

THE BRAZILIAN DATA PROTECTION POLICY AND ITS IMPACTS FOR COMPETITION ENFORCEMENT



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I. INTRODUCTION

Four out of ten of the most downloaded antitrust articles of 2018 were about the challenges competition policy faces in the digital economy.² While this debate has multiple fronts, discussions about the interface between competition and data protection represent one of the most prominent. In 2016, the French and German competition authorities published a joint paper on the topic, arguing there was much potential data-based anticompetitive conduct to be investigated.³ In early February the German antitrust authority ruled that Facebook abused of its market power by the hands of “exploitative data collection,” in the first case to date to explicitly bridge both fields.⁴ In Europe, Commissioner Margrethe Vestager has long defended the need for regulating tech companies and argued data could play a role in constituting market power – especially regarding merger review.⁵ In the United States, for its part, the discussions proposed by the so-called Neo-Brandeisian school have caused academics to debate the potential antitrust implications of data collection.⁶

Yet, to discuss antitrust and data protection in Brazil is to navigate uncharted waters. There is no legal device in the country that properly clarifies the interface between the two legal branches. Also, the Brazilian antitrust authority (“CADE”) has never directly tackled the issue in any case. Although some individual members of the authority have commented on the topic, there is no official statement about the role data can play in competition policy – which, in turn, does not mean the authority is not interested in the topic.⁷ In August 2018, CADE hired a consultant to work together with the Department of Economic Studies to develop a study on the challenges for antitrust in the digital economy. In early February, the authority announced it is recruiting two more consultants to develop works

2 Available at <https://econcurrentialiste.com/2019/01/02/the-10-most-downloaded-antitrust-articles-of-2018/>.

3 Available at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html;jsessionid=94562779C7216ECF430D4C112D1E4306.1_cid371?nn=3591568.

4 The full decision is not yet available but the Bundeskartellamt published a FAQ and a press release about the case, both of which are available in English at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

5 For example, one of her latest announcements summarizes these opinions presented https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/protecting-consumers-digital-world_en.

6 Wu, Tim. The Curse of Bigness: *Antitrust in the New Gilded Age*. Columbia Global Reports, 2018.

7 For example, former-Commissioner Cristiane Alkmin Junqueira Schmidt has written short article defending the consumer welfare standard should encompass considerations other than price, such as data privacy. Available in Portuguese at <https://www.jota.info/opiniao-e-analise/colunas/coluna-da-cristiane-alkmin/hipster-antitrust-poder-de-mercado-e-bem-estar-do-consumidor-na-era-da-informacao-28122018>.

regarding competition and the digital economy.⁸

Also, in late 2018, CADE's Plenary opened an administrative inquiry to investigate potential anticompetitiveness in the payment systems sector regarding data sharing. The case followed a consultation presented by Redecard regarding the legality of a contractual clause that demanded payment acquirers to share some sensitive data with its operations. Despite the matter not being explicitly connected to privacy, when delivering her opinion on the consultation, Commissioner Paula de Azevedo highlighted how the case represented a valuable opportunity to assess the relevance of data from a competition perspective and emphasized that it was relevant for antitrust authorities to be vigilant of the implications of data custody in terms of competition.⁹ It is possible to say, therefore, that although CADE seems to be wary of the debates surrounding the topic, the antitrust authority has not voiced an official opinion about it yet.

On the other side, there is uncertainty about how the Brazilian data protection public policy will be structured in the coming years. As this article intends to show, the enforcement of data protection legislation is the focal point which will define what the interplay between competition policy and data protection will look like in the future.

II. THE NEW DATA PROTECTION LEGISLATION IN BRAZIL

Brazil did not have a General Data Protection Act ("GDPA") until August 2018. The LGPD, as it is known by its Portuguese acronym, creates a new legal framework for the treatment of personal data in Brazil, both online and offline, in the private and public sectors – complementing and to some extent substituting the former diffuse sectoral-based regulatory framework. The topic was the subject of a broad discussion in the Legislative branch, with different bills being debated in the two houses of Congress.

After approval by the Congress, bills are subject to presidential approval or veto. On August 14, former President Michel Temer vetoed some provisions of the new law, including the creation of the national data protection authority, arguing that the inclusion of the agency was legally flawed.¹⁰ The expectation was for the issue to soon be resolved, with the creation of the authority through a separate instrument. Although the LGPD is only set to come into effect in 2020, the veto raised concerns because the authority supported the whole data protection regulatory system and would hold an important role in both structuring the public policy and making sure it works accordingly.

