

Multi-homing Limitations in the Brazilian Food Delivery Sector: A Case Study on iFoodCade's Decision

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ABSTRACT

The expansion of digital platforms influences competition policies, particularly in markets as online food delivery. This article examines the competition law's treatment of exclusivity and the role of multi-homing in the sector, focusing on the Brazilian Competition Authority's (CADE's) decision in the iFood case. Multi-homing may seem an essential tool to enhance competition in digital platform markets, but it also has limitations and might harm entry in the market. A rigid treatment of exclusivity clauses by competition authorities can achieve benefits through multi-homing that must be balance against negative consequences, such as higher costs and decrease in marketing and data support for restaurants, especially small ones. Therefore, the online food delivery market debate shows the need to balance multi-homing as a competitive goal with economic efficiencies.

Keywords :

exclusivity clauses, antitrust, food delivery, iFood, multi-homing, CADE, digital platforms, dynamic competition, visibility, economic efficiencies

1.Introduction

The rise of digital platforms has major implications for effective competition policy. One goal of competition is to ensure healthy market dynamics that positively impact consumers and society with better products or services. The competitive process serves the economy and consumers through price, innovation, and quality.

behaviours and restaurant dynamics. For instance, dark kitchens¹ became a trend, on-demand delivery has shifted consumer habits and this transformation still evolves.² Although delivery is quite outdated, the rapid expansion only happened due to digital platforms. A platform can be explained as ‘place in between’, like a train platform that connects two sides horizontally, or an oil platform that makes connections vertically. In digital reality, boundaries are almost limitless, platforms can make several connections at the same time, two, three, four or more. They are called as multisided platform. The contemporary food delivery market can have five connections simultaneously: the customers who place orders (demand users), the restaurants who make orders (offer users), the couriers who deliver orders (another type of offer users), the intermediaries who manage orders (platforms) and advertisers (add agents inside the platform). A market structure as such differs effectively and normatively from traditional single-sided monopolies or oligopolies,³ reshaping theories of foundational antitrust.⁴ In single-sided relationships, interaction occurs directly (restaurant-consumer). This straight business relationship generates effects easier to predict – players know better, perceive changes in the market more easily and can internally regulate its effects. In the multisided scenario, interactions between sides occur simultaneously, in one side a consumer-platform relation and in the other a restaurant-platform relation, which affects crosswise the relationship between consumers and restaurants, and, finally, both with the platforms (excluding deliverers and advertisers for the purposes of simplification). For this analysis, the main goal is to comprehend the particularities of interactions between the two main sides of food delivery platforms, especially¹ Dark kitchens are conceptualized as having no spaces for local consumption, no direct contact with the public and selling exclusively through online platforms. (M. Khan, *Technological Disruptions in Restaurant Services: Impact of Innovations and Delivery Services*, 44 *J. Hospitality & Tourism Res.* (2020), doi: 10.1177/1096348020908636. For an study on the impacts in the Brazilian market see M. Hakim et al., *Exploring dark kitchens in Brazilian Urban centres: A Study of Delivery-Only Restaurants With Food Delivery Apps*, 170 *Food Res. Int’l* (2023), doi: 10.1016/j.foodres.2023.112969.² According with Statista’s data, the revenue in the online food delivery market worth around USD 1.40 trillion in 2025 and may compound an annual growth rate of 9.49% from 2024 to 2029, expanding from a projected USD 1.22 trillion (2024) to USD 1.92 trillion (2029) globally (Statista, *Online Food Delivery – Worldwide* (2024), <https://www.statista.com/outlook/emo/online-food-delivery/worldwide>).³ J. Røhøft & J. Tirole, *Platform Competition in Two-Sided Markets*, 1 *J. Eur. Econ. Ass’n* (2003), doi: 10.1162/154247603322493212.⁴ V. Fernandes, *Disruptive Innovations on Digital Platforms: Lessons from Epic Games v. Apple in the U.S. and Rappi v. iFood in Brazil*, *CPI Columns* (2021). 380 WORLD COMPETITION

