

MECHANISMS TO PREVENT ANTICOMPETITIVE PRACTICES BY BIG TECH IN THE USE OF AI: AN ANALYSIS OF BRAZILIAN ANTITRUST LAW, BILL 2338/2023, AND THE BRAZILIAN AI PLAN

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Abstract: The present article aims to analyze the measures that exist in Brazilian law or are currently under discussion to prevent anticompetitive practices by Big Tech companies in order to avoid their monopoly on AI in Brazil. For this approach, the work will be divided into three parts: first, an analysis of the characteristics of AI and its relationship with Big Tech will be conducted. Next, the mechanisms currently provided for in Brazilian antitrust law will be examined, with emphasis on the role of CADE and an analysis of economic order violations. Finally, the mechanisms provided for in Bill 2338/2023, which aims to establish a Legal Framework for Artificial Intelligence in Brazil, and the Brazilian Artificial Intelligence Plan will be discussed. The study shows that if Bill 2338/2023 and the Brazilian Artificial Intelligence Plan are approved as they currently stand, in conjunction with the existing antitrust legislation, Brazil will have effective legislative mechanisms to prevent the abuse of dominant positions by Big Tech.

Keywords: Artificial Intelligence. Antitrust Law. Monopoly. Big Tech. Abuse of dominant position.

INTRODUCTION

The topic of Artificial Intelligence (AI) is increasingly being discussed in society, both in academic circles and in the media, largely due to its autonomous nature, where AI systems operate independently of human supervision. To underscore the importance of this subject, it is worth noting that the Royal Spanish Academy selected the term "Artificial Intelligence" as the word of the year in 2022, due to its prominence in the media in recent months, as well as the social debate that this technology has sparked.¹

Not by chance, the so-called Big Tech – defined here as the group of companies with significant control over digital platforms, including Google, Amazon, Meta, Apple, and Microsoft² – are making substantial investments

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¹ La Real Academia Española eligió a la “palabra del año”: cuál es y por qué fue la ganadora. *In*: *TN*. Buenos Aires, December 29, 2022. Available at: <https://tn.com.ar/sociedad/2022/12/29/la-real-academia-espanola-eligio-a-la-palabra-del-ano-cual-es-y-por-que-fue-la-ganadora/>. Access on September 2, 2024.

² Khanal, Shaleen, Hongzhou Zhang, and Araz Taeihagh. 2024. “Why and How Is the

in the development of this technology. For instance, Meta has increased its spending projections for 2024 by up to \$10 billion, while Google plans to spend around \$12 billion or more each quarter this year on capital expenditures, much of which is allocated to new data centers that are crucial for AI development.³

However, due to the dominant position and financial power of these companies, there is concern that they may engage in anticompetitive practices in the AI market in Brazil. Indeed, there have already been cases involving anticompetitive practices by Big Tech. Recently, a U.S. judge ruled that Google violated the country's antitrust laws by spending billions of dollars to create an illegal monopoly and become the default search engine worldwide.⁴ Another recent case involves Apple: the iPhone maker has been sued by the U.S. for allegedly using its power in the smartphone sector to eliminate competition and limit consumer choice. The accusation claims that the company abused its market power in various ways: by stifling the growth of innovative apps and messaging services, diminishing the appeal of competing smartwatches, blocking rival touch payment apps from functioning on its devices, and obstructing the development of game streaming apps.⁵

Given this scenario, where, on one hand, Big Tech companies are investing heavily in the development of AI and, on the other hand, facing accusations of monopolistic behavior, this article, through a deductive method, aims to analyze the measures in Brazilian law or under discussion to prevent anticompetitive practices by Big Tech and to avoid them holding a monopoly on AI. The relevance of the topic lies in ensuring a competitive environment to foster the development of this technology in Brazil—particularly for Brazilian companies.

The research conducted was bibliographic, covering works and articles on AI, Big Tech, and Competition Law⁶. In addition to national works,

Power of Big Tech Increasing in the Policy Process? The Case of Generative AI.” *Policy and Society*, Oxford University Press, 1–18, 2.

³ De Vynck, Gerrit, and Naomi Nix. 2024. “Big Tech Keeps Spending Billions on AI. There’s No End in Sight.” *The Washington Post*, April 25, 2024. Accessed September 2, 2024. <https://www.washingtonpost.com/technology/2024/04/25/microsoft-google-ai-investment-profit-facebook-meta/>.

⁴ Shepardson, David, and Mike Scarcella. 2024. “Google Has an Illegal Monopoly on Search, US Judge Finds.” *Reuters*, August 6, 2024. Accessed September 2, 2024. <https://www.reuters.com/legal/us-judge-rules-google-broke-antitrust-law-search-case-2024-08-05/>.