Since August, interest groups, including non-governmental organizations, academics, and representatives from the private sector, pressed the Government to enact the complementary LGPD legislation. In addition to the reasons already mentioned, the topic gained urgency as a result of the Brazilian presidential transition in 2019 – Temer would step down in December 2018 and a new government would take office starting January 1, an administration that provided little clarity during the presidential race on how it would tackle the matter and what its commitment to the data protection legislation would be.

On December 28, the Executive Order was published, creating the National Data Protection Authority ("ANPD").¹¹

The structure of the ANPD is different from that set forth in the original bill: instead of adopting the autarchy-model, which is the structure of most regulatory agencies in the country, the ANPD was envisioned as a federal public administration entity, subject to the control of the Office of the President. In other words, instead of being autonomous, the authority will be closely connected to the government, which raises concerns regarding the path to be followed by the data protection public policy in Brazil, especially regarding the applicability of the LGPD to the public sector.¹²

8 While one of the researchers will carry out research about this interface in BRICS' countries, the other shall conduct a more general international benchmarking about competition and digital economy as well as organize an international seminar and workshop about it. Information about these recruitment processes can be found at <http://www.cade.gov.br/aceso-a-informacao/concursos-e-selecoes>.

9 Consultations n°s 08700.004009/2018-41, 08700.004010/2018-76, 08700.004011/2018-11 e 08700.004012/2018-65, all jointly presented by Redecard.

10 Although the bill that later came to be the LGPD was proposed by the Executive, the inclusion of the data protection authority was carried out by of a member of the Legislative. The Office of the President alleged this constituted a violation of Articles 61, § 1º, II, 'e' and 37, XIX of the Brazilian Constitution.

11 Executive Orders are legislative acts through which the President can enact legislation that comes into force immediately, without the approval of the National Congress. Before becoming permanent, however, the orders must be approved by the National Congress in no more than 120 days. In this sense, there is still some uncertainty when it comes to the actual creation of the authority, for Congress may still impose changes on the system currently in place.

12 The LGPD applies both to private and public sectors, though regulations differ in what they require entities to treat personal data.

Experts discussing the implementation of the GDPR had already pointed towards the importance of centralized enforcement, which would ensure a single forum for the debate of the regulations with stakeholders, secure technical soundness of the decisions, and facilitate coordination with other agencies and public policies that will be affected by the new rules – e.g. the GDPR’s specific provisions addressing data related to healthcare, which naturally implicates the National Health Agency.

III. DATA PROTECTION AND COMPETITION – THE INTERPLAY BETWEEN PUBLIC POLICIES

Regarding competition, this development is crucial. As mentioned, CADE has so far addressed data-related matters in a rather timid manner, carefully weighing when and if the allegations bear significance for antitrust. It has, however, suffered pressure from some stakeholders who believe it should be more active, embrace more data concerns, and use the investigations currently underway to send a message to the private sector. Perhaps the most meaningful example is the study developed in 2018 by Intervozes.

Intervozes is a civil society organization focused on promoting the right to communication in Brazil. In May 2018 it launched a study on “Digital Monopolies: Concentration and Diversity on the Internet” with the far-reaching aim of identifying the degrees of concentration and diversity on the Brazilian Internet, looking specifically at apps and content providers.¹³ Although suffering from conceptual inaccuracies, the study encourages antitrust scrutiny to face the “perils” associated with the digital economy. When launching the study, the organization highlighted potential privacy violations arising from companies placed in the data-driven economy.¹⁴

The establishment of a data protection authority (“DPA”) might to some extent minimize the pressure exercised by stakeholders upon CADE, for data related issues would gain a specific forum and the tendency would be for interested parties to address their concerns to this new agency. Moreover, the creation of a DPA would go a long way towards organizing and clarifying the role of data protection when it comes to competition policy. If CADE follows the same line of dialogue set forth with other agencies, the approach would be complementary and the agencies would tend to work together; CADE would also be inclined to respect the specialized agency’s takes on data protection, for it traditionally understands the regulatory actor to be better suited to decide the direction of the public policies under their command.