the role of multi-homing and the effects of exclusivity when it imposes single-homing. The main ingredient of two-sided dynamics is network effects. A positive effect refers to the increase in user welfare from many users on the same platform (more connections, more value). On the contrary, negative effects refer to reducing value for users scattered in large platforms.⁵ A digital platform's business model depends on a portfolio effect; that is, it focuses on producing positive network effects, which increases the platform value. Strong network design can lead to a winner-takes-all situation since the number of users needed to deliver relevant value can be considerable. Because of these features, positive effects may be reachable for just a few platforms, if not only one. Additionally, a two-sided platform has cross-network or cross-side effects. The concentration of users on one side directly increases value while also attracts entrance (or maintenance) of users on the other side.⁶ It is a feedback reinforcement: a platform with many restaurants becomes more attractive to consumers and vice-versa. As will be detailed later, a perfect multi-homing practice between platforms can be an illusion since users will not trade gains from interacting with a huge platform to use the option of a smaller platform with lower users and minimum network effects. Digitalization has also brought some specific consequences to competition dynamics, such as algorithmic pricing and data-driven strategies. With it, traditional problems as exclusivity clauses demand new considerations. Historically, these clauses are assessed through the effects-based approach in the EU⁷ and the rule of reason in the United States.⁸ Yet, the assessment of the anticompetitive effect remains subject to controversy. After all, even in traditional brick-and-mortar settings, evaluating the counterfactual can be complex. In digital markets, the intricacies only deepen, making assessments more challenging because technology shapes the nature and impact of exclusion.⁹ In response, competition authorities have been updating guidelines to better address the specificities of digital markets. The European Commission's Draft 5G. Parker & M. Van Alstyne & S. Choudary, *Platform Revolution*, Norton & Company 33 (2016).⁶ *Ibid.*, at 48.7A. Witt, *The Enforcement of Article 101 TFEU: What Has Happened to the Effects Analysis?*, 55 *Common Mkt. L. Rev.* (2018), doi: 10.54648/COLA2018032.8H. Hovenkamp, *The Rule of Reason*, 70 *Fla. L. Rev.* (2018); D. Ginsburg, *Vertical Restraints de facto Legality under the Rule of Reason*, 60 *Antitrust L.J.* (1991).⁹ OECD, *Exclusionary Conduct in Multi-Sided Markets* 26 (2017). K. Stylianou, *Exclusion in Digital Markets*, 24 *Mich. Telecomm. & Tech. L. Rev.* (2018), doi: 10.36645/mtlr.24.2.exclusion. MULTI-HOMING LIMITATIONS IN THE BRAZILIAN 381

Guidelines on Exclusionary Abuses,¹⁰ Article 102 of the TFEU, exemplifies the effort in this direction: it establishes a high potential for exclusionary effects when a dominant deals with exclusivity obligations. Therefore, the Draft Guidelines sets a presumption of harm under paragraph 60(b),¹¹ with the possibility of rebutting. The burden to prove that their actions do not result in exclusionary outcomes now shifts to the firm. This presumption is rooted in European case law, notably *Hoffmann-La Roche* case,¹² which set a precedent for characterizing exclusivity clauses by dominants as presumptively exclusionary. The present focus on online food delivery is relevant to show some features of two-sided platforms and the role that multi-homing and exclusivity clauses play in this new market setting. The rigid position on exclusivity clauses established by the EU will be subject of comparison. For this, we chose the recent investigation against iFood by the Brazilian Competition Authority ('CADE'), which found some pro- and anti-competitive effects of this clause in a two-sided digital market. The goal is not to

criticize or support the EU's Draft Guidelines on Exclusionary Abuses but to seize the moment of this significant change to reflect what could be missed when law goes in this direction. Therefore, the competition law treatment of exclusivity clauses related to multi-homing and visibility in online food delivery takes place. There are some limitations for multi-homing as a competition goal,¹³ even when literature treats multi-homing as a tool for preservation of choice against locked-in effects.¹⁴ For the task, this article will unfold in four sections besides this introduction, followed by final considerations. Section 2 explores the online delivery market context and its major characteristics. Section 3 addresses exclusivity clauses in digital markets, including investigations around the globe. Section 4 analyses CADE's inquiry of iFood. Finally, section 5 discusses multi-homing and visibility issues, leading to concluding remarks in section 6.¹⁰ European Commission, Guidelines on Exclusionary Abuses of Dominance (2024), https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.¹¹ Paragraph 60(b) Draft Guidelines: 'b) Conduct that is presumed to lead to exclusionary effects: [...] (i) exclusive supply or purchasing agreements; (ii) rebates conditional upon exclusivity; (iii) predatory pricing; (iv) margin squeeze in the presence of negative spreads; and (v) certain forms of tying'.¹² Case 85/76 Hoffmann-La Roche (1979).¹³ A single-homing situation happens when an agent chooses one technology or one company, and that choice has an exclusion effect on its competitors. On the other hand, multi-homing occurs when the choice does not exclude its competitors. Therefore, when a user accesses several platforms for the same purpose, it is multi-homing (Rohet & Tirole, *supra* n. 3; B. Caillaud & B. Jullien, *Chicken and Egg: Competition Among Intermediation Service Providers*, 34 *RAND J. Econ.* (2003), doi: 10.2307/1593720).¹⁴ A. Andreangeli, *Platform Markets, Dominance Issues and Single- and Multi-homing of Merchants: A Real or Hypothetical Choice?*, 17 *Eur. Competition J.* (2021), doi: 10.1080/17441056.2021.1872928.382 WORLD COMPETITION

