



CCIA Comments on Brazilian Bill No. 2768/2022

The Computer & Communications Industry Association (CCIA)¹ welcomes the opportunity to submit comments on Brazilian Congress (the “Congress”) Bill No. 2768/2022² (the “Bill”) released for public consultation on October 20, 2023.³ These comments follow up on the remarks CCIA made during the Brazilian Chamber of Deputies’ Economic Development Commission hearing on the Bill in August 2023.⁴

Digital platforms offer innovative and popular services and have revolutionized the way consumers and businesses interact with each other. However, the Bill seems to suggest that digital markets might have features that may hinder, distort, or restrict competition. CCIA strongly believes that to determine if there are potential competition concerns that need to be addressed through regulation, it is paramount for policymakers to fully and accurately understand the various digital business models and services, and the industries in which they operate. As such, when proposing an *ex-ante* regulation for digital markets, legislators and policymakers must consider market realities and how the proposed regulation might affect businesses, consumers and the overall economy.

These comments discuss important principles for the Brazilian Congress to consider when proposing and designing any regulation for digital markets. Without relying on some key regulatory considerations, an *ex-ante* regulation would run the risk of harming Brazilian consumers, competition, and innovation. Therefore, these comments offer some important regulatory principles and recommendations regarding some of the key provisions of the Bill.

¹ CCIA is an international, not-for-profit trade association representing a broad cross-section of technology and communications firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

² Congresso Nacional, Projeto de Lei No. 2768/2022, https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2214237&filename=PL%202768/2022.

³ Consulta Pública Mercados Digitais, <https://www.mercadosdigitais.org/tomadadesubsidios>.

⁴ “Regulamentação dos mercados digitais no Brasil precisa ser feita com cautela, afirmam especialistas estrangeiros,” Câmara dos Deputados, Comissão de Desenvolvimento Econômico (Aug. 10, 2023), <https://www.camara.leg.br/noticias/985302-regulamentacao-dos-mercados-digitais-no-brasil-precisa-ser-feita-com-cautela-afirmam-especialistas-estrangeiros/>.



I. Key Considerations and Principles to Guide Regulatory Proposals

Global digitalization across numerous industries of the economy has provided consumers and businesses with tremendous benefits. Numerous studies have confirmed the many ways in which digital services and multi-sided business models create and stimulate competition in the economy.⁵ Given the dynamic and innovative nature of digital markets, any proposed digital regulation needs to consider the wider potential implications for businesses, consumers, innovation, and the broader economy.

An overly burdensome and heavy-handed digital regulation could significantly hinder innovation and economic growth. This should be a particularly important consideration for economies with a thriving innovation and start-up ecosystem, as is the case with Brazil and its technology start-ups, including its dynamic fintech sector.⁶ Importantly, in addition to the effect from a competition enforcement and policy perspective, any digital regulatory proposal will likely have a significant impact in other policy areas as well, such as data privacy, national security, cybersecurity, and intellectual property, with important ramifications for businesses operating in Brazil. This interconnectedness of policy areas in the digital space requires a particularly careful calibration of any *ex-ante* regulatory proposal in this area.⁷

⁵ See, e.g., European Commission, “Staff Working Document: Evaluation of the Vertical Block Exemption Regulation” (Sep. 8, 2020), https://ec.europa.eu/competition/consultations/2018_vber/staff_working_document.pdf, at 32 (“[A]lternative online distribution models such as online marketplaces have made it easier for retailers to access customers. By using these third-party platforms, small retailers may, with limited investments and effort, become visible to potential customers and sell products to a large customer base and in multiple Member States.”); Oxera, “How platforms create value for their users: implications for the Digital Markets Act” (May 12, 2021), <https://www.oxera.com/wp-content/uploads/2021/05/How-platforms-create-value.pdf>, at 34 (“The bundling and tying of different features and services by a platform can boost the efficiency of a market by reducing transaction costs, increasing choice for consumers, and helping businesses to achieve scale economies.”).

⁶ “Brazil Country Review: Regulation in the Digital Transformation,” International Telecommunications Union (2023), at 9, https://digitalregulation.org/wp-content/uploads/D-PREF-THEM.31_Brazil-2023-PDF-E.pdf; International Telecommunication Union, ICT Regulatory Tracker, International Telecommunication Union (2023) https://app.gen5.digital/tracker/about?_ga=2.219506015.792952719.1652307232-1329504368.1648823243&_gl=1*vtee1m*_ga*MTMYOTUwNDM2OC4xNjQ0ODIzMjQz*_ga_27GW57NRWK*MTY1MjMwNzIzMi40LjAuMTY1MjMwNzIzMi4w.