Some may argue that in light of the recent Bundeskartellamt decision condemning Facebook’s data collection strategy these observations lose weight. The German authority decided that Facebook’s terms and conditions were exploitative and amounted to abuse of market power, and explicitly resorted to data protection legislation to do so.¹⁵ Moreover, although personnel at the authority had previously stated that the case would have never been started had the data protection authorities done their job, the antitrust enforcer emphasized that:

Social networks are data-driven products. Where access to the personal data of users is essential for the market position of a company, the question of how that company handles the personal data of its users is not only relevant for data protection authorities, but also for competition authorities. [...] Monitoring the data processing activities of dominant companies is therefore an essential task of a competition authority, which cannot be fulfilled by data protection officers. In cases of market dominance a competition authority must take into account data protection principles, in particular in the assessment of whether terms and conditions for the processing of data are appropriate. In this respect there is an interface between competition law and data protection law.¹⁶

Again, the decision of the authority has not yet been published, and hopefully it will make this statement both clearer and more robust, but we do not believe it weakens our claim that Brazil would benefit from a strong DPA and that this would help organize enforcement.

¹³ The English version of the study is available at http://monopoliosdigitais.com.br/site/wp-content/uploads/2018/11/Monopolios_Digitais_INGL%C3%8AS.pdf.

¹⁴ The study also suggests potential anti-competitive practices conducted by the so-called digital monopolies. For example, regarding Google, it mentions how the prioritization of ownership services in search results could represent an antitrust issue.

¹⁵ As mentioned, the decision itself is not yet available, but the Bundeskartellamt has already said that “If a dominant company makes the use of its service conditional upon users granting the company extensive permission to process their personal data, this can be taken up by the competition authorities as a case of ‘exploitative business terms’. According to the case-law of the German Federal Court of Justice, civil law principles can also be applied to determine whether business terms are exploitative. Often such principles stem from the legislation on unfair contract terms or the German Constitution. This applies to any legal principle that aims to protect a contracting party in an imbalanced negotiation position. Following this approach, the Bundeskartellamt applied data protection principles in its assessment of Facebook’s terms and conditions. [...] On the basis of data protection principles, in particular under the General Data Protection Regulation (GDPR) applicable since May 2018, the review of the data processing policies showed that Facebook has no effective justification for collecting data from other company-owned services and Facebook Business Tools or for assigning these data to the Facebook user accounts.”

¹⁶ Available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=5.

Establishing a model for interaction between policies does not mean CADE would be passive in cases regarding data, but merely that the jurisdiction of each authority would be clearer and therefore less undue pressure for the competition authority to take action that falls outside its mandate would exist. The Brazilian antitrust agency is of the understanding that there is no antitrust immunity in regulated sectors and that the agencies and CADE have concurrent jurisdiction (the possible exemption is the financial sector).¹⁷ In those occasions, CADE usually restricts its action to competition matters while the regulatory agency remains responsible for the sector-specific affairs.

In the recent merger review of the *AT&T-Time Warner* deal, for example, CADE's Tribunal ruled that the antitrust agency should not block the acquisition under a provision of the Cable TV law which prohibits vertical integration between a provider of telecommunications services (such as AT&T) and a television programmer (such as Time Warner).¹⁸ In their analysis, the Commissioners were clear that CADE should limit itself to a standard antitrust approach, approve the merger, and leave the regulatory aspects to the Telecommunications Agency, even though they expressly recognized that under the Cable TV Regulation the transaction should be blocked, given that the proposed structure of the future company would clearly violate Article 5 of the sectorial legislation.¹⁹ The merger was therefore approved by CADE, but still awaits the approval of the Telecommunications Agency, which shall decide on the matter of Article 5.

In fact, this tendency to separate the spheres of influence and maintain distinct competition and regulatory mandates dates back to CADE's early years and has been reaffirmed in several opportunities. One example is the Administrative Proceeding in which two gas companies were accused of abusive pricing for raising their prices according to the determination of the competent agency – which at that time was responsible for setting prices.²⁰ In CADE's view, the agency was pursuing a clear and legitimate goal and the companies were simply following its determinations. Since there was no option other than to follow the determined price increases, CADE ruled that the companies could not be fined and that the regulation should be upheld.