2 THE DELIVERY MARKET MADE BY DIGITAL PLATFORMS Delivery services existed long before the platform era, mostly via telephone or internet, back in the 2000s. In Europe, for example, the first companies to offer a web model were Just Eat and Hungry House,¹⁵ without any infrastructure, fleet of drivers or complex operations. Around 2013, as smartphone usage grew, a more sophisticated model of on-demand delivery emerged: platforms as Deliveroo (2013) and Foodora (2015) started in Europe,¹⁶ and iFood (2011) in Brazil.¹⁷ They provide an integrative space between restaurants (users-supply) and consumers (users-demand) and fast delivery services through their own fleet. During this 'race for the market' moment, a business goal is to introduce not only the product, but the whole concept.¹⁸ If it succeeds, a dominant design emerges, shaping future generations of products and the 'architectural franchise'.¹⁹ The leading force in this race for the market is radical innovation to meet users' needs. The winner strategy is to combine technological sophistication with user attraction and to overcome switching costs²⁰ of established platforms.²¹ The exception happens when no established platforms exist, then entrance will face no resistance, commonly known as the pioneer's advantage.²² Once the opportunity gap presents, agents rush to establish a critical mass of users²³—preferably on both sides. As the network becomes more rigid, market uncertainties and instabilities tend to reduce.¹⁵ L. Richardson, *Platforms, Markets, and Contingent Calculation: The Flexible Arrangement of the Delivered Meal*, *Antipode 2* (2020).¹⁶ Y. Ecker & A. Strüver, *Towards Alternative Platform Futures in Post-Pandemic Cities? A Case Study on Platformization and*

Changing Socio-spatial Relations in On-demand Food Delivery, 3 *Digital Geography & Soc'y* 3 (2022), doi: 10.1016/j.diggeo.2022.100032.17 Richardson, *supra* n. 15, at 5.18 'the competitive process shifts from competition in the market to competition for the market' (Stigler Center, Stigler Committee on Digital Platforms Final Report 29 (2019)). Also, as described by Schumpeter, markets created around technology are subject to the cycles of creation and destruction, in which market dominance by one player is a matter of time, as is its future replacement by another more efficient and innovative (J. Schumpeter, *Capitalismo, Socialismo e Democracia* 111 (Fundação de Cultura 1961)).19 A. Brem, P. Nylund & G. Suster, Innovation and de facto Standardization: The Influence of Dominant Design on Innovative Performance, Radical Innovation, and Process Innovation, 50 *Technovation*, Sheffield 80 (2016).20 Switching costs are the ones user incur when change platform, usually related to learning time, registration and consolidated information (Centre, *supra* n. 18, at 105–106).21 D. Evans & R. Schmalensee, Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries, 2 *Innovation Pol'y & Econ.* 10 (2002), doi: 10.1086/653753.22 C. Christensen, S. Anthony & E. Roth, *O Futuro da Inovação* 16–17 Elsevier (2007).23 N. Petit, *Big Tech & the Digital Economy* 78–79 (Oxford University Press 2020).MULTI-HOMING LIMITATIONS IN THE BRAZILIAN 383

