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WHITE PAPER: A PROPOSAL ON EX-ANTE REGULATION OF DIGITAL ECOSYSTEMS IN BRAZIL

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INTRODUCTION

Recently, discussions in Brazil about competition policy enforcement in digital markets have gained momentum. The number of cases in digital markets decided by the Brazilian Competition Authority (Conselho Administrativo de Defesa Econômica or CADE) has increased considerably, particularly in merger reviews. In contrast, antitrust cases in digital markets analyzed by CADE have been relatively few, with most being resolved through settlements or dismissed, even when different outcomes were reached in other jurisdictions. Nevertheless, several significant investigations are ongoing, involving major digital players such as Mercado Livre, iFood, Meta, and Google. Moreover, the increased frequency of institutional publications—such as the reports *Digital Platform Markets*,[1] *Conglomerate Mergers: Theories of Harm and CADE's Precedents between 2012 and 2022*,[2] the *Guidelines for the Analysis of Non-Horizontal Mergers*,[3] and the editions of BRICS in the *Digital Economy: Competition Policy in Practice*[4]—underscores CADE's growing commitment to this agenda.

On November 10, 2022, Congressman João Maia introduced Bill No. 2,768/2022 to the Chamber of Deputies, proposing a regulatory framework for the "organization, functioning, and operation of digital platforms offering services to the Brazilian public."[5] The bill seeks to implement competition-focused regulations for specific platforms with essential gatekeeping power, defined as those generating annual operating revenue of BRL 70 million or more from services provided to the Brazilian public. It also imposes specific obligations on these platforms.

[1] See CADE, Mercados de Plataformas Digitais (2021).

[2] See CADE, Fusões Conglomerais: Teorias do Dano e Jurisprudência do Cade entre 2012 e 2022 (2023).

[3] See CADE, Guia V+: Guia de Análise de Atos de Concentração Não Horizontais (2024).

[4] See Working Group on Digital Economy, BRICS in the Digital Economy: Competition Policy in Practice. 1st Report by the Competition Authorities (2020); and Working Group on Digital Economy, BRICS in the Digital Economy: Competition Policy in Practice. 2nd Report by the Competition Authorities (2024).

[5] See PL 2768/2022, Câmara dos Deputados, https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2337417.

Key provisions include requirements for platforms to provide clear and comprehensive information about their services to the Brazilian Telecommunications Agency (Agência Nacional de Telecomunicações or ANATEL), deliver services in a fair and non-discriminatory manner, and ensure the proper use of data collected through their services. The bill further prohibits platforms from denying access to professional users. Additionally, Bill No. 2,768/2022 empowers ANATEL to issue regulatory directives, impose necessary remedies, resolve disputes between operators, and review all mergers involving targeted platforms that are not subject to CADE's review.

Although Bill No. 2,768/2022 aims to establish guiding principles for regulators, its provisions have been widely criticized as too unstable to support a robust legal framework.[6] While the bill emphasizes a diverse set of objectives for Brazil's new ex-ante regulation of ecosystems, it simultaneously proposes a varied—and often immeasurable—array of goals and mechanisms to uphold these principles. The controversy surrounding the initial proposal, particularly its flawed design and the seemingly arbitrary decision to assign regulatory authority over digital platforms to ANATEL, not only stalled discussions on Bill No. 2,768/2022 in the National Congress but also prompted alternative efforts to develop a regulatory model better suited to Brazil's institutional context.

In January 2024, the Brazilian Ministry of Finance launched a public consultation process to collect input from stakeholders on the ex-ante regulation of digital ecosystems. The Brazilian Ministry of Finance received 72 contributions from a diverse range of actors, including civil society, businesses, digital platforms, and regulatory agencies.

[6] See Victor Oliveira Fernandes, Lost in Translation? Critically Assessing the Promises and Perils of Brazil's Digital Markets Act Proposal in the Light of International Experiments, 52 Comput. Law Secur. Rev. (2024); Arthur Sadami et al., Is There a Brussels Effect in Brazil? The Case of Digital Platforms Regulation, 10 North East Law Review 134 (2024); and Caio Mario da Silva Pereira Neto & Antonio Bloch Belizatio, Rethinking the Path to Digital Platform Regulation in Brazil: A Critical Appraisal of DMA-Inspired Bill 2.768/22, 25 BLI 215 (2024).

