Is iFood Starving the Market? Antitrust Enforcement in the Market for Online Food Delivery in Brazil

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Abstract: This article examines the decisions taken by the Brazilian Competition Authority (CADE) in two antitrust cases related the dominant food delivery platform iFood, one merger review and one investigation into exclusive dealing agreements. Through an in-depth examination of the case documents, this article uncovers the evolution in CADE's comprehension of the competition dynamics in multi-sided digital markets, while also revealing gaps and inadequacies in the authority's substantive and procedural antitrust enforcement. Based on the findings, the article draws lessons that can help strengthen the authority's approach to digital platform cases in the future. Firstly, CADE must adapt its steps of analysis and develop new theories of harms that are better tailored to the characteristics of multi-sided platforms. Secondly, CADE should conduct more rigorous merger reviews that take into account the wider impact of dominant platforms' business strategies on the ecosystem of players orbiting them. Thirdly, the article highlights the importance of the authority building its capacities and expertise to detect competition problems from an early stage, design effective remedies, and ensure these remedies are enforced effectively. These recommendations underscore the significance of continuously updating the enforcement framework and enhancing the capabilities of the competition authority to keep pace with the rapidly evolving digital economy.

Keywords: digital markets; competition law; antitrust; exclusivity dealing; merger review; theories of harm; online food delivery; Brazil

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INTRODUCTION

On February 15, 2023, the Brazilian competition authority, the Administrative Council for Economic Defence (CADE, in the acronym in Portuguese), ratified a settlement agreement suspending a long-standing investigation into alleged anticompetitive practices by the food delivery giant iFood.[1] The investigation lasted for over twenty eight months and raised significant questions about how the competition authority should evaluate exclusive dealing cases in digital markets in Brazil and what parameters they should use to determine the legality of such practices.[2] The complaint by iFood's competitor (second largest player Rappi) that triggered this investigation was not the first time that CADE was made aware of the platform's exclusive dealings and the potential anticompetitive effects of this practice. In fact, the first case involving the delivery platform was filed in November 2017, which was a merger case between Naspers, the controller of iFood, and Delivery Hero, a company that owned two locally based food delivery services (Pedidos Já and Subdelivery) that received considerably less scrutiny by the competition regulator and went largely unnoticed by the public.[3]

The iFood merger case was the first-ever analysed by the Brazilian competition authority in the online food delivery market, and this concentration was notified only in Brazil. During the investigation, CADE discovered that iFood's controller had been acquiring several small startups that did not meet the revenue thresholds for mandatory filing. The merger investigation also uncovered that iFood had made agreements with significant restaurant chains with high visibility, which included restrictive clauses that prevented these establishments from conducting business with other delivery apps. At the time, all the available evidence confirmed that iFood was the dominant player in the food delivery market in Brazil, operating in an increasing number of municipalities, and without any comparable rivals. Nevertheless, CADE concluded that there was no evidence that the specific merger under review would have anticompetitive effects in the relevant market. Consequently, on March 9, 2018, CADE unconditionally approved the transaction.[4]

Could a different reasoning in the merger case have mitigated some of the concerns that later arose in the unilateral conduct investigation? What other factors could CADE have considered when examining the proposed merger? What has changed in the authority's approach to the unique features of multi-sided digital markets from the merger case to the unilateral conduct investigation? This article provides a comprehensive analysis of CADE's decision in both cases to explore more broadly how the Brazilian authority has addressed competition concerns in

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[1] Cease and Desist Agreement (TCC in the acronym in Portuguese) No. 08700.005597/2022-17 [hereinafter *iFood TCC procedure*].

[2] Investigatory Procedure (IA from the acronym in Portuguese) No. 08700.004588/2020-47 [hereinafter *iFood unilateral conduct investigation*].

[3] Merger Review (AC in the acronym in Portuguese) No. 08700.007262/2017-76 [hereinafter *iFood merger case*].

[4] *iFood merger case*, Decision No. 5/2018/CGAA1/SGA1/SG.

rapidly changing digital markets and what insights regulators and authorities in other jurisdictions can derive from the Brazilian experience. I argue that when reviewing the merger CADE did not exhaust the range of possible, meaningful ways in which the transaction could have harmed competition and failed to discuss theories of future harm and dominance that are particularly relevant to digital markets. The authority has also overlooked or too quickly dismissed some factors that lead to higher barriers to entry, including strong network effects that are typical of platform markets, and the fact that iFood had been making exclusivity agreements with key restaurants that have already established a significant client base. Crucially, CADE wittingly limited the analysis to the specific effects of the one merger under review, thereby failing to consider it in the context of the series of acquisitions conducted by iFood's controller in previous years. Although a more nuanced understanding of the markets under review may not have altered the outcome of the case, CADE's narrow focus during the merger review potentially facilitated iFood's further consolidation of market power, which eventually led to accusations of dominance abuse and concerns about the competitiveness of the online food delivery market that persist to this day.[5]

In contrast, the article shows that CADE was more thorough when investigating the anticompetitive behavioural claims and considered in its analysis specific concerns related to the nature of competition in multi-sided digital markets, as raised in current antitrust literature. The adoption of interim measures and the decision to settle the case reflects a cautious approach by the authority towards dynamic digital markets, where it favours provisional and negotiated remedies that can be implemented and monitored over time rather than unilaterally imposing restrictions to close the case. Despite the lack of a final decision on the merits, the case provides insights into the Brazilian authority's stance on exclusivity deals and the theory of harm that CADE is likely to adopt in similar cases in the future.

This article is structured as follows. Section 1 offers a review of CADE's decision in the iFood merger case, critically examining the theories of harm considered by the Brazilian competition authority. An assessment of CADE's decision is provided based on the evidence that was available at the time. The detailed analysis exposes the limitations of the procedures and analytical tools available to the Brazilian competition authority for monitoring and intervening in the structure of digital markets in a timely manner. Section 2 proposes alternative theories of

[5] Signs of iFood's dominance were also felt in adjacent markets. On April 2022, CADE opened a new inquiry to investigate whether the company was involved in anticompetitive practices in the market of food and meal vouchers, through its iFood Benefits (iFood *Benefícios*) services. The complaint was filed by the association that gathers companies that manage food and meal vouchers, benefits that are commonly offered to workers in Brazil. The complainant argued that iFood has been using the data collected through its food delivery app to leverage its position in the food and meal voucher market. The complaint also expressed concern that iFood has been offering discounts and other benefits to user of iFood Benefits that are only viable due to its dominant position in the adjacent market of food delivery. Further, the association argued that iFood's delivery platform is a gateway to the provision of food and voucher benefits, and that iFood has been offering more favourable treatment to its own services (iFood Benefits) than to those of competitors who depend on the app to access clients. At the time of writing this case was under preliminary investigation by CADE and a decision was yet to be issued. See Investigatory Procedure No. 08700.001797/2022-09, Technical Note 7/2022/CGAA1/SGA1/SG/CADE, 28 April 2022.

harm that were not considered by the Brazilian competition authority during the iFood merger case. These theories of harm are better suited to understanding the functioning of digital markets and could have revealed significant risks problems in the market for online food delivery in Brazil. Drawing on evidence available after the merger, including industry reports and recent antitrust investigations, Section 3 evaluates the evolution of the market to determine whether the assumptions made by the competition authority at the time of the merger were appropriate. Additionally, it examines two of CADE's recent decisions in the investigation of iFood's exclusive dealing agreements – the interim measures and the settlement agreement – to assess how the authority's approach has changed over time. The conclusion summarises the article's lessons and raises questions that competition authorities should consider in future cases involving multi-sided digital platforms, not just in Brazil, but in other jurisdictions with similar rules and decision-making practices.

I. CADE'S ASSESSMENT OF THE IFOOD MERGER

The Naspers/Delivery Hero merger case met the double threshold criteria for mandatory notification in Brazil and was notified to CADE in November 2017.[6] The deal involved the acquisition by Naspers of a stake of Delivery Hero – representing a 13% increase in Naspers participation and making it the single largest shareholder of the company, with 23.6% of the shares. The transaction was motivated by Naspers recognition of Delivery Hero's global presence and its desire to expand their business into different regions of the world.[7] At the time, Naspers was already the controller of iFood, a popular food delivery app in Brazil, and of Spoonrocket, another delivery app. The only two platforms controlled by Delivery Hero in Brazil at the time of the merger were also in the market for food delivery services: Pedidos Já and Subdelivery. This was the first case in the market for food delivery apps analysed by the Brazilian competition authority, and this concentration was only notified in Brazil.[8] In their merger notification form, the Parties stated that the proposed transaction would not imply the elimination or restriction of competition nor create or reinforce a dominant position that could have a negative impact on the Brazilian market.[9]

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[6] A pre-merger notification should be submitted for CADE's approval if the transaction meets a double gross revenue threshold (article 88, Law 12,529/2011). Following Inter-ministry Resolution 994/2012, the turnover of one of the firm or economic group involved should be equal to or exceed R$750 million, and, cumulatively, the turnover of one other enterprise involved in the undertaking should be equal to or greater than R$75 million. Any transaction that meets the double threshold shall not be completed prior to CADE's approval. Failure to notify a transaction that meets the legal criteria could lead to fines ranging from R$60 thousand to R$60 million and could also lead to an investigation procedure for infringements against the economic order (Article 88, para. 3, Law 12,529/2011).

