LEGAL GROUNDS' REPORT ON THE IMPACT OF BILL 2768 ON LEGAL CERTAINTY:
SUMMARY OF THE FINDINGS

Legal Grounds institute

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This Report analyzed the potential impact of Bill 2.768 on legal certainty, and comparing the application of the obligations outlined in its Article 10/11 with CADE's jurisprudence over the past 10 years. We have measured the impact on legal certainty in terms of potential conflicts between Bill 2.768 and CADE's jurisprudential parameters, considering that the legislative proposal maintains CADE's antitrust enforcement powers while giving ANATEL enforcement of the new law (and it is quite unclear how the two agencies would work together)

We have raised the following hypothesis: if self-preferencing, refusal of access to platforms, and misuse of data had been analyzed by applying the prohibitions contained in Bill 2.768, what would have been the divergence between CADE and ANATEL's decision? Since the standards for analyzing self-preferencing in Bill 2.768 are broad, it is possible to compare practices offline and online across various markets, thus providing more examples to visualize the potential impact in terms of conflicting decisions.

The analysis also allows for measuring and comparing CADE's conviction rate for these practices versus ANATEL's hypothetical application of Bill 2.768. To do so, we compared the application of the ex-post antitrust methodology vis a vis the ex-ante parameters presented in Bill 2.768. This evaluation, with concrete examples of self-preferencing cases CADE has analyzed, allows us to draw conclusions on the very feasibility of stipulating per se obligations or prohibitions concerning vertical conduct.

A key point to note from the outset is the lack of clarity on how the parameters for balancing the obligations provided in Article 10, outlined in Article 11 of Bill 2768, would be applied. There are at least four possible interpretation scenarios for applying the obligations contained in Article 10 alongside Article 11 of the bill.

Scenario 1 (C1): Outright prohibition of non-discrimination provided in Article 10, without a case by case analysis of the market or specific practice with Article 11 only serving as a guideline for sanction calibration. Article 11 would have no material consequences for characterizing the infraction, having relevance only for penalty dosimetry.

Scenario 2 (C2): Article 11 has material effects on the characterization of infractions, leading to two sub-scenarios:

Scenario 2-A (C2-A): Strict conditional rules with exceptions to self-preferencing. Once the condition of one of the clauses in Article 11 is met, the obligation of non-discrimination is exempted.

Scenario 2-B (C2-B): Conditional contributory rules where conditions in Article 11 are reasons in favor of self-preferencing, but not sufficient for its permission. There would be discretion to weigh reasons for and against allowing the conduct.

Below, we rewrite the rules of self-preferencing with the conditions set out in the clauses of Article 11 of the Bill, in Scenarios C2-A (non-bolded formulation of the legal consequence) and **C2-B** (bolded formulation of the legal consequence):

Rule 1) Even if there is power to control access and market power, if self-preferencing is based on technical and non-arbitrary criteria, then self-preferencing is allowed (**then this is a reason in favor of allowing self-preferencing**)

Rule 2) Even if there is power to control access and market power, if self-preferencing does not pose a risk of harm, then self-preferencing is allowed (**then this is a reason in favor of allowing self-preferencing**)

Rule 3) Even if there is access control power and market power, if self-preferencing brings benefits to the market or reduces costs, then self-preferencing is allowed (**then this is a reason in favor of allowing self-preferencing**)

Rule 4) Even if there is access control power and market power, if there is high competition in the service offered by the platform, then self-preferencing is allowed (**then this is a reason in favor of allowing self-preferencing**)

Scenario 3 (C3): The very application of the antitrust methodology, with hierarchical criteria for commercial justification, rivalry, damage potential, and compensatory efficiencies. In this scenario, there is obviously full convergence with CADE's jurisprudence.

The very existence of at least four possible interpretations of how to apply the obligations under Bill 2768 introduces considerable legal uncertainty. This would also likely lead to judicial challenges, causing potential divergences between administrative and judicial decisions.

