Antitrust Analysis of Online Sales Platform

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The Brazilian competition legal framework does not provide a different set of rules for each specific market or designate different institutions to enforce competition regulations. Both traditional and innovative markets—the "old" and the "new" economies—are subject to the same set of rules. Moreover, there are no competition law guidelines particularly relevant to the new economy or pertaining specifically to online sales platforms in Brazil.

Nevertheless, it is undeniable that the application of the same rules may be affected differently according to the specific characteristics of the markets in which anticompetitive conduct is practiced or in which mergers are carried out. In Brazil, the law requires the examination of the actual and potential economic effects arising from a particular act on a relevant market both with regard to the analysis of conducts and the control of concentration acts (although, as will be seen later, in some cases, there are some discussions about the burden of proving such economic effects).

The Internet reduces distances and increases markets, creates new barriers and eliminates others, and, above all, accelerates innovation in such a way that results in uncertainty about the future shape of a market or the potential effects of a certain conduct, making the analysis of the antitrust authorities more complex.

Although it is not yet possible to anticipate how future major competition/anti- trust issues entailed by the growth of online sales platforms will be analyzed, former decisions of the Brazilian Antitrust Authority (CADE) can bring some light and allow some provisional answers to this question.

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5.1 The Brazilian Antitrust System

The Brazilian Antitrust System is structured by the "Brazilian Antitrust Act"[1] (Antitrust Act) and is grounded on the principles of free competition, freedom of initiative, consumer protection, and prevention of abuse of economic power. Those are the primary guidelines that steer all other legal provisions on the matter, as well as the performance of CADE.

CADE is an independent agency and is responsible for merger reviews and for imposing penalties upon infringement of Brazilian antitrust provisions. Its decisions are final in an administrative level and may only be challenged in judicial courts. In the performance of these roles, CADE must abide by the legal principles and assure that they are followed by all economic agents.

Violations to the economic order are listed in Article 36 of the Antitrust Act and include acts under any circumstance that have as object or that may have the effect of (1) limiting, restraining, or in any way injuring free competition or free initiative;
(2) controlling the relevant market of goods or services; (3) arbitrarily increasing profits; and (4) abusively exercising a dominant position, regardless of the agent's fault. According to this rule, economic agents that practice such acts are subject to penalties, even if the mentioned effects are not produced. The third paragraph of Article 36, in its turn, serves as a guide for the interpreter of the law, indicating conducts that may be considered unlawful in certain circumstances, to the extent that they fall under the aforementioned situations.[2]

1 Federal Law (Lei Federal) No. 12,529 of 30 November 2011.

2 Those are the examples of conducts indicated in Article 36 of the Antitrust Act: "I – to agree, join, manipulate or adjust with competitors, in any way: a) the prices of goods or services individually offered; b) the production or sale of a restricted or limited amount of goods or the provision of a limited or restricted number, volume or frequency of services; c) the division of parts or segments of a potential or current market of goods or services by means of, among others, the distribution of customers, suppliers, regions or time periods; d) prices, conditions, privileges or refusal to partici- pate in public bidding; II – to promote, obtain or influence the adoption of uniform or agreed business practices among competitors; III – to limit or prevent the access of new companies to the market; IV – to create difficulties for the establishment, operation or development of a competitor company or supplier, acquirer or financier of goods or services; V – to prevent the access of com- petitors to sources of input, raw material, equipment or technology, and distribution channels; VI – to require or grant exclusivity for the dissemination of advertisement in mass media; VII – to use deceitful means to cause oscillation of the prices for third parties; VIII – to regulate markets of goods or services by establishing agreements to limit or control the research and technological development, the production of goods or services, or to impair investments for the production of goods or services or their distribution; IX – to impose, on the trade of goods or services, to distribu- tors, retailers and representatives, resale prices, discounts, payment terms, minimum or maximum quantities, profit margin or any other market conditions related to their business with third parties; X – to discriminate against purchasers or suppliers of goods or services by establishing price dif- ferentials or operating conditions for the sale or provision of services; XI – to refuse the sale of goods or provision of services for payment terms within normal business practice and custom; XII – to hinder or disrupt the continuity or development of business relationships of undetermined term, because the other party refuses to abide by unjustifiable or anticompetitive terms and condi- tions; XIII – to destroy, render useless or monopolize the raw materials, intermediate or finished products, as well as to destroy, disable or impair the operation of equipment to produce, distribute or transport them; XIV – to monopolize or prevent the exploitation of industrial or intellectual property rights or technology; XV – to sell goods or services unreasonably below the cost price; XVI – to retain goods for production or consumption, except to ensure recovery of production costs; XVII – to

On the other hand, whenever market power is conquered by the agent's own merits and efficiency, it will not constitute a violation to the economic order and will be deemed lawful.