⁵ Palma, Stefania, and Michael Acton. 2024. “US Accuses Apple of Building Smartphone Market Monopoly.” *Financial Times*, March 22, 2024. Accessed September 2, 2024. <https://www.ft.com/content/e3f83740-f44a-4e1d-9dec-0439ef2ebf58>

⁶ Regarding competition law, it is important to highlight that the protection of free competition is crucial for society. Beyond economic reasons, excessive economic power resulting from the absence of free enterprise can even jeopardize democratic institutions, as

foreign bibliography will be used, with a focus on European law that addresses Artificial Intelligence, considering that European Union Law inspired Bill No. 2338/2023. This article will be divided into three parts: initially, it will explore the more technical aspects of AI and its relationship with Big Tech; subsequently, it will examine the mechanisms within Brazilian legal order to prevent anticompetitive practices, with emphasis on Law No. 12.529/2011; and finally, it will analyze Bill No. 2338/2023 and the Brazilian AI Plan to regulate the use of AI in the country.

Thus, this work, following the described approach, will discuss a matter of great importance in Brazilian law, aiming to examine whether Brazil has sufficient normative protection to prevent a Big Tech monopoly concerning AI development.

I. ARTIFICIAL INTELLIGENCE AND BIG TECH

Although the term "Artificial Intelligence" has existed since at least 1956⁷, this technology has become more widespread in recent years due to the development of machine learning techniques, in which systems develop the capacity for entirely autonomous decision-making without human intervention.⁸ Thus, AI can be defined as technology developed using statistical methods, where the system learns to make decisions through some form of model, typically from examples. This includes applications such as recommendation systems, fraud detection, and facial recognition. AI has been developed primarily due to the abundance of data required for its training

such power has the ability to influence economic policies of the Executive Branch, the legislative process of the Legislative Branch, and decisions of the Judiciary. In: Santiago, Luciano Sotero. 2008. *Direito da Concorrência: Doutrina e Jurisprudência*. Salvador: Juspodivm, 31.

⁷ The term "Artificial Intelligence" was originally coined by John McCarthy, a computer scientist, at the Dartmouth Conference held in 1956. However, the idea of Artificial Intelligence had emerged earlier through Alan Turing, considered the father of computing. In his 1950 paper titled *Computing Machinery and Intelligence*, Turing questioned whether machines could think by proposing what is now known as the Turing Test. In this test, a human interrogator would converse with both a machine and a human simultaneously without being able to identify which was which. The computer would pass the test if the human interrogator could not determine whether the responses were coming from a person or a computer. In: Norvig, Peter, and Stuart Russell. 2013. *Inteligência Artificial*. Rio de Janeiro: Elsevier. E-book; Turing, Alan M. 1950. "Computing Machinery and Intelligence." *Mind* 59 (236): 433–60, 433; e Flasiński, Mariusz. 2016. *Introduction to Artificial Intelligence*. Cham: Springer, 3.

⁸ Mulholland, Caitlin. 2020. "Responsabilidade Civil e Processos Decisórios Autônomos em Sistemas de IA: Autonomia, Imputabilidade e Responsabilidade." In *Inteligência Artificial e Direito: Ética, Regulação e Responsabilidade*, edited by Ana Frazão and Caitlin Mulholland. São Paulo: Thomson Reuters Brasil. E-book.

(with data being the raw material for learning) and the advancement in processing power.⁹

Through mass data processing, machines acquire self-learning capabilities, allowing them to achieve certain outcomes independently of any human supervision.¹⁰ Thus, the system is capable of correctly interpreting external data, learning from this data, and using the acquired knowledge to achieve specific goals and tasks.¹¹

The use of AI systems took on a disruptive quality with the advent of Generative Artificial Intelligence (GAI), and more specifically, with the launch of ChatGPT (the most popular tool in the realm of GAI¹²) in November 2022. GAI employs sophisticated systems to create new content, which can be in the form of text, audio, images, and even video.¹³ Users continuously specify their desired tasks as input prompts to generate results and solve their tasks.¹⁴

AI systems operate through algorithms, which are precisely defined methods for computing something.¹⁵ They are used to automate decision-making processes or assist human decision-making by providing decision-makers with information such as classification results (e.g., high-risk vs. low-risk borrowers) and predictive analyses (e.g., credit default risk), along with consequential recommendations (e.g., whether to grant a loan to an applicant).¹⁶ This prediction can be in the form of scores (e.g., a score of 88

⁹ Cortiz, Diogo. 2021. “Inteligência Artificial: Conceitos Fundamentais.” In *Inteligência Artificial: Sociedade, Economia e Estado*, edited by Rony Vainzof and Andrei Guerrero Gutierrez. São Paulo: Thomson Reuters Brasil. E-book.

¹⁰ Mulholland, Caitlin, and Isabella Z. Frajhof. 2020. “Inteligência Artificial e a Lei Geral de Proteção de Dados Pessoais: Breves Anotações sobre o Direito à Explicação perante a Tomada de Decisões por meio de Machine Learning.” In *Inteligência Artificial e Direito: Ética, Regulação e Responsabilidade*, edited by Ana Frazão and Caitlin Mulholland. São Paulo: Thomson Reuters Brasil. E-book.

