



BRAZILIAN REGULATION OF GATEKEEPERS: DIGITAL PLATFORMS IN THE NATIONAL DIGITAL MARKET

REGULAÇÃO BRASILEIRA DE GATEKEEPERS: PLATAFORMAS DIGITAIS NO MERCADO DIGITAL NACIONAL

RAFAELA IANSEN MIRANDA SILVA* | VICENTE BAGNOLI** | TAISA TAINÁ PEREIRA MENQUI***

RESUMO

Este artigo aborda a possibilidade de estipular regras destinadas a condicionar a atuação dos gatekeepers no mercado digital brasileiro. O problema de pesquisa consiste na possível insuficiência dos atuais critérios antitrustes brasileiros para lidar com o poder de mercado dessas plataformas digitais. O objetivo principal é analisar as iniciativas regulatórias internacionais e o atual tratamento jurídico da temática no Brasil, para propor ajustes legais adequados. Metodologicamente, o estudo adota uma abordagem dedutiva, utilizando pesquisa qualitativa bibliográfica e documental. Para melhor compreensão do assunto, a discussão está dividida em quatro partes. A primeira trata do conceito de gatekeeper e dos impactos de suas ações na livre concorrência. A segunda apresenta as principais iniciativas regulatórias existentes em todo o mundo. A terceira cuida do tratamento jurídico dado atualmente a essas empresas, dentro da realidade nacional. A quarta ilustra o debate sobre os níveis de concentração no ambiente virtual por meio do caso específico da aquisição do WhatsApp pelo Facebook. Conclui-se que são necessários pequenos ajustes legais para incentivar o melhor funcionamento deste setor. Contudo, é importante que a regulamentação imposta não se transforme numa distorção por si só, afetando o equilíbrio do mercado.

Palavras-chave: Gatekeepers; concorrência; mercado digital brasileiro.

ABSTRACT

This article addresses the possibility of stipulating rules designed to condition the actions of gatekeepers within the Brazilian digital market. The research problem consists of the potential insufficiency of the current Brazilian antitrust criteria to address the market power of these digital platforms. The main objective is to analyze the international regulatory initiatives and the current legal treatment in Brazil to propose adequate legal adjustments. Methodologically, the study adopts a deductive approach, utilizing qualitative bibliographical and documentary research. For a better understanding of the subject, the discussion is divided into four parts. The first deals with the gatekeeper's concept and the impact of its actions on free competition. The second presents the main regulatory initiatives that exist around the world. The third takes care of the legal treatment currently given to these undertakings, within the national reality. The fourth illustrates the debate on concentration levels through the specific case of the WhatsApp acquisition by Facebook. It is concluded that small legal adjustments are needed to encourage the better functioning of this sector. However, it is important that the imposed regulation does not become a distortion of its own, affecting the balance of the market.

Keywords: Gatekeepers; competition; Brazilian digital market.

* Professora nos Programas de Pós-graduação Lato Sensu e em cursos de curta duração da Universidade Presbiteriana Mackenzie. Doutoranda e mestre em Direito Político e Econômico pela Universidade Presbiteriana Mackenzie. Atuou como Visiting Scholar na Duke Law School. Possui pós-graduação Lato Sensu em Direito Constitucional pela Pontifícia Universidade Católica de São Paulo e graduação em Direito pela Universidade Presbiteriana Mackenzie.

profrfaelaiansen@gmail.com

* Professor at Mackenzie Presbyterian University Law School in the Undergraduate and Graduate programs. Director of ASCOLA – Academic Society for Competition Law, chapter Brazil. Non-governmental advisor of the International Competition Network – ICN.

vicente.bagnoli@mackenzie.br

* Ph.D. candidate with a Master's degree in Political and Economic Law from Universidade Presbiteriana Mackenzie. Graduate in Law from Unioledo University of Araçatuba/SP, Criminal Lawyer, volunteer lawyer at "mapa do acolhimento", researcher in the Public Security and Citizenship research groups and in the Invisible People group with focus in the study on International Human Trafficking, both at Mackenzie Presbyterian University.

taisa_menqui@hotmail.com

Recebido em: 16-10-2025 | Aprovado em: 12-03-2026



SUMMARY

INTRODUCTION; 1 GATEKEEPERS AND THEIR IMPACT ON FREE COMPETITION; 2 INITIATIVES TO COMBAT THE NEGATIVE IMPACTS OF GATEKEEPERS IN THE GLOBAL DIGITAL MARKET; 3 LEGAL TREATMENT OF GATEKEEPERS IN BRAZIL; 4 ACQUISITION OF WHATSAPP BY FACEBOOK AND THE DEBATE ON CONCENTRATION LEVELS IN THE DIGITAL MARKET; CONCLUSION; REFERENCES.

■ INTRODUCTION

Although technological progress has provided countless benefits to humanity, it has also given rise to substantial challenges regarding the regulation of digital platforms. These issues have become more evident with the emergence of gatekeepers, demanding from these companies a higher scrutiny of Competition Law.

The actions of these agents, who sometimes hold a privileged position in the market, can result in disproportionate entry barriers for new competitors, limiting diversity and inhibiting fair competition. Furthermore, the power to influence the visibility of products and services on digital platforms gives these undertakings a unique ability to shape consumer preferences and direct the flow of demand.

In the context of the European Union, these questions culminated in the promulgation of an *ex ante* legislation entitled Digital Markets Act, which establishes the main guidelines for identifying gatekeepers and seeks to condition the performance of these undertakings within the scope of the digital market. According to this standard, the company recognized as an access controller can be defined as a gatekeeper if it has considerable influence in the internal market and offers a central platform service, serving as a gateway for other companies to reach end users.

Another important example, internationally, comes from the United Kingdom, which implemented a regulation focusing on content moderation and with substantial repercussions on the behavior of digital platforms.