⁷ See, e.g., “The age of digital interdependence,” Report of the UN Secretary-General’s High-level Panel on Digital Cooperation (2019), at 6, <https://www.un.org/en/pdfs/DigitalCooperation-report-for%20web.pdf>; “Achieving Inclusive Growth in the Face of Digital Transformation and the Future of Work,” OECD report to G-20 Finance Ministers (Mar. 19, 2018), https://www.oecd.org/g20/OECD_Achieving%20inclusive%20growth%20in%20the%20face%20of%20FoW.pdf.



Overly complex, intrusive, or broad regulatory regimes are likely to deter entry and investment from innovative companies.⁸ Therefore, any *ex-ante* regulation should only be introduced to address particular market failures, which is not the same as the mere existence of market power. Dynamic competition, which is particularly relevant in digital markets, comes forth as a natural way to resolve market failures by firms competing for the market and creating new and innovative products.⁹ In this regard, a key consideration before proposing any *ex-ante* regulation is whether the existing enforcement and policy frameworks, including competition, consumer protection, and data privacy already provide more proportionate ways to achieve the desired outcomes. Therefore, clarifying the expected outcomes of a proposed regulatory framework in advance is particularly important for consumers and businesses alike.

1.1. The Congress Should Analyze the Costs and Benefits before Implementing Any New Regulation

Due to the potentially significant economic impact of regulating digital markets, it is fundamental for Brazilian legislators and policymakers to engage with stakeholders in the development of any proposal for a new *ex-ante* regulatory regime. Introducing new regulations is not costless, especially given the dynamic and innovative nature of digital markets. As a result, the ultimate objective of any new regime should be to promote and stimulate competition and innovation.

As the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN) have underscored, to ensure that the cost of any new regulation does not outweigh its benefits, it should allow clearly procompetitive or competitively benign conducts, and recognize justifications for legitimate protections.¹⁰ Without appropriate

⁸ See, e.g., Aghion, Philippe, Bergeaud, Antonin, and Van Reenen, John, “The Impact of Regulation on Innovation” (Jan. 16, 2023), Banque de France Working Paper No. 804, forthcoming, <https://ssrn.com/abstract=4325116>; Regulatory Reform and Innovation, OECD, <https://www.oecd.org/sti/inno/2102514.pdf>; “Regulation that enables innovation,” William D. Eggers, Sam J Walsh, Carsten Joergensen and Pankaj Kamleshkumar Kishnani (Mar. 23, 2023), <https://www2.deloitte.com/us/en/insights/industry/public-sector/government-trends/2023/regulatory-agencies-and-innovation.html>.

⁹ Joseph A. Schumpeter, “Capitalism, Socialism, and Democracy,” 81 (1942).

¹⁰ “Key Issues in Digital Trade,” OECD Global Forum on Trade 2023 (Oct. 2023), at 13, <https://www.oecd.org/trade/OECD-key-issues-in-digital-trade.pdf>; “Framework of Competition Assessment Regimes,” ICN Advocacy Working Group (Apr. 2015), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_FrameworkCompetitionAssessmentRegimes.pdf; “Maintaining Competitive



safeguards, a regulation may harm Brazilian consumers and businesses, including small and medium-sized businesses (SMBs) that use and rely on digital services. Therefore, CCIA encourages the Brazilian Congress to thoroughly assess the Bill’s potential impact and whether the benefits of this proposed *ex-ante* digital regulation would outweigh its potential negative impact on Brazilian consumers, businesses, and the economy.¹¹

1.2. Policymakers Should Be Cautious in Relying on Untested International Regulatory Experiments

Ex-ante digital regulatory proposals are currently being discussed and debated in a number of jurisdictions worldwide.¹² The Bill reflects some of the provisions of some of these initial regulatory proposals from other jurisdictions, including the European Union’s (EU) Digital Markets Act (DMA).¹³ However, it is important to underscore that so far only one jurisdiction, Germany, has created a new and fully operational *ex-ante* digital regulatory framework through the 10th amendment of the German Competition Act (GWB)¹⁴ and Section 19a of the GWB.¹⁵ Following the recent designation of “gatekeepers,”¹⁶ the EU’s DMA is expected to be fully operational only early next year, in 2024. Given the extremely limited experience with these regulations,¹⁷ policymakers in Brazil and other countries will likely want

Conditions in the Era of Digitalization,” OECD (Jul. 2018), at 4, <https://www.oecd.org/g20/Maintaining-competitive-conditions-in-era-of-digitalisation-OECD.pdf>.

¹¹ See OECD, Regulatory Policy Outlook (2021), https://www.oecd-ilibrary.org/governance/oecd-regulatory-policy-outlook-2021_38b0fdb1-en; OECD, Regulatory Impact Assessment (2020), <https://www.oecd.org/gov/regulatory-policy/regulatory-impact-assessment-7a9638cb-en.htm>.

¹² See, e.g., “Your Definitive End-of-Year Global Tech Regulation Wrap-Up: Who’s Doing What, Where, and What to Make of It,” Lazar Radic, Truth on the Market (Dec. 21, 2022), <https://truthonthemarket.com/2022/12/21/your-definitive-end-of-year-global-tech-regulation-wrap-up-whos-doing-what-where-and-what-to-make-of-it/>.