¹¹ Steibel, Fabro, Victor Freitas Vicente, and Diego Santos Vieira de Jesus. 2020. “Possibilidades e Potenciais da Utilização da Inteligência Artificial.” In *Inteligência Artificial e Direito: Ética, Regulação e Responsabilidade*, edited by Ana Frazão and Caitlin Mulholland. São Paulo: Thomson Reuters Brasil. E-book.

¹² ChatGPT emerged as a true cultural phenomenon: in the first week after its launch, over one million users registered on the platform. To put this in perspective, Facebook took ten months to reach this milestone, and Instagram took two and a half months. In: Taulli, Tom. 2023. *Generative AI: How ChatGPT and Other AI Tools Will Revolutionize Business*. Berkeley, CA: Apress, 11.

¹³ Taulli, Tom. 2023. *Generative AI: How ChatGPT and Other AI Tools Will Revolutionize Business*. Berkeley, CA: Apress, 4.

¹⁴ Bahn, Leonardo, and Gero Strobel. 2023. “Generative Artificial Intelligence.” *Electronic Markets* 33, 4.

¹⁵ Russell, Stuart. 2021. *Inteligência Artificial a Nosso Favor*. Translated by Berillo Vargas. São Paulo: Companhia das Letras, 95.

¹⁶ Kordzadeh, Nima, and Maryam Ghasemaghaei. 2022. “Algorithmic Bias: Review,

out of 100) or classifications (e.g., eligible for a loan/not eligible).¹⁷

In this context, and considering the already mentioned dominant position, an exorbitant digital power is concentrated in the hands of Big Tech companies, which control both the design and development of algorithms and the ecosystems in which these algorithms operate.¹⁸ This dominant position is only expected to grow, given that they use the personal data collected on their platforms to train the algorithms that make autonomous decisions.¹⁹ In this regard, the development of Generative AI requires three essential components: talent, large training datasets, and computational power. Data from millions of users across various sectors enable Big Tech to build unique datasets, and similarly, access to financial resources allows them to hire the most skilled professionals in the field and possess the computational potential needed to train these datasets.²⁰

The concentration of power among Big Tech companies raises several concerns. First, this small group of companies controls a significant portion of the sector's wealth, allowing them to acquire any competitor that threatens their market power.²¹ Second, their economic power grants them political influence²², which can be used to push for favorable regulations that further entrench their dominance. Third, these companies increasingly control public discourse by moderating content on platforms where social conversations,

Synthesis, and Future Research Directions.” *European Journal of Information Systems* 31 (4): 388–409, 388.

¹⁷ Maxwell, Winston J. 2023. “Le Contrôle Humain pour Détecter les Erreurs Algorithmiques.” In *Un Droit de l’Intelligence Artificielle: Entre Règles et Régime Général*, edited by Céline Castets-Renard and Jessica Eynard. Brussels: Bruylant, 717.

¹⁸ Carretta, Silvia A. 2024. “Everybody Wants to Rule the World: The Relevance of the Rule of Law for Private Law in the Context of Algorithmic Profiling of Online Users.” In *YSEC Yearbook of Socio-Economic Constitutions*, vol. 2023, edited by Eduardo Gill-Pedro and Andreas Moberg. Cham: Springer, 170.

¹⁹ Carretta, Silvia A. 2024. “Everybody Wants to Rule the World: The Relevance of the Rule of Law for Private Law in the Context of Algorithmic Profiling of Online Users.” In *YSEC Yearbook of Socio-Economic Constitutions*, vol. 2023, edited by Eduardo Gill-Pedro and Andreas Moberg. Cham: Springer, 170.

²⁰ Khanal, Shaleen, Hongzhou Zhang, and Araz Taeihagh. 2024. “Why and How Is the Power of Big Tech Increasing in the Policy Process? The Case of Generative AI.” *Policy and Society*, Oxford University Press, 1–18, 2.

²¹ In the last 30 years, Facebook, Amazon, Microsoft, Google, and Apple have made more than 800 acquisitions. In: CBInsights. *Visualizing Tech Giants’ Billion-Dollar Acquisitions*. 24 fev. 2021. Available at: <https://www.cbinsights.com/research/tech-giants-billion-dollar-acquisitions-infographic/>. Access on September 3, 2024.