[7] *iFood merger case*, merger notification form, page 1.

[8] *iFood merger case*, Annex I, Decision 5/2018/CGAA1/SGA1/SG, para. 39.

[9] *iFood merger case*, merger notification form, page 2.

The analysis followed the ordinary procedure and was entirely reviewed by CADE's General Superintendence (SG in its acronym in Portuguese), with no involvement from CADE's Tribunal (the composite decision-making body).[10] Even though the SG analysis did not explicitly mention which theories of harm it considered, it was possible to identify at least two, as detailed below. The decision also briefly mentioned the challenges that digital markets pose to conventional analytical tools and assessed the suitability of the Brazilian competition law to deal with the particularities of these markets but did not provide any new guidance or adapted the steps of analysis to speak to these specificities.[11]

A. Loss of competition and analysis of rivalry

The first theory of harm considered by the SG was *loss of competition,* and the merger analysis discussed whether the merger would have made the competitive constraint that the parties exerted on each other in the market for food delivery platforms disappear. Loss of actual competition is a traditional type of theory of harm, generally related to the risk of creating monopoly power.[12] In order to assess the extent of this risk, competition authorities should examine market rivalry and consider whether a proposed merger would have eliminated the competitive constraints that the parties exerted on each other.

This theory of harm was dismissed based on the fact that Pedidos Já was not an actual relevant competitor that constrained iFood and based on the existence of many other more relevant competitors, in particular UberEATS and Rappi, which had the potential to expand in the future. The main piece of evidence presented by the authority to support the understanding that Pedidos Já was not a particularly strong competitor of iFood and that other companies such as UberEATS had the potential to grow into relevant rivals, was a market study produced by the Charles River Associates, a consultancy firm, which was corroborated by CADE's Department

[10] In Brazil, after a case has been submitted to merger review, CADE can follow one of two main procedures: ordinary merger review (*procedimento ordinário*) or fast-track merger review (*procedimento sumário*). Mergers that are considered to pose a lower risk to competition can follow a fast-track review process. These cases include joint ventures, cases with a small horizontal overlap (less than 20%), and cases with a small vertical integration (less than 30%) in the relevant market of the transaction, amongst other situations in which a higher level of scrutiny is considered unnecessary by the competition authority. Upon receiving a merger notification, the SG looks into the details of the case and writes a report presenting its main findings. The SG has a dedicated unit to work on specific sectors of the economy and a 'first-analysis' unit which assigns the cases and decides on the level of concern raised by each transaction. In ordinary procedures, the SG will only refer cases to the Tribunal if they believe that the merger should be rejected, approved with remedies or that there are no conclusive evidence as to its effects on the market. Any deferral to the Tribunal should include a detailed description of effective or potential harms to competition that could be caused by the anticipated merger and the reasons why CADE should either take remedial steps or reject it.

[11] For an overview of theories of harm tested by the Brazilian competition authority in other merger cases involving digital platforms, see Nicolo Zingales and Bruno Renzetti, 'Digital Platform Ecosystems and Conglomerate Mergers: A Review of the Brazilian Experience' (2022) 45 W. Comp. 473.

[12] For more on the classic market failures of monopoly power see Oliver E Williamson, 'Dominant Firms and the Monopoly Problem: Market Failure Considerations' (1972) 85 Harv. Law Rev. 1512.

of Economic Studies (DEE in its acronym in Portuguese).[13] The study demonstrated that the presence of UberEATS and the increase in the number of registered restaurants had a negative and statistically significant impact on iFood's order volume, which would show that UberEATS exerts a significant degree of rivalry over iFood. The analysis, however, was based less on the competitive pressure exerted by competitors at the time of the transaction, and much more on the possibility of expansion of such competitors. CADE put too much weight on the historical entry rates to support its conclusion, even when such rates are known for either underestimating or overestimating the likelihood of future entry, in particular in highly dynamic markets.[14]

Although relevant, this data should have been interpreted carefully, and the quantitative analysis alone could not have led to the decision on whether the merger deserved closer scrutiny. The analysis also failed to discuss the potential that Pedidos Já would grow into a relevant competitor in the future. While great emphasis was put on the recent entry of UberEATS and Rappi, which would 'raise the expectation of intensifying domestic rivalry',[15] with regards to Pedidos Já, the analysis focused on the fact that it was not an actual competitor at the time of acquisition. In other words, the analysis adopted a dynamic perspective of competition to identify potential growth of other competitors but chose a static perspective of competition to discuss the competitive pressure exerted by the target company.

Further, the authority considered that at the time of the analysis, the online food platform market was an extremely fragmented market, and that there were several companies operating in it. The SG overlooked the strong evidence of concentration and lack of rivalry, which could have been accentuated by the merger, in favour of the potential for expansion and the dynamic nature of the sector. The SG recognized that despite the growing number of players, the market was mostly composed of startups dispersed throughout the country and without a wide national presence, which would mean that iFood was the dominant national player. In addition, the SG admitted that the lack of reliable data from competitors and third-parties presented to the authority was a strong indication of the market fragmentation and of iFood's strong position. Moreover, the authority explicitly mentioned that most of the startups that presented themselves as potential rivals had been acquired by iFood. As revealed in the investigation, between 2013 and the time of the proposed merger, iFood acquired 10 companies in Brazil, including startups and companies belonging to large international groups.[16]

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[13] When the current Brazilian competition law came into force in 2012 and changed the institutional design of the national competition authority creating the Department of Economic Studies (*Departamento de Estudos Econômicos*, in Portuguese), it became the main body of CADE responsible for producing quantitative studies and interpreting economic data. For a detailed review of Brazilian experience in adopting quantitative methods and evidence in the assessment of mergers, see Camila C Pires-Alves, Marcos Puccioni de Oliveira Lyra and Marina Maria Gutierrez Bonfatti, 'Quantitative Methods and Mergers Effects in Competition Policy: The Brazilian Case' (2019) 42 W. Comp. 523.

[14] For a detailed discussion of the practical challenges of merger review in dynamic markets, see OECD, 'Merger Control in Dynamic Markets' (Organisation for Economic Co-operation and Development 2020).

[15] *iFood merger case*, Annex I, Decision 5/2018/CGAA1/SGA1/SG, para. 102.

[16] *iFood merger case*, Annex I, Decision 5/2018/CGAA1/SGA1/SG, para. 97.

All the evidence pointed to the fact that iFood was the dominant player in the food delivery market in Brazil, active in a growing number of municipalities, and with no comparable rivals at the time of the analysis. However, the strong position of iFood in the market was attributed to its 'first mover' advantage. Even though the analysis identified that the market was highly concentrated and that there was little rivalry, the SG chose not to consider the evidence because iFood's dominant position was allegedly achieved on its own merits. According to the decision, the specific transaction under analysis (the acquisition of Pedidos Já) would have had little impact on the structure of the market and iFood's market power would not be 'significantly increased by the transaction'.[17] The SG focused the analysis on the removal of this particular player from the market, which was considered to be an irrelevant one, but arguably the SG underestimated Pedidos Já's potential to grow into a significant competitive force.

B. Barriers to entry in multi-sided markets

The second theory of harm considered by the SG involved an analysis of whether the merger would lead to an *increase in barriers to entry*. M&A activity in markets with strong network effects is of particular concern because of their potential to confer the merged entity a significant degree of market power.[18] In many cases, network effects can be beneficial to users, providing them access to a wider network of other users and suppliers. However, as the economics literature has revealed, the same demand-side economies of scale that help form a network can also come to shield the network from competition.[19] When combined with increasing returns to scale, network effects allow a dominant platform to quickly grow to a large scale after it has reached a critical point – known as a 'tipping point'. Once the market has tipped, high switching costs can make it harder for more efficient entrants to displace an incumbent. Any potential competitor would need a significant number of users to opt to move to its network, choosing it over the existing product or service, and new players would have difficulty gathering a critical mass that was sufficiently large to enter the market.[20] Consumers are thus more likely to be locked-in with the dominant firm; the one that reached a critical mass first.[21] Therefore, network effects can constitute significant barriers to entry and expansion in digital markets, which could substantively exacerbate the anticompetitive effects and loss of competition between merging

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[17] *iFood merger case*, Annex I, Decision 5/2018/CGAA1/SGA1/SG, para. 106.

[18] Marc Rysman, 'The Economics of Two-Sided Markets' (2009) 23 J. Econ. Perspect. 125.

[19] For example, Geoffrey G Parker and Marshall W Van Alstyne, 'Two-Sided Network Effects: A Theory of Information Product Design' (2005) 51 Management Science 1494; Mark Armstrong, 'Competition in Two-Sided Markets' (2006) 37 Rand J. Econ. 668; Gönenç Gürkaynak and others, 'Multisided Markets and the Challenge of Incorporating Multisided Considerations into Competition Law Analysis' (2017) 5 J. Antitrust Enforc. 100.