¹³ Regulation (EU) 2022/1925 of The European Parliament and of The Council (Sep. 14, 2022), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A265%3ATOC.

¹⁴ 10th Amendment to the German Competition Act (GWB), Federal Law Gazette Volume 2021 Part I No. 1, issued in Bonn on January 18, 2021, https://www.bgbl.de/xaver/bgbl/start.xav#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl121s0002.pdf%27%5D1701266446605.

¹⁵ *Id.*, Section 19a (“The Bundeskartellamt may issue a decision declaring that an undertaking which is active to a significant extent on markets within the meaning of Section 18(3a) is of paramount significance for competition across markets.”).

¹⁶ Gatekeepers, Digital Markets Act, European Commission, <https://digital-markets-act-cases.ec.europa.eu/gatekeepers>.

¹⁷ Germany’s GWB went into effect just over two years ago in 2021. The EU’s DMA is not expected to be fully operational until early 2024.



to first learn from the experience in these jurisdictions and wait for more concrete results of those regulatory experiments. This, in turn, may help to inform some of the proposals and determine whether these regulatory examples could be applicable and even useful to adopt in the Brazilian market. In this regard, CCIA strongly recommends being cautious when relying on international regulatory experiments in this area.

Although digital reforms are being considered in various jurisdictions, there are no convergent proposals or results in sight. The U.S. antitrust bills targeting a handful of technology companies raised numerous major concerns and seem to have no political support to be adopted.¹⁸ Other regulatory models around potential codes of conduct are being discussed in Australia and the United Kingdom.¹⁹ Alternatively, they could potentially provide a more flexible and tailor-made regulation, which only time will tell.²⁰ Japan provides another international model. In 2020, Japan adopted its so-called Transparency Act,²¹ which stipulates that designated digital platforms take voluntary and proactive steps to ensure transparency and fairness under a so-called co-regulatory approach.

Based on the extremely limited experience with recent *ex-ante* regulatory proposals worldwide, CCIA urges the Brazilian Congress to avoid rushing to adopt reforms reflecting international regulatory experiments. As CADE's President and senior officials also underscored,²² the recommended approach for Brazil would be to first allow some time to gauge

¹⁸ See, e.g., "AICOA's Data Security, Privacy, and Content Moderation Issues Call for Risk Assessment," Krisztian Katona (Jun. 7, 2022), <https://www.project-disco.org/privacy/060722-aicoas-data-security-privacy-and-content-moderation-issues-call-for-risk-assessment/>; "AICOA's Failure and the Future of Competition Policy in Congress," Project DisCo (Jan. 6, 2023), <https://www.project-disco.org/competition/010623-aicoas-failure-and-the-future-of-competition-policy-in-congress/>.

¹⁹ See, e.g., CCIA Comments on the Australian Treasury's Consultation Document on the Australian Competition and Consumer Commission's Regulatory Reform Recommendations (Feb. 17, 2023), <https://ccianet.org/wp-content/uploads/2023/02/CCIA-Comments-to-the-Australian-Treasury.pdf>; CCIA Comments on the United Kingdom's "Digital Markets, Competition, and Consumer Bill" (Jul. 18, 2023), <https://ccianet.org/wp-content/uploads/2023/07/CCIA-Comments-to-UK-Parliament-on-DMCC.pdf>.

²⁰ See "ACCC calls for new competition and consumer laws for digital platforms" (Nov. 11, 2022), <https://www.accc.gov.au/media-release/accc-calls-for-new-competition-and-consumer-laws-for-digital-platforms>.

²¹ Act on Improving Transparency and Fairness of Digital Platforms (TFDPA), Ministry of Economy, Trade and Industry (METI) (Jun. 3, 2020), https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/index.html.

²² See, e.g., "Interview with Alexandre Cordeiro Macedo, President, Administrative Council for Economic Defense (CADE)," Conducted by Krisztian Katona on behalf of the ABA Antitrust Magazine (Jun. 30, 2023), https://www.americanbar.org/groups/antitrust_law/resources/source/2023-june/interview-with-alexandre-cordeiro-macedo/; "'Solid' body of case law for digital markets must be built in Brazil, CADE's Fernandes says," MLex



how these international regulatory proposals are working in practice and then evaluate whether the reforms result in benefiting or harming consumers and innovation.

