ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION
SCHUMPETER PROJECT ON COMPETITION POLICY

700 K Street NW Suite 600
Washington, DC 20001

COMMENTS OF ITIF

Before the

Ministry of Finance (Ministério da Fazenda)

Brasilia, Federal District, Brazil

In the Matter of:	)	
	)	Public Comment
Draft Bill No. 2768/2022	)	
	)	
	)	
	)	

May 2, 2024

MINISTRY OF FINANCE CONSULTATION ON DRAFT BILL NO. 2768/2022: ENABLING THE DIGITAL TRANSFORMATION THROUGH COMPETITION, NOT REGULATION

CONTENTS

Introduction 2
The Bill Is Unnecessary 3
The Ex-Ante Ex-Post Paradigm Shift Is a Flawed Approach 5
The Bill Is Not Well-Defined 6
The Bill Risks Chilling Innovation 7
Recommendations 9
Conclusion 9

INTRODUCTION

On October 11, 2022, João Maia (MP, Partido Liberal) presented Bill 2768/2022 (bill) to the federal legislators of Brazil, which contemplates the regulation of its digital markets.[1] The bill proposes to amend two laws: the General Telecommunications Law (9472/1997), which provides rules for the legal structure of telecoms services, defines the general principles governing the telecoms services, and created the Brazilian Telecoms Agency (Anatel); and the Brazilian Civil Framework of the Internet (12,965, of April 23, 2014) which establishes the principles, guarantees, rights and duties for using the Internet in Brazil.[2] The bill bears a considerable resemblance to the Digital Markets Act (DMA) of the European Union (EU), which gradually entered into force between May 2, 2023 and June 25, 2023.[3] The Brazilian Ministry of Finance has called for public consultation aiming "to obtain contributions from society on the economic and competitive regulation of digital platforms in Brazil, questioning whether there should be changes in the antitrust law, whether new regulation is needed, what aspects should be subject to regulation and how to coordinate state action to manage the issue."[4]

The Information Technology and Innovation Foundation (ITIF), the world's top-ranked science and technology policy think tank, appreciates the opportunity to comment on the bill, and specifically to discuss its problems from the standpoint of promoting innovation. ITIF's comment proceeds in five parts. First, regulation in the digital sector should be necessary to remedy market failure if the current legal framework is

[1] Portal da Câmara dos Deputados (camara.leg.br).

[2] See: The Brazilian Civil Framework of the Internet, 2016 and General Telecommunications Law, available at: L9472 (planalto.gov.br)

[3] The European Parliament and the Council of the European Union adopted the Digital Markets Act on 14 September 2022, a Regulation 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828.

[4] See the call for consultation here: https://www.gov.br/participamaisbrasil/concorrencia-plataformas-digitais.

insufficient to address the cases arising in the digital markets. This does not appear to be the case here. Second, even if regulation is justified to address market failure, regulation should put forward clear goals that complement the broader legal and regulatory ecosystem. But here again, the bill is lacking. Third, even if the bill could be facially justified, its policy objectives are unclear and its application is far too broad. Fourth, the obligations in Article 10 of the bill are substantially out of step with sound legal and economic principles for applying antitrust law to protect innovation. Finally, ITIF recommends that Brazil step back from following the EU's experimental DMA regime and at least wait before embarking on a similar policy.[5] A brief analysis follows.

THE BILL IS UNNECESSARY

As a general matter, ex-ante regulation is justified only in the presence of market failure. However, the Brazilian digital ecosystem currently does not exhibit signs of market failure. On the contrary, Brazil's digital landscape is nascent and well-positioned to become a vibrant and dynamic arena where firms are incentivized to compete through creative destruction. Indeed, the Brazilian economy has been marked by a period of substantial growth and social progress and is poised for a digital transformation. With a population of almost 220 million citizens, Brazil is the largest country in South America (and the fifth-largest fintech market in the world), presenting an immense market potential.[6] Recent trends indicate a commitment to digital innovation, as evidenced by the National Internet of Things Plan and the Brazilian Digital Transformation Strategy (E-Digital).[7] The vibrant and emerging digital market, with its potential to fuel productivity growth, has become a focal point in leveraging Brazil's economic resilience. As Brazil embraces policies that promote trust, innovation, and market openness, the digital sector thus constitutes a significant aspect of the country's economic strategy. In sum, the nascent and essential nature of Brazilian digital markets belies the existence of evident market failure but rather underscores the argument against immediate and extensive regulation.