Apart from this exception, all competitors face network effects to enter the market, as well as economies of scale, data-driven strategies, high entry costs and low operating costs from each other.24 Users 'get used to' some platform and demand more for changing (multi-homing25). Thus, for multi-homing to be viable, consumers must perceive tangible benefits, otherwise, they tend to remain loyal to one. This is true for the delivery market and other platforms based on network effects: switching costs are the single most significant force working in favor of incumbents. Worse yet for would-be entrants and innovators, switching costs work nonlinearly: convincing ten people connected in a network to switch to your incompatible network is more than ten times as hard as getting one customer to switch.26 In this sense, the coronavirus pandemic created the necessary gap to push consolidation, especially in food delivery. The event catalysed social change due to restrictions in public places. With people locked in their homes, delivery orders increased considerably, changing users' relationship with platforms even after normalization. This type of market was already prone to concentration27; pandemic only made it faster on a global scale. According to Measurable AI, three platforms compete for the delivery market in Italy: Glovo (22%), Just Eat (33%), and Deliveroo (40%) – with a small share held by Uber Eats (6%).28 In Spain, the competition is between Glovo (54%), Just Eat (27%), and Uber Eats (18%) – with no significant participation from Deliveroo in 2022.29 Moving to Asian, the market in Hong Kong counts with Foodpanda (50%) and Deliveroo (34%), with 17% of the remaining users using both platforms; in Taiwan, Foodpanda (44%) competes with Uber Eats (38%), with 18% of users on both.3024 Evans & Schmalensee, *supra* n. 21, at 5–13.25 Act of switching between possible options of the same (or similar) service to cf. prices and conditions (V. Landsman & S. Stremersch, *Multihoming in Two-Sided Markets: An Empirical Inquiry in the Video Game Console Industry*, 75 *J. Mktg.* 39 (2011), doi: 10.1509/jm.09.0119).26 C. Shapiro & H. Varian, *Information Rules* 184–185 (Harvard Business School Press 1999).27 Evans & Schmalensee, *supra* n. 21, at 20.28 Measurable AI, *Your Guide to Italy's Food Delivery Market* (2022), <https://blog.measurable.ai/2022/11/04/your-guide-to-italys-food-delivery-market/>.29 Measurable AI, *Spain Food Delivery Market Overview* (2020–2022 Q1) (2022),

<https://blog.measurable.ai/2022/11/03/spain-food-delivery-market-overview-2020-2022-q1/>.³⁰Measurable AI, *Measuring Loyalty in Food Delivery Users in Asia* (2022), <https://blog.measurable.ai/2022/07/12/measuring-loyalty-in-food-delivery-users-in-asia/>.³⁸⁴

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Delivery market around the globe mainly consists of two or three big players: Figure I Number of Large Delivery Platforms in National Markets. Source: O. Kivisto, *The competitive effects of exclusivity and price parity clauses in the online food delivery market*, master's thesis at Aalto University (2024), pages 33. In Brazil, iFood had in 2022 a 68% market share; UberEats, 10%; others, 15%, and, as considered by the study, 7% goes to WhatsApp, even though it is not a proper competitor.³¹ These data, by the Brazilian Association of Bars and Restaurants (ABRASEL),³² match those reported by Bain & Company on iFood IA, which estimates a 60–70% market share for iFood.³³ Currently, the numbers have changed due to UberEats' exit from Brazil: iFood has 82.2%, followed by Rappi with 9.1%, and PedePronto with 2.1%, as data released by ABRASEL in 2024.³⁴ An³¹ ABRASEL, *iFood ficou tão grande que afeta concorrência e clientes, dizem analistas* (2022), <https://abrasel.com.br/noticias/noticias/ifood-ficou-tao-grande-que-afeta-concorrenca-e-clientes-dizem-analistas/>.³² The institution is co-plaintiff with Rappi as it fully subscribed the representation, according to art. 331 of the iFood IA.³³ Bain & Company produced the report (2020) at Rappi's request, attached to the representation (CADE, *iFood Administrative Inquiry* n° 08700.004588/2020-47 (2020), hereinafter referred to as 'iFood AI', at 47).³⁴ ABRASEL, *O delivery antes e depois da pandemia* (2024), <https://abrasel.com.br/revista/mercado/delivery-pandemia/>. MULTI-HOMING LIMITATIONS IN THE BRAZILIAN 385