²² This political influence can be exerted through, for example, direct consultations with the government; lobbying; hiring experts who work directly with governments; and funding think tanks, universities, and influential experts. In: Lindman, Juho, Jukka Mäkinen, and Eero Kasanen. 2023. “Big Tech’s Power, Political Corporate Social Responsibility, and Regulation.” *Journal of Information Technology* 38 (2): 144–59.

including political discourse, take place.²³

Finally, these companies control a significant portion of the personal data that each data subject generates daily, granting them considerable power over users.²⁴ In this regard, as the use of data is currently dominated by digital platforms (such as Google and social media), their actions have a dual effect on the competitive landscape: on one hand, they create their own competitive dynamic regarding the use and processing of data within their domain, making competition in the data and processing market outside of them either impossible or highly difficult; and, on the other hand, they foster increasing dependence of other economic agents on their services.²⁵

Moreover, the informational asymmetry due to the control of data subjects' information amplifies the power of big techs over users: for example, if Facebook knows a lot about an individual, and the individual has no information about the social network, then Facebook will have more power over the data subject than if both parties knew equal amounts about each other.²⁶ While big techs know a great deal about users in order to predict individuals' future behavior for profit, their operations are designed to remain unknown.²⁷

This dominance in the technology sector makes Big Tech companies central players in domestic policies, emerging as actors similar to states on the global stage.²⁸ This occurs also because these platforms perform sophisticated and complex intermediation between content providers, sellers of products and services, IT infrastructure providers, consumers, and the government.²⁹ Similarly, as online platforms rely primarily on self-regulation for the development and implementation of algorithms used to profile users, prioritizing shareholder interests over user rights protection, this results in a

²³ Bradford, Anu. 2023. *Digital Empires: The Global Battle to Regulate Technology*. Oxford: Oxford University Press. E-book.

²⁴ Bradford, Anu. 2023. *Digital Empires: The Global Battle to Regulate Technology*. Oxford: Oxford University Press. E-book.

²⁵ Frazão, Ana. 2021. "Big Data e Aspectos Concorrenciais do Tratamento de Dados Pessoais." In *Tratado de Proteção de Dados Pessoais*, edited by Bruno Bioni et al. Rio de Janeiro: Forense. E-book.

²⁶ Véliz, Carissa. 2021. *Privacidade é Poder: Por Que e Como Você Deveria Retomar o Controle de Seus Dados*. Translated by Samuel Oliveira and Ricardo Campos. São Paulo: Editora Contracorrente. E-book.

²⁷ Zuboff, Shoshana. 2019. *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. New York: PublicAffairs. E-book.

²⁸ Khanal, Shaleen, Hongzhou Zhang, and Araz Taeihagh. 2024. "Why and How Is the Power of Big Tech Increasing in the Policy Process? The Case of Generative AI." *Policy and Society*, Oxford University Press, 1–18, 13.

²⁹ Frazão, Ana. 2021. "Big Data e Aspectos Concorrenciais do Tratamento de Dados Pessoais." In *Tratado de Proteção de Dados Pessoais*, edited by Bruno Bioni et al. Rio de Janeiro: Forense. E-book.

high risk to the fundamental rights of data subjects.³⁰

Given that the self-regulation model proves insufficient in practice to address the issue of dominant market position, the next section of the work will examine the mechanisms provided by Brazilian Competition Law to address or, at least, mitigate this problem.

II. BIG TECH AND COMPETITION LAW IN BRAZIL

The main infraconstitutional law on this topic is Law No. 12.529/2011, which establishes the Brazilian System for the Defense of Competition. This legislation restructured the CADE³¹ (Administrative Council for Economic Defense), an autonomous agency linked to the Ministry of Justice, giving it responsibility for handling administrative processes related to violations of economic order, as well as analyzing concentration acts.³²

CADE has preventive, repressive, and educational functions: preventive, regarding the effective analysis of concentration acts that pose some risk to competition, repressive, consisting in the repression of unlawful conduct established by law, and educational, concerning the pedagogical role, aiming at the dissemination of the rules of free competition to society.³³

Article 36 of this Law lists the cases of violations of economic order, and for the present article, the relevant cases are primarily those in items II (domination of a relevant market of goods or services) and IV (abusive exercise of a dominant position), as these are practices that are quite likely to be carried out by Big Tech companies, given that they hold a dominant position in their respective markets. By way of example, Google is the leader

³⁰ Carretta, Silvia A. 2024. "Everybody Wants to Rule the World: The Relevance of the Rule of Law for Private Law in the Context of Algorithmic Profiling of Online Users." In *YSEC Yearbook of Socio-Economic Constitutions*, vol. 2023, edited by Eduardo Gill-Pedro and Andreas Moberg. Cham: Springer, 170.

³¹ Although the emergence of the first competition legislation in Brazil dates back to 1945, it was in 1962, with the enactment of Law No. 4.137, that the country established an agency responsible for safeguarding competition. However, CADE became a federal autonomous agency with administrative independence and its own budget only with the passing of Law No. 8.884/1994. In: De Carvalho, Vinicius Marques, and Carlos Emmanuel Joppert Ragazzo. 2013. *Defesa da Concorrência no Brasil: 50 Anos*. Brasília: Conselho Administrativo de Defesa Econômica, 14 e 56.