The potential conflict between Bill 2768 and CADE's jurisprudence is significant, as the bill 2768 uses the concept of "power of essential access control", akin to the DMA's "gatekeeper" concept, which is based on revenue rather than on market power (the analysis used by CADE). The concept used by the Bill likely subjects companies without market power to obligations and penalties without sufficient evidence of anticompetitive behavior or harm to competition or consumers.

Even if we assume a conservative perspective, where platforms with "power of essential access control" are arbitrarily assumed to have market power, the analysis reveals significant potential for conflict and legal uncertainty.

The table below summarizes the divergences between interpretation scenarios of Bill 2.769 and

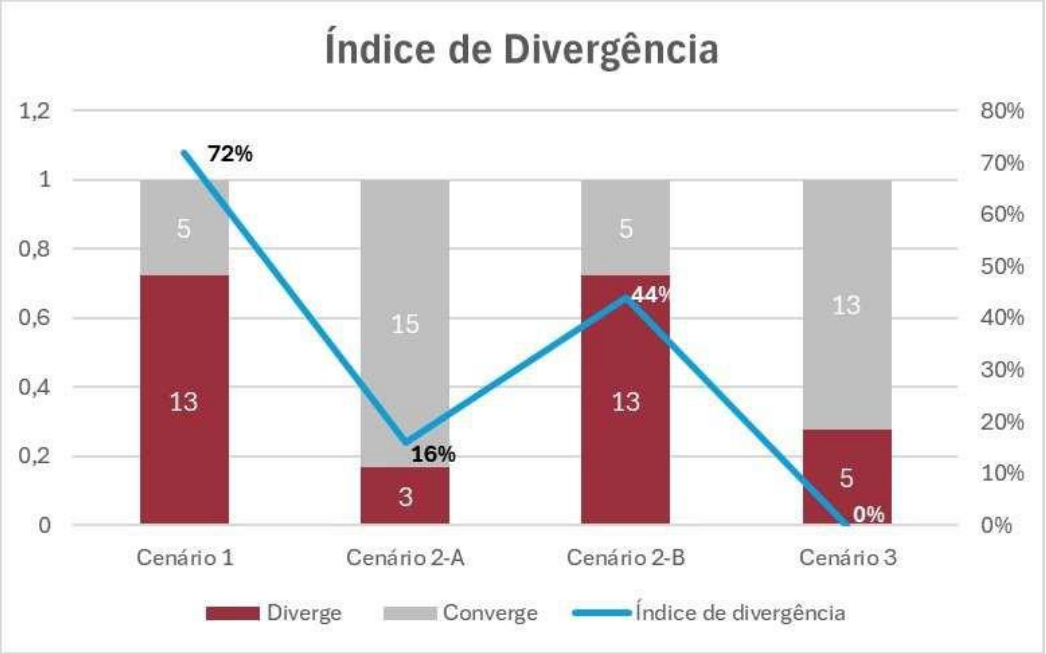
CADE's decisions over the past 10 years:

Table 3 – Divergence and Convergence for each interpretative scenario

Case	Scenario 1	Scenario 2A	Scenario 2B	Scenario 3
Cash Transport	Conflicts	Converges	Converges	Converges
ANTAQ vs OGMO	Converges	Converges	Converges	Converges
Automotive Alarms	Converges	Conflicts	Converges	Converges
Videolar Innova vs Braskem	Conflicts	Converges	Conflicts	Converges
Semasa vs Sabesp	Conflicts	Converges	Conflicts	Converges
Comgás vs White Martins	Converges	Converges	Converges	Converges
BT vs Postal Service Consortium	Converges	Conflicts	Converges	Converges
Verri vs White Martins	Conflicts	Converges	Converges	Converges
PTI vs Target & ABNT	Conflicts	Converges	Converges	Converges
Google Adwords	Conflicts	Converges	Converges	Converges
Google Onebox	Conflicts	Converges	Conflicts	Converges
Cielo vs Linx & Stone	Conflicts	Converges	Conflicts	Converges
Airline Loyalty Programs	Conflicts	Converges	Converges	Converges
Google Shopping	Conflicts	Converges	Conflicts	Converges
Veloe vs Connect Car & Sem Parar	Conflicts	Converges	Conflicts	Converges
Âmbar vs Petrobras	Conflicts	Converges	Conflicts	Converges
THC2	Converges	Converges	Converges	Converges
Comgás vs Petrobras	Conflicts	Conflicts	Conflicts	Converges