II. The Bill’s Low Designation Thresholds Would Create Higher Barriers to Entry and Hinder Competition

The Bill establishes a threshold for companies to be considered “controllers of essential access” (“controllers”) when they have an annual revenue greater than R\$70 million (approx. US\$14-15 million),²³ a designation similar to that of “gatekeepers” by the EU’s DMA.²⁴ However, a major difference from the EU’s DMA is that under the Bill’s proposed thresholds, at least 187 companies operating in Brazil, just from the digital service and e-commerce sector, would be designated as controllers.²⁵ This would be compared to the six designated “gatekeeper” companies under the EU’s DMA.²⁶ As a result of the Bill, this very large number of designated companies would end up facing significant compliance burdens and barriers to introducing new services.²⁷

When designing regulatory proposals, it is imperative that legislators and policymakers have a clear reasoning for designating certain companies as “controllers” or “gatekeepers” (under the DMA) and understanding the potential consequences of requiring these companies to comply with significantly increased regulatory burdens and requirements.²⁸ As such, it is crucially important to consider what significant ramifications designating such a high number of companies as “controllers” would mean for the Brazilian digital and innovation ecosystem.

(Aug. 25, 2022), <https://mlexmarketinsight.com/news/insight/solid-body-of-case-law-for-digital-markets-must-be-built-in-brazil-cade-s-fernandes-says>.

²³ *Supra* n. 2, Article 9.

²⁴ *Supra* n. 16.

²⁵ Crunchbase data, *see* <https://www.crunchbase.com/>.

²⁶ *See* “Digital Markets Act: Commission designates six gatekeepers” (Sep. 6, 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_4328.

²⁷ *See, e.g.*, “The Unintended Consequences of Internet Regulation,” Mike Masnick (Apr. 12, 2023), <https://research.ccianet.org/reports/unintended-consequences-of-internet-regulation/>; Submission to European Commission’s public consultation on the template for compliance report under the DMA, CCIA (Jul. 2023), <https://ccianet.org/wp-content/uploads/2023/07/CCIA-Europe-submission-to-EC-public-consultation-on-the-template-for-compliance-report-under-the-DMA.pdf>.

²⁸ *See, e.g.*, “Gatekeeping, the DMA, and the Future of Competition Regulation,” Lazar Radic, Truth on the Market (Nov. 8, 2023), <https://truthonthemarket.com/2023/11/08/gatekeeping-the-dma-and-the-future-of-competition-regulation/>.



The Bill’s low threshold for the designation as a controller provides an overly broad applicability of the regulation to a vast number of companies with vastly different business models, which would not only affect incumbent companies but further increase barriers of entry for potential competitors. The resulting higher compliance costs under the Bill would not only reduce the high investment in research and innovation (R&D) in the country’s digital markets,²⁹ but this regulation would also increase the barriers of entry and reduce the appeal for start-ups to invest in these markets.

When designing these regulations, Brazilian policymakers should pay careful attention to the business realities of the country’s digital markets and analyze whether, on the one hand, the reasons behind designating “*gatekeepers*” in other jurisdictions are applicable to the Brazilian digital markets; and, on the other hand, whether adding very significant regulatory burdens to a large number of technology, digital services, and e-commerce companies would truly benefit Brazilian consumers, innovation, and the economy.

CCIA recommends a clarification of the concept of “controllers of essential access” and a review of the threshold for this designation.³⁰ A detailed analysis of each one of the markets, products, and services is needed for an evidence-based determination of which undertakings would be designated as controllers, and why these undertakings should be subject to significantly more regulation than others also participating in the same markets.

III. The Bill Would Likely Have a Negative Economic Impact in Brazil

As discussed above, the Bill would affect at least 187 different digital service and e-commerce companies that would be designated as controllers.³¹ These companies generate between \$13.3 billion and \$76.3 billion (between R\$65 billion and R\$372 billion) in revenue, and employ between 114,374 and 258,770 workers in Brazil.³² These figures are limited to firms headquartered in Brazil, meaning that the Bill’s impact will be much larger for Brazil’s

²⁹ See, e.g., “Brazil Digital Transformation,” Market Intelligence, International Trade Administration, US Department of Commerce (Aug. 19, 2022), <https://www.trade.gov/market-intelligence/brazil-digital-transformation>.

³⁰ *Supra* n. 2, Articles 6 and 9.

³¹ *Supra* n. 25.

³² *Id.*



workforce once foreign firms operating in Brazil that will likely be covered by the Bill are also considered.³³

The Bill seems to suggest that regulating digital companies will benefit Brazilian consumers, entrepreneurs, and the technology sector. However, introducing a European DMA-style regulatory proposal will very likely have the opposite effect on Brazil's economy. Studies have found that the policy debate around the EU's DMA largely ignored competition and innovation models.³⁴ If this type of *ex-ante* regulation were to be adopted in Brazil, companies would likely invest less in their own R&D, leading to a decrease in innovation expenditure in the country. In turn, this would have larger spillover impacts in the economy, thereby hurting employment, wages, and productivity.³⁵

Looking further at the potential implications of the EU's DMA, this legislation could cause over-enforcement of competition laws by restricting a series of business practices (including bundling, tying, and self-referencing, among others) that are commonly found both offline and online, and that have a generally positive impact on society.³⁶ If Brazil adopts a similar regulatory approach through the Bill, it will risk over-enforcement and restrict business practices that are often procompetitive or at least competitively benign. This would likely stifle the growth of the Brazilian digital economy, including the country's dynamic financial technology (fintech) sector.