interesting percentage in this study is that 45.5% of restaurants declared regular sales via WhatsApp, and 34.4% through their own websites, platforms, or apps. Despite general conviction, many restaurants still rely on telephone orders or WhatsApp. As presented by the Federation of Hotels, Restaurants and Bars of the State of São Paulo (FHORESP) on iFood IA, there are approximately one million food establishments in Brazil, but only around 300,000 have partnerships with marketplaces³⁵ (data from 2022). It is not difficult to assume the quantity of potential users (meaning restaurants) available to any player. Another data shown by FHORESP is the degree of recycling in the food sector: 50% of establishments close within two years of opening, but the replacement rate is even higher.³⁶ Brazilian food sector is constantly recycling itself and growing. Several new restaurants start fresh, unaffiliated with any platforms, which implies potential users. Naturally, the popularity of a platform like iFood in Brazil encourages new users to opt for it more easily. Therefore, how can a new competitor overcome the incumbent's network and popularity? Two main options for it: differentiation or quality.³⁷ One or both can encourage elastic behaviour by users. Katz describes user expectations as compatible with pursuing novelty (because of either differentiation or quality). If an entrant exhibits superior quality, users will follow it.³⁸ This phenomenon occurs even if users remain loyal to one platform because each generation has a 'decision period' and a 'useful period' of digital activity. Markets receive new generations of users in every new cycle; at this time, they decide which network to join ('decision period') and may or may not remain on it throughout the 'useful period'. In this regard, user behaviour is generally elastic (with loyalty or not) because 'at any given time, half of the consumers in the market are choosing a network'.³⁹ Given that users pursue quality and

restaurants' replacement rates are high, one cannot say delivery competition for restaurants lacks minimum scale for viable operation. Differentiation is the feature that sustains success stories of apps as Candy Crush, Tiktok, and Tinder. Tinder, for example, succeeded not because of big data or previous users, but because it offered a solution.⁴⁰ Differentiation is often a *35iFood AI*, supra n. 33, at 1.247–1.256 (questionnaire's answer).^{36iFood AI, supra n. 33, at 1.252.³⁷ Shapiro describes as evolution or revolution. Even though this characterization dates back to 1998, the strategies remain true until today despite the constant changes (C. Shapiro, *Exclusivity in Network Industries*, 7 *Geo. Mason L. Rev.* 190–191 (1998)).³⁸ M. Katz, *Big-Tech Mergers: Innovation, Competition for the Market, and the Acquisition of Emerging Competitors*, 54 *Info. Econ. & Pol'y* 13 (2021), doi: 10.1016/j.infoecopol.2020.100883.³⁹ *Ibid.*, at 12.40 A. Lambrecht & C. Tucker, *Can Big Data Protect a Firm from Competition?*, 6 (*Competition Policy International* 2017).³⁸⁶ WORLD COMPETITION}

better solution. It can be a key element in competition between platforms while fostering multi-homing –users integrated into Tinder while still on Instagram.⁴¹ However, if the marginal costs of maintaining two platforms simultaneously are greater than the benefits, users will practice single-homing (use only one). In this sense, more options are not always the best strategy. Switching implies time and search costs, that will be avoided when benefits are minimal. A study carried out in the city of Graz (Austria's second largest city) identified the successful entry of the *Velofood* platform despite the dominance of the incumbents *Mjam* and *Lieferando*. The authors found *Velofood* was able to gain a foothold due to its unique proposal. The platform is based on sustainability and quality, making deliveries by bicycle, demanding biodegradable packages from partner restaurants (among other requirements), and designating deliveries by dispatcher (instead of distribution by algorithm).⁴² Not all restaurants are 'accepted' into the platform, causing segmentation: in the *Velofood* app, it is possible to find restaurants of higher quality (due to requirements cost) and more committed to environmental and social issues. Knowing this, users who support the cause choose *Velofood* as the place to find restaurants with similar values to theirs. In the example, users are searching for meals that meet their needs (or values), not necessarily the experience inside the app. An aspect that can be meaningful, if a user can bypass the platform and still get the food, they are probably going to do so –not all of them, some will use the platform as a convenience tool.⁴³ This shows some deficiencies in the general platforms operation. A negative aspect of using different platforms simultaneously is the coordination costs, a real problem for restaurants,⁴⁴ as for users. The need to manage different apps for the same purpose and incur switching costs. A good way to overcome this is with exclusivity clauses. Restaurants incur no coordination cost, users enjoy positive cross-network effects and platforms create a portfolio while securing some investments in case of user bypass.

