

# Kluwer Competition Law Blog

## Some Remarks on the Comments Submitted to the Brazilian Public Consultation on Economic and Competitive Aspects of Digital Platforms held by the Ministry of Finance

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May 2nd, 2024 was the last day to submit comments to the [Public Consultation](#) (Economic and Competitive Aspects of Digital Platforms) held by the Brazilian Ministry of Finance. The Consultation, which was released on January 19, 2024 and had one deadline extension, was designed and organized by the Secretary for Economics Reforms – one of the 8 different Secretaries within the Ministry of Finance.

The text of the Public Consultation initiated with a brief introduction and contextualization of the unique characteristics of the digital markets. After that, it presented the international debate regarding *ex-ante* digital markets regulation – in particular, the European experience of the Digital Markets Act (DMA), but also commenting that other jurisdictions have adopted (Germany, UK and Japan) or are discussing (Australia, South Africa and Canada) the passing of *ex-ante* regulation. Finally, it presented the Brazilian context with recent academic discussions, but also briefly analyzed the digital antitrust cases that were adjudicated by CADE – the Brazilian Antitrust Authority -, citing the Market Studies “[Digital Platforms Markets](#)” produced by the Department of Economic Studies at CADE.

The Public Consultation was divided into 4 different topics: (i) the goals and regulatory rationale; (ii) the sufficiency and the adequacy of the current model of economic regulation and competition defense; (iii) the design of a possible pro-competitive economic regulatory model; and (iv) the institutional structure for regulation and supervision. In total, it addressed 9 questions asking about the fundamental and broad discussions of *ex-ante* regulation for digital platforms.

The Consultation received an official number of 301 comments – this number is inflated because some people/companies/entities posted distinct comments for the 9 different answers, counting each contribution as a comment (so the number of official participants was smaller than 301). Companies, civil society organizations, think tanks and even Brazilian regulatory bodies participated in the Consultation.

The goal of this article is to present the main topics and arguments submitted to the Consultation. However, before presenting them, the next section will briefly give a background of the current *ex-ante* digital markets regulation debate in Brazil. After that, the next two sections, divided by companies and CADE comments, will highlight some of the most important arguments submitted to the Brazilian Ministry. The last section concludes the article addressing some ideas for the future

of this debate in Brazil.

## Previous Background on Digital Markets Regulation in Brazil

First of all, and before talking about the comments of the Consultation, it is crucial to remember that this Public Consultation is not the starting point of the debate on *ex-ante* digital markets regulation in Brazil. Besides the academic and international discussions that arrived in Brazil a few years ago, the possibility of *ex-ante* digital markets regulation dawned on November 10, 2022, when Congressman João Maia submitted a proposal to the Brazilian Congress, more specifically, in the Brazilian House of Representatives. This proposal was registered as [Bill 2768/2022](#) and is commonly known as the “Brazilian DMA” Bill.

After being submitted to the Brazilian House of Representatives, the Congressman President of the House of Representatives decided that the Bill must pass and be approved in four different Committees inside the House of Representatives: the Constitution, Justice and Citizen Committee (CCJC, *Comissão de Constituição e Justiça e Cidadania*), the Economic Development Committee (CDE, *Comissão de Desenvolvimento Econômico*), the Finance and Tax Committee (CFT, *Comissão de Finanças e Tributação*) and the Communication Committee (CCOM, *Comissão de Comunicação*). After this initial decision, the Bill began its legislative process of analysis firstly within the Economic Development Committee.

Within the Committee, Congresswoman Any Ortiz was designated to be the Bill’s rapporteur. As the rapporteur, the Congresswoman must produce a final report with her opinions regarding its approval or rejection. While the rest of the members of the Committee have the power to provide suggestions for amendments to the Bill, the rapporteur has the final say in order to adopt or reject these amendments, at the same time that he/she could present a new text of the Bill, presenting his/her ideas for modifying the text in this final report. Obviously, all these legislative movements take into account political balancing and discussion with the members of the Committee and the political parties’ preferences in advancing or blocking the movement of the Bill.

