality, tipping points, and path dependency, and therefore it may not be possible to predict reality: perhaps decision-support tools can only offer suggestions for actions that can lead to an improvement, but not necessarily tools for optimizing an utility function.

Mr. Victor Oliveira Fernandes, Commissioner at CADE, noted that between the antitrust scenarios among the BRICS countries, we can observe two different trends: while Brazil, India, and China present a more "conservative" approach towards the traditional consumer welfare standard, Russia and South Africa seem to hold a wider approach for antitrust in digital markets.

Mr. Fernandes also stated that the digital economy and the diversity of approaches among BRICS countries may push authorities into rethinking categories of abuse of dominance when the category is not necessarily helpful to understand these practices and that the approach of BRICS countries seem to diverge significantly to the approach taken by the European Union, which begs the question on how remedies would be implemented globally.

Workshop: Feedback and Discussion on Day 1

Finally, it was recognized that the Schumpeterian and the evolutionary perspective of economics are valid viewpoints in the analysis of digital ecosystems, calling for the need to assess the trade-offs between static and dynamic competition- so it would be interesting to understand how the EcoAntitrust project addresses that.

Mr. Andrey Tsyganov endorsed the EcoAntitrust approach as one of the possible tools necessary to widen the approach of competition authorities. This wider approach is already being pursued worldwide, something that can be attested by the discussions in the main meetings held among antitrust and anti-monopoly authorities. Mr. Tsyganov also explained the unorthodox approach to antitrust followed by the Federal Antimonopoly Service of the Russian Federation, when compared with European authorities.

The organ was responsible for consumer rights and the promotion of small businesses for several years, which makes its approach to antitrust much wider when compared to other countries. Russian competition legislation also encompasses advocacy.

In this sense, the Russian government has been implementing a five year program for the development of competition, which does not apply only to the competition authority, but to the whole of the government. For those reasons, FAS sees the expansion of theoretical tools of analysis extremely positively. Mr. Tsyganov also stated that, with regard to antitrust policies, the goal is not to punish the companies, but yes to promote a sound business environment.

Workshop: Feedback and Discussion on Day 1

Mr. Wang Lile also provided positive feedback regarding the EcoAntitrust project, emphasizing that this new theoretical explanation provides a fresh perspective to antitrust studies which may help the regulation systems and theories better adapt to the economic and technological development such as the metaverse which is not a very clear concept so far itself.

In his view, an approach that combines the micro and the macro level would be appropriate, creating an early warning system to predict risk. Furthermore, a broad approach, which is able to coordinate regulation, antitrust, consumer, and data protection, could be considered when thinking of competition law in the digital economy.

Mr. Mahmoud Momtaz presented an important dilemma when approaching the possible downsides of the actions of antitrust authorities: since many innovators building startups aim to sell their companies to big techs, authorities face a dilemma as to whether to allow this acquisition or not, at the risk of harming innovation in case the operation is hindered.

Mr. Alexey Ivanov responded to this concern by pointing to the existence of a “kill zone” in terms of reduced investments when big techs enter into a particular line of business and suggested that the ecological approach can serve to ensure that the ecosystem is populated by a variety of players, and promote alternative ways to reward investment and innovation.

Mr. Shri Rajinder Kumar highlighted the importance of understanding the technology behind the ecosystem as well as the relationship between this technology and the business model of the ecosystem.

Workshop: Feedback and Discussion on Day 1

From his viewpoint, the technology employed in certain ecosystems (for instance, the payment system of an app store) has the potential to affect the competitors in the market and innovation itself.

Furthermore, he pointed to the necessity of having clear terminology on what constitutes a digital service (which in some app stores is subject to a 30% tax) as opposed to a physical service. Mr. Itumeleng Lesofe discussed the concept of the ecosystem that had been adopted by participants since the previous day of the Forum, stressing its usefulness considering that it allows researchers and authorities to consider markets in a much broader view than the traditional approaches, which focus on specific issues within limited markets.

This can inform remedy design, which is the approach that the South African Commission adopted in their provisional findings of the market inquiry mentioned on day 1.