To be sure, large platforms are often thought to be environments characterized by a high degree of market power. However, any assessment of market power requires accurately defining markets, which is best understood in terms of "eyeballs" or "attention markets."[8] A Sao Paulo resident who is using Twitter is not

---

[5] See: AURELIEN PORTUESE, The Digital Markets Act: A Triumph of Regulation Over Innovation | ITIF, 2022, and LILLA NORA KISS, The United States' Tech Regulatory Dilemma—Through a Foreigner's Eyes—Digital Platforms and American Life: A Project by the American Enterprise Institute (aei.org), 2023, and AURELIEN PORTUESE, The Digital Markets Act: European Precautionary Antitrust | ITIF, 2021, and The Digital Markets Act Is "Bad Economics and Bad Law," Says ITIF, https://itif.org/publications/2022/09/14/the-digital-markets-act-is-bad-economics-and-bad-law-says-itif/.

[6] MALENA DAILEY, Why the U.S. Rejected European Style Digital Markets Regulation: Considerations for Brazil's Tech Landscape, 2023, available at: https://www.progressivepolicy.org/wp-content/uploads/2023/10/PPI-Brazil-EU-Tech.pdf.

[7] See more at OECD: Brazil in the digital transformation: Opportunities and challenges | Going Digital in Brazil | OECD iLibrary (oecd-ilibrary.org) and MCTIC (2018), Brazilian Digital Transformation Strategy: E-Digital, Ministério da Ciência, Tecnologia, Inovações e Comunicações, Brasilia, www.mctic.gov.br/mctic/export/sites/institucional/sessaoPublica/arquivos/digitalstrategy.pdf.

[8] Lilla Nora Kiss: Comments to the National Congress of Brazil Regarding Regulation of Digital Platforms, https://itif.org/publications/2023/11/20/comments-to-the-national-congress-of-brazil-regarding-regulation-of-digital-platforms/.

using YouTube, LinkedIn, Facebook, or TikTok. In other words, even though digital platforms serve particular niches, they compete fiercely for consumer attention. To the extent that any become "lazy monopolists," they will quickly lose market share. Moreover, on the ad side of the market, there is intense competition, with Brazilian advertisers having a wide array of choices for getting their messages to consumers. [9]

Of course, as is consistent with the current Brazilian competition framework, the existence of market power does not by itself indicate that market failure exists.[10] Since the groundbreaking work of Joseph Schumpeter in the 1940s, it has long been understood that competition is not merely, as neoclassical economics holds, an equilibrium where price equals marginal cost. Nor is it simply, as Adam Smith imagined, a rivalry between many sellers in a market. Rather, as Schumpeter explained, innovation or dynamic competition occurs through "gales of creative destruction" whereby one firm competes for the market by creating a new product, only to be challenged by additional "leapfrog competition" that supplants the formerly dominant firm with a still newer product that not just dazzles consumers but allows for the firm to recoup the costs of its innovation.[11]

Even in the case of market failure, regulation should only be undertaken if it would be superior to non-regulation. Indeed, even if market power may appear to be anti-competitive, such market power is often transient: dynamic competition, if left to function freely and on the merits, will support self-correction. Especially in innovative industries, regulatory measures that go beyond competition law enforcement may impede the natural process of competition—hindering economic dynamism and stifling long-term growth.[12] Put another way, regulation can be far more harmful than helpful when addressing market failure, including by placing costs on market entrants that ultimately benefit established incumbents. That is, the entry of new, innovative firms and the competitive forces within the market, unimpeded by regulation, are often the best mechanisms to address any market imbalances.