Among the contributors was CADE, which advocated for an ex-ante framework targeting selected digital platforms.[7] CADE proposed an asymmetric approach designed to foster ongoing regulatory dialogue with digital platforms, promote a culture of compliance, and enable more agile and adaptable enforcement of laws that align with technological advancements and evolving market dynamics. CADE also recommended that the criteria for selecting regulated platforms combine both quantitative and qualitative measures, developed through comprehensive market analysis and consultation with diverse stakeholders. The resulting report from this public consultation process, *Digital Platforms: Economic and Competition Aspects and Recommendations for Regulatory Improvements in Brazil* (Report), published in October 2024, unfolds into four main sections, each focusing on the development of guidelines for a proposed framework for a Brazilian ex-ante regulation of ecosystems.[8]

First, the Report presents general aspects of the platform economy, discussing the strategic relevance of the digital economy for Brazil and examining its characteristics, such as winner-takes-all dynamics, strong network effects, and the role of data. *Second*, it addresses the limitations of Law No. 12,529/2011 (the Brazilian Competition Act), highlighting how merger review may fail to identify potentially problematic transactions and how antitrust enforcement faces challenges in digital markets. *Third*, the Report reviews similar regulatory initiatives worldwide, including those in the European Union, the United Kingdom, Australia, Japan, Germany, the United States, South Africa, India, Taiwan, and Singapore. *Fourth*, the Report proposes reform guidelines, including: (i) establishing procedures for designating platforms with systemic relevance in digital markets; (ii) introducing procedural transparency obligations for designated entities; (iii) creating a process for investigating designated companies and imposing substantial obligations on a case-by-case basis; (iv) establishing a specialized unit within CADE to implement this new pro-competitive mechanism; (v) collaborating with regulators such as ANATEL and the Brazilian Data Protection Agency (Autoridade Nacional de Proteção de Dados or ANPD) to enforce substantive obligations as necessary;

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[7] See CADE, Contribuição do Cade à Tomada de Subsídios para Regulação de Plataformas Digitais do Ministério da Fazenda (2024).

[8] See Secretaria de Reformas Econômicas, Plataformas Digitais: Aspectos Econômicos e Concorrenciais e Recomendações para Aprimoramentos Regulatórios no Brasil (2024).

(vi) enhancing CADE's capacity to conduct market studies, with powers to request and analyze sector-specific data; (vii) creating an interagency cooperation forum between CADE and other federal bodies, such as ANATEL, ANPD, and the Brazilian Consumer Protection Agency (Secretaria Nacional do Consumidor or SENACON); (viii) updating antitrust analysis tools to identify and assess concerns in digital markets, including new theories of harm; (ix) revising the notification form for transactions to include questions about digital platforms' business models; (x) considering the adoption of the non-fast track procedures for mergers involving large digital platforms with a high number of users; (xi) requiring the submission of mergers that may pose concerns, even if they do not meet formal notification criteria; and (xii) updating revenue thresholds for mandatory merger notifications under Law No. 12,529/2011.

The Report marks a significant advancement in the debate on ex-ante regulation models for ecosystems in Brazil, especially when compared to Bill No. 2,768/2022. It not only opens a broad dialogue between the state, the market, and civil society on regulatory proposals, as shown by the high level of participation in the public consultation process that shaped the Report,[9] but also offers a systematic set of recommendations for concrete institutional reforms. Nevertheless, an integrated proposal that consolidates the Report's recommendations into a unified reform agenda could strengthen its guidelines. This white paper specifically aims to propose a way to implement the agenda outlined in the Report. To that end, this brief commentary presents the core principles of a proposal for ex-ante regulation of ecosystems in Brazil, with particular focus on the authority responsible for its implementation and the specific mechanisms for executing it.

[9] See Secretaria de Reformas Econômicas, Relatório de Sistematização das Contribuições à Tomada de Subsídios nº1/2024, da Secretaria de Reformas Econômicas do Ministério da Fazenda (2024).

1. A PROPOSAL ON EX-ANTE REGULATION OF DIGITAL ECOSYSTEMS IN BRAZIL

This proposal for ex-ante regulation of ecosystems in Brazil consists of two key components. First, it involves establishing an enforcement body to implement specific mechanisms for regulating these players. Second, it focuses on determining how different regulatory tools and mechanisms suggested by the Report—such as market studies and the new pro-competitive instrument—can be effectively applied in Brazil. This proposal also reflects some key principles on regulating technologies: (i) the need to adapt tools to keep regulation up to date, using flexible and adaptable methods that promote transparency, interdisciplinarity, and stakeholder engagement; (ii) the establishment of a foundation for interinstitutional and transnational cooperation; (iii) the development of governance structures that enable agile, results-driven regulation supporting innovation, leveraging its benefits while considering institutional capacities, the feasibility of non-binding solutions, and regulatory experimentalism; and (iv) the creation of strategies to foster compliance across different jurisdictions through responsive approaches to risk, and the integration of enforcement considerations into legislative movements.[10]

First, in line with the recommendations of the Report, this proposal calls for the creation of a new unit within CADE to implement the envisioned approach to ecosystem regulation: the Market Monitoring Unit (Unidade de Acompanhamento de Mercado or UAM). This unit will be tasked with conducting market studies, implementing the new pro-competitive mechanisms outlined in the Report, and developing expertise based on CADE's institutional experience as an independent competition authority.