In 2023, the Congresswoman rapporteur of the Bill in the CDE Committee requested public hearings to gather further information and to receive different views from society and companies to better substantiate her views regarding the debate. Four public hearings were held by the Committee on [August 10<sup>th</sup>](#), [August 17<sup>th</sup>](#), [August 24<sup>th</sup>](#) and [August 31<sup>st</sup>](#). In addition, on October 9<sup>th</sup> and 10<sup>th</sup>, Congresswoman Any Ortiz, as the rapporteur of the Bill and also as the President of the Parliamentary Front for Women Entrepreneurs, organized the [Digital Markets Seminar: Entrepreneurship and Innovation](#), a two-day seminar debate within the Brazilian Senate focused in debating all the different aspects of digital markets, having as the underpinning debate the Bill 2768/2022.

Lastly, at the end of 2023, the rapporteur coordinated a Public Consultation related to the Bill (although the website that hosted the Consultation is no longer available, there are public comments [against](#) and [in favor](#) of Bill 2768/2022 available that present the questions and discussion proposed by the Consultation). In sum, this first Public Consultation had 21 questions and addressed a range of different topics: spanning from initial discussions about the characteristics of digital markets, the need for an *ex-ante* regulation, whether it is correct to classify digital markets as essential facilities and other broad and academic discussions of digital markets

regulation to more specific and direct questions about the articles of Bill 2768/2022 and whether the text was well written to solve market failures. The deadline for its first publication was set out for December of 2023.

All these initiatives were public discussions held by the Committee and the rapporteur to receive public comments related to an *ex-ante* regulation of digital platforms for economic and antitrust purposes. However, since the end of this first Public Consultation, no further movements on Bill 2768/2022 were seen in CDE. In a recent statement made by the rapporteur in a CDE hearing, she stated that the project has not made much progress within the Committee since they are waiting for further developments in the Fake News Regulation Bill (Bill 2630/2020) project in the House of Representatives (a Bill already approved in the Brazilian Senate aiming to regulate digital platforms in the context of fighting the spread of disinformation and fake news on the internet that has a very low, or almost zero, possibility to be approved in the House of Representatives according to the latest news), on the one hand, and that they are “*observing how the DMA is being implemented in the EU in particular, so we have more solid elements to implement and discuss the regulation of digital markets in Brazil*”, on the other hand.

In other words, Bill 2768/2022 is currently stuck in the first Committee of the House of Representatives, and it has a long and tough way to go through in its legislative process – at least three more Committees in the Brazilian House of Representatives and also a lengthy road in the Brazilian Senate. In line with the current scenario, the Bill will likely be filed if no external force pushes it. Nonetheless, at the beginning of the year, that external force appeared – the Public Consultation held by the Brazilian Ministry of Finance, the center of discussion of this article.

The first point to be noted is that the Consultation (Economic and Competitive Aspects of Digital Platforms) was designed and organized by the Secretary of Economic Reforms, a secretary from the Brazilian Ministry of Finance – i.e., a public body from the Brazilian executive branch. Hence, all the previous initiatives related to *ex-ante* digital markets regulations were held by the Brazilian Legislative Branch underpinned by Bill 2768/2022, while the current Public Consultation was held by the Brazilian Executive Branch and apart from the Bill. That is an important distinction because it is the first movement made by the current Brazilian administration – Lula’s administration – on antitrust regulation.

Until the beginning of the year, we did not have an official position from the government regarding its view on an *ex-ante* regulation of digital markets for economic and antitrust purposes. Actually, it appears that the current administration still does not have a clear position on this topic and has organized the Public Consultation to create and structure its views. The current Brazilian administration indeed positioned itself in favor of different forms of digital markets regulation, such as the Fake News Bill, the Brazilian AI Bill and the Bill that regulates the employment status of Uber and similar apps’ drivers. It is plausible to imagine that the administration will be in favour of an *ex-ante* digital markets regulation in the style of the DMA.

Nonetheless, the official position is expected to be released after analyzing all the comments received in the consultation and balancing this priority with all the other government priorities and the political costs and benefits related to a project like this one. Hence, after understanding and reviewing some of the background of the current stage of digital markets regulation in Brazil, the next sections highlight some of the main points of the comments submitted to the Public Consultation.