³² Brazil. Federal Government. *Histórico do Cade*. Available at: <https://www.gov.br/cade/pt-br/acesso-a-informacao/institucional/historico-do-cade>. Access on August 29, 2024.

³³ Engelmann, Wilson, Daiana Flores, and Juliano Jung. 2021. O conselho administrativo de defesa econômica –cade como instrumento de efetivação da função social e solidária das instituições empresariais. *Brazilian Journal of Development*, Curitiba, v.7(7): 72459-72477, 72474.

in the Brazilian search engine market, with a 93% market share, according to 2023 data.³⁴

The aforementioned article concerns an open legal clause on violations of economic order that generally encompasses collusive conduct, vertical restraints, and unilateral practices.³⁵ The abuse of a dominant position can be defined as a business practice carried out by a dominant economic agent with the aim of depriving current or potential rivals of achieving the necessary economies of scale to enter the market or to expand their operations in a particular niche.³⁶

In order to analyze the unlawfulness of a dominant position – since the line that separates the abuse of a dominant position from its normal exercise is sometimes very thin³⁷ – CADE, influenced by economic arguments mainly associated with the Chicago School³⁸, uses the rule of reason as its interpretative method. This rule guides the examination of the anticompetitive effects produced by a particular conduct.³⁹ Thus, a sequence of assessments is carried out in each case, starting with the delineation of market power, taking into account the specificities of the market in question. Next, the capacity and incentive of the agent to engage in the allegedly anticompetitive conduct are assessed, and finally, the effects of this conduct, whether potential or actual, are examined.⁴⁰

As an illustration of CADE's actions in complaints involving allegations of dominant position by Big Tech, the Google Shopping case stands out, where Google allegedly favored its own service by deciding in 2013 to position Google Shopping results at the top or side of the search engine page

³⁴ SNAQ. 2023. “Mecanismos de Busca: 93 % do Market Share é do Google.” March 9, 2023. Accessed August 29, 2024. <https://www.snaq.co/post/mecanismos-de-busca-93-do-market-share-%C3%A9-do-google>.

³⁵ Fernandes, Victor Oliveira. 2022. *Direito da Concorrência das Plataformas Digitais: Entre Abuso de Poder Econômico e Inovação*. São Paulo: Thomson Reuters. E-book.

³⁶ Fernandes, Victor Oliveira. 2022. *Direito da Concorrência das Plataformas Digitais: Entre Abuso de Poder Econômico e Inovação*. São Paulo: Thomson Reuters. E-book.

³⁷ On the subject, Paula Forgioni states that as long as a company is more capable than its competitor, it may lawfully seek a dominant position in the market, even to the extent of dominating it by eliminating its competitors, given that the economic agent's objective is growth in the sector in which it operates. In: Forgioni, Paula. 2012. *Os Fundamentos do Antitruste*. 5th ed. São Paulo: Editora Revista dos Tribunais, 138.

³⁸ The Chicago School, influenced by Aaron Director's ideas in the 1950s, introduces economic analysis to antitrust, where the main antitrust concepts begin to be considered in terms of “allocative efficiency.” In: Forgioni, Paula. 2012. *Os Fundamentos do Antitruste*. 5th ed. São Paulo: Editora Revista dos Tribunais; Posner, Richard A. 1979. “The Chicago School of Antitrust Analysis.” *University of Pennsylvania Law Review* 127 (4): 925–48, 925.

³⁹ Martins, Ciro, and Laura dos Santos. 2020. “Abuso de Posição Dominante segundo a Jurisprudência do CADE.” *Revista de Defesa da Concorrência* 8 (2): 164–76, 173.

⁴⁰ Martins, Ciro, and Laura dos Santos. 2020. “Abuso de Posição Dominante segundo a Jurisprudência do CADE.” *Revista de Defesa da Concorrência* 8 (2): 164–76, 173.

through image ads. However, these ads were allegedly incompatible with the functioning of competing price comparison tools, which would constitute supposed discriminatory treatment. In 2019, CADE decided to dismiss the case, as it was not possible to verify any manipulation of Google's organic search algorithms in the Brazilian market.⁴¹

Linking the CADE's activities to the topic of Big Tech and AI, it is noteworthy that, in late August 2024, the administrative body initiated four administrative proceedings⁴² to investigate allegations of concentration acts involving the acquisition of AI development startups by Big Tech companies.⁴³ The objective of this measure is to understand, in advance, whether these operations need to undergo CADE analysis to assess their competitive impacts.⁴⁴

Another recent case related to this theme involves Meta, which announced in June 2024 that it would begin using posts on Instagram and Facebook to train AI models. CADE, after receiving a notification from IDEC (Instituto de Defesa dos Consumidores), opened a preliminary investigation into the compulsory use of consumer data for AI training on Meta's platforms.⁴⁵ One of the arguments raised by IDEC is that such training could represent an abuse of dominant position, as there are no other companies with such a vast amount of personal data for training new technology, thereby disadvantaging new entrants.⁴⁶ After being notified by

⁴¹ Brazil. Federal Government. *Processo contra Google no mercado de busca na internet é arquivado*. June 26, 2019. Available at: <https://www.gov.br/cade/pt-br/assuntos/noticias/processo-contra-google-no-mercado-de-busca-na-internet-e-arquivado>. Access on September 02, 2024.