From this table, we can visualize the degree of divergence versus convergence for each scenario and calculate the divergence rate for each interpretative scenario of Bill 2768:

Table 4 – Divergence and Convergence for each interpretative scenario



Thus, it can be seen that Scenario 1 (interpreting Bill 2768 as imposing categorical obligations) would bring drastic consequences, with a divergence rate of 77% in relation to CADE's jurisprudential tradition and conflicts in all cases where discriminatory practices were allowed by CADE, as it analyzed various factors including commercial justifications, absence of harm, or economic efficiencies.

In Scenario 2-A (interpreting Bill 2768 as having strict conditional obligations with exceptions), the divergence is low at 16%, thus making the application of Bill 2768 less impactful on legal certainty. However, as will be observed below, this scenario is more lenient than CADE's jurisprudence for markets in general, which seems contradictory with the Bill's goal of bringing greater rigor to competition enforcement in the so-called "digital markets."

Scenario 2-B (interpreting Bill 2768 as having contributive conditional obligations, i.e. as condtions bringing reasons for or against the permission of self-preferencing), on the other hand, is quite impactful, with a 44% divergence from CADE's decisions on self-preferencing: there would be conflict and, therefore, potential for judicial disputes in nearly half of the discrimination cases evaluated by ANATEL and CADE.

Finally, Scenario 3 presents full convergence, as it interprets the bill as applying the same ex-post methodology of antitrust analysis, with the inconvenience of duplicating the national competition authority.

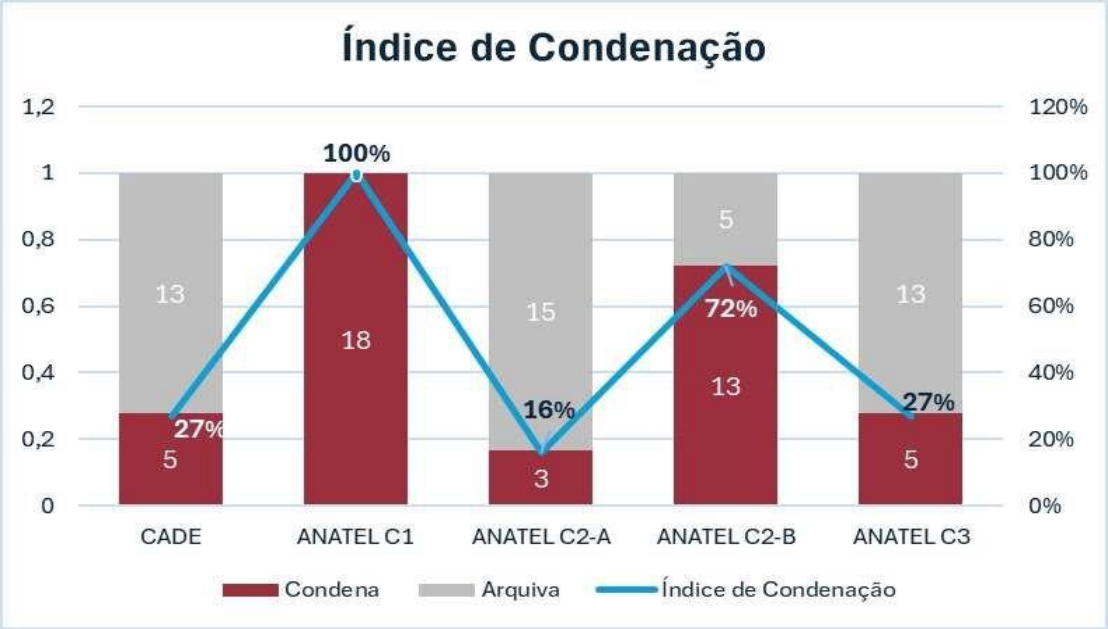
It is also interesting to observe the conviction rates in each scenario to assess the potential impacts of Bill 2768.