## Companies Comments

A different range of companies submitted comments to the Public Consultation. Big international digital companies (Amazon, Meta, Google and Airbnb), regional digital companies (Mercado Livre), and also telecommunication companies (Tim S.A. and Telefônica S.A) are examples of companies that participated in the Consultation.

A big part of their arguments was almost the same. They sustained that there is no such thing as “digital markets” since they are very heterogeneous markets with significant distinctions between them, so that a regulatory cost-benefit analysis should be properly carried out before enacting any regulation in order to not have a negative impact in the competitive process and in stifling innovation. Therefore, they recommended that Brazil should wait for the evidence of the consequences of adopting this type of regulation and it must refrain from copying international legislation without duly adapting its provisions to the Brazilian economic context. Besides those arguments, the companies indeed raised other important aspects.

Google initiated its contribution by stating that, according to their tests, European consumers are being negatively affected due to the new rules implemented by the company in Europe as a response to the DMA and the prohibition of self-preferencing. Nowadays, Google is not linking Google Maps results in a Google Search response. Their tests also pointed to the fact that big intermediate companies are having more results in the detriment of direct suppliers, including small local businesses.

It is also interesting to notice that Google urged that CADE should be the regulatory body in charge in Brazil if an *ex-ante* regulation was to be adopted. In its words, “*the large digital platforms in Brazil should be regulated by a regulatory body with economic experience and a deep understanding of the trade-offs involved in product design decisions. CADE already meets these criteria and is perfectly placed to regulate large digital platforms in Brazil*”.

Corresponding to a different line of reasoning, Amazon emphasized that the political, economic and legal framework that allowed the DMA to be approved in Europe was a very specific one, with the objective to avoid the fragmentation between the Member States, which is, in turn, very different from the Brazilian one. Amazon also highlighted that prior to enacting the DMA, the European Union and the National Competition Authorities (NCAs) of the Member States produced a trove of cases which were the direct inspiration of the regulation’s mandates, which, again, is not comparable with the Brazilian reality.. Therefore, Amazon suggests that CADE should explore this same path before the Brazilian Congress enacts an *ex-ante* regulation.

Meta argued that data is not the new oil and not having them is not an insurmountable barrier to entry in digital markets. Furthermore, the success of digital products is not only produced as a consequence of having data. It gave the example of many digital firms that, albeit having a huge amount of data and being market leaders, failed throughout the years, such as Orkut, AOL, Friendster, Myspace, etc. Digital products are valuable to consumers as a consequence of other variables, such as online security, privacy and content moderation. At last, regarding interoperability, a mandatory rule demands some kind of coordination between companies which would reduce product differentiation – one of the most important variables of competition between companies. According to the company, all of those points should be minutely detailed before

enacting an *ex-ante* regulation.

Airbnb, a company that is not captured by the DMA, argued that an *ex-ante* regulation should be tailored so that the digital platforms and markets that require regulation, i.e., that have market failures that should be solved by regulation, remain captured by it. A broad and inflexible regulation may negatively affect companies and markets which would not need this kind of intervention.

Mercado Livre is an Argentinian company and the second biggest company in Latin America in market cap, only behind Petrobras – the Brazilian petroleum company. In the digital sector, it is the biggest digital Latin America company. Mercado Livre also argued that Brazil should carry out an in-depth investigation of the digital markets. It highlighted that the Brazilian e-commerce market, and, in particular, marketplaces remain unconcentrated and ought not to receive a special *ex-ante* regulation (this point was also brought forward by Amazon). Although expressing this opinion, the company asserted that this unconcentrated situation of the e-commerce market is not equally relevant nor applicable in other digital markets, such as in Apple’s case, which is currently being investigated by CADE’s General Superintendence ([Administrative Inquiry 08700.009531/2022-04](#)). Hence, it asserted that while some digital markets may need *ex-ante* regulation, other markets should not bear this burden. And, in a similar position to Google, it also advised that CADE should be the regulatory body to implement *ex-ante* regulation if adopted.