[20] Armstrong (n 19); David S Evans and Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* (Boston: Harvard Business Review Press 2016).

[21] For an analysis of how network effects can lead to consumer 'lock in', see Joseph Farrell and Paul Klemperer, 'Chapter 31 Coordination and Lock-In: Competition with Switching Costs and Network Effects', *Handbook of Industrial Organization*, vol 3 (Amsterdam: Elsevier 2007).

parties.

In deciding the case, the Brazilian authority considered the increase in difficulty for new players entering the online food delivery market following the merger. However, the SG dismissed this theory of harm based on two arguments; one, the fact that the market was still in very early stages with great potential to grow, and two, the simplicity of the technology required to build an app and enter the market. Regarding the first point, the decision referred to data that showed the intense entry of new players into this market in recent years, with particular emphasis on the entry of UberEATS and Rappi, a Colombian company with a strong presence in Latin America. The Brazilian authority emphasized that the market was continuing to grow and was not yet consolidated, which was interpreted as evidence of low barriers to entry.

On the second point, the SG argued that the technology needed to create and establish a digital platform, either a website or a mobile application, was relatively simple. The greatest difficulty identified in the decision for the entry of new agents was related to the multi-sided nature of the market; the ability to create a wide network of registered restaurants to attract consumers. Indeed, two barriers to entry were mentioned by the majority of competitors that gave evidence in the procedure. The first was the need to structure a chain of registered restaurants, which makes it difficult to expand to other locations. The second and main barrier to entry identified by the SG were investments in marketing.[22] Nonetheless, the SG concluded that the conditions for entering the online food ordering market were favourable, and that the transaction would not increase the likelihood of the merged entity exercising market power. This conclusion was further reinforced by an expectation of an increase in market rivalry in the coming years and the lack of effective competitive pressure by the target company, which had a low market share.[23]

C. Merger assessment tools

Alongside examining the relevant theories of harm, the SG's decision also reflected on the extent to which the Brazilian competition law toolkit was fit for the purpose of supervising mergers in digital markets. In terms of *merger assessment tools*, the SG mentioned in the decision the fact that the business models of the companies are structured as multi-sided platforms and referred to the 'difficulty in applying traditional analysis tools'.[24] The decision argued that in new and fast-evolving markets 'the boundaries of the relevant markets involved may prove to be fluid, and the analysis of competitive dynamics, market trends, rivalry conditions or even consumer behaviour is especially challenging'.[25]

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[22] *iFood merger case*, Annex I, Decision 5/2018/CGAA1/SGA1/SG, para. 102.
[23] *iFood merger case*, Annex I, Decision 5/2018/CGAA1/SGA1/SG, para. 172.
[24] *iFood merger case*, Annex I, Decision 5/2018/CGAA1/SGA1/SG, para. 81.
[25] *iFood merger case*, Annex I, Decision 5/2018/CGAA1/SGA1/SG, para. 35.

Indeed, the literature has highlighted the many difficulties involved in defining the boundaries of the market in antitrust analysis. For example, Magali Eben argues that markets are not neutral objects, but rather intellectual constructs that serve the purpose of answering an specific question. As such, the relevant market should be more broadly considered as the frame of reference within which competition law is applied.[26] In antitrust assessments involving digital platforms the 'purposive' definition of the market supported by Eben is arguably more complex and there is a growing realization of the need to look beyond traditional merger assessments tools.[27] Recent scholarship has placed more emphasis on analyzing the competitive dynamics at play in different markets, arguing that authorities should consider multiple sources of evidence and be complemented by methodologies beyond the definition of the relevant market. For example, Louis Kaplow argues that the analysis of evidence in pre-merger review should focus explicitly on the determinants of competitive effects, rather than attempt to define a relevant market.[28] Pereira Neto and Lancieri argue for a multi-layered approach, placing more emphasis on analyzing the impacts of a given conduct or merger over an industry, rather than on strict market boundaries. According to them, focusing on the multiple layers of competition affected by the firm's conduct or merger would more effectively identify competitive constraints faced by multiple firms operating within and across transaction platforms.[29]

Alternative approaches also include changing the focus from relevant markets to a focus on the 'value capture' and 'value generation' strategies adopted by economic agents. This would require the development of new tools for representing horizontal and vertical competitive interactions in the digital economy more accurately.[30] In a similar vein, Holzweber argues that because of the interrelated nature digital platforms, the antitrust analysis should include an intermarket analysis that places emphasis on the connections between the different markets involved in a platform.[31] Overall, there has been growing understanding that market definition in competition analysis is only a (limited) means to the end of assessing competitive pressures, and that alternative conceptual tools might be required.

Further, recent developments in literature claim that traditional measures of market power and concentration are strained by how digital markets function.[32] There is evidence that the sources of market power and the competitive pressures at play in digital markets are not easily

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[26] Magali Eben, 'The Antitrust Market Does Not Exist: Pursuit of Objectivity in a Purposive Process' (2021) 17 J. Compet. Law Econ. 1.

[27] For a detailed analysis of the limitations of conventional conceptual tools to define the relevant market in two-sided markets, see L Filistrucchi and others, 'Market Definition in Two-Sided Markets: Theory and Practice' (2014) 10 J. Compet. Law Econ. 293.

[28] Louis Kaplow, 'Market Definition and the Merger Guidelines' (2011) 39 Rev. Ind. Organ. 107. According to Kaplow, 'market definition should be abandoned entirely, both across the board and, in particular, in merger analysis'. p. 123.

[29] Caio Mario da Silva Pereira Neto and Filippo Maria Lancieri, 'Towards a Layered Approach to Relevant Markets in Multi-Sided Transaction Platforms' (2020) 83 Antitrust Law J. 429.

[30] Ioannis Lianos, 'Digitalisation and Competition Law: New Challenges' (2019) 7 RDC 46.

[31] Stefan Holzweber, 'Market Definition for Multi-Sided Platforms: A Legal Reappraisal' (2017) 40 W. Comp. 563.

[32] Frederic Jenny, 'Changing the Way We Think: Competition, Platforms and Ecosystems' (2021) 9 J. Antitrust Enforc. 1.

captured by the traditional antitrust toolkit, and that static measures of concentration such as market shares are considered an imperfect indicator of market power in highly dynamic, data-driven markets.[33] Relevant factors to consider when analyzing dominance and contestability in digital markets for a more accurate assessment of market power include, for example, the presence of strong network effects and economies of scale discussed above,[34] the information held by a dominant player,[35] the capacity to collect and process data at great velocity and scale,[36] and control of key infrastructure or gateways to access users and services.[37]

Despite the evidence of the limitations of conventional metrics and the need to adapt the antitrust assessment to the particularities of digital platforms, the Brazilian authority employed the traditional methods of analysis in the case.[38] The relevant market was technically decided as 'online food ordering', comprising three different business models: marketplaces, logistic specialists, and dedicated platforms. The assessment of market power was based on estimates of market shares distribution. The data presented by the complainant pointed to the high participation of iFood in the market for online food orders. However, due to the lack of data about competitors' participation in the market, the SG was not able to calculate the HHI index for the merger, what it deemed 'essential to conclude whether there is (or not) the possibility of exercising market power resulting from the transaction'.[39] Surprisingly, although the multi-sided nature of the market was acknowledged by SG, the strong network effects, which are characteristic of these markets, were not discussed at any point in the analysis.

II. CRITICAL APPRAISAL OF THE MERGER DECISION

[33] See, for example, Jason Furman and others, 'Unlocking Digital Competition, Report of the Digital Competition Expert Panel' (Digital Competition Expert Panel 2019) Report of the Digital Competition Expert Panel; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era' (Directorate-General for Competition, European Commission 2019); Fiona Scott Morton and others, 'Committee for the Study of Digital Platforms: Market Structure and Antitrust Subcommittee' (George J Stigler Center for the Study of the Economy and the State 2019).

[34] Rysman (n 18). See also the discussion on market definition in Holzweber, where the author argues that digital platforms present different levels of indirect effects, which require their multi-sidedness to be approaches as a matter of degree. Holzweber (n 31).

[35] Francisco Costa-Cabral and Orla Lynskey, 'Family Ties: The Intersection between Data Protection and Competition in EU Law' (2017) 54 Common Mark. Law Rev. 11.

[36] Beatriz Kira, Vikram Sinha and Sharmadha Srinivasan, 'Regulating Digital Ecosystems: Bridging the Gap between Competition Policy and Data Protection' (2021) 30 Ind. Corp. Chang. 1337.

[37] Niamh Dunne, 'Platforms as Regulators' (2021) 9 J. Antitrust Enforc. 244; Michael G Jacobides and Ioannis Lianos, 'Ecosystems and Competition Law in Theory and Practice' (2021) 30 Ind. Corp. Chang. 1199.