CADE must impose penalties to the economic agents upon sufficient evidence of commitment of the practices described above. As a general rule, CADE applies the rule of reason to the interpretation of the antitrust law, which considers as unlawful acts that may have the possible effect of unreasonably restricting competition. However, recent decisions issued by CADE in specific cases—such as horizontal price fixing and bid rigging—have considered the practice of the act as "unlawful by object"—on the ground that these acts, due to their nature, would have a high potential of restricting competition. As such, CADE would not have the burden of proving any actual or likely anticompetitive effects on the market to consider the conduct illegal and, consequently, apply the penalties defined by law. Such approach is even stricter with respect to hardcore cartel cases, in which the mere evidence of the practice would be enough for conviction.

The theory of acts that are "unlawful by object" was also considered by CADE in a case of retail price maintenance. On that occasion, it was considered that the fixing of minimum resale prices by an agent with a dominant position on the market would constitute a quasi per se illicit act that would result in the reversal of the burden of proof to the defendant. The imposition of resale prices is one of the examples of acts that may be considered illegal, according to item IX of para 3 of Article 36.

However, it cannot be said at this time that there is a consensus about the charac- terization of some illicit acts as unlawful by object or about the burden of proof in some competition matters. There are not enough cases capable of affirming a clear trend in CADE's jurisprudence or sufficient judicial decisions that confirm the understanding on the subject.

In general, the thesis that the characterization of unlawful acts against competi- tion depends on CADE's demonstration of the potential adverse effects on the mar- ket after due investigation prevails. The various examples listed in the third paragraph of Article 36, including exclusivity clauses in vertical agreements, dis- crimination between suppliers or purchasers, and refusal to deal, would be, like most conducts, subject to a rule of reason and to the demonstration of negative effects, and the burden of proof would be on CADE.

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partially or totally cease the activities of the company without proven just cause; XVIII – to condition the sale of goods on the acquisition or use of another good or service, or to condition the provision of a service on the acquisition or use of another good or service, and XIX – to abusively exercise or exploit intellectual or industrial property rights, technology or trademark."

This same rule is applied in CADE's assessment of most-favoured-nation clauses (MFN). That was the case with Procedimento Preparatorio[3] No. 08700.005679/2016- 13, under which agreements among three relevant players of the online tourism market were investigated. The antitrust authority sustained that such provisions would be considered a violation to the economic order upon appraisal of their harm- ful effects to competition. CADE preliminarily recognized that such MFNs could produce such effects and determined production of additional evidence to confirm its understanding.

All such provisions and understandings shall equally apply to Internet-related businesses. Strictly speaking, the characteristics of this type of business, subject to constant changes and innovations, make the adoption of presumptions about the possible negative effects of conduct less likely while making the examination of competitive issues in light of the rule of reason more likely, especially in relation to vertical restraints. Therefore, acts such as bans on sales through third-party Internet platforms—as well as any other Internet-related exclusivity agreement—will prob- ably be considered in light of the rule of reason. Thus, they will only be considered exclusionary practices upon evidence of their potential negative effects.

On the other hand, it is difficult to anticipate if Internet-related retail price main- tenance will be assessed by the "unlawful by object" rule or by a rule of reason approach.

Upon assessment of a practice with unlawful effects, the economic agents may be subject to the pecuniary and nonpecuniary penalties set forth in Article 37 of the Antitrust Act, such as (1) payment of a fine of one-tenth percent (0.1%) to twenty percent (20%) of the gross sales of the company, group, or conglomerate in the last fiscal year before the establishment of the administrative proceeding, in the field of the business activity[4] in which the violation occurred, which will never be less than the advantage obtained, when the estimation thereof is possible; (2) the ineligibility for official financing and for participation in public biddings; (3) the registration of the wrongdoer with the National Registry for Consumer Protection; and (4) the conviction's publication in newspapers.

The Antitrust Act also sets forth the possibility of execution of leniency agree- ments and cease-and-desist agreements.

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3 Preparatory Proceeding. The Preparatory Proceeding precedes an Administrative Investigation and an Administrative Proceeding. The purpose of the Preparatory Proceeding, which must be performed within a maximum period of 30 days, is just to verify if certain facts potentially may be considered unlawful and require an investigation (Article 66 of the Antitrust Act).