Finally, the current Brazilian Competition Act of 2011 seems to be efficient in answering issues occurring in the digital markets. The referred act declares in Article 36 (1) that "it is not a violation of competition law for a company to gain market power by becoming more efficient than its competitors." In addition to this, the merger review (Art. 90) allows the Administrative Council for Economic Defense (CADE) to approve mergers that eliminate competition in a substantial part of the relevant market if the merger otherwise "increases productivity or competitiveness" or "promotes efficiency and technological or economic development". The current Brazilian competition framework focuses on the notion of "consumer welfare" as

[9] Brazil - Finance (trade.gov) and Brazil in the digital transformation: Opportunities and challenges | Going Digital in Brazil | OECD iLibrary (oecd-ilibrary.org)

[10] See about cases before the CADE Tribunal by Camila C. Pires-Alves *et al*: Conduct Analysis in Digital Cases: A Review of the Brazilian Antitrust Authority Decisions, In: Antitrust and the Digital Economy: Legal Standards, Presumptions and Key Challenges, Institute of Competition Law, 2023, pp. 280-282.

[11] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81 (1942).

[12] See Robert M. Solow, Technical Change and the Aggregate Production Function, 39 Rev. Econ. & Stat. 312 (1957); see also Charles I. Jones, Sources of U.S. Economic Growth in a World of Ideas, 92 Am. Econ. Rev. 220 (2002).

the main goal of competition policy, and it has been reinforced in the CADE's case law as well.[13] As such, it did not extend the scope of competition policy beyond the neoclassical perspective to cover broader social issues such as fairness or barriers to entry.[14] At the bottom, instead of preemptive regulatory measures, the emphasis should thus be placed on allowing innovation and competition to flourish by enabling a healthy competitive process, including through sound enforcement of Brazil's competition laws to address any anti-competitive conduct. There is no evidence that the current Brazilian market has failed or discourages competition in the digital markets.

THE EX-ANTE EX-POST PARADIGM SHIFT IS A FLAWED APPROACH

Ex-ante regulation, which involves setting rules and standards before potential issues arise, requires well-defined goals to be effective. Specifically, regulatory frameworks that are too broad and multifaceted risk hindering the adaptability and responsiveness that is particularly needed in digital markets, which are characterized by rapid technological evolution. In this sense, the ex-post nature of antitrust law, which involves addressing market issues after they have occurred, differs significantly from the ex-ante approach embraced by the proposed regulations and should be the preferred form of addressing potential market issues. Without question, the ex-post nature of antitrust allows for a more flexible response to emerging challenges, enabling authorities to intervene when necessary without preemptively constraining market dynamics.

While the bill intends to provide a path to overcome the rigid economic analysis offered by the Competition Act of 2011, it fails to offer a better alternative.[15] To begin, a major concern with the bill is its incredibly broad and open-ended nature. Its regulatory goals are unclear and vague.

That is, the Brazilian bill provides a general framework that is too all-encompassing to provide sufficient guidance about its application. Specifically, articles 4 and 5 of the bill respectively delineate six broad and incommensurable principles along with five objectives that will surely create confusion. For example, the objectives encompass economic development, fair competition, access to information, knowledge, and culture, promotion of innovation, the massification of new technologies and access models, encouragement of interoperability through open technological standards, and the incentivization of mechanisms for data portability—a hodgepodge of conflicting goals. Some of these goals should be addressed by other legislative products and not by antitrust legislation. The same is true with the enumerated principles such as freedom of initiative, free competition, consumer protection, reduction of regional and social inequalities, repression of abuse of economic power, and expansion of social participation in public interest matters. These far-reaching statements of principles and objectives are highly abstract and undefined, making it challenging to identify concrete regulatory priorities focused on preserving competition and those aiming at broader societal and

[13] LUIZ FELIPE ROSA RAMOS: Antitrust and the Multivalued Function of Competition, Hart Publishing, Nomos, 2021, pp. 97-90.

[14] VICTOR OLIVEIRA FERNANDES: Los in translation? Critically assessing the promises and perils of Brazil's Digital Markets Act proposal in the light of international experiments, Computer Law and Security Review: The International Journal of Technology Law and Practice, Vol. 52., 2024.