3 EXCLUSIVITY CLAUSES AND INVESTIGATIONS FROM COMPETITION AUTHORITIES IN ONLINE FOOD DELIVERY MARKETS

From the literature on two-sided markets, some address dominance as a situation where an incumbent needs little effort to sustain its position,⁴⁵ especially after ⁴¹Differentiated entrant faces a different demand curve (H. Hovenkamp, *Antitrust and Platform Monopoly*, 130 *Yale L.J.* 1996 (2021), doi: 10.2139/ssrn.3639142).⁴² Ecker & Strüver, supra n. 16, at 5–6.⁴³ J. Baker & F. Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 7 *Yale L.J.* 2185 (2018).⁴⁴ Some restaurants highlighted this in the *Food AI*, at 1.094; 1.188; 1.201; 1.210; 1.232; 1.283.⁴⁵ J. Furman, D. Coyle, A. Fletcher, D. McAuley & P. Marsden, *Unlocking*

Digital Competition, Report of the Digital Competition Expert Panel 32–33 (2019). MULTI-HOMING LIMITATIONS IN THE BRAZILIAN 387

hitting intense positive network effects. Small platforms would have to compete hard for users without an established network or database. A lot of users usually means high levels of data, and with that, algorithms can perform better and increase value to users enabling exclusionary conducts against small platforms.⁴⁶ This has led some authors say ‘law has also been on their side’,⁴⁷ in reference to Big Techs.⁴⁸ The period of weak competition law enforcement made it possible for these companies to grow outrageously while amassing even more power on the way. While this is true in some instances, it does not tell the full story. Randomness or luck also plays an important part. Like a sudden pandemic that creates an opportunity gap for installed but small players. When dealing with dynamic competition, it is necessary to deal with opportunity gaps and legislation gaps – at least for a period. Typically, law follows market trends, not anticipates them. The digitalization process came along with these companies’ growth. Therefore, another group of literature contests the thesis of dominants just settling ‘into the quiet life of monopoly’.⁴⁹ As Evans argues, online platforms face dynamic competition as a result of disruptive innovation originated from multiple areas. Innovation can create its own opportunity for market entry. An entrant may unravel⁵⁰ a dominant’s network from an adjacent market, because these huge platforms compete in several markets. In some cases, smaller platforms can coexist with larger players by differentiating their services to attract users.⁵¹ This could be done by giving distinctive benefits or by offering different types of services to a specific subset of users, e.g., focusing on young users (TikTok) or athletes and cyclist types (Strava). Regarding network effects and data, they indeed help to sustain a dominant position. iFood enjoys a sound network effect because of its well-established strategy together with pioneer advantages. The first one to move into an unknown market faces less resistance and normally engages with the evolution type of strategy.⁵² In the evolution strategy, platform development is smooth, users are not aggressively attracted, and companies may deliberately choose to open⁴⁶ Maurice Stucke & Allen Grunes, *Big Data and Competition Policy* 277 (Oxford University Press 2016).⁴⁷ A. Bradford, *Digital Empires: The Global Battle to Regulate Technology* 8 (Oxford University Press 2023).⁴⁸ The term Big Techs is used on literature in reference to Apple, Alphabet, Meta, Microsoft, Amazon and similar companies.⁴⁹ D. Evans, *Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights But not Sleepy Monopolies*, SSRN Electronic Journal 5 (2017).⁵⁰ ‘Unraveling is the process by which a shock to a platform or market leads to increasingly larger cascades of user departures’, a reversed network formation, where many users leave the platform because a lot of them already did (F. Chang & S. Benzell, *Facebook, Welfare, and Natural Monopoly: A Quantitative Analysis of Antitrust Remedies*, SSRN Electronic Journal 24 (2022)).⁵¹ B. Jullien & W. Sand-Zantman, *The Economics of Platforms: A Theory Guide for Competition Policy*, 54 *Info. Econ. & Pol’y* 6 (2021), doi: 10.1016/j.infoecopol.2020.100880.⁵² Shapiro & Varian, *supra* n. 26, at 191.388 WORLD COMPETITION

functionalities to increase compatibility. Microsoft did this with Word, making it open, compatible, and convertible with a range of systems. At the other side of the spectrum, the revolution strategy consists of performance. The agent creates a superior product, but charges high switching costs for it. In this scenario, user convincement is by ‘brute force’ of irresistible attraction. Finally, there is