Mr. Vikas Kathuria, Associate Professor at BMU Munjal Law School, expressed considerations regarding more traditional themes within Competition Law. According to him, warning and settlement systems have huge limitations in digital markets, considering the speed at which business scenarios evolve, and the difficulty of putting the toothpaste back into the tube after a particular conduct has been undertaken.

He also praised the use of market studies, which are valuable even if not binding, because it allows generalist judges to understand the complex dynamics of digital markets; however, they do not necessarily solve the problem, without binding value. Interim measures can be a useful tool, as well, particularly when there are insufficient reasons behind a particular conduct by a digital platform- they can lead the authority to suspend the conduct while investigating it.

Workshop: Feedback and Discussion on Day 1

However, a preferable way to approach this is to require reasons for certain conducts (such as self-preferencing) to be provided ex ante. Mr. Aldash Aitzhanov presented an important point of view from Kazakhstan, as a representative of smaller countries who struggle with ensuring the implementation of regulations when faced with the dominance of foreign Big Techs in their national markets. In order to remedy this situation, Mr. Aitzhanov highlights the importance of building common economic and legal approaches, and also establishing firm international cooperation, especially with BRICS countries.

Mr. Cui Zhiyuan, a Professor at the School of Politics and Public Administration at Tsinghua University in Beijing, characterized the ecological approach as very promising, highlighting the variety of different approaches as an important value in Competition Law. In his presentation, he referred specifically to BRICS countries, suggesting that antitrust law could be set as a third pillar to protect the economies of the group, along with the New Development Bank and the Contingency Reserve Arrangement. The Chairs of the session (Ms. Rovenskaya, Mr. Ivanov, and Mr. Zingales) responded to the comments and provocations of participants, highlighting that the approaches presented offer a different perspective towards antitrust law, especially when considering the Western-centric approach in spaces like the OECD.

Diversity was presented as a key feature of this new approach and as a value to be promoted within Competition Law, possibly including equitable concerns. Authorities and academics must also recognize the diversity of business models and technologies and recognize that a diversity of theories and tools is necessary to fully comprehend the effects on a variety of stakeholders, which are not necessarily only online users (very traditional sectors are being increasingly affected by digital technologies in some way).

Workshop: Feedback and Discussion on Day 1

It was also noted that killer acquisitions do not need to be addressed with an “all-or-nothing” approach, as they represent a fertile space for behavioral remedies. Furthermore, it wes recognized that this approach can be facilitated by the use of meta-regulatory tools (such as periodic reports, auditing and supervisory fees) and the ability for third parties (including civil society) to participate in the proposal and monitoring of negotiated remedies.

Case-study: Hypothetical BRICS Merger Review

The Organizing Team presented an “Enforcement Game” in order to discuss a hypothetical merger between the companies owned by Elon Musk - most notably, the recently acquired Twitter - and Bytedance, the owner of TikTok. In this setting, Musk represents not just financial capital, but also the control of a number of resources, ranging from the personal data extracted by Twitter to the Tesla cars and SpaceX satellites, for example.

This case-study is of particular relevance for BRICS countries considering Twitter has extensive presence in Brazil and India, for example, and the merger with Bytedance would allow Musk to enter the Chinese market. Also, this global merger could have effects for the BRICS national markets due to disruptive consequences for technology and innovation.

Mr. Jia Kai presented the business plan of the hypothetical merger case, discussing the potential business models and the growth strategy that could be pursued after the merger.

He also stated that the end result of the merger would be a “super app”, since the new app resulting from the merge between Twitter and TikTok would be a service platform and an e-commerce platform, gathering users from both platforms in a single one. He also stressed the potential vertical effects of the merger, notably the combination of features such as Cloud Computing (e.g. Tiktok on Starlink) and the internet of things (e.g. ads in the car).

Mr. Eduardo Gaban, Director at the Brazilian Institute for Competition and Innovation, raised a number of questions for discussion, such as whether it would be advisable for agencies to cooperate; if so, what kind of information should be exchanged and under which timeline; and whether agencies would also take into account the goals of other areas of law, such as data protection and consumer protection.

Case-study: Hypothetical BRICS Merger Review

Mr. Andrey Tsyganov responded that cooperation is always better, a point which was subsequently endorsed by other colleagues.