[15] VICTOR OLIVEIRA FERNANDES: Los in translation? Critically assessing the promises and perils of Brazil's Digital Markets Act proposal in the light of international experiments, Computer Law and Security Review: The International Journal of Technology Law and Practice, Vol. 52., 2024, p. 17.

economic goals. Moreover, incorporating these broader purposes into Brazilian competition policy represents a significant departure from the historically well-developed policy recommendations of economics-based competition and economic regulation policy based on market equilibrium and neoclassical economic models that have helped drive innovation and growth in America.[16]

In addition to the need for a clearly defined set of goals, the bill also introduces a risk of regulatory fragmentation or the existence of disparate regulations that overlap and conflict with one another. The dangers of regulatory fragmentation are evident from the European experience with the DMA.[17] In fact, while the DMA was introduced as an attempt to limit regulatory fragmentation by establishing EU-wide regulations, the legislation fell short of this goal, as it permitted additional national regulatory initiatives and did not remove existing national regulatory barriers. This lack of harmonization raised concerns about decentralized and disparate enforcement practices within the EU. For example, while the DMA allowed Member States to set new rules on gatekeepers, this flexibility contributed to potential inconsistencies and contradictions between the DMA and national rules. Such overlap is likely to hinder the harmonization of digital regulations within the EU, resulting in confusion rather than a unified approach.

The bill seems poised to result in similar regulatory confusion. Indeed, the subject matter affects at least three agencies: Anatel, the CADE, and the Brazilian Data Protection Agency (ANPD). This regulatory triad plays distinct roles in overseeing different facets of the digital landscape, and the bill's focus on digital platforms with essential access does not eliminate this interdependence and overlap. The bill proposes that Anatel should administer the regulation, which provides a prominent role to the telecommunications agency in digital competition issues instead of relying on the expertise of Brazil's competition agency (CADE). In so doing, the bill introduces a serious risk of regulatory fragmentation by concurrently empowering Anatel and CADE with full competition enforcement in digital markets, as well as raises concerns about the risk of over-enforcement in their respective actions.[18]

THE BILL IS NOT WELL-DEFINED

Regulation should be narrowly focused to avoid imposing unnecessary costs on market participants, including the smaller players and entrants that may stimulate competition. Rather, as noted above, regulation should be targeted to address market failure and the corresponding dominant firms that enjoy a high degree of durable market power. However, the Brazilian approach is not so limited. Instead, it specifically targets digital platforms with significant economic size in several sectors, which Article 6 (2) lists as online intermediation services, search tools, social networks, video-sharing platforms, cloud computing services, and operating systems, among others, as digital platforms under its scope. Furthermore, Article 9 defines digital platforms as

[16] NIAMH DUNNE: Competition Law and Economic Regulation: Making and Managing Markets, Cambridge University Press, 2015., pp. 6-11.

[17] AURELIEN PORTUESE: The Digital Markets Act: A Triumph of Regulation Over Innovation, 2022, available at: https://itif.org/publications/2022/08/24/digital-markets-act-a-triumph-of-regulation-over-innovation/.

[18] See: DIRK AUER, GEOFFREY A. MANNE, LAZAR RADIC: Playing the Imitation Game in Digital Market Regulation – A Cautionary Analysis for Brazil, International Center for Law and Economics, 2023, Playing the Imitation Game in Digital Market Regulation – A Cautionary Analysis for Brazil - International Center for Law & Economics (laweconcenter.org).

having "essential control" encompassing companies with annual gross revenues exceeding BRL 70 million in services to Brazilians—less than $15 million.

This broad definition of digital platforms encompassing companies with annual gross revenues exceeding just BRL 70 million in services to Brazilians introduces a paradoxical situation. The general definition of digital platforms so defined and the ipso iure assumption that they market power that could be driving market failure seems very hard to support. Specifically, the bill might ensnare not just the large players but also smaller entities that lack the market influence commensurate with the regulatory burden imposed. As an estimate, the bill would affect at least 187 different digital service and e-commerce companies that would be designated as controllers.[19] This counterproductive outcome could deter innovation, hinder market entry for smaller players who reach the regulation threshold, and potentially stifle the very competition the regulations aim to promote.