The Bill also introduces an obligation for controllers to avoid refusing access to their platforms to "professional users."³⁷ Having the exclusive use of certain proprietary innovations can promote heightened competition by encouraging companies to continuously strive for

³³ *Id.*

³⁴ *See, e.g.*, "Implications of the Digital Markets Act for Transatlantic Cooperation," Center for Strategic and International Studies, Meredith Broadbent (Sep. 15, 2021), at 6, <https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation>; "Is the Proposed Digital Markets Act the Cure for Europe's Platform Ills? Evidence from the European Commission's Impact Assessment," David J. Teece and Henry J. Kahwaty (Apr. 12, 2021), at 47, https://media.thinkbrg.com/wp-content/uploads/2021/04/11215103/Is-the-DMA-the-Cure_Teece_Kahwaty.pdf.

³⁵ "Is the Proposed Digital Markets Act the Cure for Europe's Platform Ills? Evidence from the European Commission's Impact Assessment," David J. Teece and Henry J. Kahwaty (Apr. 12, 2021), at 6, https://media.thinkbrg.com/wp-content/uploads/2021/04/11215103/Is-the-DMA-the-Cure_Teece_Kahwaty.pdf.

³⁶ *See, e.g.*, "How platforms create value for their users: implications for the Digital Markets Act," Felipe Florez Duncan, Oxera (May 12, 2021), <https://www.oxera.com/insights/reports/how-platforms-create-value/>.

³⁷ *Supra* n. 2, Article 10.



advancements, knowing that they can reap the rewards of their efforts without being forced to share those advancements with the competition immediately. However, the Bill’s overly broad language regarding non-discrimination³⁸ opens a possibility for interpretation that could dissuade businesses from enhancing and promoting their own products, likely harming Brazilian consumers and stifling innovation. Given the importance of incremental innovation on economic growth,³⁹ the Bill’s potential repercussions on the Brazilian economy and consumer welfare underscore the necessity for a more meticulously considered regulatory approach.

The Bill is designed to target digital “controllers of an essential access,” but this designation can spillover onto non-controller platforms, which increases the cost of false positives and overregulation in the digital economy.⁴⁰ A major concern for the Brazilian economy is that, under the Bill’s provisions, any company that is dominant or in a position in which suppliers are economically dependent on it could be impacted by the significant *per se* rules of the Bill. If Brazil adopts the Bill in its current form, non-controller companies will be heavily impacted as well.

It is expected that the EU’s DMA might significantly threaten workers in some of the largest job-creating industries – technology and e-commerce.⁴¹ If Brazil moves forward with this proposal, the Bill’s low designation thresholds and broad provisions could significantly hurt job growth in these important sectors and slow down the momentum of job creation. This could impact at least 114,000 workers⁴² in the 187 controller-designated companies headquartered in Brazil, as these companies will face enormous compliance challenges, decreasing their revenue.

³⁸ *Id.* (“Operators of digital platforms referred to in the item II of art. 6th of this Law, holders of access control power essential, will be subject, among others, to the following obligations: ... II - isonomic and non-discriminatory treatment in the provision of services to professional users and end users”).

³⁹ *See, e.g.*, “The Aggregate Implications of Innovative Investment in the Garcia-Macia, Hsieh, and Klenow Model,” Andy Atkeson and Ariel Burstein, UCLA Economics (Feb. 2017), <http://www.econ.ucla.edu/arielb/innovationGHK.pdf>.

⁴⁰ *See, e.g.*, “The DMA’s Risk to Non-Gatekeeper Platforms,” Kay Jebelli, Project DisCo (Mar. 11, 2022), <https://www.project-disco.org/european-union/031122-the-dmas-risk-to-non-gatekeeper-platforms/>.

⁴¹ “ICYMI: Experts Say DMA Threatens Job Creation,” Project DisCo (Nov. 11, 2021), <https://www.project-disco.org/21st-century-trade/111121-experts-say-dma-threatens-job-creation/>; Aurelien Portuese, “The Digital Markets Act: A Triumph of Regulation Over Innovation,” ITIF (2022), https://itif.org/publications/2022/08/24/digital-markets-act-a-triumph-of-regulation-over-innovation/#_edn7.

⁴² *Supra* n. 25.



IV. The Bill Would Hinder Brazil's Start-up Ecosystem

Digital start-ups have been a disruptive force in the way traditional service providers work and interact with customers. They are changing the dominant paradigms by which consumers access products and services.⁴³ Given the great importance of start-ups in the digital economy, it is paramount for policymakers and regulators to promote, not hinder, competition and innovation in these complex ecosystems.