⁴² These are them: process 08700.005962/2024-55 (acquisition of Anthropic by Amazon); process 08700.005961/2024-19 (acquisition of Mistral AI by Microsoft); process 08700.005966/2024-37 (acquisition of Inflection AI by Microsoft); process 08700.005638/2024-30 (acquisition of Character AI by Google).

⁴³ Carretta, Silvia A. 2024. "Everybody Wants to Rule the World: The Relevance of the Rule of Law for Private Law in the Context of Algorithmic Profiling of Online Users." In *YSEC Yearbook of Socio-Economic Constitutions*, vol. 2023, edited by Eduardo Gill-Pedro and Andreas Moberg. Cham: Springer, 170.

⁴⁴ Doca, Geralda. 2024. "Cade Investiga Compra de Empresas de Inteligência Artificial por 'Big Techs'." *O Globo*, August 26, 2024. Accessed August 29, 2024. <https://oglobo.globo.com/economia/noticia/2024/08/26/cade-investiga-compra-de-empresas-de-inteligencia-artificial-por-big-techs.ghtml>

⁴⁵ Lima, Bernardo. 2024. "Cade Abre Procedimento Preliminar contra Meta por Uso de Dados de Brasileiros para Treinamento de IA." *O Globo*, July 4, 2024. Accessed September 3, 2024. <https://oglobo.globo.com/economia/noticia/2024/07/04/cade-abre-procedimento-preliminar-contra-meta-por-uso-de-dados-de-brasileiros-para-treinamento-de-ia.ghtml>

⁴⁶ IDEC. *Utilização compulsória de dados de consumidores para treinamento de inteligência artificial (IA) das plataformas da Meta*. July 26, 2024. Available at: https://idec.org.br/sites/default/files/notificacao_idec_-_meta_ia_generativa_26.06.2024.pdf. Access on September 03, 2024.

the National Data Protection Authority (another federal agency that investigated the case and issued a preventive measure suspending the use of personal data for training generative AI), Meta complied with the Authority's requirements and resumed the use of personal data for AI training with restrictions (such as the prohibition of using data from individuals under the age of 18 for training purposes).⁴⁷

Having analyzed the main aspects involving competition law and Big Tech in the Brazilian context, we move on to the final point, where the treatment of this theme concerning Big Tech will be examined in the context of Bill No. 2338/2023 and the Brazilian AI Plan.

III. BILL NO. 2338/2023 AND THE BRAZILIAN AI PLAN

When regulation is mentioned in relation to the development and use of AI, two issues are generally addressed: the concern that regulation might stifle innovation and progress, and whether current laws are sufficient to regulate the complexities of AI.⁴⁸ On the other hand, contrary to the assumption that AI regulation is necessarily incompatible with innovation, it is believed that appropriate regulation can actually encourage innovation by providing the legal certainty needed to discipline the market and encourage the entry of new players and new business models.⁴⁹

After all, for new entrants and small businesses, the absence of regulation or regulatory instability can lead to very harmful scenarios, as not everyone is able to undertake a project while the rules of the game are not at least minimally defined; on the other hand, it is difficult to structure new business models based on respect for the rights of those affected by AI systems if the market is dominated by large players who do not adopt these precautions and, precisely for this reason, are not subject to the corresponding costs.⁵⁰

In legislative terms, Bill No. 2338/2023 stands out, which currently awaits approval by Congress and was based on the premise that, despite the

⁴⁷ Brazil. Federal Government. *Meta cumpre exigências da ANPD e poderá retomar, com restrições, o uso de dados pessoais para treinamento de inteligência artificial*. Available at: <https://www.gov.br/anpd/pt-br/assuntos/noticias/meta-cumpre-exigencias-da-anpd-e-podera-retomar-com-restricoes-o-uso-de-dados-pessoais-para-treinamento-de-inteligencia-artificial>. August 30, 2024. Access on September 05, 2024.

⁴⁸ Dignum, Virginia. 2020. "Responsibility and Artificial Intelligence." In *The Oxford Handbook of Ethics of AI*, edited by Markus D. Dubber, Frank Pasquale, and Sunit Das. New York: Oxford University Press, 225.

⁴⁹ Frazão, Ana. 2024. "Regulation of Artificial Intelligence in Brazil: Examination of Draft Bill No. 2338/2023." *UNIO – EU Law Journal* 10 (1): 55–70, 58.