the possibility of exerting competitive pressure through the adjacent market. The entrant builds up a network of users and gradually expands its reach towards lateral business, like Uber expanding to UberEats.⁵³ There are cases of successful entries by some of these strategies: Candy Crush took off in the games market; Uber and Lyft defeated taxi companies; AirBnB grew rapidly in a highly competitive sector; and Tinder had no consumer or informational base for matches and, yet, it quickly stood out in the social segment.⁵⁴ These platforms presented to the public a high-value innovation that generated ‘irresistible’ interest. With this in mind, some companies engage in exclusive dealings to secure their position in the market, because dominance can be easier with network effects, but it is not unbreakable. Before effectively analysing the impact of exclusive dealings in the market, it is crucial to understand briefly how competition authorities define the market.

3.1 THE RELEVANT MARKET

A critical step in competition analysis is the delimitation of the relevant market⁵⁵ that concerns mapping the service’s (or product’s) characteristics to understand the degree in which consumers can shift to another similar one. In other words, it consists on defining the effective area of competition before establishing the dominant firm.⁵⁶ In this case, an instant definition comes right away: the relevant market of competition occurs between digital platforms of delivery by marketplace. This means the platform builds up an area (marketplace) for connection between users, takes orders from demand and directs it to restaurants for a fee – usually a percentage of the order. The platform could still be responsible for delivering meals or not.⁵³ Katz, *supra* n. 38, at 2.54 Lambrecht & Tucker, *supra* n. 40, at 5–7.55 Also, some literature defends the idea of leaving this measurement step alleging that there is no ‘coherent way to choose a relevant market without first formulating one’s best assessment of market power’ L. Kaplow, *Why (Ever) Define Markets?*, 437 Harv. L. Rev. (2010). This is a minority view and most authorities use the definition of the Relevant Market as the initial step in an antitrust process.⁵⁶ G. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow* 5 (SSRN 2012).

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And, what about WhatsApp or phone orders? In the Brazilian Case Naspers/Rocket/Delivery Hero (2017),⁵⁷ CADE defined four models: (1) By phone (off-line); (2) Marketplace (without delivery, only intermediation); (3) Restaurants own website or app; (4) Full-service model (similar to marketplace but also responsible for delivery). From a geographic perspective, a definition of both national and municipal may be considered.⁵⁸ This was a major debate in the iFood IA, where iFood argued that WhatsApp should integrate the Relevant Market. Doing so, iFood’s market share gets diluted which contributes to its defence. When thinking about it, integration of WhatsApp makes sense for small cities because the probability of consumers that already know the desired restaurants is higher – raising expectations of user bypass. In large cities, consumers use platforms as catalogs and convenience tools. Therefore, orders directly by WhatsApp may be rarer. If consumers are unaware of local restaurants, they will not order directly by WhatsApp, which means WhatsApp could not impose contestability on iFood. In this line of reasoning, it would make sense to distinguish between a national and a municipal geographic perspective of the relevant market. For small cities, it would make sense to aggregate services into a single relevant market, a unique market for orders by marketplace (with delivery or not), phone/WhatsApp and private app; as for large cities, segmentation may work better, a relevant market for each model of ordering.

3.2 EXCLUSIVITY CLAUSE

To apply exclusivity in a business contract means one party takes the commitment to deal in an exclusive manner with the other and enjoys some benefits for it, like lower

commission rates, better deals, more visibility, entrepreneurial counselling or preference in products. The question of exclusivity clauses is not new in competition policy. The initial position of competition authorities and courts was to point out per se illegality. However, after the emergence of the Chicago school, exclusivity clauses were analysed under the rule of reason, and economic defences were accepted in several cases, such as loyalty discounts⁵⁹ and parity clauses⁶⁰ cases. It can encourage⁵⁷ CADE, Process n° 08700.007262/2017-76 Naspers/Rocket/Delivery Hero (2017), SG note n° 5/2018/CGAA1/SGA1/SG/CADE.⁵⁸ CADE, Mercado de plataformas digitais, Ministry of Justice, Guide on digital platforms 49 (2016).⁵⁹ G. Faella, The Antitrust Assessment of Loyalty Discounts And Rebates, 4 JCLE 375–410 (2008), doi: 10.1093/joclec/nhn004.⁶⁰ Price parity clauses, also called Most Favoured Nation, are used to set the lowest price for an intermediary agent or platform (‘Main Intermediary’), thus the sellers is free to offer products any-where, but prohibit to do in lower prices than those offered to the Main Intermediary. The main goal is to ensure the best deal for Main Intermediary. Amazon did it a lot in the beginning with Amazon Buy Box granting customers the best deal of all (F. Morton, Improving the Contestability of E-commerce in Two Jurisdictions: The Amazon Case, 22 Bruegel Pol’y Brief 3 (2023)).³⁹⁰ WORLD COMPETITION