This is especially important for Brazil, as it is not only the first jurisdiction in Latin America to have a legislative proposal for an *ex-ante* digital regulatory framework, but is also the largest and one of the most advanced Latin American economies in terms of policy and regulatory frameworks for the digital sector.⁴⁴ As the OECD noted, Brazil's investment in R&D in the digital sectors, relative to its GDP, is well above that of other countries in the region.⁴⁵ Further, the \$9.4 billion investment received by Brazil's start-up ecosystem in 2021⁴⁶ is a true testimony of the importance of the start-up industry to Brazil's overall economy. Brazil's 18,000 start-up companies accounted for 77 percent of Latin American's start-ups in 2021,⁴⁷ reflecting that the Brazilian digital ecosystem is a driver of innovation and development for the entire region. Brazil, in addition to being the largest economy in Latin America, is also the fifth largest

⁴³ See, e.g., Zhang K, Feng L, Wang J, Qin G and Li H (2022), "Start-Up's Road to Disruptive Innovation in the Digital Era: The Interplay Between Dynamic Capabilities and Business Model Innovation," *Front. Psychol.* 13:925277, <https://doi.org/10.3389/fpsyg.2022.925277>; Maximilian Palmié, Jonas Boehm, Jonas Friedrich, Vinit Parida, Joakim Wincent, Jonas Kahlert, Oliver Gassmann, David Sjödin, "Startups versus incumbents in 'green' industry transformations: A comparative study of business model archetypes in the electrical power sector," *Industrial Marketing Management*, Volume 96 (2021), at 46, <https://doi.org/10.1016/j.indmarman.2021.04.003>.

⁴⁴ Brazil Country Review: Regulation in the Digital Transformation (2023), at 9, https://digitalregulation.org/wp-content/uploads/D-PREF-THEM.31_Brazil-2023-PDF-E.pdf; International Telecommunication Union, ICT Regulatory Tracker, International Telecommunication Union (2023) https://app.gen5.digital/tracker/about?_ga=2.219506015.792952719.1652307232-1329504368.1648823243&_gl=1*vtee1m*_ga*MTMYOTUwNDM2OC4xNjQ0ODIzMjQz*_ga_27GW57NRWK*MTY1MjMwNzIzMi40LjAuMTY1MjMwNzIzMi4w.

⁴⁵ Going Digital in Brazil, Innovation in the Brazilian Economy (2020), OECD, <https://www.oecd-ilibrary.org/sites/e9bf7f8a-en/1/3/5/index.html?itemId=/content/publication/e9bf7f8a-en&csp=4d15becbcaf4101a1f8bb9316741cfec&itemIGO=oecd&itemContentType=book#sec-148> (Brazil's investment in R&D amounted to 1.26 percent of its GDP, while other countries in Latin America such as Argentina, Chile and Mexico, do not invest in R&D more than 0.5 percent of their GDP).

⁴⁶ *Supra* n. 29.

⁴⁷ *Id.*



fintech market in the world⁴⁸ and the second fastest growing country in the app market.⁴⁹ Hence, when designing *ex-ante* regulatory proposals for digital markets, legislators should consider how these regulations can promote, and not hinder, Brazil’s regional leadership and global role in the technology sector and contribute to the growth of the national economy.

An important example of Brazil’s regional and global technology leadership is the country’s dynamic fintech sector. According to the Inter-American Development Bank (IDB), the fintech industry grew 112 percent in the Latin American region from 2018 to 2021,⁵⁰ with Brazil representing almost a third of that market.⁵¹ The Brazilian fintech industry, with its impressive size, rapid growth, and high investment levels, provides a critical example of the importance of the start-up ecosystem in the overall Brazilian economy. Importantly, Brazil has recently ranked as the top start-up ecosystem in the region and the 27th worldwide.⁵²

Considering the Bill’s potential implications for the Brazilian start-up ecosystem, the Bill’s proposed annual fee amounting to two percent of the designated controllers’ gross turnover of an essential access would raise significant burdens and concerns for the impacted companies.⁵³ As the Bill states, this fee would contribute to fund the activities of the digital markets regulator.⁵⁴ When considering the Bill’s impact on businesses, it is critical for the Brazilian Congress to consider how the proposed fee and additional costs of operation might hinder innovation and stifle competition in the prospering and innovative Brazilian start-up ecosystem,⁵⁵ and what the Bill’s potential impact would be on digital businesses that have been

⁴⁸ See Malena Dailey, “Why the US. Rejected European Style Digital Markets Regulation: Considerations for Brazil’s Tech Landscape” (2023), <https://www.progressivepolicy.org/wp-content/uploads/2023/10/PPI-Brazil-EU-Tech.pdf>.

⁴⁹ Business of Apps, Brazil App Market Statistics (Oct. 20, 2023), <https://www.businessofapps.com/data/brazil-app-market/#:~:text=According%20to%20Sensor%20Tower%2C%20Brazil,emerging%20as%20a%20gaming%20powerhouse>.