In the Brazilian context, the absence of a clear regulatory structure to deal with gatekeepers highlights the importance of an in-depth analysis of the legal aspects involved in their actions. Currently, relevant legal dimensions, related to the behavior of digital platforms in the national market, require examination, reinforcing the discussion about the need for specific regulations able to balance innovation and competition, while protecting the interests of consumers and the business environment.

The research problem consists of the potential insufficiency of the current Brazilian antitrust criteria to address the market power of these digital platforms. Having this in mind, this article attempts to research the phenomenon of gatekeepers, emphasizing international parameters. Its main objective is safeguarding the fundamental principle of free competition and proposing adequate legal adjustments.

Methodologically, this study adopts a deductive approach through qualitative bibliographical and documentary research. To this end, a careful analysis of existing legislation is

carried out, as well as adaptations to national regulatory structures are suggested, ensuring a more democratic and dynamic business environment.

Ultimately, the debate surrounding the regulation of gatekeepers is not merely theoretical, but a pressing practical necessity to align Competition Law with the realities of the digital economy. Therefore, before proposing any definitive legal adjustments, it is strictly necessary to comprehend the precise nature of these platforms and how their unique economic power fundamentally alters the traditional dynamics of free competition.

1 GATEKEEPERS AND THEIR IMPACT ON FREE COMPETITION

In face of the technological revolution that, at an accelerated pace, reshapes the material base of society¹, p. 21, which today is marked by the predominance of digital platforms, prominent figures emerge and significantly change the economic and business panorama. These figures are called gatekeepers.

Although this article is focused on the behavior of digital platforms, it is worth saying, from start, that the figure of gatekeepers can be found in several fields of Law. As Peter Oh explains, the term is a ubiquitous metaphor used to describe intermediary functions in diverse disciplines, from economics and political science to communications. Legally, the concept appears in analyses of commercial systems, cyberspace, intellectual property, and even criminal procedure², p. 736-738.

That is why when defining this action, from the perspective of the Brazilian Consumer Law, Cláudia Lima Marques elucidates that the digital collaborative economy has given rise to new intermediaries, often called gatekeepers. Instead of directly providing goods or services, these entities organize and control the transaction environment, effectively managing the meeting point between consumers and professionals, while also controlling vital information, choices, and even dispute resolution mechanisms³, p. 77.

It is understood, in general terms, that gatekeepers are intermediaries, responsible for connecting the parties involved in each transaction, and, depending on their way of acting, they can also function as access controllers, by preventing communication between those involved in some negotiation or the entry of new figures into the market they operate.

¹ CASTELLS, M. *A sociedade em rede*. Paz e Terra, v. I, 2nd ed., 1999.

² OH, P. B. Gatekeeping. *Journal of Corporation Law*, v. 29, p. 735-800, 2004. Available at: <https://ssrn.com/abstract=601361>. Accessed on: Nov. 11, 2023

³ MARQUES, C. L. Perspectives for consumer protection in the XXI century. *Macau Journal of Brazilian Studies*, v. 4, no. 01, p. 73-86, 2021. Available at: <http://aebm.mo/en/list-29/106>. Accessed on: Nov. 11, 2023.

In the digital market, digital platforms can function as gatekeepers if they occupy a dominant position, capable of dominating their sector and influencing many users⁴. Often, these undertakings can also influence competition, access to the market and innovation. To counter the disproportionate power they have gained, an adequate analysis of their actions is necessary. In this regard, Vinicius Klein, Juliana Oliveira Domingues, and Eduardo Molan Gaban observe that the advent of the digital economy and the consolidation of big techs (such as Amazon, Facebook, Apple, and Google) have introduced unprecedented challenges to traditional Antitrust Law⁵, p. 316.

In Consumer Law, for example, they occupy an active position in the consumer relationship, playing the role of supplier. In this scenario, by exercising control over the market, as access controlling agents, they can guide consumers' interests towards products and services they own.

This problem was identified by the European Union and is the subject of attention in its legislation on gatekeepers, Regulation no. 2022/1925 of September 14, 2022, called the Digital Markets Act, which will be the subject of specific analysis in the subsequent topic. Within this context, introductory topic 2 of Regulation no. 2022/1925 of September 14, 2022, clarifies that certain platform characteristics, when combined with unfair practices, can severely undermine market contestability and disrupt fair commercial relationships. This dynamic rapidly diminishes choices for both business and end users, thereby elevating the platform provider to the status of a gatekeeper, excluding non-commercial collaborative projects from this definition⁶.

By having market control, platforms can benefit from price manipulation, which destabilizes the competition. Furthermore, these undertakings can benefit from "network effects", which occur if benefits are generated by the coordination of interactions between users who share compatible or complementary interests.

This means that the effects increase as more users access a certain product or service. As Robin Mansell notes, this dynamic is strategically cultivated by platform owners, whose primary interest lies in aggregating content and shaping traffic flows to maximize their profitability and secure a dominant, highly visible position within the media marketplace⁷, p. 02.

The crucial element to this problem lies in the possession of the most valued resource in contemporary times: data. This consideration is established considering the evolution of technology and the preponderant rise of digital media in the economy. In this way, undertakings that hold consumer data assume the position of major access controllers.

⁴ In 2023, the European Commission designated, for the first time, certain companies as gatekeepers. They must follow obligations stipulated in the Digital Markets Act, which is the legislation designed to regulate these platforms. These undertakings are Alphabet, Amazon, Apple, Byte Dance, Meta e Microsoft. This information is available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328. Accessed on: Nov. 19, 2023.

⁵ KLEIN, V.; DOMINGUES, J. O.; GABAN, E. M. Quem tem medo de Lina Khan?. *Justiça do Direito*, v. 35, no. 03, p. 309-331, 2021.