In this regard, the bill reflects a striking departure from the EU's DMA. The European Commission's "gatekeeper" criteria are more nuanced, considering factors such as significant impact on the internal market, provision of core platform services crucial for business users, and an entrenched or foreseeable durable position. Currently, it only applies to the largest digital players. The European approach thus reflects a narrower understanding of what entities should be subject to regulation and thus, at least in one way, avoids the pitfalls of undue overbreadth relative to the bill. Moreover, while the DMA provides for a review clause allowing the European Commission to amend or repeal gatekeeper status at any moment, the Brazilian bill does not explicitly provide any similar offramp. In addition, the European Commission is required to review regularly (at least every two years) whether the designated gatekeepers continue to satisfy the criteria. Anatel, by contrast, does not appear to have this duty in the bill.[20] As a result, the application of the draft bill goes dangerously beyond even the EU's DMA and risks imposing significant costs on Brazil's competitiveness relative to other jurisdictions.

Additionally, while Article 9 introduces the concept of "essential access control power," it does not provide specifics for how such a categorization will work in practice, and is expected to be further evaluated by Anatel as the regulatory agency nominated by the bill. Still, it is unclear whether companies with essential access control power are obliged to comply with these ex-ante obligations in all markets in which they operate or only where the markets fall within the scope of this bill.

THE BILL RISKS CHILLING INNOVATION

The Brazilian DMA's overbroad definitions and lack of well-defined goals are not the only factors contributing to the bill's problems from a competition and innovation perspective. Altogether, the bill lists four obligations for Article 6 companies of "essential access control power" in Article 10. These are "transparency and provision of information for Anatel on the provision of services, isonomic and non-discriminatory treatment in the provision of services to professional users and end users, proper use of data

[19] See the estimate in CCIA's Comments on Brazilian Bill No. 2768/2022, CCIA Comments on Brazilian Bill No. 2768/2022 - CCIA (ccianet.org).

[20] VICTOR OLIVEIRA FERNANDES: Los in translation? Critically assessing the promises and perils of Brazil's Digital Markets Act proposal in the light of international experiments, Computer Law and Security Review: The International Journal of Technology Law and Practice, Vol. 52., 2024, p. 11.

collected in the exercise of its activities and non-refusal of provision of access to the digital platform to professional users". The bill adds that "Anatel shall impose obligations of accounting and functional separation, as well as measures to mitigate possible abuses of economic power, including those related to portability and interoperability". Other than this, the bill does not provide much detail on these obligations.

First, the latter "non-refusal of provision of access to the digital platform to professional users" appears to reflect a per se ban on refusals to deal. However, in general, sound legal principles provide freedom for corporations to select their partners, as reflected in U.S. Supreme Court jurisprudence.[21] While it is also true that under certain circumstances, there may be limits on this freedom for a firm with market power, a general prohibition on refusals to deal chills innovation. Specifically, maintaining the exclusivity of certain innovations can foster competition by encouraging companies to continuously strive for advancements, knowing that they can reap the rewards of their efforts without immediate compulsory sharing. Rivals are also incentivized to innovate, as they cannot rely on compulsory sharing to get in the market. For all these reasons, a nuanced approach is needed to help balance preventing anticompetitive behavior and recognizing the legitimate pro-competitive justifications that very often underlie refusals to deal.

Although the bill does not have a clear per se ban on self-preferencing, the unclear feature of its obligation relating to non-discrimination opens a wide window for interpretation that could dissuade businesses from enhancing and promoting their products, which will likely harm consumers. "Self-preferencing," in the vast majority of cases, reflects innovative behavior and organic vertical integration—a prevalent business strategy across various industries, including digital platforms. Given the importance of incremental innovation in driving growth, the potential repercussions on economic efficiency and consumer benefits underscore the necessity for a more meticulously considered regulatory approach.[22] Additionally, a universal ban on self-preferencing would discourage competitive market entry by limiting businesses' capacity to promote their own products, and inadvertently hinder market dynamism and impede the positive effects of robust competition. And of course, no one is forcing Brazilian consumers to consume the additional product or service of a digital company that chooses to prefer their own (e.g., Google search on Android). Consumers are inclined to leave if the platform fails to offer the diverse array of products and services they seek.