4 The concept of "field of the business activity" is not identical to the notion of relevant market. At the time the Brazilian Antitrust Act was published, the legislator deliberately substituted the term "relevant market" by "field of the business activity" as a basis for calculating penalties. The con- cept of field of the business activity, however, was entirely new, generating uncertainties as to its scope. On May 29, 2012, CADE issued Resolution n. 3 that lists 144 fields of business activities that will serve as the basis for the calculation of the penalty.

Leniency agreements are set forth in Article 86 of the Antitrust Act and allow that an economic agent involved in an unlawful act admit such practice and present a first-hand report with details of its conduct and of the other agents involved in the practice. They can only be entered into with the first company that qualifies for this purpose. Upon confession and compliance with the conditions set forth in Article 86, including the cooperation with the investigations and administrative proceed- ings resulting from such cooperation, CADE may terminate any punitive action against that specific agent or reduce one (1) to two thirds (2/3) of the applicable penalty. Leniency agreements also benefit the individuals involved in the violation (management and employees of the party executing the leniency agreement) with the same reductions in the administrative penalties and by preventing the offering of a criminal complaint provided that they enter into the leniency agreement jointly with the relevant company and respect the imposed conditions.

Agents may also benefit from CADE's Leniency Plus program, which consists of the reduction of the applicable penalty for an agent that does not qualify for a leni- ency agreement in connection with a practice in which it has participated but that provides information on a second anticompetitive conduct that CADE had no prior knowledge of.

Leniency agreements are appropriate in cases of anticompetitive agreements, especially cartel formation, but do not apply to unilateral conducts. This is because one of the essential conditions for the execution of leniency agreements is the pre- sentation of evidence capable of leading to the conviction of the other parties that practiced the offense.

On the other hand, cease-and-desist agreements (called "TCC" in Brazil—an acronym for "Termo de Compromisso de Cessação") are available both in relation to cartels (when it is no longer possible to conclude a leniency agreement) and in relation to unilateral conduct.

The execution of cease-and-desist agreements interrupts the course of the admin- istrative proceeding, and if all the conditions set forth in the agreement are met, the proceeding may be dismissed. Individuals who are already involved in criminal proceedings cannot benefit from TCCs but, under certain circumstances, are entitled to negotiate different agreements with the Federal Police or the Public Prosecution by collaborating with investigations of the collusion.

The admission of guilt and the payment of monetary contribution to a federal fund for the protection of diffuse rights (which will represent a percentage of the fine imposed to the parties that do not negotiate a TCC) are required in cartel cases but may be dismissed in cases of unilateral conduct.

When TCC obligations are observed, the proceeding is dismissed without a deci- sion on the merits. Only in case of breach of such commitment will the proceeding return to its due course and entail the issuance of a decision with precedent value by CADE and application of penalties. It can therefore be stated that, in relation to unilateral conducts in the online sales market that CADE may consider to have potential anticompetitive effects, the negotiation of a TCC can be an effective way of reducing contingencies.

The Brazilian legal system also ensures the right of those who have suffered damages due to anticompetitive conduct to be indemnified. In fact, the Brazilian Federal Constitution establishes as a fundamental right the access to a court of law,[5] and the Brazilian Civil Code establishes the general rule according to which any person that by an unlawful conduct causes damages to other persons shall indem- nify the victim[6]). Therefore, if the anticompetitive practice caused harm to a person or entity, this entitles such person or entity to request indemnification before a Brazilian court. It is even possible that, whereas CADE in its assessment does not recognize such conduct as a violation to the economic order, the Brazilian courts rule that such act was illegal, thus entailing the right to indemnification to the dam- aged person. The right to receive compensation in principle is not affected by the existence of leniency agreements or TCC.

Collective damages caused by anticompetitive conduct, as well as moral and financial damages suffered by individuals, can be subject to compensation and pur- sued by class associations and the public prosecutors. Brazilian law does not pro- vide for punitive damages. It is important to note, however, that in spite of being legally admitted, claims for damages arising from anticompetitive conducts are still rare in Brazil.

CADE's antitrust enforcement has been generally in line with international stan- dards, with CADE being very active in the various international cooperation orga- nizations in which it participates, notably the International Competition Network (ICN). In this sense, no conflict or gap between Brazilian practice and international practice regarding the application of antitrust rules in relation to the online sales platforms should be expected.