Mr. Itumeleng Lesofe made reference to the Google/Fitbit merger, which raised challenges because South Africa was the first authority to assess the case, and this led the parties to withdraw their application as they preferred to first get a decision by authorities in other jurisdictions. Subsequently, they applied again and this led to a truly global cooperation from this merger.

Mr. Ricardo Castro commented that very specific comments could not be provided since the only hypothetical aspect of the merger was whether it would take place, rather than the characteristics of the markets in question. On the other hand, at a general level, it could be said that a possible product of the digital working group of the BRICS would be to develop a model of waivers to promote cooperation, in line with the BRICS Memorandum.

At the same time, he pointed out that complexity theory by definition requires more computational effort in its application to specific cases. However, he pointed out that the inspiring ideas of the eco-antitrust project may generate a risk of complicating the cooperation dialogue. Also, a potentially useful project in the future would be to look at the application of remedies ex post.

Mr. Cairo Pereira Neto raised some questions about theories of harm, and a general question about whether it is possible to harmonize the way of thinking about those, as well as market definition issues, and general remedies issues.

Mr. Gustavo Augusto stressed the importance of market definition, pointing to at least 2 separate markets (users and advertisers) and with the challenge to understand whether the parties overlap in those. It would also be important to look at the efficiencies for consumers, and possible coordinated effects.

Case-study: Hypothetical BRICS Merger Review

In terms of vertical effects, the question is whether there would be a foreclosure on any side of the market (for instance, through Starlink), but if rivals can match the merged entity within two years it would not be problematic. In terms of conglomerate effects, these concerns are more significant when it comes to digital platforms, however, this would not be worrisome in case of greenfield entry: it would only be the case if the existing market is not sufficiently mature yet, and can be interfered with through the conglomerate activities.

On remedies, the authority would test them with market participants and apply proportionality, which probably requires avoidance of structural remedies. It would probably need to consult with the data protection authority in case data sharing was chosen. The authority could also align the objectives of both by requesting the merging parties to use a more privacy-protecting policy.

One could also propose a timeline, where users can use both products separately for a certain period of time, to see if other competitors grow during that period, an enhanced obligation to notify mergers (below the current mandatory notification standards), and a prohibition of further acquisition in the space for a limited time of period.

Mr. Tembikosi Bonakele pointed out that for effective cooperation it is necessary for technical officers working on a case to have each other´s number, and have a workshop that involves only merger analysts. He suggested that the path starts more informally, perhaps on the side of UNCTAD, and only then it should be formalized. He also pointed out the need for cooperation with regard to seeking expert advice from people who are unencumbered from possible influence.

Case-study: Hypothetical BRICS Merger Review

Mr. Raijinder Kumar noted that Tiktok is not available in India, where it was prohibited, and suggested looking at the user migration rate after the prohibition to understand market power. It was also suggested that the theory of harm should involve not only users but also other stakeholders, including advertisers.

Mr. Victor Fernandes opined that a suitable perspective would be analyzing this as an ecosystem merger, with implications both for intra- and inter-ecosystem competition. He also suggested that it may not be necessary to precisely define the relevant market on the content side, as both parties are centered on a digital ecosystem related to social networking, and that the main theory of harm would be that the merger would have negative impacts on innovation.

From a perspective of intra-ecosystem competition, a theory of harm would be to leverage the position from a core service to a complementary market. Finally, another important aspect regarding innovation is to ask whether the merger enhances contestability and appropriability, the latter potentially representing an incentive to encourage greater innovation in the industry, which can be quite important if the level of innovation is currently low.

Mr. Rodrigo Luchinsky pointed out that there is a significant potential for cooperation, but also some limitations, including the interaction with different authorities. He offered the idea of cooperation similar to the one for anti-money laundering in the Egmont group, which involves some exchange of cooperation without a specific waiver.

Case-study: Hypothetical BRICS Merger Review

Mr. Mahmoud Momtaz endorsed the point about the need for cooperation involving technical officials and confirmed that cooperation does not necessarily imply the need for waivers, as a conversation about potential remedies can be done on a no-name basis. He also suggested that one way to look at the market is to evaluate the overlap in terms of age group, while another way would look more into the future of the market and taking into account the connections among users as a resource for other markets. He finally envisaged the application of a possible structural remedy.