[38] For a critical analysis of how the Brazilian competition authority has followed established rules of thumb and failed to take into consideration features of the market in other cases, see Paulo Furquim de Azevedo, 'Following the Rules to the Wrong Path' (2021) 9 J. Antitrust Enforc. 398.

[39] In the absence of the HHI index, the SG chose to adopt a more cautious approach and argued for the possibility of market power based on increase in the turnover of restaurants registered on the food platforms and the number of orders registered over the years, which allowed the SG to identify that iFood and Pedidos Já had both grown their market participation – the former in absolute terms, the latter in relative terms. *iFood merger case,* Annex I, Decision 5/2018/CGAA1/SGA1/SG, para. 71.

In recent years, the Brazilian competition authority has been endeavouring to develop expertise around the particularities of antitrust enforcement in digital markets, for example through technical collaborations with experts, events, and publication of studies.[40] There is also an incipient body of case law in digital markets, where CADE has recognized that the competitive dynamics of digital markets might be different from brick-and-mortar cases, but has opted for a more cautious approach, favouring the use of interim measures and settlement agreements and stopping short from developing new theories of harm or providing clear guidelines on how future cases would be decided.[41]

The iFood concentration followed this same pattern. Despite explicitly recognizing in the decision the new challenges that digital markets present to the enforcement of competition law, the Brazilian authority did not innovate nor went beyond the application of conventional tools. It also did not consider new theories of harm that would be particularly relevant to assess the effects of the merger. The theories of harm discussed by the SG in the decision did not consider the whole range of possible, meaningful ways in which the deal could have harmed competition. As theories of harm are designed by scholarship and antitrust practice based on each case, new formulations of theories of harm are constantly emerging. As such, they give a certain degree of malleability to antitrust enforcement, making it possible to update antitrust practice without necessarily changing the law. In this sense, the formulation of new theories of harm is a useful way to refine the applying of competition law to better fit emerging contemporary challenges and the portfolio of theories of harm adopted by competition authorities should be constantly updated to reflect the evolving reality of markets. This section briefly examines two (amongst many possible) further theories of harm that could have been considered by the Brazilian authority.

A. Loss of potential competition through acquisition of nascent firms

The SG decision did not seriously consider a theory of harm based on the series of *acquisitions of nascent firms* and *the loss of potential competition.* One of the tendencies related to mergers and acquisitions in digital markets identified in the literature, and the basis of some of the ongoing antitrust investigations against technology companies is the strategy pursued by dominant companies of buying up smaller innovative firms before they become significant

[40] For example, CADE chaired the BRICS competition authorities working group on the digital economy and organized a report presenting experiences and exploring common challenges. See https://www.gov.br/cade/en/matters/news/cade-releases-report-on-digital-economy-during-the-vi-brics-competition-conference. Other examples include the white papers on digital markets that CADE commissioned: Filippo Maria Lancieri and Patricia Sakowski, 'Competition in Digital Markets: A Review of Expert Reports' (2021) 26 Stan. J.L. Bus. & Fin. 65; BRICS Competition Authorities, 'BRICS in the Digital Economy: Competition Policy in Practice' (Conselho Administrativo de Defesa Econômica - CADE 2019) 1st Report by the Competition Authorities Working Group on Digital Economy; CADE, 'Mercados de Plataformas Digitais' (Conselho Administrativo de Defesa Econômica 2021).

[41] For an overview of CADE's enforcement in digital markets, see Caio Mário S Pereira Neto, Ricardo Ferreira Pastore and Raíssa Paixão, 'Competition Law Enforcement in Digital Markets: The Brazilian Perspective on Unilateral Conducts' (2022) 67 Antitrust Bull. 622. See also Zingales and Renzetti (n 11); de Azevedo (n 38).

competitors. Argentesi *et al* report that in 60% of the acquisitions carried out by Google, Facebook and Amazon between 2008 and 2018, the target companies were four years old or younger at the time of the transaction.[42] In many cases, incumbents buy up nascent firms with a view to extinguishing them as potential rivals, in order to prevent the development of a competitor. These transactions receive the label 'killer acquisitions' when they lead not only to loss of potential competition, but also to the loss of a product and therefore of an innovation.[43] Removing an existing or potential product from the market can also lead to harm through the reduction in choice and variety, whereby consumers would face a smaller choice or range of options. There are even arguments that there would be indirect negative effects on innovation due to the existence of a 'kill zone', an area of the market dominated by large digital platforms from which startup firms and venture capitalists would stay away in order not to be affected by the exclusionary behaviour and aggressive acquisition strategies employed by incumbents.[44]

In the case, while the SG focused the analysis on the removal of one particular player from the market – Pedidos Já, which was considered not to be a relevant competitor at the time of the analysis –, it failed to seriously discuss the loss of potential competition. More specifically, it did not discuss what this acquisition would mean in the context of the strong dominant position held by iFood nor in the context of the series of acquisitions of smaller firms conducted by the company in the year that preceded the analysis. The decision expressed a certain level of concern with the lack of competitive pressure that could result from iFood acquiring 'every startup that entered the market',[45] but this theory of harm was not investigated by the SG. The SG did, however, acknowledge that iFood had been carrying out several acquisitions of small startups that did not meet the revenue thresholds for mandatory filing, and that this could be evidence of a business strategy employed by iFood. The analysis concluded that this strategy should be 'closely monitored by the Brazilian competition authority in future cases', due to the risk it could translate into barriers to entry.[46] Nonetheless, the authority considered it to be a separate issue, rather than viewing this data as evidence to support a relevant theory of harm related to the merger under scrutiny. Crucially, there is no evidence that CADE took any measures to act on the information revealed, nor that it monitored the market to evaluate the impact of the successive mergers and exclusive dealings on competition.

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[42] Elena Argentesi and others, 'Merger Policy in Digital Markets: An Ex Post Assessment' (2021) 17 J. Compet. Law Econ. 95. p. 102.

[43] As Cunningham *et al* explain, these transactions could kill the development or production of an innovative product, either because the incumbent acquirer has weaker incentives to continue producing the newly acquired product that poses a risk to its established product line, or because the acquirer might abandon its own projects aiming at the development of a competing product. Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2021) 129 J. Political Econ. 649.

[44] Massimo Motta and Martin Peitz, 'Big Tech Mergers' (2021) 54 Inf. Econ. Policy. 100868; Sai Krishna Kamepalli, Raghuram G Rajan and Luigi Zingales, 'Kill Zone' (Becker Friedman Institute for Research In Economics 2020).

[45] *iFood merger case*, Annex I, Decision 5/2018/CGAA1/SGA1/SG, para. 21.

[46] *iFood merger case*, Annex I, Decision 5/2018/CGAA1/SGA1/SG, para. 180.

B. Exclusionary conduct and market foreclosure

Another theory of harm which was touched upon in the decision but not properly investigated was the *risk of exclusionary conduct and market foreclosure* related to the exclusivity agreements signed by iFood with a few restaurants. A number of theories of harm related to M&A activity and exclusionary conduct have been articulated by antitrust literature. One is related to the possibility that the merged entity could leverage its strong market position to ban, or to make it more difficult for competitors to access valuable tools and inputs.[47] This exclusionary concern emerges from the power and incentive that firms operating an upstream essential facility have to refuse to supply its rivals in downstream markets (total foreclosure), or to charge higher prices or reduce the supply (partial foreclosure). In the context of digital platforms, a key concern is that dominant players can restrict access to certain facilities or infrastructure;[48] for example, by closing or limiting access to relevant consumer data, access to marketplaces such as app stores, or to microservices such as data analytics tools.[49] In merger cases, the concern is that the structure of digital markets would not only make it possible, but also that a merged entity would be more likely to engage in such strategies once it has gained access to further tools or inputs. When investigating these exclusionary theories of harm, authorities should consider the merged entity's ability to discriminate against competitors and to favour its own services or products, for example, through restriction access to its infrastructure, preventing interoperability between the platform and competitors, or deteriorating the quality of services provided by rivals, with the intent of foreclosing them.

In the iFood merger case, despite being aware of the exclusivity agreements, the Brazilian authority did not thoroughly investigate the restaurant side of the market and the risk that these agreements could serve as barriers to entry for new players. It did not consider that the merger would expand iFood's reach, by incorporating restaurants that were part of the portfolio of Pedidos Já. More specifically, it did not conduct further investigation into the restrictive clauses that iFood had agreed with big restaurant chains with high visibility and more capacity to attract consumers. That is, it was possible that the merger and the restrictive clauses agreed with restaurants could have been used to prevent new players from offering some restaurants in their platforms, which could have reduced the attractiveness of iFood's competitors.[50] This risk was

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[47] For a detailed discussion of exclusionary theories of harm in digital markets, drawing on a comparison of decisions by the European Commission in the Microsoft case and in the Google case, see John Temple Lang, 'Comparing Microsoft and Google: The Concept of Exclusionary Abuse' (2016) 39 W. Comp. 5.