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5 According to Article 5, item XXXV of the Federal Constitution, no law is able to exclude any harm or threat to someone's right from the consideration of the Brazilian courts.
6 According to Article 186 of the Civil Code.

5.2 Internet and Antitrust Assessments

The principles and provisions outlined above shall equally apply to the new econ- omy of Internet-related businesses and enterprises. This new facet of Brazilian economy has been growing fast, and the number of economic agents in the field is expanding rapidly.

So far in Brazil, CADE's merger reviews have presented interesting questions and acknowledged material differences to the Internet-related businesses. In order to understand such differentiation, it is important to, in the first instance, provide a brief overview of CADE's proceeding when analyzing mergers.

The Antitrust Act establishes a premerger control in transactions in which (1) two or more previously independent companies merge; (2) one or more companies acquire, directly or indirectly, by purchase or exchange of stocks, shares, bonds, or securities convertible into stocks or assets, whether tangible or intangible, by con- tract or by any other means, total or partial control of one or more companies; (3) one or more companies are merged into one or more other companies; or (4) two or more companies enter into associative, consortium, or joint venture agreements.

CADE's aim in such assessment is to prevent transactions that could eliminate competition in a substantial portion of a relevant market, create or strengthen a dominant position, or result in the domination of a relevant market of goods or ser- vices. Such transactions shall only be approved by CADE if proved that they could increase productivity or competitiveness, improve the quality of goods or services, or encourage efficiency and technological or economic development, as well as transfer a relevant part of the resulting benefits to consumers, despite the apparently negative effects.

For this assessment, CADE normally divides its analysis into the following stages: (1) definition of the relevant market, (2) analysis of the level of market con- centration, (3) examination of the possibility of using market power as a result of the merger, and (4) comparison between the negative effects and the efficiencies result- ing from the concentration act.[7]

[7] CADE is not required to follow this order of analysis. In addition, as it has made clear in the Guide to Analysis of Horizontal Concentration Acts published in 2016, CADE may, in certain cases, adopt alternative ways for antitrust analysis, such as counterfactual analysis and simulations of the transactions' effects that may depend or not on the prior definition of the relevant market.

Although this type of analysis is not mandatory, and may vary in some cases depending on specific circumstances, these steps apply in principle to any and all assessments of this nature and in respect of all market businesses, including transac- tions involving companies from Internet-related businesses.

5.2.1 Relevant Market

As mentioned above, CADE first identifies the group of economic agents, consum- ers, and producers that may be affected by the transaction in a determined geo- graphic area. According to the "hypothetical monopolist" test—one of the analytic tools used by CADE to define a relevant market—the relevant market is the smallest group of products/services in the smallest geographic area needed for a hypothetical monopolist to impose "a small but significant and non-transitory" increase in prices.

In order to identify the products/services that are part of a certain relevant mar- ket, CADE assesses, from a demand perspective, which goods and services are con- sidered substitutable by the consumer for their characteristics, prices, and usage. In order to assess this substitutability, CADE examines the possibility of consumers shifting their demand to other products.

From the geographical point of view, CADE's Guide to Analysis of Horizontal Concentration Acts recognizes that certain relevant markets are based on the loca- tion of the consumer, others in the location of suppliers, and others in both locations (mixed markets).

In merger reviews involving Internet-related products and services, this pattern has been applied. At first, one could attribute a global reach to any and all Internet businesses since websites can be accessed from any computer in the planet.

However, as CADE has already decided in Processo Administrativo[8] No. 08012.003386/2001-73, this global outreach is usually restricted by some barriers, such as (1) the website's language, (2) regulatory barriers, (3) product/service taxa- tion, and (4) delivery and payment options. Ergo, upon analyzing the relevant geo- graphic area, the World Wide Web's potential is not considered but rather the real boundaries of that agent's performance, considering the items mentioned above, including the nature of the products/services it offers and the consumers that the agent aims to achieve, the language options in the website, and the areas where it is able to deliver its products/services.

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8 Administrative Proceeding. The Administrative Proceeding is initiated when CADE's General Superintendence consider that there are indictments of an unlawful conduct. It is an adversarial proceeding, aiming to guarantee to the accused party wide defense in regard to the conclusion of the investigation (Article 69 of the Antitrust Act).

Such aspects have been restated by CADE in more than one occasion, with the acknowledgment that high transaction costs to ship products outside of the Brazilian territory[9] and advertising clearly focused on a determined group of consumers that might be able to purchase and receive the products/services[10] represent barriers that restrict the business's geographic area.