Mr. Alexey Ivanov shared the importance of formalizing this type of exercise, sending a questionnaire from authorities to design a guideline to be used by authorities for cooperation in concrete cases, including formalizing ideas for common monitoring trustees or common compulsory licensing regimes.

Ms. Sílvia Faga, Director for Economics at LCA Consultores, shared her concern about the possible side effects of innovation stemming from the sharing of technology or data, which seem to be the most relevant remedies in this market. She also pointed to the scarcity of staff, which would be required to monitor behavioral remedies, and to the need to leave political power issues to other (non-antitrust) authorities.

Mr. Tembikosi Bonakele asked, in response to Ms. Faga´s point, whose job it should be to address political power. He pointed to the Australian model as one that incorporates this kind of concern, especially with regard to news publishers.

Mr. Caio Pereira Neto followed up on this point suggesting that one should test the extent to which existing solutions are sufficient, with antitrust being just one of the possible avenues for intervention.

Book launch - Digital Ecosystems: a Brazilian perspective

Mr. Nicolo Zingales and Ms. Paula Farani de Azevedo, professors at the Brazilian Institute of Public Law, presented an overview of the book “A aplicação do direito antitruste em ecossistemas digitais: desafios e propostas” (‘The application of Antitrust Law in digital ecosystems: challenges and proposals’), which stems from a seminar on e-commerce and the challenges it brings to antitrust.

Ms. Juliana Domingues, Chief Attorney General at CADE, and Mr. Eduardo Gaban gave a brief overview of their chapter in the book, stating the main focus of the piece was to observe the relationship between competition, consumer protection, and data protection policies - both examining good practices and identifying gaps. In this scenario, digital platform ecosystems have particularities when taken side by side with traditional concepts in antitrust law, above all the fact that they do not compete on the basis of monetary prices. One of these particularities is the way in which the architecture of digital platforms is created in order to allow them to use and exploit the attention of consumers in their regular business. However, what is required to properly understand this is metrics and methods to assess consumer welfare in this environment.

In her comments regarding the chapter, Ms. Camila Leite stated that there is a need for deeper cooperation between the competition, consumer and data protection law fields. In particular, we should move beyond current generic cooperation agreements between authorities in Brazil: an institutionalization of cooperation is necessary.

Mr. Rafael Zanatta & Ms. Helena Secaf, respectively Executive Director and Researcher at Data Privacy Brasil, commended the paper's focus on the attention economy, that is, a kind of capitalism that focuses on the attention of individuals.

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They stated that a complementary perspective on the paper is the fundamental problem of collective harms from data capitalism, which has to do with group profiling carried out by platforms, which extract data and value from social relations, and is ultimately used to shape behavior.

The commentators stressed that it is important to frame this issue taking into account the fundamental right nature of privacy as well as data protection, which are two distinct rights- one about non-intrusion and the other one about positive obligations.

On the other hand, considering the logic of antitrust, it is important to be able to frame this in economic terms: data, for instance, is seen as a business asset, but the fundamental rights that are attached to it should not be forgotten. One of the main challenges which stem from this viewpoint is how to conjugate antitrust law and other legal fields - for instance, seeing data protection as a parameter of non-price competition.

Mr. Michel Roberto de Souza also made remarks on how strengthening the collaboration between antitrust and data protection and consumer authorities can foster the enforcement of the current legislation.

This can be achieved by setting models of task forces between these authorities and promoting a more regular discussion involving these topics. Citing a recently published article about the various cases involving WhatsApp in Latin America, he referred to the international dialogue occurring at UNCTAD as a factor that played a role in driving Argentina´s approach to intermingle competition and data protection concerns.

Mr. Paulo Furquim offered a teaser of his chapter, focusing on the importance of adding a new approach to understanding digital ecosystems: behavioral economics.

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This approach is particularly valuable when considering its predictability of scenarios, meaning that it can be used to assist antitrust authorities in their operations (and not necessarily to replace, but rather to enhance traditional analysis). This includes gathering more evidence about behavioral biases and assessing the impact of these biases on competition authorities, as well.