Table 5 – Results of CADE's decisions and Bill 2.768 interpretation scenarios

Case	CADE's Decision	Scenario 1	Scenario 2A	Scenario 2B	Scenario 3
Cash-in-Transit	Dismisses	Condemns	Dismisses	Dismisses	Dismisses
Antaq vs OGMO	Condemns	Condemns	Condemns	Condemns	Condemns
Automotive Alarms	Condemns	Condemns	Dismisses	Condemns	Condemns
Videolar Innova vs Braskem	Dismisses	Condemns	Dismisses	Condemns	Dismisses
Semasa vs Sabesp	Dismisses	Condemns	Dismisses	Condemns	Dismisses
Comgás vs White Martins	Condemns	Condemns	Condemns	Condemns	Condemns
BT X Office Consortium	Condemns	Condemns	Dismisses	Condemns	Condemns
Verri vs White Martins	Dismisses	Condemns	Dismisses	Dismisses	Dismisses
PTI vs Target & ABNT	Dismisses	Condemns	Dismisses	Dismisses	Dismisses
Google Adwords	Dismisses	Condemns	Dismisses	Dismisses	Dismisses
Google Onebox	Dismisses	Condemns	Dismisses	Condemns	Dismisses
Cielo vs Linx & Stone	Dismisses	Condemns	Dismisses	Condemns	Dismisses
Fidelidade de cias aéreas	Dismisses	Condemns	Dismisses	Dismisses	Dismisses
Google Shopping	Dismisses	Condemns	Dismisses	Condemns	Dismisses
Veloe vs Connect Car e Sem Parar	Dismisses	Condemns	Dismisses	Condemns	Dismisses
Âmbar vs. Petrobras	Dismisses	Condemns	Dismisses	Condemns	Dismisses
THC2	Condemns	Condemns	Condemns	Condemns	Condemns
Comgás v. Petrobrás	Dismisses	Condemns	Dismisses	Condemns	Dismisses

Similarly, we can visualize, for each scenario, the degree of divergence versus conviction through the bas chart below and calculate the conviction rate for discriminatory conduct in CADE's case law, compared to each of the interpretation scenarios of PL 2.768.

Table 6 – Convictions by CADE and in the Different Scenarios of PL 2.768



Looking at the conviction rates, **Scenario 1** (interpreting Bill 2768 as imposing categorical obligations) seems unacceptable as it completely stiffens differentiation strategies in the market

without any consideration of the impacts on competition and possible benefits to consumers and innovation. Moreover, there might not even be market power among the agents, as highlighted above.

Scenario 2-A (interpreting Bill 2768 as stipulating strict conditional obligations with exceptions), as observed, significantly reduces the conviction rate for discriminatory conduct by CADE, almost by half. Although this interpretation is plausible, it would have the reverse effect of the explicit motivation behind the PL, which aims to apply stricter treatment to digital platforms with "power of essential access control".

Meanwhile**, Scenario 2-B** (interpreting Bill 2768 as stipulating contributive conditional obligations, i.e. as reasons for the permission self-preferencing that may be overridden), even under the conservative interpretation made during the analysis, shows a high conviction rate for discriminatory practices, reaching 72%, which could have harmful effects by discouraging pro-competitive behavior from economic agents offering online services. As seen in the qualitative analysis of the cases, Scenario 2-B brings several points of incompatibility that do not seem reasonable and could lead to decisions difficult to justify, considering the proper functioning of the market and consumer welfare.