⁶ EUROPEAN PARLIAMENT AND COUNCIL OF THE EUROPEAN UNION. *Digital Markets Act*, Regulation no. 2022/1925, September 14, 2022, on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828. Available at: <https://eur-lex.europa.eu/eli/reg/2022/1925>. Accessed on: Nov. 11, 2023.

⁷ MANSELL, R. Platforms of power. *The London School of Economics and Political Science*, v. 01, no. 43, p. 20-24, 2015. Available at: <http://eprints.lse.ac.uk/61318/>. Accessed on: Nov. 21, 2023.

Today, data plays a fundamental role in determining consumers' final choices. When a company holds this information, it acquires the ability to influence the interests of buyers, especially at the end of the consumption chain.

In the same sense, Maurice E. Stucke and Allen P. Grunes observe that tech firms and investors are currently engaged in a competitive race for data accumulation. Big Data has become a pivotal element in strategic decision-making, leading more companies to adopt data-driven business models designed to secure and maintain a competitive advantage over their rivals⁸, p. 01. Therefore, it is crucial to regulate digital platforms, observing, however, the natural balance of the market.

For example, in Brazil, the “Data Privacy Brazil”, a non-profit civil society organization, is running a project called “Antitrust and Regulation in the Digital Economy”⁹, which aims to strengthen the debate about the use of personal data in Brazil and promote decentralization policies for the digital economy¹⁰. In this project, several data and information about the concentration of economic power of the undertakings are gathered, which allows better comprehension of the limits of an efficient regulation.

Considering that free competition is a primary requirement for healthy markets, the economy becomes susceptible to distortions when power is concentrated in only a few companies. Thus, the main issue to be faced, regarding gatekeepers, in the digital market, concerns the competitive advantage that digital platforms have, since, by regulating the entry of other competitors, these undertakings can limit competition and affect innovation.

The need to combat these problems has proven to be a global concern and, therefore, proposals for eventual regulation of the sector have grown. In the following topic, the main current initiatives to control the actions of gatekeepers and limit their influence in the digital market will be discussed.

2 INITIATIVES TO COMBAT THE NEGATIVE IMPACTS OF GATEKEEPERS IN THE GLOBAL DIGITAL MARKET

To combat the spread of anti-competitive practices in digital markets, in recent years, several authorities around the world have joined forces to limit the behavior and economic power of gatekeepers.

In the European Union, these debates culminated in new legislation, the Digital Markets Act, which contains the main rules for identifying gatekeepers, as well as guidance and limitation for the activities of these undertakings in the digital market.

⁸ STUCKE, M. E.; GRUNES, A. P. Introduction: Big Data and Competition Policy. *The Oxford University Press*, 2016. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849074. Accessed on: Nov. 26, 2023.

⁹ Free translation. In the original language, Portuguese: “Antitruste e Regulação da Economia Digital”.

¹⁰ The Information about the Antitrust and Regulation in the Digital Economy project can be found at: <https://www.dataprivacybr.org/projeto/antitruste-e-regulacao-na-economia-digital/>. Accessed on: Nov. 26, 2023.

It should be noted that, in addition to the Digital Markets Act, other regulations, such as the Digital Services Act, were published, integrating a series of policies aimed at shaping Europe's digital future¹¹.

The official version of the Digital Markets Act, Regulation no. 2022/1925 of September 14, 2022, was published on October 12, 2022, by the European Parliament and the Council of the European Union, in the Official Journal of the European Union. The Act has the explicit objective of ensuring a more competitive and fair market when it comes to the digital sector¹².

Although the Digital Markets Act was promulgated on November 1, 2022, an implementation phase was determined, so that its provisions only came into effect, in fact, from May 2, 2023¹³.

Among other aspects, the Digital Markets Act innovated by recognizing the leading role of gatekeepers in the European digital market¹⁴, as well as their ability to negatively influence free competition¹⁵, establishing criteria for their identification.

According to the Digital Markets Act, gatekeepers can be recognized for normally having the ability to connect companies and consumers, which provides them with advantages, including access to enormous amounts of data¹⁶.

Certain gatekeepers even exercise absolute control over complete ecosystems within the digital economy, a panorama that makes competition extremely difficult, especially for new companies¹⁷.

Thus, under the terms of the legislation applicable in the European Union, a company can be designated as a gatekeeper if it has a significant impact on the internal market, provides

¹¹ The European Union's strategy and policies directed to shaping its digital future can be found at: <https://digital-strategy.ec.europa.eu/en/policies>. Accessed on: Nov. 12, 2023.

¹² According to introductory topic 7 of the Digital Markets Act: *"Therefore, the purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular. (...)".*

¹³ According to article 34 of the Digital Markets Act: *"This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. It shall apply from 2 May 2023. (...)".*

¹⁴ According to introductory topic 3 of the Digital Markets Act: *"A small number of large undertakings providing core platform services have emerged with considerable economic power that could qualify them to be designated as gatekeepers pursuant to this Regulation. (...)".*

¹⁵ According to introductory topic 4 of the Digital Markets Act: *"The combination of those features of gatekeeper is likely to lead, in many cases, to serious imbalances in bargaining power and, consequently, to unfair practices and conditions for business users, as well as for end users of core platform services provided by gatekeepers, to the detriment of prices, quality, fair competition, choice and innovation in the digital sector".*

¹⁶ According to introductory topic 3 of the Digital Markets Act: *"(...) Typically, they feature an ability to connect many business users with many end users through their services, which, in turn, enables them to leverage their advantages, such as their access to large amounts of data, from one area of activity to another. (...)".*

¹⁷ According to introductory topic 3 of the Digital Markets Act: *"(...) Some of those undertakings exercise control over whole platform ecosystems in the digital economy and are structurally extremely difficult to challenge or contest by existing or new market operators, irrespective of how innovative and efficient those market operators may be. (...)".*

a central platform service, constituting the main way for undertakings to achieve its end user, or enjoys a rooted and lasting position in its operations¹⁸.