CADE's role as the foundation for ex-ante regulation of digital ecosystems was supported by the Brazilian Competition Authority itself throughout the consultation process led by the Brazilian Ministry of Finance.[11] Two key arguments support the decision to place UAM within CADE. Firstly, despite the unique characteristics of this regulatory approach, CADE brings valuable expertise in competition enforcement, which would aid in implementing ex-ante regulation for digital ecosystems. Secondly, the operational costs are significantly lower when maintaining the UAM within CADE, especially compared to creating a new authority to oversee the implementation of this regulatory framework.

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[10] See OECD, Recommendation of the Council for Agile Regulatory Governance to Harness Innovation (2021).

[11] See CADE, supra note 7.

We argue that UAM should operate independently from both CADE's General Superintendence (Superitência-Geral do CADE or SG/CADE) and Department of Economic Studies (Departamento de Estudos Econômicos or DEE). This organizational autonomy is designed to address the inherent biases in CADE's traditional enforcement approach. By establishing a new internal structure with direct access to CADE's Administrative Tribunal, UAM will be free from internal dynamics that could undermine its effectiveness. Moreover, this approach supports UAM's specialization by assigning it responsibility not only for managing tools distinct from conventional antitrust enforcement but also for implementing specific procedures related to these tools.

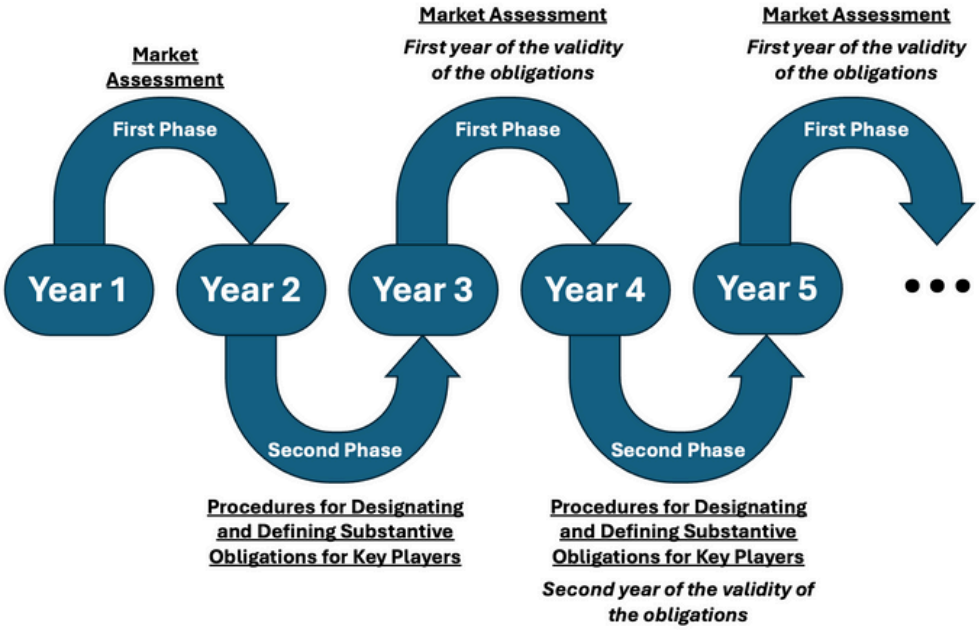
Similar to SG/CADE, we propose granting UAM its own investigatory powers and the authority to initiate proceedings independently, while overseeing the new pro-competitive tools outlined in the Report. Additionally, like the DEE, the UAM will conduct market studies as recommended in the Report, with the aim of enhancing the unit's technical expertise and serving as a tool for competition advocacy.