[48] In this sense, authors argue that the essential facilities doctrine should apply to digital markets. Lina Khan, 'The Separation of Platforms and Commerce' (2019) 119 Columbia Law Rev. 973; Nikolas Guggenberger, 'Essential Platforms' (2021) 24 Stan. Tech. L. Rev. 237.

[49] For example, Ezrachi and Robertson discuss in detail how data collection and data analytics capabilities can lead to market power, and how the enhanced ability to gather and combine data from multiple sources following a merger can lead to exploitation or exclusion in digital markets. Ariel Ezrachi and Viktoria HSE Robertson, 'Competition, Market Power and Third-Party Tracking' (2019) 42 W. Comp. 5.

[50] *iFood merger review,* decision 5/2018/CGAA1/SGA1/SG, para. 22.

not seriously considered in the analysis and dismissed too quickly, based on the understanding that due to the size of the target company, the merger would not significantly increase iFood's market power. The Brazilian authority concluded that any market power by iFood would not emerge from the transaction and therefore, would not justify blocking the merger.[51] The exclusivity agreements which were known to CADE at the moment of the analysis further increased barriers to entry, but their deleterious effects on actual and potential competition were belittled by the SG.

III. THE AFTERMATH OF THE MERGER: EVIDENCE OF ANTICOMPETITIVE BEHAVIOUR

The discussion of the theories of harm that were adopted by CADE in the iFood merger case, and the scrutiny of the evidence the authority considered to back its decision at the time, reveals significant blind spots.[52] As shown above, there were other theories of harm that could have guided a more refined analysis of the case, that would be better suited to the particularities of the markets involved in the transaction. This section provides a snippet of the aftermath of that merger case, tracing relevant developments that occurred both in the food delivery market in Brazil and CADE's enforcement approaches. The aim is not to establish any causal relationship between the facts reported below and the outcome of CADE's merger decision, but rather to describe more recent events that highlight the competition issues that affected the market since the merger and the Brazilian authority's response.

A. Unilateral conduct investigation and interim measures

Over the years following the approval of the transaction, as correctly predicted by CADE, the online food ordering and delivery market grew at a rapid rate in Brazil. The platform iFood remained the dominant company, growing in number of users and restaurants registered in the platform, and expanding its operations to other Brazilian municipalities. The Covid-19 pandemic has significantly boosted the importance of the online food delivery market. In order to slow the transmission of the virus, Brazilian state governments around the country adopted a series of restrictions, which included the closure of commercial establishments and workplaces.[53]

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[51] *iFood merger review*, decision 5/2018/CGAA1/SGA1/SG, para. 24.

[52] The retrospective evaluation draws on the similar assessment performed by Argentesi *et al* of two cases reviewed by the UK competition authority. In their assessment, the authors looked 'back at the original analysis made by the authorities to assess whether the decision the authorities took was reasonable based on evidence that was, or would reasonably have been, available at the time'. Argentesi and others (n 42).

[53] See Thomas Hale and others, 'A Global Panel Database of Pandemic Policies (Oxford COVID-19 Government Response Tracker)' (2021) Nat. Hum. Behav. 529.

Individuals also changed their behaviour and moved many of their activities online. During these closures, digital platforms played a fundamental role, enabling the maintenance of contacts and professional and personal commitments, as well as the continuity of the provision of a series of services and products. These changes in consumer behaviour led to important changes in digital markets, creating new challenges to competition law.[54] Online ordering and delivery applications, in particular, have experienced a substantial growth in Brazil, as in other parts of the world, and helped customers to stay connected to bars and restaurants.

Research conducted by Bain & Company in May 2020 in the main Brazilian state capitals (see Table 1, below), commissioned by Rappi, revealed that iFood had reinforced its dominant position in the online food ordering market, with shares between 60-70% and 70-80%, depending on the metric adopted. From the standpoint of restaurant revenue by platform, iFood accounted for 70-80% of restaurant earnings during the first few months of the pandemic; from the consumers' perspective, iFood represented 60-70% of orders, and adjusting the measure for average value and frequency of orders, iFood's participation in the market was between 60%-70%. During the beginning of the pandemic, the overall proportion of restaurants' revenue coming from delivery services increased significantly from 40-50% pre-pandemic to 70-80% during. The data also revealed a small increase in iFood's market share in the same period, while competitors such as Rappi and UberEATS had a small reduction in their market participation.[55]

Table 1. Proportion of online orders per application, from consumers' perspective (%)

	Mar-2019	Aug-2019	Sep-2019	Nov-2019	Dec-2019	Jan-2020	Feb-2020	Mar-2020	Apr-2020	May-2020
iFood	50-60	50-60	60-70	50-60	60-70	50-60	50-60	60-70	60-70	60-70
UberEATS	10-20	10-20	10-20	10-20	10-20	10-20	10-20	10-20	10-20	10-20
Rappi	>10	>10	>10	>10	>10	>10	>10	>10	>10	>10
99 Food	0	0	0	0	0	>10	>10	>10	>10	>10
Others	20-30	10-20	10-20	10-20	10-20	10-20	10-20	>10	>10	>10

Source: Bain & Company (2020), retrieved from *iFood unilateral conduct investigation*

[54] Priscila Brolio Gonçalves, Coutinho, Diogo R. and Beatriz Kira, 'Virus and Screens: The Economic Law of Digital Platforms in the COVID-19 Pandemic' (2022) 13 Revista Direito e Práxis 44.

[55] Data from economic report by Bain & Company, included in Rappi's complaint in the *iFood unilateral conduct investigation*. The table contained in the public version of the petition shows only the brackets for each company, which prevents a categorical reference to the size of the change, but the document describing the text mentions the direction of the change, reporting a grow in iFood's participation and a decline in that of its competitors.

Overall, the structure of the market suggests that the expectation that competitors such as UberEATS and Rappi would impose effective rivalry in the market has not fully materialised. In fact, UberEATS, the company that CADE hoped would grow into a significant player, has ended its restaurant delivery services in Brazil in March 2022.[56] The participation of iFood in the market seemed to have only grown in recent years. This may have been a result of the efficiencies achieved through the merger (or series of mergers), which certainly were exacerbated by the pandemic (an unpredictable event), but it could also be an indication of exercise of market power by the merged entity. Indeed, there is further evidence that iFood is exerting its market power, as illustrated by the concern in a recent investigation by CADE into the exclusivity agreements made with some restaurants that use the platform.

In September 2020, Rappi filed a complaint that triggered an investigation by CADE into the business practices of iFood. According to Rappi, iFood had been using its dominant market condition to hinder the performance of competitors, through the signing of exclusive dealing agreements with partner restaurants.[57] The concern was that the adoption of this strategy, which was already known to CADE at the time of the Naspers/Delivery Hero merger, was raising barriers to entry and expansion, preventing new companies from entering and competing in the market. As iFood is the dominant player in the market, restaurants had strong incentives to adhere to its restrictive business model. Rappi's claims were also supported by the Brazilian Association of Bars and Restaurants (Abrasel in the acronym in Portuguese), who filled a complaint in December 2020 arguing that, in the context of the pandemic, online food ordering applications have become more important channels for bars and restaurants to sell their products. Abrasel further argued that, because of iFood's leading position, bars and restaurants have become dependent on the platform, and are under even more pressure to adopt its restrictive terms of services with exclusivity clauses. Following a preliminary investigation, CADE decided to adopt interim measures in March 2021, banning iFood from signing new exclusivity deals with restaurants for the duration of the investigations.

The provisional ruling offered important insights into how the approach of the Brazilian competition authority to digital platforms has evolved since it decided on the iFood merger case. In terms of analytical steps, the technical notes produced by the SG in support of the preventative measures clearly articulated the importance of examining the effects of behaviour on both sides of the platform simultaneously, taking into account cross-side network effects and the significant advantages they provide to the dominant player.[58] In doing so, the document references the study on competition in digital markets published by DEE, demonstrating that the Brazilian authority's efforts to better understand the nuances of such markets are already translating into improved

[56] 'Uber to Bow out of Brazil Restaurant Deliveries' *Reuters* (6 January 2022) <https://www.reuters.com/technology/uber-end-uber-eats-operations-brazil-report-2022-01-06/>.

[57] Preparatory Proceeding (PP in the acronym in Portuguese) No. 08700.005254/2019-57, opened by the SG on 29 October 2019.