Not limited to the context of the European Union, currently, the United Kingdom has its own regulation of digital platforms, the Online Safety Act of October 26, 2023, which, although more focused on content moderation, causes impacts on performance of these companies¹⁹.

In any case, the United Kingdom's concern with the influence of gatekeepers in the digital market is latent, which can be demonstrated by ongoing interinstitutional cooperation attempts, such as the Digital Regulation Cooperation Forum²⁰, as well as that carried out between the Competition and Markets Authority (CMA, the acronym in English) and the Information Commissioner's Office²¹, authorities responsible, respectively, for regulating competition and data protection.

Likewise, the United States has bills in progress that seek to establish stricter standards for certain undertakings, such as the American Innovation and Competition Online Act, which provides a similar classification of these undertakings, called covered platforms²².

According to the definitions brought by the American Innovation and Competition Online Act, a company can be included in the concept of covered platform if it is so designated, by the responsible authorities, for law enforcement purposes, or if it meets certain requirements, based, above all, on the number of active users²³.

Also, in China, the State Administration for Market Regulation, in 2021, published a proposal, called Guidelines for Classification and Grading of Internet Platforms, aimed at classifying digital platforms into categories, according to the number of users²⁴. The objective of these guidelines is to provide a balanced and healthy development of the Chinese digital economy, protecting competition and innovation in this market.

¹⁸ According to article 3 of the Digital Markets Act: "An undertaking shall be designated as a gatekeeper if: (a) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future".

¹⁹ The entire content of the Online Safety Act can be found at PARLIAMENT OF THE UNITED KINGDOM. *Online Safety Act 2023*, An Act to make provision for and in connection with the regulation by OFCOM of certain internet services, for and in connection with communications offences and for connected purposes, 2023. Available at: <https://www.legislation.gov.uk/ukpga/2023/50/contents/enacted>. Accessed on: Nov. 12, 2023.

²⁰ DIGITAL REGULATION COOPERATION FORUM. *Multi-agency Advice Service Final Recommendations Report*, 2023. Available at: https://www.drcf.org.uk/_data/assets/pdf_file/0028/269560/DRCF-Multi-agency-Advice-Service-Final-Report-Recommendations.pdf. Accessed on: Nov. 11, 2023.

²¹ COMPETITION AND MARKETS AUTHORITY AND INFORMATION COMMISSIONER'S OFFICE. *Competition and data protection in digital markets: a joint statement between the CMA and the ICO*, 2021. Available at: <https://www.gov.uk/government/publications/cma-ico-joint-statement-on-competition-and-data-protection-law>. Accessed on: Nov. 11, 2023.

²² The entire content of the Online Safety Act can be found at: SENATE OF THE UNITED STATES. *American Innovation and Choice Online Act* (S. 2992), To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes, 2022. Available at: <https://www.congress.gov/bill/117th-congress/senate-bill/2992/text>. Accessed on: Nov. 12, 2023.

²³ The full definition of covered platform can be found in section 2, item 5, of the American Innovation and Choice Online Act.

²⁴ THE STATE ADMINISTRATION FOR MARKET REGULATION. *Guidelines for Internet Platform Categorization and Grading (draft for comment)*, 2021. Available at: <https://web.archive.org/web/20220228190246/https://www.samr.gov.cn/hd/zjdc/202110/P020211029613172534705.doc>. Accessed on: Nov. 12, 2023.

Having presented the main initiatives to regulate gatekeepers, on the global stage, the following topic will analyze, specifically, what is the current legal treatment given, by Brazil, to these undertakings.

3 LEGAL TREATMENT OF GATEKEEPERS IN BRAZIL

It is important to clarify, at first, that, despite the presence of gatekeepers in its digital market, Brazil still does not have specific legislation directed to regulating these undertakings.

There are, however, initiatives in this direction. As an example, Bill no. 2,768 of 2022, which seeks to classify digital platforms as “holders of essential access control power”²⁵, when they earn annual operating revenue equal to or greater than 70 million Reais (approximately 13 million US Dollars) from offering services to the Brazilian public.

In the following sense, Article 9, *caput*, of Bill no. 2,768 of 2022, seeks to classify the operators of certain digital platforms as holders of essential access control power if their annual operating revenue from services provided to the Brazilian public reaches or exceeds that value, subject to regulation by the National Telecommunications Agency²⁶.

It is essential to align the existence of these emerging digital initiatives with the traditional framework of Competition Law. The regulation of digital platforms cannot be isolated within antitrust boundaries alone. It requires a concatenated approach that also observes other digital rights and regulatory trends. In this scenario, legislative updates such as Bill no. 2,768 of 2022 demonstrate that changing the legal base is a necessary step to equip Brazilian authorities with specific regulatory tools, complementing the traditional merger analysis and effectively addressing the market concentration driven by gatekeepers.

It is also worth mentioning that Brazil possesses its own competition defense system, which is structured around the economic order established in the Federal Constitution of October 5, 1988. This framework aims, basically, at the proper functioning of the market and the promotion of healthy competition. Specifically, Article 170, IV, of the constitutional text establishes free competition as a fundamental principle, aligning it with the broader systemic goals of valuing human labor, promoting free enterprise, and ensuring a dignified existence under the dictates of social justice²⁷.

To operationalize these constitutional principles, the Brazilian Competition Defense System²⁸ is governed by Law no. 12,529 of November 30, 2011. According to Article 3, this system

²⁵ Free translation. In the original language, Portuguese: “*Detentoras do poder de controle de acesso essencial*”.