⁵⁰ Frazão, Ana. 2024. "Regulation of Artificial Intelligence in Brazil: Examination of Draft Bill No. 2338/2023." *UNIO – EU Law Journal* 10 (1): 55–70, 58.

undeniable degree of uncertainty that still exists regarding AI, there is already considerable mapping in the literature and various empirical studies on many of its risks, which is why the regulation of these systems is necessary.⁵¹

It was inspired by the EU's AI Act, ratified by the EU Council on May 21, 2024, which is the first global AI regulation and reflects the EU's commitment to guiding AI development with ethics, trust, fundamental rights, and dignity as its main principles.⁵² While several Big Tech companies have adopted ethical codes to mitigate the risks associated with AI, the EU recognized that these market-oriented self-regulation tools would be insufficient⁵³, making it necessary to create a regulation on the subject. It is driven by two main objectives: improving the functioning of the internal market by establishing a uniform legal framework for the development, marketing, and use of trustworthy AI; and ensuring a consistent and high level of protection for public interest reasons, such as health and safety.⁵⁴ The AI Act has adopted a horizontal approach, regulating AI systems in general, rather than following a specific sectoral approach.⁵⁵

Specifically regarding competition law, Bill No. 2338/2023 introduced, in its Article 2, Item IV, free competition as one of the foundations for the development, implementation, and use of AI systems in Brazil⁵⁶, in addition to Article 170, Item IV, of the Federal Constitution, which establishes free competition as one of the principles of the economic order.

An additional aspect that Bill No. 2338/2023 provides is the creation, under Article 4, Item XI, of a National System for Regulation and Governance of Artificial Intelligence (SIA), which is a regulatory ecosystem coordinated by the competent authority for the full implementation and enforcement of the law throughout the national territory with legal certainty. An amendment to the bill has proposed that ANPD (National Data Protection Authority), the agency responsible for overseeing, implementing, and

⁵¹ Frazão, Ana. 2024. "Regulation of Artificial Intelligence in Brazil: Examination of Draft Bill No. 2338/2023." *UNIO – EU Law Journal* 10 (1): 55–70, 56.

⁵² Bradford, Anu. 2023. *Digital Empires: The Global Battle to Regulate Technology*. Oxford: Oxford University Press. E-book.

⁵³ Bradford, Anu. 2023. *Digital Empires: The Global Battle to Regulate Technology*. Oxford: Oxford University Press. E-book.

⁵⁴ Palmiotto, Francesca. 2024. "When Is a Decision Automated? A Taxonomy for a Fundamental Rights Analysis." *German Law Journal* 25: 210–36, 218.

⁵⁵ Smuha, Nathalie A., and Karen Yeung. 2023. "The European Union's AI Act: Beyond Motherhood and Apple Pie?" In *The Cambridge Handbook on the Law, Ethics and Policy of Artificial Intelligence*, edited by Nathalie A. Smuha. Cambridge: Cambridge University Press, 8.

⁵⁶ Article 2 The development, implementation, and use of artificial intelligence systems in Brazil are based on the following principles:

(...)

VII – free enterprise, free competition, and consumer protection;

enforcing the General Data Protection Law in Brazil, serve as the coordinating body for the SIA.⁵⁷ It is worth noting that the creation of an AI supervisory authority is already a reality in Europe: in August 2023, the Spanish government approved the statute of the Spanish Agency for Artificial Intelligence Supervision (*estatuto de la Agencia Española de Supervisión de la Inteligencia Artificial*), becoming the first European country to incorporate such an authority into its legal framework.⁵⁸

Furthermore, the SIA, in its Article 40, § 2, Item II, aims to collaborate with agencies and regulatory bodies on other cross-cutting issues, such as competition and consumer law.⁵⁹ The goal is to facilitate joint action between this competent authority and CADE on matters involving allegations of abuse of dominant position by Big Tech when the issue is related to AI. In this regard, CADE, in its contribution to Bill No. 2338/2023, suggested the creation of a provision allowing competition defense bodies to request technical opinions from regulatory agencies related to their sectors of operation, which would be used to support the analysis of concentration acts, with the aim of providing greater legal certainty for joint actions by the entities within the system.⁶⁰

Another important document related to the topic, released at the end of July 2024, is the Brazilian Artificial Intelligence Plan. It outlines investments of up to R\$ 23 billion in 54 initiatives between 2024 and 2028, with the goal of promoting the development, availability, and use of AI in Brazil to address major national, social, economic, environmental, and cultural challenges. Among the proposals to prevent the concentration of technology in Big Tech are the creation and enhancement of national databases for AI training to

⁵⁷ Brazil. Federal Government. *ANPD é formalizada como coordenadora do Sistema Nacional de Inteligência Artificial*. Available at: <https://www.gov.br/anpd/pt-br/assuntos/noticias/anpd-e-formalizada-como-coordenadora-do-sistema-nacional-de-inteligencia-artificial>. Access on August 30, 2024.