It is notable how distorted the situation becomes in Scenario 2-B when the step-by-step nature of the antitrust methodology is lost. This is because the presence of a factor, such as a legitimate business justification, in traditional antitrust analysis is highly important to determine whether or not conduct in question is anti-competitive or pro-competitive. Thus, other reasons against the practice listed in Article 11 would not apply. However, in the ex-ante rules framework of Scenario 2-B and the proposal in the PL, all rules are triggered, meaning the authority must simultaneously consider and weigh all the reasons.

In particular, as observed in some cases referenced in Table 3, the absence of competitive relationships in the downstream market led CADE to conclude that there were no incentives or risk of harm to competition in the market, which would already disqualify the practice as illegal under traditional antitrust analysis. This same rational reasoning is not available in the application of ex-ante rules. Under the proposed Bill, even in the absence of competitive harm or lack of incentives for anticompetitive behavior, the mere existence of differentiated treatment by the platform triggers the pros and cons analysis outlined in Article 11, under Scenario 2-B. If other reasons against differentiation, such as arbitrariness, lack of technical criteria, absence of competition in supply, or lack of cost reduction, are applicable, the conduct then becomes prohibited. This was evident in the Report's analysis of cases like Comgás vs. Consórcio Gemini, THC2, and the administrative proceeding in the automotive alarms market.

This distortion is particularly relevant when we consider that the analysis proposed by Bill 2768 does not assume that the agent holds market power, but merely the power of essential access control, measured by revenue, which could lead to conviction regardless of market power.

In other words, differentiated conduct by a platform providing online services could be prohibited and penalized, even if the conduct is directed at a vertically related company that is not a competitor of the platform, or even if the platform does not have market power. As a result, the prohibitions in the Bill exceed the objective of protecting competition in so-called digital markets, and therefore, contrary to the goals stated in the legislative proposal.

The same issue arises with the analysis of efficiencies. Article 11, section IV of Bill 2768 seems to have intended to incorporate some types of efficiencies by considering "market benefits" or "cost reductions." Several problems emerge in its application.

First, in antitrust methodology, the recognition of compensatory efficiencies authorizes the conduct, overriding all other reasons against the practice. However, in the application of ex-ante rules, there is no step-by-step methodology or hierarchy of considerations, as in antitrust analysis, which could lead to conviction even when compensatory efficiencies are recognized. This is what happens in cases like Google Shopping, Google Adwords, and Âmbar vs. Petrobras.

Furthermore, the analysis of market benefits or cost reductions does not cover all efficiency scenarios recognized by CADE. In particular, it does not capture dynamic efficiencies or those related to quality, which are highly relevant in digital services. As a result, cases dismissed by CADE could be condemned under Bill 2768, especially in innovation-driven markets where dynamic efficiencies are present and desirable. Any adjustments to expand the scope of efficiencies in line with current CADE practices would only marginally affect the impact on legal certainty.

However, there are also instances where mere cost reductions, although observable, are not accepted by CADE—either because they could be achieved through other means or because they are not sufficiently compensatory. This occurs when balancing welfare gains from efficiencies against the degree of harm to competition. In such cases, there are conflicts between CADE's condemnatory decisions, which would be permitted under Bill 2768—not only in scenario 2-A, where exceptions, once considered, are applied strictly, but also in scenario 2-B, if there are other favorable reasons for the practice unrelated to the severity of the market harm.

It could be argued that these hierarchical considerations about the reasons for and against discrimination, typically made by CADE based on the antitrust methodology, could be adopted by the new authority responsible for competition in so-called "digital markets." However, this would mean abandoning the ex-ante approach to embrace the very antitrust methodology. This would lead us to collapse into **Scenario 3**, where there is no justification for duplicating authorities, with a strong risk of institutional conflicts and litigation, as previously discussed.

The analysis undertaken in this Report casts serious doubts on the very prospect of success in formulating ex-ante rules or per se prohibitions for vertical conduct. This is because the issues and incompatibilities pointed out relate less to the content of the rules and more to the methodology of

application.