²⁶ HOUSE OF REPRESENTATIVES. Bill no. 2,768, 2022. Available at: <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2337417>. Accessed on: Nov. 12, 2023.

²⁷ BRAZIL. *Federal Constitution*, October 5, 1988, Brasília, Federal Register, October 5, 2023. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: Nov. 12, 2023.

²⁸ Free translation. In the original language, Portuguese: “*Sistema Brasileiro de Defesa da Concorrência (SBDC)*”.

is structurally composed of two main authorities: the Administrative Council for Economic Defense²⁹ and the Secretariat for Economic Monitoring of the Ministry of Finance³⁰, each with specific statutory duties³¹.

It is the responsibility of the Plenary of the Tribunal of the Administrative Council for Economic Defense (CADE, the acronym in Portuguese) to assess administrative processes of economic concentration. As provided for in Article 9, X, of Law No. 12,529 of November 30, 2011, the Court holds the authority to appraise these acts and, when deemed appropriate, establish merger control agreements³².

Furthermore, according to the provision of Article 90 of Law no. 12,529 of November 30, 2011, acts of economic concentration must be submitted to CADE in specific scenarios. These include the merger of previously independent companies; the acquisition of control or parts of a company through shares, securities, or assets; corporate incorporations; or the establishment of associative contracts, consortiums, or joint ventures³³.

The criteria chosen by Law no. 12,529 of November 30, 2011, to determine the submission of acts of economic concentration to the Administrative Council for Economic Defense, are basically the annual gross revenue or total business volume in the country.

According to Article 88, *caput*, I and II, of Law no. 12,529 of November 30, 2011, and Interministerial Decree No. 994/2012, regarding the thresholds for mandatory notification, a cumulative revenue criterion is established. The parties must submit the operation to CADE if, in the year prior to the transaction, at least one of the involved groups registered an annual gross revenue or total turnover in Brazil equal to or greater than R\$ 750,000,000.00, and at least one other involved group registered a minimum of R\$ 75,000,000.00³⁴.

It turns out that the digital market has unique characteristics, which have already been identified by CADE itself. According to the antitrust authority's understanding, digital markets possess a distinct economic structure driven by network effects, economies of scale, and the fundamental role played by data. This environment often leads to 'tipping effects,' where initial intense competition rapidly turns into a highly concentrated market dominated by a single agent, demanding a differentiated antitrust analysis³⁵, p. 12-14.

In view of these peculiarities, it is common for some undertakings to offer their main products and services to users for free, but to produce billions of dollars in revenue because of other functions. On the subject, Anna Binotto and Marcela Mattiuzzo point out that a crucial challenge for antitrust analysis is the fact that many digital platforms operate in "zero-price" markets. In these environments (such as social networks, search engines, and email

²⁹ Free translation. In the original language, Portuguese: "*Conselho Administrativo de Defesa Econômica (CADE)*".

³⁰ Free translation. In the original language, Portuguese: "*Secretaria de Acompanhamento Econômico do Ministério da Fazenda (SEAE)*".

³¹ BRAZIL. Law no. 12.529, November 30, 2011, Brasília, Federal Register, December 1, 2011, rectified on December 2, 2011. Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm. Accessed on: Nov. 12, 2023.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. Working document no. 005/2020, 2020. Available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2020/documento-de-trabalho-n05-2020-concorrenca-em-mercados-digitais-uma-revisao-dos-relatorios-especializados.pdf>. Accessed on: Nov. 12, 2023.

servers), users do not pay monetary value but rather exchange other elements (like data) for access. This business model complicates the application of traditional economic theories that heavily rely on price variables³⁶, p. 80.

In any case, it is important to highlight that the Competition Law, in its article 88, § 7, provides that CADE (the Brazilian antitrust authority) may, within one (1) year from the respective date of consummation, request the submission of mergers and acquisitions that do not fall under the provisions of this article. This legal provision can be used in cases involving digital platforms, even if they do not meet the objective revenue criteria for submitting business transactions to CADE.

Within this scenario, the criteria used by CADE do not always reflect the reality of the size of a digital platform, which can often reach a gigantic number of users, without necessarily reaching the values of annual gross revenue or total business volume, required by Law no. 12,529 of November 30, 2011.

To address transactions involving digital platforms that might escape rigid financial thresholds, Law no. 12,529 of November 30, 2011, provides a fundamental legal alternative. Under Article 88, §7, the legislation allows CADE to request the submission of concentration acts that do not meet the standard gross revenue or total business volume requirements. The authority holds this discretionary prerogative for a period of one year from the date of the transaction's consummation, ensuring that potentially harmful mergers in the digital sector do not evade antitrust scrutiny³⁷.

Even so, also to make the procedure faster, it may be prudent to add criteria to the legal text for submitting acts of concentration to the Administrative Council for Economic Defense, to cover digital platforms.

Given the potential repercussions of a possible competitive regulation of digital platforms in Brazil, the Secretariat for Economic Reforms of the Ministry of Finance presented in October 2024 a comprehensive Report based on research into the economic and competitive regulation of digital platforms in Brazil.³⁸ The Report also offers suggestions for new sector regulation, with mechanisms and tools to guarantee fair competition in the country. The Report was conducted with the aim of deepening knowledge about the economic and competitive aspects of digital platforms in Brazil and supporting proposals for improving the Brazilian Competition Defense System (SBDC).³⁹

³⁶ BINOTTO, A.; MATIUZZO, M. Objetivos do antitruste e mercados digitais: a reconstrução de uma política pública concorrencial. In: ZANATTA, R. A. F.; CONTRI, C. L.; SECAF, H., *Dados, mercados digitais e concorrência*, Letramento, 2022. Available at: <https://conteudos.dataprivacy.com.br/livro-dados-mercados-digitais-e-concorrencia>. Accessed on: Nov. 11, 2023.