[58] *iFood unilateral conduct investigation*, Technical Note 4/2021/CGAA1/SGA1/SG/CADE, paras 30-31.

decision-making practices.[59]

This improved understanding of competitive dynamics in digital platforms has also led to a more nuanced comprehension of the risks that exclusive dealings pose to competition. The interim ruling expressed concern about the terms of contracts, particularly the fines and extra costs imposed on restaurants if they broke the exclusivity clause. This signalled that potential competitors would face significant additional costs to include these restaurants on their platforms. The SG referred to iFood's 'first mover' advantage, which contributed to its dominant position in the sector. Unlike the analysis in the merger case, the SG argued that the adoption of exclusivity clauses by the 'first mover' would have a high potential to harm competition. A key aspect was the fact that iFood entered into exclusivity agreements with strategic restaurants that would attract users to its platform. These restaurants were important for any entrant seeking to reach a critical mass of customers, making them more attractive to businesses and enabling them to expand their portfolio.[60]

The provisional ruling shed light on the type of theory of harm that the Brazilian authority would likely apply to assess the legality of exclusive dealings in a final decision on the merits. Specifically, the ruling examined whether the exclusive dealings could lead to substantial market closure. Whilst the SG acknowledged that the use of exclusive dealings is not *per se* illegal and that firms may have legitimate reasons to adopt such an arrangement, the authority also noted that when dominant agents adopt exclusive clauses, it can result in market closure, higher barriers to entry, and increased costs for competitors. This can limit their activities in the market or force them to deal with less attractive suppliers – in this case, less attractive restaurants. To determine whether the exclusive clauses can harm competition, the SG stated that it would be necessary to investigate the extent of market closure, duration, and renewal conditions of such clauses.[61] As such, the ruling provides important guidance on the factors that the competition authority is likely to consider when evaluating the legality of exclusive dealings in digital markets in the future. Arguably, if the exclusive dealings agreements encompass only a fraction of the market so that there are enough users in both sides of the platforms that could be attracted to rival platforms, or are in force only for a limited period of time, then the market could remain contestable and competition concerns would be mitigated.[62]

In their defence, iFood submitted an economic report, prepared by *LCA Consultores*, aimed at demonstrating three key points regarding the exclusivity contracts. Firstly, that the sanctions imposed in the event of contract termination were not restrictive and justified by the need to

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[59] *iFood unilateral conduct investigation*, Technical Note 4/2021/CGAA1/SGA1/SG/CADE, paras 31-32.

[60] *iFood unilateral conduct investigation*, Technical Note 4/2021/CGAA1/SGA1/SG/CADE, paras 33-34.

[61] *iFood unilateral conduct investigation*, Technical Note 4/2021/CGAA1/SGA1/SG/CADE, paras 37-39.

[62] This was also the approach adopted in a similar case involving platform markets, when the Brazilian authority provisionally allowed the health and wellness firm Gympass to use exclusive dealings only when it could provide concrete evidence of its direct investments in capital goods or infrastructure of gyms, and the restrictive clause could only have a limited duration – that is, it should only be valid for the necessary period to pay back the investment. See Investigatory Procedure 08700.004136/2020-65, Technical Note 14/2021/GAB-SG/SG/CADE, 17 December 2021 [hereinafter *Gympass case*]

recoup the investment made. Secondly, that the exclusivity deals led to sales growth, market expansion and were important tools for differentiation between platforms. And thirdly, that the scope of the contracts did not create barriers to entry and that, due to the low costs of entering and existing platforms, consumers could use multiple platforms, thus preventing iFood from potentially abusing its market power.[63]

After conducting an initial analysis, the SG has determined that iFood's exclusive agreements may have captured some key restaurants, thus making the portfolios of other competing apps less attractive to consumers, and hindering their market development. Moreover, these restrictive clauses increase the costs for a restaurant that wishes to terminate their exclusivity agreement with iFood, making it necessary for competing platforms to make an attractive proposal to offset the losses incurred from breaking the exclusivity contract. While the actual magnitude of these switching costs and whether they are significant enough to harm competition require further investigation, the SG found sufficient evidence that they exist. These observations led the SG to conclude that, while a thorough investigation would be necessary to establish whether iFood's exclusive clauses constitute an anticompetitive practice, there was the potential for harm to competitors that would provide the legal basis for the adoption of interim measures.

In terms of the measure's scope, the SG has prohibited iFood from entering into new contracts that include an exclusivity clause and from amending existing contracts to add such clauses.[64] However, the interim decision did not invalidate the restrictive clauses in contracts that were already in place on the date of the decision. This means that iFood was not required to terminate existing exclusivity agreements, even with key restaurants, and could still use these agreements to prevent competing platforms from challenging its dominant position. Given the circumstances of the case, it is debatable whether CADE's interim decision was in fact able to achieve the stated objectives of 'preventing future competitive harm' and 'ensuring the normal operation of companies in the market for online food ordering and delivery services'.[65]

B. CADE's settlement agreement with iFood

After the interim decision, CADE continued its investigation and gathered evidence to determine whether iFood's exclusivity agreements increased operating costs for its competitors and created barriers to entry and expansion in the market, hindering new companies offering

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[63] *iFood unilateral conduct investigation*, Technical Note 4/2021/CGAA1/SGA1/SG/CADE, para. 15.

[64] The preventive measure prohibited iFood from entering into new contracts that included exclusivity clauses and prohibited the company from changing existing contracts to include the restrictive exclusivity clause. The decisions allowed iFood to maintain the contracts that already included the exclusivity clause. However, these contracts can only be extended for periods of one year if they were to include an exclusivity clause (without limit of renewals). These measures will be in place CADE reaches a final decision on the legality of the practice.

[65] *iFood unilateral conduct investigation*, Technical Note 4/2021/CGAA1/SGA1/SG/CADE, para. 66.

online food ordering and delivery services in Brazil.[66] In July 2022, the SG began to negotiate a settlement on behalf of CADE, with the aim of agreeing on the terms of a cease and desist agreement (TCC, in the acronym in Portuguese). This follows a trend in other digital market cases examined by CADE, where settlements are used to resolve cases more quickly and mitigate information asymmetries.[67] After months of negotiations, the draft agreement was presented to CADE's Tribunal along with a technical note explaining the investigation's findings and the proposed measures' reasoning. [68] In February 2023, almost two years after the interim measures were adopted, the Tribunal ratified the settlement agreement.[69]

In the technical note, the SG outlined the theories of harm considered, explained the competition concerns discovered during the investigation, and detailed how the terms of the settlement would alleviate these concerns. The primary theory of harm analysed by the SG related to whether the exclusive agreements would lead to market foreclosure, higher barriers to entry, and increased costs for competitors. Through the investigation and information provided by competing marketplaces and restaurants, the SG identified three principal competitive issues that it aimed to tackle through the negotiated settlement.[70]

The first issue involves the scope of the market covered by iFood's exclusive dealings, and the concern that these commitments – especially with key or strategic restaurants – have created significant obstacles for competitor marketplaces to enter and operate in the market. To address this concern, the settlement prohibits iFood from signing or renewing exclusivity agreements or taking any contractual measures that could lead to exclusivity with restaurant brands that have 30 or more stores. Existing exclusivity agreements with such brands must be terminated by 30 September 2023 (clause 4.8 of the TCC). The SG considered this a critical step in ensuring that competitors will have the necessary critical mass to succeed in the online delivery market. Based

[66] To aid the investigation, the SG solicited information from several market participants, such as 21 restaurants (both exclusive and non-exclusive to iFood), five competing marketplaces (both established and new entrants), and five associations/unions operating in the restaurant and bar sector. The information sought pertained to the significance of delivery and marketplaces for restaurants, the attributes of online food delivery marketplaces, the existence or lack of multihoming by restaurants and consumers, the merits and drawbacks of adopting exclusive policies for platforms, and the characteristics of the exclusivity contracts entered into with iFood.

[67] For a discussion of the use of settlement agreements in unilateral conduct investigations by CADE, see Pereira Neto, Pastore and Paixão (n 41).

[68] *iFood TCC procedure*, Technical Note No. 3/2023/CGAA1/SGA1/SG/CADE, 7 February 2023.

[69] Article 85 of Brazilian competition law allows CADE to enter into a TCC with a company under investigation for anticompetitive behaviour. The TCC aims to stop the harmful effects of the company's behaviour. According to the law, CADE will only agree to a TCC if it considers the terms appropriate and justified, and if the deal is in the best interests of protecting competition.

[70] The investigation focused on the arguments presented by iFood's main competitors. For instance, 99Food contended that iFood's high market share was not due to operational efficiency but rather the inability of competitors to challenge its market power. According to them, being present in strategic locations and including strategic restaurants that attract consumers was crucial. 99Food argued that providing promotions to customers and charging lower fees would be a more effective way to support restaurants and drive growth, instead of exclusive contracts proposed by iFood. Furthermore, 99Food suggested that iFood may be promoting exclusivity by offering non-linear and discriminatory financial incentives to restaurants. Rappi also challenged iFood's reasoning, claiming that the issue was not the importance of exclusive restaurants to iFood's gross merchandise value (GMV) but the adverse impact that the inability to contract with key restaurants would have on the performance of competitors, especially new entrants. *iFood TCC procedure*, Technical Note No. 3/2023/CGAA1/SGA1/SG/CADE, paras 24-25.

on market data, removing these restrictions would enable competitor marketplaces to partner with the largest restaurant chains in Brazil, which represent over 80% of the number of stores of food service chains with five or more locations.[71]