Finally, the telecommunication companies (TIM and Telefônica) that submitted comments presented a pro-regulatory view. Although the fight between telecommunications and digital companies, along with the fair share debate, has just started in Brazil (as an example, in March 2024, a [Bill](#) prohibiting fair share fees was submitted in the Brazilian House of Representatives), it was expected that those companies would defend a pro-competitive regulation. The companies argued that, as a consequence of all the distinct characteristics that the digital markets have (direct and indirect network effects, low marginal costs, economies of scale and scope, zero-price products, switching costs, the “winner-takes-all” phenomenon, etc.), it is necessary to implement an *ex-ante* regulation to complement the *ex-post* antitrust enforcement presented in Brazil. Differently from Google and Mercado Livre, TIM and Telefônica urged that ANATEL should be the regulatory body responsible for applying the *ex-ante* regulation.

### **CADE’s Comment**

Besides all the comments from companies, civil society entities, academic organizations and think tanks submitted to the Public Consultation, CADE’s comment was by far the most relevant one.

CADE is a federal agency structured within the big umbrella of the Brazilian Ministry of Justice. Albeit being a public body inside the Brazilian executive branch, it has a high degree of autonomy since its major positions, such as the President, General-Superintendent and Commissioners, have terms of 2 or 4 years, after being appointed by the Brazilian President and confirmed by the Brazilian Senate – a similar process as the designation of the FTC Commissioners. Although having this high degree of autonomy, its budget comes from the federal budget stipulated by the annual negotiation between the Brazilian federal executive and legislative powers. Therefore, it is also dependent on the political game in the Brazilian Congress.

CADE presented a comment due to an internal political fight related to the public body responsible

for regulating the digital markets in Brazil – if an *ex-ante* regulation is supposed to be adopted. This fight began with the submission of Bill 2768/2022 to the Brazilian Congress. In the text of the Bill, the public regulatory body responsible for applying the *ex-ante* measures would be ANATEL – the Brazilian regulatory agency for the telecommunication industry (the Brazilian version of the US Federal Communication Commission – FCC). ANATEL has already positioned itself in favor of its ability to regulate digital platforms and has also organized a different Public Consultation on the discussion of regulating digital markets. The head of ANATEL’s competition unit has also presented a comment to the Ministry of Finance Public Consultation in favor of an *ex-ante* regulation being imposed by the agency.

Until the submission of its comment, CADE had never presented its opinion, as an institution, regarding the existence of *ex-ante* digital markets regulation in Brazil. However, this scenario has changed. According to the document submitted by CADE, the Brazilian Antitrust Authority positioned itself in favor of an *ex-ante* digital markets regulation. In its own words, “*CADE defends the need for an ex-ante regulation and believes that the information gathered from this diagnostic effort [the production of Regulatory Impact Assessment] could provide a more consistent and technically sounded basis for discussions on the possible need to revise or improve the Brazilian legal regulatory framework*”.

This new position from CADE aligns with a statement released by its President, Mr. Alexandre Cordeiro Macedo, at the beginning of the year, in which he asserted that CADE sees itself as “*prepared*” to regulate the Big Tech and digital markets. In addition, the submission of this document was seen by the Brazilian political and antitrust communities as CADE’s first movement to position itself as the public body in charge of the regulation, if it moves forward in the Brazilian Congress, in clear opposition to ANATEL.

Regarding the content of the submission, it must be highlighted that CADE has not argued for a specific and defined structure of *ex-ante* regulation for digital platforms, but for a flexible regulatory structure with individual adjustments applied to each target and continuous monitoring powers. The institution affirmed that, in its view, while an *ex-ante* digital markets regulation is necessary to provide better solutions and to complement the classical *ex-post* antitrust enforcement, it has also argued that, before enacting any *ex-ante* digital markets regulation, a Regulatory Impact Assessment (RIA) should be produced, in a similar way to the one produced before the DMA’s enactment. This RIA should study and address “*the characteristics and peculiarities of the main digital platform markets in Brazil, examining factors such as the concentration levels, barriers to entry, innovation standards, single and multi-homing patterns by users, as well as the potential anti-competitive effects resulting from vertical integration and conglomerate strategies adopted by the dominant platforms. RIA is relevant for a responsible and effective regulation in a specific sector*”.