³⁷ BRAZIL. Law no. 12.529, November 30, 2011. Brasília, Federal Register, December 1, 2011, rectified on December 2, 2011. Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm. Accessed on: Nov. 12, 2023.

³⁸ BRAZIL. *Plataformas digitais no Brasil: fundamentos econômicos, dinâmicas de mercado e promoção de concorrência*, October 22, 2024. Available at: https://www.gov.br/fazenda/pt-br/central-de-conteudo/publicacoes/relatorios/sre/relatorio-economico_plataformas_publicacao_rev.pdf. Accessed on: Oct. 16, 2025.

³⁹ BRAZIL. *Plataformas digitais: aspectos econômicos e concorrenciais e recomendações para aprimoramentos regulatórios no Brasil*, October 10, 2024. Available at: <https://www.gov.br/fazenda/pt-br/central-de-conteudo/publicacoes/relatorios/sre/relatorio-plataformas-consolidado.pdf>. Accessed on: Oct. 16, 2025.

The Report highlights how the specific economic dynamics of digital platforms and the markets in which they operate limit the applicability of analytical tools commonly used in competition law. The concentration of economic power in large platforms emerges as a market power structure that traditional competitive analysis tools have difficulty identifying and remedying effectively.

With a focus on improving the Brazilian Competition Defense System, the Report inspired Bill No. 4675/2025, prepared by the Civil House of the Presidency of the Republic, which amends Law No. 12,529/2011 (Competition Law), provides for the processes of designating systemically relevant economic agents in digital markets (“gatekeepers”) and determining special obligations for systemically relevant economic agents, and creates the Superintendency of Digital Markets within the Administrative Council for Economic Defense.

Under the terms of the aforementioned Bill, the economic agent that has systemic relevance in digital markets will be designated by CADE, considering, in a non-cumulative manner, the following characteristics: (i) presence in one or more multi-sided markets; (ii) market power associated with network effects; (iii) the existence of vertical integrations and activities in adjacent markets; (iv) strategic position for the development of third-party business activities; (v) access to a significant amount of relevant personal and commercial data; (vi) a significant number of professional and end users; or (vii) the offering of multiple digital products or services.

The Bill also stipulates that only agents whose economic groups have recorded global annual gross revenue exceeding R\$ 50 billion or annual gross revenue in Brazil exceeding R\$ 5 billion, based on the latest financial statements available on the date the administrative process for such designation is initiated, may be designated as economic agents of systemic relevance in digital markets.

According to the Bill, the term of the designation is up to ten years and may be renewed through a new procedure. The designation covers the entire economic group to which the designated economic agent belongs.

Once designated as a systemically relevant economic agent in digital markets, the agent must, under the terms of the Bill, maintain an office in Brazil, and CADE may determine special obligations for the promotion and protection of competition, such as: (i) submitting to CADE's analysis the mergers in which they are parties, regardless of the revenue criteria provided for in the Competition Law; (ii) disclosing to all its end users, whether business or professional, relevant information about the offer and use of products and services; (iii) informing end users of changes in the terms of use of the services or products offered; (iv) prohibiting acts or practices that, for example, limit or prevent the participation of competitors in markets in which they operate or in adjacent markets; and, among other obligations, (v) offering free data transfer tools for end users, including through an appropriate technological interface, and offering its products and services under equal and non-discriminatory access conditions. Economic agents of systemical relevance in digital markets will also be required to submit a compliance report detailing their fulfillment of any special obligations assigned to them.

In continuation to this subject, the following topic discusses the specific case involving the purchase of WhatsApp by Facebook and the requirements for its notification, within the scope of the European Union.

4 ACQUISITION OF WHATSAPP BY FACEBOOK AND THE DEBATE ON CONCENTRATION LEVELS IN THE DIGITAL MARKET

To illustrate the possibilities for the protection of competition in digital markets, it is pertinent to mention the specific case involving the acquisition of WhatsApp by Facebook, notified to the European Commission in 2014.

Within the scope of the European Union, the requirements for notification of mergers are dealt with by Regulation no. 139/2004 of January 20, 2004, the EC Merger Regulation⁴⁰. According to the legal text, every concentration act with a community dimension must be, obligatorily and in advance, notified to the European Commission, the authority responsible for regulating competition⁴¹.

These criteria encompass, in short, situations in which the combined global business volume of the companies involved exceeds five billion euros or if, individually, it exceeds two billion and five hundred million euros, except if each of them concentrates more than two thirds of its business volume in a single Member State⁴².

Even if the aforementioned requirements are not met, a community dimension is considered to exist if: the combined global business volume of the companies involved exceeds two billion and five hundred million euros; in each of at least three Member States, it exceeds 100 million euros; in each of at least three Member States, the business volume of at least two of the companies involved exceeds 25 million euros; or the business volume, at Community level, of at least two of the companies involved, exceeds 100 million euros, unless each of them generates more than two thirds of its business volume in a single Member State⁴³.

As explained in the previous topic, within the scope of the digital market, where many digital platforms offer their services at zero-price, competition authorities are faced with difficulties in finding a criterion capable of identifying possible distortions in competition, caused by gatekeepers.

⁴⁰ EUROPEAN PARLIAMENT AND COUNCIL OF THE EUROPEAN UNION. *EC Merger Regulation, Regulation no. 139/2004, January 20, 2004, on the control of concentrations between undertakings*. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139>. Accessed on: Nov. 19, 2023

⁴¹ According to article 4, 1, of Regulation no. 139, 2004: "Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest".

⁴² According to article 3, 2, of Regulation no. 139, 2004: "A concentration has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State".

⁴³ According to article 3, 2, of Regulation no. 139, 2004: "A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State".

