Brazil's antitrust authority monitors digital markets

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In June 2020, Brazil's antitrust authority, CADE, initiated a wide-ranging market consultation[1] to obtain information on transactions carried out by technology companies over the last 10 years. Among other information, CADE asked the consulted companies to identify all transactions carried out by the company/economic group, with details such as the nature of the transaction, along with a description, the value of the transaction, and the sales revenue of the parties involved.

The request for information is based on the powers conferred to the General Superintendence of CADE under article 13 of Law 12.529/2011 to require information and documents from companies with dominant position in the market, in order to monitor their commercial practices and so detect potential competition violations. A refusal to provide the requested information can expose the companies to daily fines.

The information requested by CADE gives clues to what the agency may be looking for: abusive conduct by players that wield market power, gun jumping violations, and even ex-post merger control.

With respect to abusive conduct, the information collected would allow CADE to identify and map potential "killer acquisitions". Like competition authorities around the world, CADE has been watching the trend toward aggressive acquisitions of technology companies. The main concern is that companies holding market power may be acquiring potential competitors with a view to protecting their market position.

Identifying conduct that is harmful to competition is complex in markets where there is intense use of technology, since it involves analyzing companies' dominance and proving the harmful effects of the practice in question. Meeting these two conditions demands a profound understanding of the affected market, and the development of innovative metrics to identify dominance. Even if information provided to CADE raises suspicions, any investigation it might undertake would require a complex analysis.

As for gun jumping practices, questions about the turnover in the year prior to the transaction, associated with questions about the transaction's nature, reveals that CADE may be interested in finding out whether the market agents violated article 88 of Law 12.529/2011, which prohibits the consummation of certain transactions prior to CADE's review and approval. When that prohibition is not respected (i.e. the parties jump the gun), CADE has the power to review the transaction and apply appropriate sanctions, which include voiding the transaction and fines.

Gun jumping is an administrative violation, with a limitation period of five years counted from the time the offending conduct ceases, under article 46 of Law 12.529/2011. Thus, if CADE finds that the conduct ceased on closing, transactions closed in violation of the law and prior to 2015 will not be subject to punishment. Gun jumping investigations will therefore affect only part of the information requested by CADE – i.e. transactions that closed in the last five years.

A third possible objective of CADE's initiative is ex-post merger control. The information gathered through the consultation process would allow CADE to require companies to submit for review transactions that did not meet the pre-merger review criteria, subject to the one-year post-consummation limit under article 88§7 of Law 12.529/2011.

The broad investigation commenced by CADE is one of a series of initiatives that reveal its growing interest in digital markets[2]. In line with global trends, these markets have become the focus of regulators' attention because of their distinctive competitive dynamics, which present challenges for the tools traditionally used in competition analyses. The results of CADE's analysis of the Brazilian digital market can be expected in the next few months.

NOTES:

1. In all, 19 companies were consulted: Amazon, B2W, Booking.com, Decolar, Google, iFood, Mercado Livre, Magazine Luiza, Facebook, Grupo Netshoes, Twitter, Microsoft, Submarino Viagens, Apple, Uber do Brasil, 99Taxis, Via Varejo, Walmart Brasil, and Tencent (Proceeding no. 08700.002785/2020-21).

2. See, for example, Concorrência em mercados digitais: uma revisão dos relatórios especializados (Competition in digital markets: a review of specialized reports), a study by CADE's Department of Economic Studies – DEE.

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