We propose that the President of CADE's Administrative Tribunal appoint the Director-General of the UAM, with approval from a majority of its members. This approach seeks to reduce the risk of political interference that could hinder the ecosystem regulation agenda during the nomination and approval process. Appointing a single individual concentrates significant authority over competition enforcement in an industry that is increasingly politically sensitive. In contrast, the plural composition of the Administrative Tribunal of CADE, with its diverse members, promotes greater balance. Unlike the General Superintendent, who is appointed by the President of the Republic for a two-year term, this structure aims to ensure greater efficiency and independence in the UAM's work. Additionally, requiring approval from all members of the Administrative Tribunal—rather than following the model for the Chief Economist, who is appointed jointly by the General Superintendent and the President—reinforces the intent to select a nonpartisan individual, thereby strengthening the neutrality and impartiality of the nomination process.

Secondly, we propose integrating market studies and the new pro-competitive mechanism outlined in the Report into a single regulatory policy cycle. This cycle can be divided into two main phases: the assessment of the market and the procedures for assigning and defining substantive obligations for key players. Integrating these proposals strengthens the UAM's institutional resilience, allowing it to establish itself as an independent body for ecosystem regulation. In this way, the goal is to gain a deeper understanding of market dynamics before implementing concrete interventions, ensuring that regulatory actions are more accurate and effective.

This cycle would last two years. In the first year, the UAM would conduct a competitive market assessment, identifying priority services for potential intervention and deepening the understanding of their competitive dynamics. The outcome of this process would be a consolidated market study. In the second year, based on this assessment, the UAM would initiate procedures to assign and define substantive obligations for key players. These obligations would remain in effect for two years. At the end of this period, the cycle would restart: a new competitive assessment would be conducted, and in the following year, new procedures for assigning and defining obligations would be established, starting at least one year before the expiration of the previously defined obligations. This approach ensures regulatory continuity and constant adaptation to market transformations.

The figure below illustrates the two phases of this cycle:



We also propose that the two phases comprising the regulatory policy cycle for ecosystems can be further divided into specific procedures.

Regarding the **first phase**, we propose the creation of a new procedure: **the Market Inquiry**. This procedure would aim to both identify target services for the competitive assessment and conduct a detailed study of these markets. The goal is to examine their competitive dynamics, both endogenous and exogenous, as well as identify competition concerns that are not adequately captured by the traditional enforcement tools set forth in Law No. 12,529/2011. The Market Inquiry would consist of two main stages.

The **first stage of the Market Inquiry** begins through by UAM's **list of target services** to be investigated. The selection of target services should be based on a preliminary analysis that justifies the need to examine these markets, particularly considering factors such as the presence of strong network effects, economies of scale and scope, and market dynamics that tend to result in winner-takes-all or winner-takes-most processes. Additionally, the dependence of commercial users and interconnected markets on the actions of key players within these ecosystems should be considered. To support this choice, UAM may also rely on arguments such as: (i) the history of procedures within CADE, indicating potentially problematic markets; (ii) the existence of similar procedures in other jurisdictions, suggesting that analogous concerns could arise in Brazil; and (iii) market studies conducted by other agencies, offering relevant insights.

This first stage will last a maximum of 90 days. After the publication of the Technical Note initiating the Market Inquiry by UAM, a 30-day period will be opened for third parties to express their views and submit requests for qualification, suggesting the expansion or reduction of the preliminary list of target services proposed. Once this period ends, UAM will have 30 days to prepare and publish the final list, along with the justifications supporting the selection of the target services for the competitive market assessment. Subsequently, the Administrative Tribunal of CADE will have an additional 30 days to deliberate and finalize the list of target services for the Market Inquiry.

This stage lies in the very nature of services that may be subject to ex-ante regulation of ecosystems, based on two main reasons. First, especially in digital markets, services can quickly become outdated, making a rigid legal definition of target services obsolete and ineffective for enforcement coverage.[12] Making this definition part of a constant review cycle helps mitigate this flaw without compromising the legal certainty of regulated entities, as the list can be challenged (administratively) by interested third parties, reviewed by the Administrative Tribunal of CADE, and applied only for the subsequent cycle of assigning key players and defining substantive obligations. Second, a stage of selecting target services by CADE also represents a clarification of the objectives of ex-ante regulation of ecosystems. This not only brings greater transparency to the regulatory process but also creates a communication channel, especially through the participation of third parties, regarding the adequacy of the target services' scope in light of the constantly evolving dynamics, particularly in digital markets.[13]

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[12] See Teresa Rodríguez de las Heras Ballell, The Scope of the DMA: Pivotal for Success, Critically Assessed, Verfassungsblog (Aug. 30, 2021), https://verfassungsblog.de/power-dsa-dma-02/#:~:text=Pivotal%20for%20success%2C%20critically%20assessed,actors%20operate%20as%20'gatekeepers ("the rapid transformation of the market and the emergence of innovative business models could render the list outdated and obsolete in the (near) future. Unless the listed services prove to be sufficiently broad to embrace not only analogous services, but also other new services sharing similar characteristics and raising equivalent policy concerns, the Regulation might lack future-proof adaptability"). See also Maurits Dolmans et al., Rigid Justice is Injustice: The EU's Digital Markets Act Should Include An Express Proportionality Safeguard, 2 Ondernemingsrecht (2022).