This complexity is echoed by Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, who argue that digital markets lack a single parameter that allows competition authorities to easily measure market power or define dominance. They express hope that as the economics of digital platforms become better understood and more cases are analyzed, more sophisticated analytical frameworks will be developed⁴⁴, p. 50.

Especially due to the requirement for differentiated values for situations involving more than one Member State, the criteria required by the European Union for the notification of acts of concentration to the authority responsible for regulating competition ends up, in practice, being more comprehensive than those used in Brazil.

In the specific case involving the acquisition of WhatsApp, by Facebook, there was a need for prior notification to the European Commission, which was done by the company in 2014. At the time, the purchase was approved by the authority without restrictions, because of, among other arguments, the non-identification of barriers capable of preventing competition and the entry of new companies⁴⁵.

Regarding this initial assessment, Vicente Bagnoli explains that the authority concluded in October 2014 that Facebook Messenger and WhatsApp were not direct competitors. Despite the network effects typical of communications apps, the understanding was that consumers would still have access to a wide variety of alternatives post-merger⁴⁶, p. 20-21.

This analysis, however, proved problematic over time because it failed to address all vectors of market domination. Still drawing on Vicente Bagnoli's analysis, the European Commission's initial scrutiny focused narrowly on potential data concentration regarding the online advertising market. Because WhatsApp was not an active provider of online advertising, the Commission concluded there were no significant horizontal overlaps, underestimating the broader implications of data accumulation⁴⁷, p. 88.

In that regard, in 2016, Facebook notified the European Commission again about a change in WhatsApp's privacy policy, which would allow automatic integration of the two undertakings' user bases. The amount of data and users covered by this change caused the European Commission to review its position. In response, the authority issued a Statement of Objections, stating that the information provided by Facebook, in the first notification, was misleading, a fact that led to an investigation and application of a fine against the company⁴⁸. The acquisition, however, was maintained.

The specific case presented demonstrates a concern, at least in the European Union, in preventing competition problems because of the union of digital platforms, which, in practice, can result in penalties, such as fines.

⁴⁴ CRÉMER, J.; MONTJOYE, Y. A.; SCHWEITZER, H. *Competition policy for the digital era*. Publications Office of the European Union, 2019. Available at: <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en>. Accessed on: Nov. 26, 2023.

⁴⁵ The full text of the approval of the proposed purchase of WhatsApp by Facebook, by the European Commission, is available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1088. Accessed on: Nov. 19, 2023.

⁴⁶ BAGNOLI, V. Questions that Have Arisen since the EU Decision on the Whatsapp Acquisition by Facebook, *Market and Competition Law Review*, v. iii, no. 01, p. 15-51, 2019.

⁴⁷ BAGNOLI, V. The big data relevant market. In: PORTO, F., *Concorrenza e Mercato: antitrust, regulation, Consumer Welfare, Intellectual Property*, Giuffré Editore, v. 23, p. 73-94, 2016.

⁴⁸ The objections and penalties applied by the European Commission against Facebook are available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_16_4473. Accessed on: Nov. 19, 2023.

The European Union's decision on the acquisition of WhatsApp by Facebook had consequences, affecting other subsequent decisions. For example, in Germany, in March 2016, the *Bundeskartellamt*⁴⁹ initiated a proceeding against Facebook Inc. and Facebook Germany on suspicion of abuse of market power by infringing data protection rules. The initial concern was that Facebook might have exploited its dominant position in the social networks market due to potential violations of data protection regulations through the implementation of illegitimate terms and conditions. Such actions could be interpreted as imposing unfair terms on users in a manner that is considered abusive^{50, p. 30}.

On the other hand, in Brazil, although there is a rule to prevent acts of concentration, its effectiveness is limited in the digital market, due to the legal criteria not adapting to the economic reality of undertakings that offer their main services at zero-price. There is, therefore, a demand for these requirements to be reformulated, so that they become broader and capable of covering transactions involving digital platforms.

■ CONCLUSION

The scenario presented throughout this article makes it clear that the objective criteria imposed by Law no. 12,529/2011, which restrict CADE's jurisdictional limits, are not always aligned with the complexity and real reach of digital platforms.

In summary, the present study identified that the Brazilian regulation of gatekeepers, focusing on the legal aspects of the operation of digital platforms in the national market, reveals an evident gap in their effectiveness, especially in the digital segment.

The rules to prevent mergers require a suited approach to companies that offer services at zero-price. There is an urgent need to review the legal criteria, to enable a more precise and adaptable analysis to the economic nuances of transactions involving digital platforms, thus providing effective regulation consistent with the reality of the Brazilian digital ecosystem.

The discussion surrounding the imposition of behavioral rules aims to find a balance between preserving free competition and preventing anti-competitive practices. It is crucial to consider how eventual standards can be designed to promote a dynamic business environment, so that it can stimulate innovation and fairer competition, without compromising the efficiency and functionality of the digital market.

The establishment of clear and adaptable guidelines can, therefore, be essential to ensure that the actions of gatekeepers are aligned with the principles of Competition Law.

⁴⁹ This is the name of the independent competition authority responsible to protect competition in Germany. More information about its functions can be found at https://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html. Accessed on Nov. 12, 2023.

⁵⁰ BAGNOLI, V. Questions that Have Arisen since the EU Decision on the Whatsapp Acquisition by Facebook, *Market and Competition Law Review*, vol. iii, no. 01, p. 15-51, 2019.