The other Article 10 obligations also need further clarification to ensure legal certainty in the Brazilian digital markets. For example, the obligation of transparency and information provision is much more a principle than a legal duty, and the bill fails to explain to what extent it differs from the general transparency requirement in, for example, Brazilian consumer protection law. And if it is not different, why is it added to the new bill? In addition, while the EU DMA is strict in defining its per se obligations regarding data usage, it clearly delineates prohibited practices. By contrast, the Brazilian bill only calls for an "appropriate" use of data without defining its meaning. It not only leads to interpretation challenges but also risks enforcement pitfalls.

Finally, the last provision – mentioned separately from the first four obligations – entitles Anatel to take measures in case of possible abuse of economic power. The bill is silent about the enforcement of these

---

[21] *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), The U.S. courts have acknowledged "the long recognized right [of even a monopolist] freely to exercise his own independent discretion as to parties with whom he will deal."

[22] The Aggregate Implications of Innovative Investment in the Garcia-Macia, Hsieh, and Klenow Model, AtkesonBurstein.pdf (umn.edu).

measures. This indicates that Anatel will have a privileged role in elaborating the regulatory framework and executing it, which may raise further concerns from the perspective of due process and separation of powers perspectives, as well as challenging conduct that is merely exploitative and not exclusionary and harmful to competition.

RECOMMENDATIONS

For these reasons, ITIF has significant concerns about the bill and offers the following recommendations:

- **Wait and see:** Given the enormous implications of the DMA for Europe's digital economy, Brazil should put its own legislation on hold for at least until economists and other scholars can process evidence-based impact assessment on the EU's DMA on EU consumers and the EU digital economy. Should the benefits outweigh the costs, then Brazil should consider moving forward with its own legislation. But if the costs outweigh the benefits, it should not. In either case, Brazil needs a Brazilian approach to its digital markets, and not a copycat of foreign solutions.[23]
- **Review the need for the bill:** Brazil's booming digital marketplace, brimming with innovation, suggests a measured approach to regulation. Without evident problems, heavy-handed regulations could hinder the very progress driving the country's economic strength and digital transformation. As Brazil contemplates its digital future, carefully considering the inherent resilience of competitive dynamics is paramount to ensuring that regulatory measures align with the genuine economic needs and requirements of the burgeoning digital market.
- **Minimize regulatory conflicts:** The bill's delegation of anti-competitive conduct monitoring and prosecution to Anatel raises questions regarding the potential for a disjointed regulatory framework, conflicting enforcement actions between agencies, and as such, risks of regulatory fragmentation.
- **Use well-defined objectives and deliniated scope:** The bill adopts a broad approach of applying to all companies with annual gross revenues equal to or exceeding BRL 70 million in services provided to Brazilians. This seemingly indiscriminate definition targets major industry players and casts a wide net, ensnaring smaller and medium-sized enterprises and startups. The flawed approach risks placing an undue burden on smaller, aspiring businesses seeking to enter the market.
- **Reconsider obligations:** The bill does not define Article 10 obligations narrowly, which potentially stifles innovation and limits the platforms' ability to optimize user experience and functionality. Restricting companies' ability to choose their partners and promote their own products potentially discourages development.

CONCLUSION

Brazil's draft legislation pertaining to digital markets, which resembles the European Union's Digital Markets Act, signifies a juncture in the nation's approach to regulating its burgeoning digital platform industry.

---

[23] LILLA NORA KISS: Innovation Instead of Imitation: Brazil Needs a Brazilian Approach to Digital Markets, https://itif.org/publications/2024/04/04/innovation-instead-of-imitation-brazil-needs-a-brazilian-approach-to-digital-markets/ and LILLA NORA KISS: Inovacao e Nao Uma Imitacao, 2024, https://www.estadao.com.br/opiniao/espaco-aberto/inovacao-e-nao-uma-imitacao/.

However, due to the relatively recent enforcement of the DMA since March 7 2024, a comprehensive assessment of its practical ramifications remains outstanding. Consequently, as Brazil crafts its own DMA, it is prudent for the nation to possess a heightened awareness of the potential shortcomings and unsubstantiated advantages associated with such wide-ranging economic regulation within the digital market landscape.

Thank you for your consideration.

Lilla Nóra Kiss, Ph.D.
Senior Policy Analyst, Schumpeter Project on Competition Policy
Information Technology and Innovation Foundation