In sum, CADE did not provide an in-depth view of what market failures and problems related to the Brazilian digital economy should be addressed via the regulations, but it indicated that there are problems at a macro level and, to assess them at a micro level, further investigations are needed. It also emphasized the need to carefully design the *ex-ante* regulation to avoid distorting the goals of antitrust enforcement, as well as to avoid overlapping and contradictory actions between *ex-ante* regulation and *ex-post* antitrust enforcement.

The comment also asserted that the Brazilian Competition Law (Federal Law No. 12.529 from 2011) is a relatively modern legislation. Although it is an *ex-post* enforcement antitrust law, it does



give CADE some alternative possibilities for interventions, such as interim measures. The document highlighted that CADE is using these interim measures in recent cases to counterbalance effectively and quickly enforcement against the lengthy regular case-by-case *ex-post* procedural analysis.

Finally, CADE's position also differs to its case law. In a [recent academic article](#) published by one of CADE's Commissioners, Mr. Victor Oliveira Fernandes examines Bill 2768/2022 in a comparative analysis, contrasting it with the different existing *ex-ante* regulations worldwide. When discussing CADE's experience with digital market cases, the author presents a table with all the seven cases opened by CADE, related to the DMA obligations and which would probably fall under the scope of Bill 2768/2022. From the seven cases opened so far, three cases were adjudicated and they were all subsequently dismissed by CADE's Administrative Tribunal – the rest are still under investigation by CADE's General Superintendence. This fact differs from the [European Commission's experience](#) and the case law of the EU Courts before enacting the DMA, which had some cases adjudicated by the European Commission and inspired the do's and don'ts of Articles 5, 6 and 7 of the DMA.

### Next Steps in this Debate

The debate of *ex-ante* digital markets regulation is still in its initial stages of development in Brazil. The Public Consultation held by the Brazilian Ministry of Finance was an important initiative that marks the first move of the current administration in this debate. Moreover, on April 24th, the Secretary for Economics Reform, along with IBRAC (the Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade), held the “[Digital Platforms Seminar: Economic and Competition Impacts Under Debate](#)” in Brasília. Hosted before the deadline for the Public Consultation, the event demonstrated the proactive initiative of the Secretary and served as a call for the submission of even more comments to the public consultation.

In political terms, the current priority of the Brazilian Ministry of Finance is related to the reduction of government debt and the initiatives that may raise the Government's revenue. In this sense, an *ex-ante* digital markets regulation bill will probably not have a revenue increase impact on the Government's account balance. Hence, even if the administration ends this Public Consultation with a favorable position for it, it is unlikely to be a priority in the Brazilian political game.

Another fact that plays against the approval of an *ex-ante* digital markets regulation in Brazil, at least in the short and medium terms, is that even the other legislative and regulation projects of digital markets that the government incurred strong political capital to be enacted were not approved in the Brazilian Congress – particularly the Fake News Bill. Robustly affected by the last presidential election in Brazil, the spreading of fake news hijacked a big space in the Brazilian political debate in the last years and still failed to reach a minimum consensus for its approval – even with a strong favorable position from the current government. Therefore, an *ex-ante* digital markets regulation, that will probably not have the same degree of priority as the Fake News Bill, will have an even higher hill to climb in the Brazilian Congress in order to be approved in both political houses.

Despite all these points and although it is unclear what the next steps of the *ex-ante* digital markets

regulation debate will be, Brazil is positioning itself as a country that is willing to debate this type of regulation. It is an exciting topic to follow closely.

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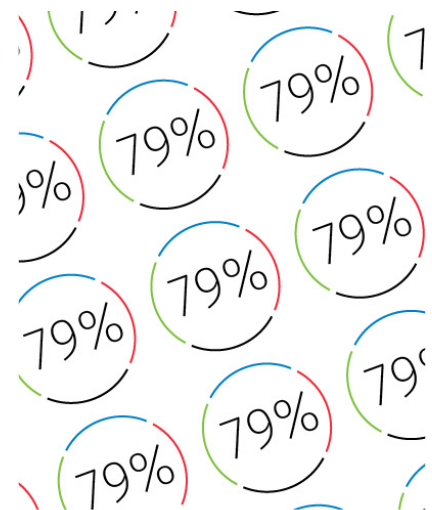
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