The geographic definition in Internet-related businesses may also vary according to the nature of the product/service. As such, the offer of "electronic products" (e.g., an e-book) may have an international reach since it does not encompass high trans- action costs. On the other hand, the sale of products that must be shipped overseas involves greater transaction costs that could hinder the delivery, depending on the distance and the costs involved—sometimes the agent might not even have the means to ship the product to other countries—which would certainly influence the definition of the affected geographic area.

Another matter CADE has dealt with in merger reviews pertains to the differen- tiation of e-commerce platforms and traditional retail stores. The agency has endorsed that, despite being related, these two businesses are not the same for con- sideration of the affected relevant market. According to the decision issued in Processo Administrativo No. 08012.007893/2005-18, e-commerce does not replace traditional stores but rather supplements them. It is of a different nature, in which consumers focus on convenience, saving time and not worrying about product trans- portation. Therefore, the definition of the relevant market should not include any kind of retail service, considering traditional retail and e-commerce as two different markets.

5.2.2 Market Concentration

The definition of the relevant market entails the assessment of the level of concen- tration of the market and the agent's market share, which is the first step to determine if the economic agent is able to exercise market power. According to Article 36, para 2, of the Antitrust Act, "[a] dominant position is assumed when a company or group of companies is able to unilaterally or jointly change market conditions or when it controls 20% (twenty percent) or more of the relevant market, provided that such percentage may be modified by CADE for specific sectors of the economy."

The presumption of dominance established by the law is, however, relative (juris tantum). That is, CADE may consider the existence of a dominant position even in cases where the market share is below the 20% level, as well as, in view of the actual circumstances, to understand that companies with more than 20% of the market have no dominant position.

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9 Processo Administrativo No. 08012.006253/1999-46.
10 Processo Administrativo No. 08012.003921/00-13.

For the definition of the level of market share, CADE examines, as appropriate, the structure of the offer on the market (in cases involving sales power) or the struc- ture of demand (in cases related to purchasing power).

5.2.3 Exercise of Market Power

A merger resulting in a large combined market share does not necessarily entail the exercise of market power. Neither is a merger involving a small combined market share completely free from the possibility of exercise of market power. Some cir- cumstances may undermine the exercise of market power in the former situation or lead to it in the latter.

One of those elements is the possibility of entry of new competitors in the rele- vant market. In such context, the so-called barriers to entry constitute any hurdles that a new player must overcome to start performing in that market and that may put it at a disadvantage compared to the players. Some of these barriers are (1) high fixed costs; (2) sunk costs; (3) legal or regulatory barriers (such as operation licenses); (4) advantages exclusively owned by the parties, such as exclusive access to an input; (5) the need for considerable economies of scale or scope; (6) level of integration of the production chain; (7) consumers' loyalty to the established play- ers' brands; and (8) possible reaction by the established players. The greater are the barriers to entry, the harder it will be for a new player to start performing in that market sector and easier for the established players to exercise market power. Consequently, the agents involved in the analyzed transaction could argue that the relevant market has few barriers to entry and that therefore their exercise of market power would be deterred.

Another element is the possible rivalry between players. Such would occur whenever the established players start acting aggressively as an offset to the likely exercise of market power by the agents involved in the merger so as not to lose their market share in light of the new economic agent. A significant and nontransitory increase in prices by such agents could boost the proposal of new—and better— offers to consumers by the other players. It would then be possible to allege that effective rivalry between players would counterbalance the possibility of exercise of market power. The possibility of importing products is also able to influence and prevent the exercise of market power since it would increase the number of substi- tute products.

The abovementioned elements must also be taken into consideration in merger reviews pertaining to Internet-related businesses. In Processo Administrativo No. 08012.011238/2006-37, CADE analyzed the merger between two well-known e-commerce companies in Brazil that would hold more than 20% market share after the transaction. Such circumstance could in theory be

sufficient to prove that the new company would exercise market power, but CADE acknowledged that the absence of barriers to entry and the rivalry among the different players in the market would neutralize it. First of all, regarding barriers to entry, CADE assessed that the Brazilian e-commerce business was rapidly expanding and creating enough space for new players, with a great deal of innovation. In addition, costs required to start an e-commerce platform are relatively low, which makes barriers to entry in the market insignificant.[11] CADE also considered the fierce competition in the market since many of the established players would be able to react to the merger reorga- nizing and innovating its commercial and marketing strategies. Besides, there are many websites that compare prices among the different e-commerce platforms with no additional costs to the consumers, which deepens even more the competition among players.