⁵⁰ “Fintech in Latin America and the Caribbean: A Consolidated Ecosystem for Recovery,” IDB, IDB Invest and Innovista (Apr. 26, 2022), at 5, <https://publications.iadb.org/publications/english/viewer/Fintech-in-Latin-America-and-the-Caribbean-A-Consolidated-Ecosystem-for-Recovery.pdf>.

⁵¹ *Id.* (In 2021, Brazil’s 771 fintech companies accounted for 31 percent of the Latin American market. By late 2022, Brazil had 855 active fintech companies.)

⁵² “The Startup Ecosystem of Brazil,” StartupBlink (2023), <https://www.startupblink.com/startup-ecosystem/brazil/>; “Brazil ranks first in startup development,” Jose Pulido, Contxto (Jun. 29, 2023), <https://contxto.com/startups/brazil-ranks-first-in-startup-development/>.

⁵³ *Supra* n. 2, Article 15.

⁵⁴ *Id.*, at 11.

⁵⁵ *Supra* n. 45.



able to thrive in a significantly less-regulated environment in recent years.⁵⁶ In addition, it is important for Brazilian policymakers to think more broadly and consider what an *ex-ante* regulation’s impact would be on consumers and SMBs that have, for long, benefitted from the targeted digital products and services. Before implementing a new *ex-ante* regulation, it is of paramount importance to analyze its potential impact and consequences for Brazilian consumers, innovation, and the economy to ensure that it is both necessary and proportionate.

Finally, and as CCIA also noted during the August Parliamentary hearing on the Bill,⁵⁷ a particularly important point that Brazil and any other jurisdiction contemplating an *ex-ante* regulatory framework for digital markets should keep in mind is that there is global competition for technology investment. Companies want to operate in jurisdictions and economies with clear, fair, and principle-based regulatory environments, without extreme regulatory obligations and paying excessive expenses to operate.⁵⁸ This is particularly important for the global export competitiveness of Brazilian companies as well. The important question from a business perspective is – how does Brazil want to position itself in this global competition for investment? What kind of national regulatory framework does it want to provide for international companies? After all, before regulating competition, a country needs to attract it.

V. The Designated Authority Should be CADE, the Expert Agency for Competition Issues

In jurisdictions where regulatory proposals on digital competition are being discussed or considered, generally the competition agency has remained as the authority responsible for implementing such digital regulations.⁵⁹ This is based on the understanding that competition

⁵⁶ See, e.g., “Internet regulation – legislative proposals in Brazil,” Sofia Kilmar and Guilherme Ribas (Jul. 24, 2023), <https://www.ibanet.org/internet-regulation-legislative-proposals-in-Brazil>.

⁵⁷ *Supra* n. 4.

⁵⁸ See, e.g., “A Quantitative Evaluation: The Economic Costs of Structural Separation, Line of Business Restrictions, and Common Carrier Regulation of Online Platforms and Marketplaces,” Christian M. Dippon and Matthew D. Hoell (Mar. 18, 2022), <https://research.ccianet.org/reports/economic-costs-regulation-online-platforms-marketplaces/#main-content>; “Tools to Compete Lower Costs, More Resources, and the Symbiosis of the Tech Ecosystem,” Engine and CCIA Research Center (Jan. 25, 2023), <https://research.ccianet.org/reports/tools-to-compete/#main-content>.

⁵⁹ In Germany the Bundeskartellamt, and in the EU the European Commission’s DG Competition and DG Connect are responsible for the implementation of the new *ex-ante* digital regulations. Similarly, in the United Kingdom’s Parliamentary debate, the Competition and Markets Authority (CMA) would be tasked with implementing the draft Digital Markets, Competition and Consumers Bill (DMCC).



authorities have more experience and accumulated expertise reviewing transactions⁶⁰ and investigating business practices in digital markets, which best places them to implement these new regulations.

Under the regulatory framework proposed by the Bill,⁶¹ Brazil's national telecommunications agency (Agência Nacional de Telecomunicações, or ANATEL) would be responsible for the *ex-ante* regulation of digital markets, while the national competition authority (Conselho Administrativo de Defesa Econômica, or CADE) would oversee *ex-post* competition enforcement and merger control.⁶² This proposed regulatory structure would potentially lead to significant institutional and regulatory overlap by empowering both ANATEL and CADE with enforcement tasks of digital markets. Today the two agencies have distinct responsibilities and authorities; however, the Bill's focus on digital platforms with essential access would increase the interdependence between the two agencies and risk significant overlaps in their responsibilities.

As a recent and important example, one of the key reasons behind Brazil's most recent competition reform⁶³ was to institutionally unify the previously existing three competition authorities into a single enforcement agency, CADE.⁶⁴ The reform brought more efficiency to the competition enforcement system by eradicating the overlap in enforcement functions. Now, a joint CADE-ANATEL digital competition enforcement and regulatory structure under the Bill would very likely lead to significant overlap of authority and duplication of responsibilities, raising similar issues that made the previous institutional reform necessary.