Although more sophisticated, the antitrust analysis methodology, being ex-post, with a hierarchy of criteria and a decision tree, allows for a contextual assessment. However, different forms of ex-ante stipulation of prohibitions, even when exceptions are also set ex-ante, can lead to a series of over-inclusions (conduct that is prohibited but, in the specific contextual analysis, should be allowed) or under-inclusions (conduct that is allowed but, in the contextual analysis, should be prohibited).

As we saw in the analysis of self-preferencing conduct, Scenario C2-A contains many under-inclusions compared to CADE's jurisprudence, while Scenario C2-B contains many over-inclusions.

The presence of under- and over-inclusions is a characteristic of rule-based regulations, where exceptions may arise during contextual application and enforcement. It is difficult to foresee all possible exceptions in a rule that would apply to an obligation or prohibition. Adopting such rules necessarily implies accepting suboptimal solutions compared to what a contextual analysis would provide. However, their adoption can be advisable when the predictable volume of suboptimal solutions is low and can be offset by reduced enforcement costs—that is, the time and material costs of analyzing all the particularities of a case. In such cases, applying ex-ante rules can bring legal certainty, as it implies stability, with few cases of suboptimal decisions and reduced enforcement costs.

But this is only the case when there is significant consensus regarding the conditions under which an obligation or prohibition of conduct should apply in different contexts, and there is no willingness to change such conviction as time and the contexts in which the practice occurs evolve. For example, there is little disagreement about the prohibition of the conduct of "killing someone," and consensus exists regarding the few exceptional conditions (e.g., self-defense). On the other hand, there is no willingness to change this solution—that is, the belief that killing should be prohibited—as social conditions evolve.

Another problem here is that *ex ante* rules are asymmetrical, as they don't apply to all players competing in the space but are based on the size of the player across various sectors.

Thus, the stipulation of ex-ante prohibitions is only suitable for providing legal certainty when it is expected that there will be a minimum of suboptimal decisions, something that is observed only with respect to practices that meet the following characteristics:

(i) There is a well-established track record of convictions for the practice.
(ii) The practice to be prohibited causes harm in the vast majority of cases, with minimal prospects of suboptimal decisions when applying a general ex-ante prohibition.
(iii) There is significant consensus regarding the conditions under which the prohibition of the conduct should apply and what should be its exceptions.

(iv) There is little or no history of establishing new conditions or exceptions to the prohibition in the authority's precedents.

(v) There is low dynamism in the evolution of social or economic conditions related to the practice of the conduct, meaning there is no willingness to alter the prohibition over time or introduce new conditions or exceptions.

As we saw in the analysis of CADE's precedents regarding discriminatory conduct and self-preferencing, none of these factors are present.

Firstly, there is no history at CADE of convictions for self-preferencing conduct in digital markets. One may argue that this supposed lenience is the very reason for changing the approach, but the point here is that making self-preferencing *ex ante* forbidden may be a radical move that inverts the spectrum of a vertical practice that may bring efficiencies and benefits to consumers in different contexts.

Secondly, when we look at markets in general, there have been few convictions for self-preferencing in CADE's jurisprudence, with a conviction rate of 27% over the past 10 years. This makes the likelihood of suboptimal decisions high, with significant under-inclusion (Scenario 2-A) or over-inclusion (Scenarios 1 and 2-B).

Thirdly, as the analysis of CADE's case law shows, the impact of self-preferencing conduct is far from being inherently anticompetitive. Indeed, even in convictions of a particular practice of self-preferencing, there is usually divergence among commissioners, including in so-called digital markets, what shows a lack of certainty that is uncongenial to a per se regulation.

Fourthly, as we have seen along this report, CADE's case law shows that a series of new conditions have been established as relevant and introduce exceptions to the prohibition of self-preferencing, which also increases the risk of suboptimal decisions, with negative effects on economic relationship.

Finally, there is a high level of innovation and changes in the economic and market conditions of the various digital services, a trend that is likely to intensify with the evolution of Artificial Intelligence, which will undoubtedly impact the dynamics of so-called digital markets.

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