In other proceedings[12] involving mergers in the online advertising business, CADE ruled that the raise in market concentration (either horizontal or vertical) entailed by the transaction did not increase the involved companies' market power due to the great number of other players in such a fragmented business.

5.2.4 Economic Efficiencies

Lastly, a merger resulting in a greater probability of exercise of market power may still be approved by CADE if it also brings about economic efficiencies, or incre- ments of welfare, to the business. By balancing these two effects, CADE may con- sider that the merger, despite causing market concentration and the possibility of exercise of market power, brings more benefits than harm to the economy and espe- cially to consumers. Some of those benefits are economies of scale and scope, new technology increasing efficiency, positive externalities, and compensatory market power (when the exercise of market power of the involved agent neutralizes or reduces the exercise of market power by another agent, such as an input supplier).

CADE has already dealt with mergers between companies aiming to increase their economic efficiencies by means of business-to-business (B2B) platforms, or e-procurement, more than once. The agents involved in such transactions usually look for reduction of transaction costs and increase in efficiency by creating platforms in which suppliers of services, inputs, or MRO[13] advertise their products/ services to the platform's users.

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11 This was also stated in Proceeding No. 08012.007893/2005-18.
12 Proceeding No. 08012.003921/2000-13 and No. 08012.010855/2008-87.
13 Materials, repairs and operations, which are not directly related to the company's main activity.

In Processo Administrativo No. 08012.006980/00-35, the agents involved alleged that such practice would provide uniformity and agility in the purchase of MROs, as well as a better cost perspective related to such products. The B2B platform was designed to rationalize their MRO purchase proceedings and is open to other com- panies that might have the same interest. This way, they would be able to acquire such products jointly, which would give them more bargaining power and represent a scale gain to all participants. In its assessment, CADE understood that the pur- chasers would not exercise market power over the suppliers and approved the transaction.

Likewise, CADE approved[14] the creation of a B2B platform with suppliers and consumers of products and services related to engineering and civil construction. This platform would also be open to any interested companies and suppliers. In this case, CADE acknowledged that B2B platforms increase economic efficiency by raising productivity and encouraging price reduction. However, their very nature could encourage anticompetitive practices, like exchange of information, joint sell- ing and purchasing, and exclusionary practices, such as imposing difficulties to the entry of new agents in the platform.

Therefore, in order to avoid such practices, the agency approved the transaction with some restrictions, such as prohibiting the involved companies from requesting the execution of exclusivity agreements to new members of the platform and estab- lishing that the companies should provide mechanisms to guarantee that no com- mercially sensitive information would be exchanged. The restrictions were imposed due to CADE's recognition that B2B platforms may increase chances of (1) collu- sion, (2) monopsony exercise, and (3) exclusionary practices against competitors that are not part of the platform. In relation to this last topic, it was also understood that B2B market is very recent and in full expansion. Therefore, despite not display- ing signs of potential exclusionary practices, it is important that CADE keep moni- toring these platforms.

5.3 Conclusion

The new economy breaks paradigms and is changing the way the law is applied not only in Brazil but also in the whole world. This is due to the Internet's potential to innovate and to the way it is changing human and business relations and adding new features to them. This change will certainly present challenges to the Brazilian antitrust authority, which must keep track of the evelopments in Internet-related businesses in order to ensure an effective protection of consumers and free competition.

[14] Proceeding No. 08012.003386/2001-73.

Adapting to this new scenario does not depend on a change of laws or regula- tions. It relies on CADE's ability to understand the market's functioning and adapt as quickly as it changes and evolves. It will be responsible for applying the already existent rules considering that this new market is extremely fragmented due to its few barriers to entry, few capital requirements, and high levels of innovation.

Even though the current Guide to Analysis of Horizontal Concentration Acts[15] does not have specific rules regarding the "new economy," it provides CADE the flexibility to analyze the markets and the effects of mergers, taking into account dif- ferent factors such as the degree of innovation and maturity of the markets, the bar- riers (or lack of barriers) to the entry of new competitors, and the differentiation of products or services.

Although such Guide refers specifically to horizontal concentration acts, some of its principles must also be taken into account by CADE for the analysis of anticom- petitive behavior.

At the moment, it seems that CADE's tendency with respect to online sales plat- forms is not to issue specific norms or guides but to analyze the markets on a case- by-case basis with certain flexibility and recognizing the peculiar characteristics of any specific relevant market.

[15] "Guia de Analise de Atos de Concentração Horizointal" approved and published by the Plenary of CADE on July 2016.