[13] See Jonathan Kanter, Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines, U.S. DOJ (Jan. 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines ("[m]ore and more we are hearing directly from affected stakeholders, and that's incredibly valuable. The views of consumers, workers, innovators, and others on the ground feeling the harms of market concentration present an incredibly valuable perspective for our efforts. [...] [P]lease share your views—we need your input and we care what you think); and and Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement, FTC (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf ("I want [...] to also encourage those beyond the antitrust community—including consumers, workers, entrepreneurs, start-ups, farmers, investors, and independent businesses—to share feedback and evidence. The quality of our review and any subsequent revisions to the guidelines will depend on robust public participation, and we are especially eager to hear from a broad set of market participants").

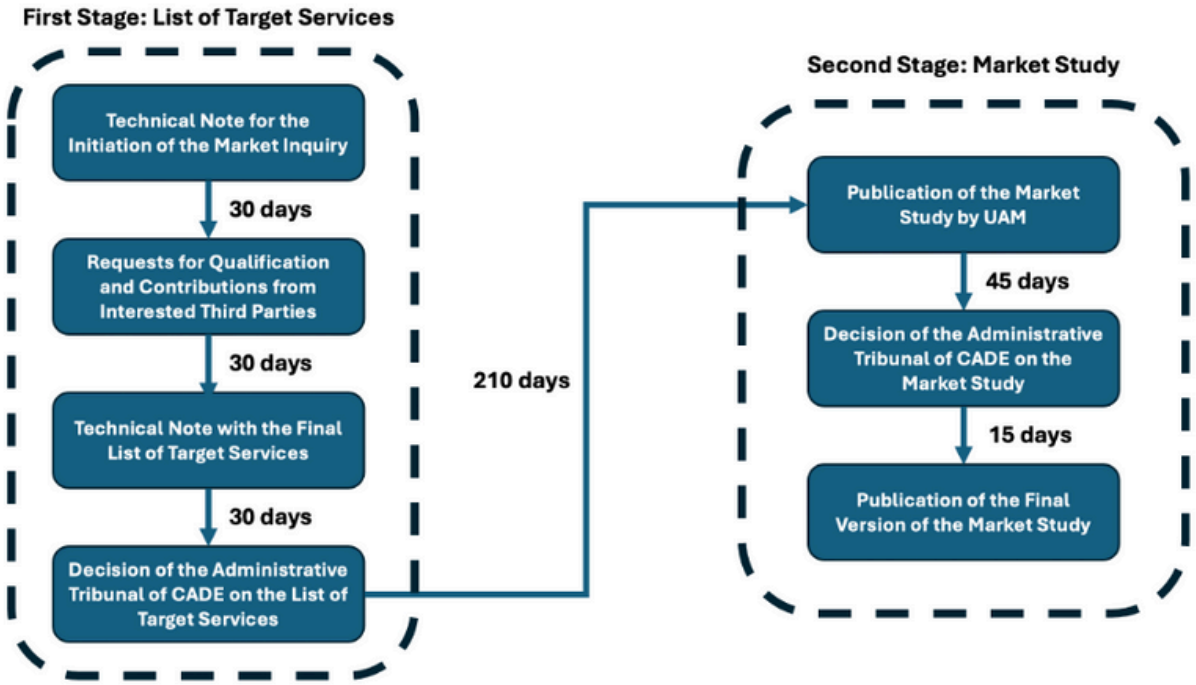
From this decision, **the second stage of the Market Inquiry** begins with UAM conducting a **market study**. In this phase, UAM will be responsible for instructing the Market Inquiry, with the goal of consolidating a study that: (i) provides a competitive overview of the target services, covering their structures and players; and (ii) identifies specific competition concerns that are difficult to address or fall outside the scope of the instruments available in accordance with Law No. 12,529/2011. To this end, UAM has instructive powers to gather information from players, stakeholders, interested third parties, regulatory agencies, and other relevant bodies. Additionally, DEE can be mobilized as an independent entity to carry out specific evaluations throughout the instruction, enriching the market study with supplementary analyses. The public nature of this procedure and the instruction carried out by UAM not only ensures transparency of the information, except for business secrets of the entities being investigated, but also allows for broad contestation of this information by qualified third parties throughout the procedure.