Commenting on this chapter, Ms. Silvia Fagá stated the importance of behavioral economics to analyze digital markets, considering that in the digital sphere, the wide availability of data allows researchers to observe behavioral issues more clearly. She pointed out that behavioral economics can be a complementary approach to mainstream remedies, but this should not lead to more discretionary enforcement- which is another reason why cooperation would be welcome to define consistent terms and methodologies.

This strategy can involve the organization of training sessions, and the publication of books, bearing in mind also that it may be difficult to compare different systems with their own peculiarities- including, for instance, whether political power is a cognizable concern.

Finally, she wondered whether remedies in digital markets are really so different, taking aside the complications of sharing data and technology and whether behavioral economics can help in making them more effective.

Ms. Rafaella Schwartz, the former researcher at CTS, presented the chapter written in co-authorship with Mr. Nicolo Zingales, which focuses on the role of legitimate justifications, efficiencies, and other types of defenses, particularly in the analysis of unilateral practices in Brazil.

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The chapter reviews cases with final merit decisions and finds that while CADE is open to recognizing dynamic efficiencies and taking into account effects on all sides of the market, important doubts remain on the extent to which trade-offs across consumers can be made, and the role of systemic efficiencies that cannot be attributed to a specific consumer group. The chapter called for more methodologies to be developed in order to address these questions.

s. Marcella Mattiuzzo, a Ph.D. student at the law school of USP São Paulo, commented on this chapter, affirming that the development of concrete standards of analysis is one of the central challenges of the discussion around markets. According to her, the chapter shows that there is still a large room for improvement considering CADE's recent cases, which can be explained by the overall recentness of the debate regarding digital markets. Ultimately, this is connected also to what should be the applicable standard of analysis in antitrust enforcement, which is a global ongoing discussion and can also benefit from constitutional grounding.

Mr. Victor Fernandes pointed out that the big challenge is how to apply in a measurable way any welfare standard which is not focused on prices. He also called for the systematization of the legal tests and criteria applied to unilateral conduct cases in Brazil, suggesting that the applicable test should be chosen depending on the envisaged remedy.

Mr. Bruno Droghetti, Partner at Figueiredo & Velloso Advogados, presented the chapter written in co-authorship with Dr. Paula Farani. The chapter's objective is to discuss, from the antitrust perspective, to what extent the orchestrator of a digital ecosystem can limit access to competitors in its own ecosystem.

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The authors point out that the application of the essential facility doctrine is rigid in the United States, while more flexible in Europe; and conclude that interoperability and the existence of an effective alternative are key issues that should be addressed for the application of this doctrine to the context of digital ecosystems.

Ms. Carolina Saito, a Ph.D. student at the law school of USP São Paulo, commented on this chapter, stating that the reaction of consumers towards the changes in business models should be a matter for the attention of antitrust scholars, especially taking into account bottleneck power and vulnerability-based types of dependencies.

She commented that refusal to deal sometimes (but not always) overlaps with self-preferencing, and adopting a broad interpretation of refusal to deal can lead to under-enforcement.

It was also concluded that self-preferencing is a long-existing practice in supermarkets, although its effects tend to be augmented in the digital environment, and its characterization as a special category of conduct does not necessarily help.

Mr. Bruno Renzetti presented the chapter he wrote together with Mr. Nicolo Zingales. The chapter discusses conglomerate mergers in Brazil, a theme that is gaining increasing attention at a time of digital ecosystems. He pointed out that the main issue is that some ecosystem-building transactions escape scrutiny due to the existing notification thresholds (which focus on the turnover of both parties), they are analyzed succinctly through the use of a “fast-track” procedure, and there is currently no specific guideline for this type of mergers. The chapter also brings a set of recommendations for CADE on how to effectively apply existing legislation in such cases.

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Ms. Marcela Mattiuzzo comments on this chapter, highlighting that Brazil has a unique provision to address un-notified mergers, although it has not been used very extensively (Mr. Bruno Renzetti specified that it has been used only in 6 cases, none of which was ex officio). She also confirmed that more guidelines are needed in this area.

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