Moreover, CADE has signed cooperation agreements with several federal agencies to ensure that both it and its regulatory counterparts can maintain their separate jurisdictions while collaborating to preserve autonomy and ensure the most appropriate decisions, considering regulatory and competitive aspects. Some examples are the agreements signed with the Brazilian Central Bank, the National Agency of Electric Energy, and the National Petroleum Agency; all of which are intended to better address competitive issues that relate to regulatory provisions.

In that light, it is certain that the implementation of a DPA is central in understanding how antitrust and data protection will interact over the next years, considering CADE's own comprehension of its jurisdiction when it comes to regulated matters in which other actors play an active role. Some provisions of the Executive Order reinforce this conclusion. Article 55-J, Paragraphs 2 and 3, as well as Article 55-K determine that the ANPD is the sole entity responsible for applying the sanctions set forth in the GDPR, that it shall coordinate enforcement with other public entities responsible for regulating specific economic sectors, and that its authority will always prevail in data protection matters when faced with other institutions.²¹

17 The issue was first addressed on the Administrative Proceeding 20/1992, in which public transport companies from Belo Horizonte were accused of cartel formation and declared in their defenses that CADE could not fine them since there was already an agency overseeing their activities. By that time, CADE understood that the only situation in which this allegation could be valid was under the State Action Doctrine, as developed in the American antitrust case law, and that the existence of a regulation or a regulatory agency did not prevent CADE from acting to put an end to anticompetitive behavior in any way. Since then, a number of cases, especially in conduct control, reinforced this understanding.

18 The deal was reviewed under the number 08700.001390/2017-14 and approved in October 17, 2017. The Telecommunications Agency, nonetheless, has not reached a decision so far.

19 Article 5 of the Law n° 12.485/2011 states that content providers shall not be vertically integrated with telecommunications service providers. In this case, AT&T functions as a telecommunications provider in Brazil, represented by SKY, and Time Warner delivers content in the country. To illustrate the echo of the regulatory norm in CADE's analysis, it is worth mentioning that Ms. Cristiane Alkmin's opinion expressly declared that under a regulatory approach the deal could not be approved at all.

20 See Administrative Proceeding 08012.006207/1998-48 involving Riogás S/A and Companhia Estadual de Gás do Rio de Janeiro – CEG.

21 Article 55-J, § 2: The ANPD, the agencies and public entities responsible for the regulation of specific sectors of economic and governmental activity shall coordinate its operation, in its corresponding sphere of activity, with the aim of ensuring the enforcement of its responsibilities with the maximum efficiency and of promoting the adequate functioning of regulated sectors, according to specific legislation, and personal data treatment, as provided in this Law. § 3: The ANPD shall keep permanent communication forum, including through technical cooperation agreements, with agencies and public entities responsible for the regulation of specific sectors of economic and governmental activities, with the aim of facilitating ANPD's regulatory and enforcement competences. Article 55-K: The application of the sanctions provided by this Law is exclusive to the ANPD, whose other competences should prevail over other agencies or public entities when focused on personal data protection. Sole paragraph: ANPD shall articulate its activities with the National System of Consumer Protection associated with the Ministry of Justice and other agencies and public entities with normative and disciplinary competences related to the theme of personal data protection and shall be the central agency responsible for the interpretation of this Law and provision of norms and guidelines for its implementation.

However, the confirmation of this prediction largely depends on two factors: first, the success of the data protection public policy – here meaning precisely the effective establishment of a robust authority able to coherently apply the new legislation. Second, the DPA's willingness to engage in dialogue with other public institutions to coordinate enforcement. Not only CADE, but also the ANPD would have to be committed to reaching a balance and to working together to set the boundaries of data protection and competition, deciding where cooperation would be profitable, where enforcement by the DPA would suffice, and where antitrust would be a more appropriate tool. The success of this “alliance” is highly dependent on the first factor: it is natural for the competition authority to be more deferential to an agency that actively embraces its objectives and puts forward a coherent policy. In that sense, the lack of autonomy for the DPA, a loose application of the GDPR, and a lack of confidence of the authority on the part of stakeholders all could work against the fulfillment of our hypothesis and impair the establishment of a dynamic similar to the one already set between CADE and other agencies.

Little certainty on how those issues will be addressed exists. The fact that a new administration just took office, and that the ANPD was created by the precarious Executive Order method, contributes to the unpredictability of what is to come. What remains, however, is the need to address the matter and the understanding that data-related issues are bound to arise with ever more prominence in the future.



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