⁵⁸ España. Ministerio de Hacienda Y Función Pública. *Aprobado el estatuto de la Agencia Española de Supervisión de la Inteligencia Artificial*. August 22, 2023. Available at: <https://www.hacienda.gob.es/GabineteMinistro/notas%20prensa/2023/consejo-de-ministros/22-08-23-np-cm-estatutos-agencia-inteligencia-artificial.pdf>. Access on September 05, 2024.

⁵⁹ In English translation:

§ 2 The SIA has the following objectives and foundations:

(...)

II - harmonization and collaboration with agencies and regulatory bodies on other cross-cutting issues such as competition defense, consumer protection, and environmental protection;

⁶⁰ Brazil. Federal Government. *Apresentação de contribuição do CADE, em âmbito de advocacia da concorrência, sobre o projeto de lei 2.338/2023, que dispõe sobre o uso de inteligência artificial, e outros nove projetos que tramitam em apenso*. May 27, 2024. Available at: https://cdn.cade.gov.br/Portal/assuntos/noticias/2024/Contribui%c3%a7%c3%a3o%20CADE%20PL%202338_final.pdf. Access on September 06, 2024.

reduce external dependence and reflect Brazil's diversity and specificities, and the creation of a sovereign cloud-based public data ecosystem to ensure national technological autonomy.⁶¹ Although praised for its content, the Brazilian Artificial Intelligence Plan does not specify in detail how it will achieve its goals.

Finally, although it is not specifically the focus of this point, it is worth mentioning the Digital Markets Act (DMA), a European Union legislation that, unlike the US, adopts a human-centered approach to regulate the digital economy, where fundamental rights and the notion of a fair market form the basis for regulation.⁶² The DMA, which came into effect in March 2024, is part of a set of regulations proposed to make “Europe fit for the Digital Age.” It sets quantitative thresholds, as well as obligations and prohibitions for online search providers, app stores, and other platform services considered “gatekeepers” of digital ecosystems. For now, the DMA applies to six non-EU companies: Alphabet, Apple, Amazon, ByteDance, Meta, and Microsoft.⁶³

To illustrate this regulation, the DMA provides that “gatekeepers” cannot favor their own products or services over those of their competitors. Considering the influence that EU law has on Brazilian law (such as influencing the General Data Protection Law and the AI Act), it is possible that some aspects of this legislation might influence any potential bill—such as amendments to Bill No. 2768/2022, which deals with the organization, operation, and functioning of digital platforms and is currently under consideration in Congress – that aims to regulate Big Tech in Brazil.

III. CONCLUSION

As seen, the concentration of power of Big Tech in terms of technology, coupled with the autonomous and self-learning characteristics of generative AI, raises significant concerns about the possibility of anti-competitive practices by these agents, particularly abuse of a dominant position.

In this context, it was observed that Brazilian antitrust legislation, with Law No. 12.529/2011 standing out, has mechanisms to prevent anti-competitive practices, such as the establishment of a federal authority to oversee such practices (CADE) and the determination of abuse of a dominant

⁶¹ Brazil. Federal Government. *Proposta de Plano Brasileiro de Inteligência Artificial 2024-2028*. July 29, 2024. Available at: https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/noticias/2024/07/plano-brasileiro-de-ia-tera-supercomputador-e-investimento-de-r-23-bilhoes-em-quatro-anos/ia_para_o_bem_de_todos.pdf/view. Access on August 29, 2024.

⁶² Bradford, Anu. 2023. *Digital Empires: The Global Battle to Regulate Technology*. Oxford: Oxford University Press. E-book.

⁶³ Boscheck, Ralf. 2024. “The EU’s Digital Markets Act: Regulatory Reform, Relapse or Reversal.” *Intereconomics* 59 (3): 154–59, 154.

position as an economic order violation. In fact, as analyzed, CADE has already examined allegations of abuse of a dominant position by Big Tech companies.

Regarding the possible mechanisms to regulate AI in Brazil, key highlights include Bill No. 2338/2023, which establishes free competition as a principle and provides for the creation of a National Regulatory Authority, and the Brazilian Artificial Intelligence Plan, which aims to reduce external dependence on Big Tech by, for example, establishing a sovereign cloud-based public data ecosystem to ensure national technological autonomy. Finally, it is essential for regulatory bodies (CADE, in the context of competition law, and the National System for Regulation and Governance of Artificial Intelligence) to work together to maintain constant dialogue and prevent unfair competition by Big Techs.

Thus, it can be asserted that, if Bill No. 2338/2023 and the Brazilian Artificial Intelligence Plan are approved as they currently stand, and when combined with the existing antitrust legislation, Brazil will have effective legislative mechanisms not only to curb the abuse of dominant position by big tech but also to encourage the development of AI technology by Brazilian companies. However, if approved, it will be necessary to assess how these regulations will be implemented in practice – for example, how the SIA will operate and whether there will be investment to ensure its effective monitoring of competitive practices.

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