Companies in different sectors of the economy, including digital markets, are already subject to CADE's oversight and the enforcement of competition laws in Brazil. This can be

⁶⁰ See, e.g., Mercados de Plataformas Digitais, Cadernos do Cade, CADE (Aug. 2023), https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/Caderno_Plataformas-Digitais_Atualizado_29.08.pdf;

Lancieri, Filippo and Sakowski, Patricia, Competition in Digital Markets: A Review of Expert Reports (Jan. 30, 2021), 26 Stan. J.L. Bus. & Fin. 65 (2021), <https://ssrn.com/abstract=3681322>.

⁶¹ *Supra* n. 2, at 9.

⁶² *Id.* See also Law No. 12.529 of November 30, 2011, Brazilian National Congress, at 10 and 28, https://www.icao.int/sustainability/Documents/Compendium_FairCompetition/LACAC/LAW_12529-2011_en.pdf.

⁶³ Law No. 12.529 of 2011 designated CADE as the sole competition enforcement authority in Brazil.

⁶⁴ See "Reforms Achieved, but Challenges Ahead: Brazil's New Competition Law," Krisztian Katona & Diego Herrera Moraes (Nov. 30, 2011), International Antitrust Bulletin, American Bar Association, Vol. 3, 2011, <https://www.ftc.gov/system/files/attachments/key-speeches-presentations/2011katona-brazil.pdf>.



seen in the previous competition decisions involving companies in the digital markets made by CADE.⁶⁵ As we see, digital technology is diffusing across the entire economy in industries as diverse as advertising, agriculture, automotive, manufacturing and retail. With the ongoing digitalization across the economy,⁶⁶ most industries have digital components and digital offerings that also compete with physical ones, as it happens in retail and telemedicine.⁶⁷ Therefore, the Bill's provisions regarding who would implement this proposed *ex-ante* regulation raises important questions to be reassessed. In addition, a number of commentators underscored whether ANATEL, having previously focused only on telecommunications issues, would be the best-placed agency to implement a much broader digital regulatory framework.⁶⁸

VI. Conclusion

Before considering *ex-ante* regulation for digital markets, the Congress should first assess whether there are actual market issues that require regulation. Further, even if there is a market issue that requires regulation, legislators and policymakers should consider the costs and benefits of a proposed regulation and its potentially significant impact on investment, innovation, and competition. This is particularly important for Brazil, a major and emerging economy and regional leader in technology investment and development. Therefore, the role for Brazil's legislators and policymakers remains to ensure that the country's competition regime and

⁶⁵ See, e.g., Mercados de Plataformas Digitais, Conselho Administrativo de Defesa Econômica – CADE, (Aug, 2023) at 21, https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/Caderno_Plataformas-Digitais_Atualizado_29.08.pdf.

⁶⁶ See, e.g., “The four pillars of a trusted industrial information infrastructure,” Sarah Robson, Tim Cowell (2023); “Digital Transformation: Examples from 5 Industries,” Yifat Perry (Jun., 2022), <https://bluexp.netapp.com/blog/cvo-blg-digital-transformation-examples-from-5-industries>.

⁶⁷ “Competitive Dynamics of Online and Brick-and-Mortar Retail Prices,” Rosa Abrantes-Metz & Mame Maloney, (Aug. 2, 2022), <https://research.ccianet.org/reports/competitive-dynamics-online-brick-mortar-retail-prices/>; Harvard Business Review, “It’s Time to Cement Telehealth’s Place in U.S. Health Care,” John Glaser and Kyle Zebley, (Jan. 20, 2023); <https://hbr.org/2023/01/its-time-to-cement-telehealths-place-in-u-s-health-care>; Harvard Business Review “Which Industries Are the Most Digital (and Why)?,” Prashant Gandhi, Somesh Khanna, and Sree Ramaswamy, (Apr. 01, 2016), <https://hbr.org/2016/04/a-chart-that-shows-which-industries-are-the-most-digital-and-why>.

⁶⁸ See, e.g., Mariana Tavares de Araujo, “The View From Brazil: A TOTM Q&A with Mariana Tavares de Araujo,” Truth on the Market (Oct. 18, 2023), <https://truthonthemarket.com/2023/10/18/the-view-from-brazil-a-totm-qa-with-mariana-tavares-de-araujo/>; “Regulation of markets mediated by digital platforms in Brazil,” IPEA Center for Research on Science, Technology and Society (Sep. 9, 2023), <https://www.ipea.gov.br/cts/en/all-contents/articles/articles/381-regulation-of-markets-mediated-by-digital-platforms-in-brazil-an-open-discussion>.



regulatory framework are fit for purpose and support the domestic economy, promote innovation, and deliver benefits to Brazilian consumers.

CCIA is pleased to provide this input on the Bill and looks forward to continuing to engage on this important proposal with the Brazilian Congress.

Respectfully submitted,

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