This stage of the Market Inquiry will last a maximum of 270 days. During this period, UAM will have 210 days to publish the market study, outlining: (i) the specific competitive concerns identified, and (ii) their severity, classifying them as low, moderate, or high. The Administrative Tribunal of CADE will then have 45 days to issue its final decision based on UAM's instructory activity regarding the considerations presented. Within 15 days of this decision, the final market study document will be published, adjusted according to the conclusions of the Administrative Tribunal of CADE regarding the identified competitive concerns and their severity (low, moderate, or high), for the purposes of designating key players and defining substantive obligations, thus concluding the Market Inquiry.

The definition of the severity of competitive concerns identified by the Market Inquiry can be guided by two sequential parameters. First, **there is the measurement of the potential or existing harm caused to all those affected by the activities of the key players in the ecosystems**, arising from anticompetitive dynamics inherent to these ecosystems, such as pronounced network effects, operation in multi-sided markets, collection and processing of competitively sensitive data, among others. This analysis involves identifying the harm, assuming that the affected agents may be multiple and simultaneous, including end users, commercial users, and workers within these ecosystems, with impacts that may manifest in various ways, including effects on price, terms of use for users, and more. Second, **a principle of specificity must be observed, identifying whether such harms would be difficult to remedy using the traditional regulatory tools available to CADE, as outlined by Law No. 12,529/2011**.

The aim is to ensure that the mobilization of ex-ante regulation of ecosystems, due to its complexity and level of intervention, is subsidiary to the current competition enforcement —which should be enhanced by less burdensome and more proportional measures, without the immediate need for the designation of key players and the imposition of substantive obligations.

The figure below illustrates the flowchart of the Market Inquiry procedure:



The proposal for conducting the Market Inquiry is driven by the goal of both clarifying the objectives and concerns that justify a more assertive intervention by CADE, using mechanisms that differ from those traditionally provided in Law No. 12,529/2011, and strengthening UAM's capacity as a specialized body in the regulation of digital ecosystems. The objective is to realign an approach that, if previously reversed, has led to operational challenges in ex-ante regulation of ecosystems globally. A deeper understanding of the target services is needed, including a precise definition of which services these are, to establish well-founded and precise obligations for the designated key players, aimed at addressing anticompetitive dynamics in these markets.

Regarding the **second phase**, we propose the creation of two procedures: the **Designation of Key Players** and the **Definition of Substantive Obligations** .

Building on the conclusions of the Market Inquiry, the **Designation of Key Players Process** begins as the **first step** of the second phase. During this process, UAM will designate key players—defined as those with the ability to unilaterally alter the conditions of the target services, leveraging a privileged position to exercise such control. This concept extends beyond the traditional notion of market dominance, potentially being both broader and more restrictive.

Quantitative criteria—such as minimum revenue and a significant user base—and qualitative criteria—including network effects, the provision of multiple relevant digital services, vertical integrations in related markets, and access to substantial volumes of personal and commercial data—established in legal or subordinate regulations, may be used to identify these players. This is without prejudice to the possibility of affected agents contesting their designation as key players.

Additionally, the integration of the Market Inquiry with the new pro-competitive mechanism proposed by the Report offers UAM, subject to the Administrative Tribunal of CADE's review, an alternative method for designating key players based on the actual characteristics of the target services. This allows for the designation of players providing services that raise medium or high competitive concerns, even if they do not meet the pre-established criteria. The aim is to reduce the arbitrariness typically associated with the creation of safe harbors in competition policy by basing decisions on concrete evidence that can identify substantial competitive concerns, while avoiding false positives. However, this does not imply the complete elimination of such safe harbors: key players in low-competitive-concern scenarios would be immediately exempt from substantive obligations, as further discussed below. This approach ensures the legal certainty of regulated players, as they will be informed of the market study's results, have the opportunity to challenge their designation during the Designation of Key Players, and will not automatically face substantive obligations during the Defintion of Substantive Obligations, although they may be subject to procedural transparency requirements, which are already familiar to CADE.[14]

[14] See, e.g., Merger Filing No. 08700.010688/2013-83 and Merger Filing No. 08700.005972/2018-42.

The Designation of Key Players Process will last a maximum of 180 days. Following the publication of the Technical Note initiating the procedure, third parties will have 30 days to submit their comments and requests for qualification. UAM will then have 90 days to instruct the procedure and issue a Technical Note designating the key players, along with the justifications supporting its decision. The Administrative Tribunal of CADE will have 30 days to issue its final decision based on the conclusions presented by UAM regarding the designation of the key players. In all cases, the final decision of the Administrative Tribunal of CADE will remain valid for two years.