The SG also addressed the issue of the scope of the market affected by exclusivity by establishing national and local maximum percentage thresholds for such contracts. Clause 4.1 sets a national cap of 25% for the total volume of business, in terms of GMV, linked to exclusive restaurants on the platform. Clause 4.2 establishes a cap for relevant municipalities – those with more than 500,000 inhabitants – where the number of exclusive restaurants registered on the platform cannot exceed 8% of the active number of restaurants on the platform. These limits will take effect on the first day of the seventh month of the TCC's validity and remain in place for the following 48 months. Prior to this, there will be a transitional period during which the thresholds can be gradually reached. In the first three months, contracts with exclusivity commitments may represent a maximum of 28% of the total national GMV and a maximum of 10% of the number of restaurants in relevant municipalities.[72]

The second main issue discussed in the technical note by the SG pertained to the efficiency defence related to the benefits that exclusivity could bring to small and medium-sized restaurant brands. iFood claims that exclusivity is necessary to provide incentives for investments that generate market efficiency and benefits to restaurants and consumers, such as advertising campaigns, personalised consulting for restaurants, increased visibility on the platform, and, exceptionally, investments in physical assets. However, the investigation revealed that the benefits offered by iFood in exchange for exclusivity had decreasing marginal efficiency for small and medium-sized restaurants. That is, their growth rate decreases as their operational activities are optimised and the number of stores expands.[73]

To mitigate this concern with decreasing efficiencies, the settlement provides obligations related to the duration of exclusive dealings. It establishes a maximum duration of two years for exclusivity commitments entered into after the approval of the TCC. After the two-year period, the partner will be subject to an 'exclusivity quarantine', that is, a cooling-off period of one year during which the partner must remain without an exclusivity commitment.[74] According to the

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[71] *iFood TCC procedure*, Technical Note No. 3/2023/CGAA1/SGA1/SG/CADE, paras 48-49 and 58-59.

[72] *iFood TCC procedure*, Technical Note No. 3/2023/CGAA1/SGA1/SG/CADE, paras 60-61.

[73] The SG also noted that large restaurant chains or brands have little or nothing to gain from the benefits offered by iFood in exchange for the exclusivity, because they already have public recognition and have reached a level of maturity and expertise in their operations where investment decisions and funding are made independently. *iFood TCC procedure*, Technical Note No. 3/2023/CGAA1/SGA1/SG/CADE, para. 59.

[74] The agreement sets different deadlines for the commencement of the quarantine period, depending on the terms of the contracts in place at the time of the settlement agreement's ratification. Clause 4.5.1 prohibits iFood from entering into a new exclusivity commitment with a partner before the end of the quarantine period for future periods. Clause 4.5.3 states that exclusivity commitments that have been in place for more than two years must be subject to quarantine immediately after their current expiration date. Partners with an exclusivity commitment remaining for over a year will be released from the obligation of exclusivity, as well as the obligation to pay a fine and other sanctions for non-compliance, after one year from the ratification of the settlement agreement. *iFood TCC procedure*, Technical Note No. 3/2023/CGAA1/SGA1/SG/CADE, para. 67.

SG, the aim is to periodically free up restaurants to contract with other platforms, opening up space for other partnerships in the market.[75] However, the deal also foresees the possibility of an exception to this general rule, allowing iFood to maintain exclusive commitment with certain partners for a longer period than the standard limit of two years, provided that the investments made by the platform are sufficiently relevant to generate a significant increase in revenue received by the restaurant on the app. The exception to the standard two-year period can only be negotiated with a maximum of 50% of contracts with an exclusive commitment and is subject to a performance target. This target states that during the period of the contract, iFood's investments in the partner's operation must generate an increase in revenue received through the iFood platform that is at least 40% higher than the growth of the food delivery market in the previous year.[76]

The third competitive problem identified by SG was related to alleged iFood business practices that were leading to *de facto* exclusivity for restaurants. To address this, the negotiated settlement prohibits certain practices that have such effect for non-exclusive restaurants (Clause 4.6). These practices include preventing partners from offering promotions on competing platforms, prohibiting partners from mentioning other food delivery services in their own advertising material, prohibiting partners from contracting with other marketplace delivery platforms after the exclusivity agreement ends, tying incentives and discounts to a commitment to conduct the majority of their online delivery business through iFood, and establishing personalised discounts for specific partners. This clause aims to prevent commercial practices that could lead to the compulsory loyalty of restaurants to iFood, which would undermine the previous limits established to restrict the scope and duration of exclusivity contracts.[77]

Finally, the negotiated settlement included two commitments that were not directly related to the initial scope of the case but emerged during the investigation and were considered relevant by the SG. The first commitment is the prohibition of price parity clauses in contracts between iFood and partner restaurants (Clause 4.7). The SG correctly identified that parity clauses, also known as MFN clauses, are harmful to other market players because they can create a barrier to entry. In this specific case, new platforms that offer lower prices than iFood would not benefit from increased demand, as partner restaurants are prohibited from offering lower prices on other channels. This practice is also harmful to end consumers who are unable to access lower prices on competing marketplaces, especially when conducted by the dominant player.[78] The second commitment requires iFood to make its Application Programming Interfaces (APIs) for the food catalogue, ordering, and finance available to external developers (Clause 4.10). This measure would allow integration between the iFood platform and partner restaurant point-of-sale

[75] *iFood TCC procedure*, Technical Note No. 3/2023/CGAA1/SGA1/SG/CADE, para. 68.
[76] *iFood TCC procedure*, Technical Note No. 3/2023/CGAA1/SGA1/SG/CADE, paras 69-70.
[77] *iFood TCC procedure*, Technical Note No. 3/2023/CGAA1/SGA1/SG/CADE, paras 72-73.
[78] *iFood TCC procedure*, Technical Note No. 3/2023/CGAA1/SGA1/SG/CADE, para. 74.

software, thus combating the tendency of restaurants to use only one platform due to operational and order management difficulties – something that emerged from market data.[79] As such, access to the APIs would facilitate multi-homing on the side of the restaurants and mitigate network effects that are typical of multi-sided markets.[80]

C. How has CADE's assessment changed over time?

While it is still too early to determine if the negotiated settlement between iFood and CADE will effectively address the competitive concerns that emerged during the investigation, it indicates that the SG has developed a more nuanced understanding of the competitive dynamics in digital markets, as evidenced by their focus on barriers to entry and on the possibility of multi-homing. Additionally, the inclusion of two additional commitments outside the initial scope of the investigation shows a more proactive and forward-looking approach by the authority. This represents a significant departure from the approach taken in the merger case, where the authority became aware of business practices that could lead to significant competitive problems but chose not to act because they were considered outside the scope of the merger review.

Overall, the analysis undertaken by CADE in the unilateral conduct case reveals that the authority has become more familiar with the growing body of literature that examines the particularities of digital markets. Both the interim decisions and the documents produced to support the settlement provide a careful and detailed analysis of the relationship between the multiple sides of the markets connected by the platform. The authority has explicitly articulated competition concerns that are typical of these multi-sided markets, including the difficulty in defining the relevant market, the competitive advantages of being a first mover, and the relevance of multi-homing to prevent network effects from leading to market foreclosure.

It is important to note that it took CADE a total of twenty eight months to settle the case, without reaching a final decision on the merits. While interim measures that were arguably able to mitigate some of the identified competition problems were adopted, the delay in the authority's response, particularly in a case involving fast-moving and dynamic markets, is concerning and highlights the need to review internal procedures and build capacity to address competition concerns in digital markets more effectively and promptly. This raises questions about whether CADE could have saved significant time and financial resources by investigating the anticompetitive effects of iFood's exclusive dealings when they first became aware of them in the context of the merger investigation, or by monitoring the online food delivery market more closely after identifying iFood's strategy of acquiring potential competitors.

The decision to settle aligns with CADE's cautious approach to digital markets, prioritising negotiated solutions over unilateral imposition of remedies. While this approach mitigates

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[79] *iFood TCC procedure*, Technical Note No. 3/2023/CGAA1/SGA1/SG/CADE, para. 75.

[80] For a discussion of how interoperability lower barriers to entry and supports competition in digital markets, see Herbert Hovenkamp, 'Antitrust Interoperability Remedies' (2023) 123 Columbia Law Rev. 1.

information asymmetries and increases the likelihood of compliance, there are also associated challenges and costs. Settlement agreements tend to have a regulatory nature, requiring closer monitoring to assess whether competition concerns have been sufficiently addressed.[81] In this case, the high level of technical detail in the agreed commitments raises questions about the authority's ability to effectively monitor compliance. Despite the appointment of a trustee to oversee compliance with the behavioural remedies established in the TCC, the SG is legally obligated to monitor compliance with the terms and conditions of the deal.[82] This will certainly require the authority to allocate resources and build the necessary capacity to effectively monitor compliance.

CONCLUSION

In March 2018, CADE unconditionally approved a merger involving the firm iFood, the dominant platform in the market for online food delivery in Brazil. Over the years following the approval of the merger, this market grew at a rapid rate and gained even more relevance in the context of the Covid-19 pandemic when the volume of online food orders experienced a significant boom. More recent evidence shows that iFood has remained the dominant company, growing in number of users and restaurants registered in the platform, and expanding its operations to other Brazilian cities since the merger. At the same time, its business practices started to draw attention from competitors and again from the Brazilian competition authority.