REFERENCES

- ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. *Working document no. 005/2020*, 2020. Available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2020/documento-de-trabalho-n05-2020-concorrenca-em-mercados-digitais-uma-revisao-dos-relatorios-especializados.pdf>. Accessed on: Nov. 12, 2023.
- BAGNOLI, V. Questions that Have Arisen since the EU Decision on the Whatsapp Acquisition by Facebook, *Market and Competition Law Review*, v. iii, no. 01, p. 15-51, 2019.
- BAGNOLI, V. The big data relevant market. In: PORTO, F., *Concorrenza e Mercato: antitrust, regulation, Consumer Welfare, Intellectual Property*, Giuffré Editore, v. 23, p. 73-94, 2016.
- BINOTTO, A.; MATIUZZO, M. Objetivos do antitruste e mercados digitais: a reconstrução de uma política pública concorrencial. In: ZANATTA, R. A. F.; CONTRI, C. L.; SECAF, H., *Dados, mercados digitais e concorrência*, Letramento, 2022. Available at: <https://conteudos.dataprivacy.com.br/livro-dados-mercados-digitais-e-concorrenca>. Accessed on: Nov. 12, 2023.
- BRAZIL. *Federal Constitution*, October 5, 1988, Brasília, Federal Register, October 5, 2023. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: Nov. 12, 2023.
- BRAZIL. *Law no. 12.529*, November 30, 2011, Brasília, Federal Register, December 1, 2011, rectified on December 2, 2011. Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm. Accessed on: Nov. 12, 2023.
- BRAZIL. *Plataformas digitais: aspectos econômicos e concorrenciais e recomendações para aprimoramentos regulatórios no Brasil*, October 10, 2024. Available at: <https://www.gov.br/fazenda/pt-br/central-de-conteudo/publicacoes/relatorios/sre/relatorio-plataformas-consolidado.pdf>. Accessed on: Oct. 16, 2025
- BRAZIL. *Plataformas digitais no Brasil: fundamentos econômicos, dinâmicas de mercado e promoção de concorrência*, October 22, 2024. Available at: https://www.gov.br/fazenda/pt-br/central-de-conteudo/publicacoes/relatorios/sre/relatorio-economico_plataformas_publicacao_rev.pdf. Accessed on: Oct. 16, 2025.
- CASTELLS, M. *A sociedade em rede*. Paz e Terra, v. I, 2nd ed., 1999.
- COMPETITION AND MARKETS AUTHORITY AND INFORMATION COMMISSIONER'S OFFICE. *Competition and data protection in digital markets: a joint statement between the CMA and the ICO*, 2021. Available at: <https://www.gov.uk/government/publications/cma-ico-joint-statement-on-competition-and-data-protection-law>. Accessed on: Nov. 11, 2023.
- CRÉMER, J.; MONTJOYE, Y. A.; SCHWEITZER, H. *Competition policy for the digital era*, Publications Office of the European Union, 2019. Available at: <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en>. Accessed on: Nov. 26, 2023.
- DIGITAL REGULATION COOPERATION FORUM. *Multi-agency Advice Service Final Recommendations Report*, 2023. Available at:

https://www.drcf.org.uk/__data/assets/pdf_file/0028/269560/DRCF-Multi-agency-Advice-Service-Final-Report-Recommendations.pdf. Accessed on: Nov. 11, 2023.

EUROPEAN PARLIAMENT AND COUNCIL OF THE EUROPEAN UNION. *Digital Markets Act*, Regulation no. 2022/1925, September 14, 2022, on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828. Available at: <https://eur-lex.europa.eu/eli/reg/2022/1925>. Accessed on: Nov. 11, 2023.

EUROPEAN PARLIAMENT AND COUNCIL OF THE EUROPEAN UNION. *EC Merger Regulation*, Regulation no. 139/2004, January 20, 2004, on the control of concentrations between undertakings. Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139>. Accessed on Nov. 19, 2023.

HOUSE OF REPRESENTATIVES. *Bill no. 2,768*, 2022. Available at: <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2337417>. Accessed on: Nov. 12, 2023.

KLEIN, V.; DOMINGUES, J. O.; GABAN, E. M. Quem tem medo de Lina Khan?. *Justiça do Direito*, v. 35, no. 03, p. 309-331, 2021.

MANSELL, R. Platforms of power. *The London School of Economics and Political Science*, v. 01, no. 43, p. 20-24, 2015. Available at: <http://eprints.lse.ac.uk/61318/>. Accessed on: Nov. 21, 2023.

MARQUES, C. L. Perspectives for consumer protection in the XXI century. *Macau Journal of Brazilian Studies*, v. 4, no. 01, p. 73-86, 2021. Available at: <http://aebm.mo/en/list-29/106>. Accessed on: Nov. 11, 2023.

OH, P. B. Gatekeeping. *Journal of Corporation Law*, v. 29, p. 735-800, 2004. Available at: <https://ssrn.com/abstract=601361>. Accessed on: Nov. 11, 2023.

PARLIAMENT OF THE UNITED KINGDOM. *Online Safety Act 2023*, An Act to make provision for and in connection with the regulation by OFCOM of certain internet services, for and in connection with communications offences and for connected purposes, 2023. Available at: <https://www.legislation.gov.uk/ukpga/2023/50/contents/enacted>. Accessed on: Nov. 12, 2023.

SENATE OF THE UNITED STATES. *American Innovation and Choice Online Act (S. 2992)*, To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes, 2022. Available at: <https://www.congress.gov/bill/117th-congress/senate-bill/2992/text>. Accessed: on Nov. 12, 2023.

STUCKE, M. E.; GRUNES, A. P. Introduction: Big Data and Competition Policy. *The Oxford University Press*, 2016. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849074. Accessed on: Nov. 26, 2023.

THE STATE ADMINISTRATION FOR MARKET REGULATION. *Guidelines for Internet Platform Categorization and Grading (draft for comment)*, 2021. Available at: <https://web.archive.org/web/20220228190246/https://www.samr.gov.cn/hd/zjdc/202110/P020211029613172534705.doc>. Accessed on: Nov. 12, 2023.