Once the key players are designated, the **Definition of Substantive Obligations** begins as the **second step** of the second phase. While safeguarding the sensitive nature of the key players' trade secrets, it is crucial that this stage be developed collaboratively among all relevant stakeholders. This approach requires close cooperation between regulators, such as ANATEL, ANPD, and SENACON, facilitated by permanent communication channels and standardized procedures for initiating dialogues and referring matters within the jurisdiction of other agencies. Additionally, several mechanisms can be employed to strike a balance between protecting trade secrets and ensuring transparency. For example, trustees acting as clearing houses can secure access to information for third parties involved in the discussion of substantive obligations, while UAM itself may also play a role in mediating. Moreover, remedies like the creation of control panels, which have been successfully implemented by CADE in structural control cases, offer a practical solution to address this challenge.[15]

The development of substantive obligations will be carried out through collaborative dialogue between UAM, the designated key players, third parties, other stakeholders, as well as relevant regulatory agencies and bodies. Based on the findings of the Market Inquiry, if the target service presents low competitive concerns, no substantive obligations will be imposed on the designated key players. However, if medium or high competitive concerns are identified, specific measures will be introduced. For medium-level concerns, UAM will establish a non-mandatory code of conduct with substantive obligations for the designated key players, along with a dispute resolution mechanism. In cases of high competitive concerns, UAM will define a set of mandatory substantive obligations, which may be either individual or cross-cutting, for the designated key players.

[15] See, e.g., Merger Filing No. 08700.009924/2013-19, Merger Filing No. 08700.005719/2014-65, and Merger Filing No. 08700.004431/2017-16.

The reasoning behind this differentiation is to align enforcement with the specific characteristics of the ecosystems, creating appropriate safe harbors for cases that do not raise concerns.[16] Hence, when low competitive risks are identified, even with the designation of key players, procedural transparency obligations are likely to suffice in mitigating potential risks. In cases where medium-level concerns are present, CADE's caution can be addressed through a non-mandatory code of conduct as a substantive duty for the designated key players, along with an alternative dispute resolution system for the implementation of the code.[17] These measures, therefore, not only serve as a signal to key players to adjust their practices in anticipation of potentially more stringent evaluations in the future[18] but also offer a pathway for incremental improvements within these ecosystems.[19] However, in the case of high concerns, substantive obligations should employ all available mechanisms to address the identified issues, especially in light of the broad array of remedies that CADE can deploy under Article 38 of Law No. 12,529/2011.

The process of Definition of Substantive Obligations will last a maximum of 180 days. Following the publication of the Technical Note that initiates the procedure, interested third parties will have 30 days to submit their comments and requests for qualification. This process will also involve the participation of relevant regulators, fostering a multilateral dialogue akin to that observed in internet regulation and the composition of the Internet Management Committee in Brazil. Subsequently, UAM will have 90 days to complete the procedure and issue a Technical Note outlining the substantive obligations, whether mandatory or voluntary, along with the justifications supporting its decision in line with the principle of proportionality. Finally, the Administrative Tribunal of CADE will have 30 days to render its final decision based on the conclusions presented by UAM regarding the substantive obligations assigned to the key players, which will remain valid for two years.

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[16] An inherent difficulty in the process of developing presumptions is the precise identification of false positives and negatives, especially in markets subject to innovation. See OECD, Safe Harbours and Legal Presumptions in Competition Law: Background Note by the Secretariat 5 (2017) ("[u]ltimately, the challenge is how to balance the pursuit of the goals of competition law –i.e. welfare maximisation– with the need to create administrable rules. This is a balance that competition enforcers struggle with constantly, as new business practices emerge and economic theory evolves").