These two cases involving the firm iFood's examined in this article shed light on the role the Brazilian competition authority has played in the supervision of the power of this economic agent, specifically, and on CADE's decisional practices and analytical steps in cases involving digital platforms, more generally. While it is not possible to claim any causal relationship between CADE's decision in the merger case and iFood's ability to exercise unilateral market power, nor to confidently argue that the market would have evolved differently had CADE decided to impose remedies or to prohibit the merger, the *ex post* analysis of the iFood merger case conducted in this article revealed a number of gaps in CADE's assessment of the case. In the more recent investigation, it is still too early to determine whether the settlement will effectively address the immediate concerns related to iFood's market dominance and conduct. However, the case reveals that CADE's understanding of digital markets has progressed significantly. The decision to settle also sheds light on the authority's stance towards exclusive dealings in digital markets, although the absence of a final decision on the merits of the case makes it difficult to assert that it has established robust parameters that will apply to future cases.

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[81] See Filippo Lancieri and Caio Mario S Pereira Neto, 'Designing Remedies for Digital Markets: The Interplay Between Antitrust and Regulation' (2022) 18 J. Compet. Law Econ. 613.

[82] Brazilian competition law (Law 12,529/2011), article 9, V, article 13, IX, and article 52.

Overall, the discussion of the cases leads to three main conclusions. Firstly, the article shows that when dealing with multi-sided digital platforms CADE needs to consciously adapt conventional steps of analysis and adopt new theories of harm that consider more broadly the competitive dynamics and interactions between the different group of users that orbit around digital platforms. In the merger case, by adopting conventional economic metrics, CADE might have neglected or too quickly dismissed some factors that lead to higher barriers to entry, including strong network effects that are typical of platform markets. This suggests that metrics such as historical entry rates, market share, and the number of users at one particular point in time provide an incomplete picture of highly dynamic markets and should not be considered the main grounds for any decision.[83] Further, even from a narrower econometric analysis, these measures are not appropriate to measure dominance in multisided markets, as they do not consider the interdependence between the multiple groups of users that are typical of these markets. This would require moving away from static metrics of market power, such as market share, to look at changes in the market structure over time, such as the history of past acquisitions by the firms involved in the transaction and the whether the transaction would eliminate a player that had the potential to grow into a relevant rival.

From a more substantive perspective, in learning from its past experiences, CADE should continually adapt its theories of harm to examine how concentrations in digital markets are able to generate the conditions and incentives for commercial practices that could create, reinforce, or entrench a dominant position, lead to abuse of market power, and thus have a negative effect on competition. By crafting new theories of harm, tailored to the particularities of digital markets, the authority should be able to capture the web of connections and relationships that are established around a dominant digital platform, examining the multitude of demand-side complementary products and services that comprise a digital ecosystem.[84] This, in turn, would require the competition authority to ask crucial questions around how a conduct or a proposed merger would impact the constellation of players around a multi-sided digital platform, including local restaurateurs and producers that would be fighting to enter the market and compete against larger chains.

Despite the shortcomings in the merger case, decided in a moment when the scholarship and practice around the challenges of digital markets was still incipient, the documents in the more recent unilateral conduct investigation point to an attempt to update CADE's decisional practice. The technical notes produced by SG and the interim decision provides some evidence the Brazilian competition authority has refined its understanding of the particularities of digital markets and of the effects of exclusive dealings in these markets since the merger case.

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[83] Jenny (n 32).

[84] Zingales and Renzetti reach a similar conclusion, arguing that CADE's current approach to mergers in digital markets misses crucial considerations about the dynamics of digital ecosystem and how market power can increase through conglomerate mergers. Zingales and Renzetti (n 11).

However, by settling the case without a substantive decision, CADE has sidestepped the need to address some of the core issues head-on. The iFood settlement, while imposing restrictions on the use of exclusive dealings, has left unanswered broader questions around CADE's assessment of market power and barriers to entry in the food delivery sector, in particular, and in digital markets, more generally.

Secondly, the article reveals that by choosing to conduct a narrow analysis of the individual merger case at hand, CADE failed to consider more broadly the implications of the merger on the structure of the market and the business practices of the merging entities. CADE should not have been deterred from investigating evidence of anticompetitive behaviour in the context of the merger review case, but rather should have looked at the wider range of activities and practices that are relevant to the analysis of the competitive dynamics. In many ways, the conceptual division between merger review and unilateral conduct that has guided enforcement practices of competition authorities in many jurisdictions is a formalistic division. Firms can adopt a complex and diverse set of business strategies that could have negative effects on competition and consumers, often combining consolidation of companies and assets, contractual arrangements, marketing practices, among others.

These strategies, in turn, often have ramifications that affect players beyond the two or more companies that are involved in a specific transaction, such as a specific merger. This is even more true when it comes to multi-sided digital markets, where multiple groups of users (including corporate clients) are so intertwined that the behaviour of one agent can affect many others. At a minimum, because unilateral conduct investigations are often time and resource consuming, there is an argument that the competition authority would need to be more strict with mergers in markets with high barriers to entry. Specifically, any evidence of anticompetitive behaviour in the context of a merger review should have been referred to the appropriate unit within the competition authority for monitoring and could eventually trigger a new investigation. Ideally, the authority should have the flexibility to consider and address the whole set of concerns related to unilateral conduct in the review mergers, including seriously considering the effect of past consolidations when reviewing and developing remedies.

Finally, the article reveals a third lesson that pertains to the institutional changes necessary for strengthening CADE's ability to identify competition issues promptly and appropriately, as well as monitor and enforce remedies effectively. In the merger case, despite the Brazilian competition authority recognizing that the acquisition was part of iFood's broader strategy of acquiring potential competitors, it failed to monitor the market and did not take seriously the risk that this strategy would lead to loss of potential competition and close the market to competitors. In the abuse of dominance case, although the settlement requires iFood to appoint a third-party trustee to ensure compliance with the specific terms and conditions outlined in the settlement, this does not relieve the authority of its legal obligation to monitor the effectiveness of the agreement and guarantee the long-term competitiveness of the online food delivery market at large. This means that the authority would need to allocate technical and human resources to

fulfil this task.

In terms of preventative strategies, to ensure that competition problems in markets of concern are addressed within a reasonable timeframe, CADE would benefit from developing tools to monitor the market and scan more proactively for potential issues. Indeed, when analyzing the iFood merger case, the SG noted the need to carefully monitor the market for food deliver in Brazil in order to identify competition problems, however there is no evidence suggesting that any monitoring activity was carried out.[85] Establishing a market intelligence hub responsible for monitoring markets of concern and requesting data from firms, without the need to establish a formal investigatory procedure, could reduce information asymmetry and help to identify potential competition problems early on. This, in turn, would require building capacity and investments in personnel and technology to examine the data gathered. Considering the particularities of certain markets, such as digital markets, CADE might be required to build in-house expertise to understand the nature and functioning of these markets. One trend that has been observed in other jurisdictions (for example, the Competition and Markets Authority in the UK), is the establishment of digital or data science units, which would be more prepared to obtain evidence of structural problems in digital markets.[86] In Brazil, such market monitoring unit could build on the expertise that CADE has already created in data mining for cartel screening (named *Projeto Cérebro*, or Brain Project), which could expand to incorporate enhanced data analytics that detect other competition issues in digital markets.[87]

From the perspective of remedies, CADE should build capacities to support the design, enforcement, and review of remedies to ensure they remain effective. Indeed, the effectiveness of behavioural, and, at times, *quasi*-regulatory remedies in the medium to long-term have been the target of criticism in the literature, as they create the need for constant monitoring to ensure compliance and to make sure the remedies remain effective and proportional over time.[88] Behavioural orders arising from merger reviews or unilateral conduct investigation can be a form of *ex ante* regulation in that they govern the future behaviour of firms.[89] Such remedies are increasingly common but bring with them concerns regarding costs and the need for adequate expertise to monitor compliance, which the competition authority would need to develop.

In Brazil, the competition authority may not have the necessary capability and resources to implement and enforce similar remedies directly in a greater number of instances. Nevertheless, there may be institutional arrangements that enable regulatory agencies' expertise and resources to be utilised in enforcing competition law, depending on the issue's nature. Specifically, CADE

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[85] In fact, CADE only decided to open the unilateral conduct investigation after it received a formal complaint from a competitor.

[86] For details about the CMA's Digital Markets Unit, see https://www.gov.uk/government/collections/digital-markets-unit.

[87] World Bank (ed), *World Development Report 2021: Data for Better Lives* (Washington DC, World Bank 2021).

[88] Lancieri and Pereira Neto (n 81).

[89] N Dunne, 'Between Competition Law and Regulation: Hybridized Approaches to Market Control' (2014) 2 J. Antitrust Enforc. 225.

could work alongside sector regulators that already have the muscle to exercise the oversight of markets, either by strengthening existing collaborations, such as in the case of the Brazilian Central Bank, or establishing new and enduring ties, such as in the case of the recently created Brazilian Data Protection Authority.