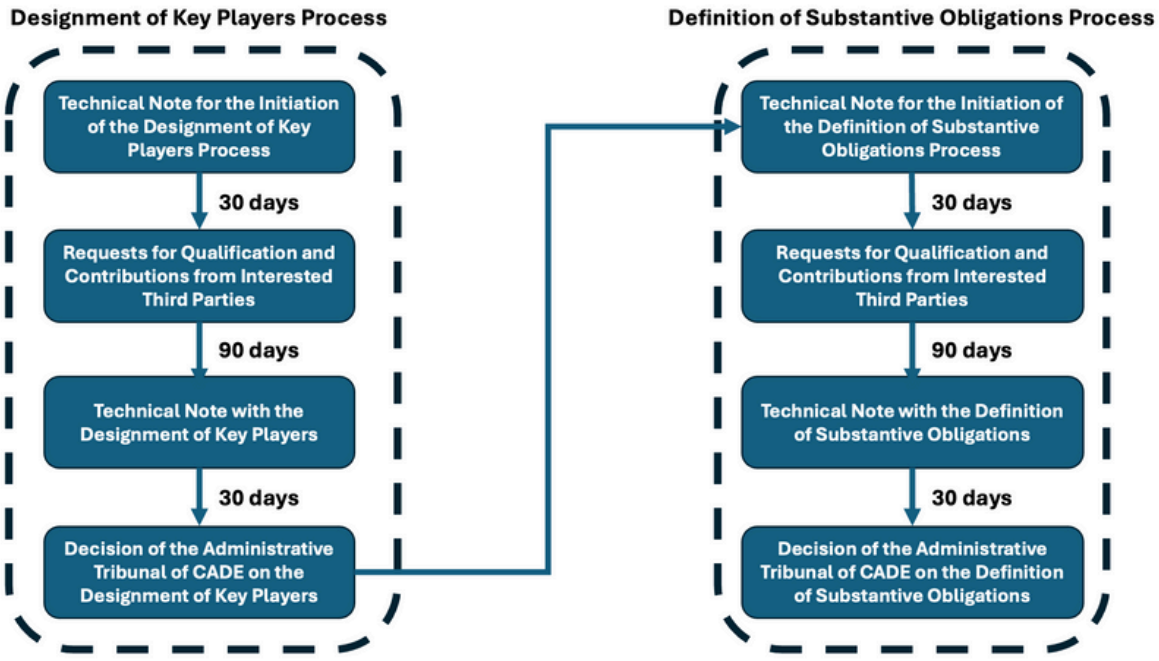
[17] See, e.g., Merger Filing No. 08700.000344/2014-47, Merger Filing No. 08700.005719/2014-65, Merger Filing No. 08700.004860/2016-11, and Merger Filing No. 08700.001390/2017-14.

[18] In a way, this type of regulatory "trial" can serve as a signal to the market players, who can then take steps to voluntarily mitigate the identified concerns. See Tim Wu, Agency Threats, 60 Duke Law J. 1841 (2011).

[19] See Robert L. Glicksman & Sidney A. Shapiro, Improving Regulation Through Incremental Adjustment, 52 U. Kan. L. Rev. 1179 (2004).

The rationale for these obligations is based on the potential to use ex-ante regulation of ecosystems as a set of sunset provisions, enabling effective periodic interventions, particularly in markets with disruptive players[20]. On one hand, periodicity helps avoid the adoption of permanent measures that could disproportionately hinder innovation by key players in these markets. On the other hand, it fosters greater experimentation in the ongoing development of substantive obligations that effectively address competitive concerns in ecosystems. CADE has already implemented periodic reviews of obligations, including in digital markets, through preventive measures.[21] The goal here is to systematize this process, establishing clearer parameters for CADE's actions in addressing these competitive concerns.

The figure below summarizes the procedural flow of the Designation of Key Players and the Definition of Substantive Obligations:



[20] See Sofia Ranchordás, Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation, 55 Jurimetrics 201 (2015); and Sofia Ranchordás, Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?, 36 Statute Law Rev. 28 (2015).

[21] See CADE, Session II: Interim Measures – Contribution from Brazil, DAF/COMP/LACCF(2024)12 (2024).

Finally, we suggest that UAM itself should conduct monitoring activities during the two years of validity of the substantive obligations defined by CADE. This choice offers advantages, as UAM will be responsible for the new Market Inquiry while the obligations are in effect, enhancing the body's specialization and promoting feedback within the cycle. In addition to UAM's direct control, through receiving reports and information requests, other control mechanisms can be envisioned, including those involving stakeholders. One example is allowing third parties interested and qualified in the Definition of Substantive Obligations to file complaints during the monitoring of these commitments. Restricting this power to interested third parties aims to prevent a "race" for complaints among stakeholders, while also encouraging future participation through the ability to monitor the obligations. Furthermore, information control panels and reporting channels, already used by CADE in remedies, can be explored by UAM. Another option is delegating technical tasks to independent experts and evaluators who can monitor compliance with the substantive obligations assigned to key players.[22] Non-compliance, particularly when systematic, could also be accompanied by fines and non-monetary sanctions, allowing an effective response to recurring violations.

[22] CADE itself recently developed its own guidelines regarding the role of trustees in monitoring commitments agreed upon or imposed with by the Brazilian Competition Authority. See CADE, Manual Trustee (2024).

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