investment in the partnership, reduce transaction costs, facilitate the entry of new players and avoid free-riding effect.⁶¹ On the other hand, there are some well-known negative effects, such as market foreclosures, increase in price for reduced supply (deadweight), withdrawal of established competitors and the discouragement of entry.⁶² Even though exclusive dealing is not perceived as uniformly good or bad, suspicion over it increases when performed by dominant players because market power stands for a possible element of anticompetitive exclusion.⁶³ The EU leans towards prohibition in this case due to foreclosure risks, as can be concluded from the new European Commission’s Draft Guidelines on Exclusionary Abuses, Article 102 of the TFEU.⁶⁴ The US applies the rule of reason to counter-balance impacts and investigates unjustified disadvantages over rivals.⁶⁵ Therefore, per se rule applies regardless of efficiencies or justifications, and the rule of reason takes negative and positive effects under consideration. Brazilian law allows the second approach, which means exclusivity by iFood cannot be seen illegal per se.⁶⁶ Specifically in online food delivery, exclusivity has grown to constitute a significant element of business model. In Figure I, we showed a list of several countries with delivery platforms; now, from the same study, these are countries with exclusivity clauses prevalence: Finland (Foodora), Norway (Foodora), UK (Yes), Spain (Deliveroo, UberEats and Glovo), Hong Kong (Foodpanda and Deliveroo), Brazil (iFood), Bangladesh (Foodpanda), Austria (Mjam and Lieferando).⁶⁷ Considering the two-sided platforms features, the analysis of effects should consider both sides of competition (competition between restaurants and competition between platforms), likewise the possible cross-effects between them (restriction on one side can affect the other).⁶⁸ An example of this is *Ohio v. AmEx* case, in which the US Supreme Court assessed a provision that raised fees for merchants (burdening only one side). The decision considered AmEx’s market as one-sided, which made it impossible to⁶¹ OECD, Latin American and Caribbean Competition Forum: Efficiency Analysis in Vertical Restraints 2 (2021).⁶² R. Hajnovicova N, Lang & A. Usai, Exclusivity Agreements and the Role of the As-Efficient-Competitor Test After Intel, J. Eur. Competition L. & Prac. 142–143 (2019), doi: 10.1093/jeclap/lpz019.⁶³ Stylianou, supra n. 9, at 195–196.⁶⁴ European Commission, supra n.

10.65B. Klein & A. Lerner, The Expanded Economics of Free-riding: How Exclusive Dealing Prevents Free-riding and Creates Undivided Loyalty, 473 *Antitrust L.J.* 474 (2007).⁶⁶CADE's Resolution n° 20 of 1999 clarifies that exclusivity clause can only be judged by balancing the anti-competitive effects against the possible benefits identified in the specific case, to the extent that it establishes the 'rule of reason' as a means of assessment.⁶⁷O. Kivisto, The Competitive Effects of Exclusivity and Price Parity Clauses in the Online Food Delivery Market, master's thesis at 36 (Aalto University 2024).⁶⁸D. Evans & R. Schmalensee, The Antitrust Analysis of Multi-Sided Platform Business, *Law & Economics Working Papers* 6–7 (2012). MULTI-HOMING LIMITATIONS IN THE BRAZILIAN 391

prove anti-competitive effects to all parties in the operation (merchants and consumers). The result was dismissal without conviction.⁶⁹When the court considered two-sided market as one, it failed to assess the real impact of cross-effects. This is a crucial step for definition of the relevant markets in digital structures. Also, the combination of a multi-sided structure with dynamic competition sets a distinct ground for analysis. Static competition is mostly 'old' economy industries, the traditional idea of multiple agents with distributed power, racing for the lowest output price.⁷⁰This type of competition has history with exclusivity clauses restriction, such as Brazilians Unilever case (ice cream)⁷¹ and Ambev case (beer).⁷²Due to the direct relationship, without interdependencies between sides, once exclusivity is in place, incumbent exerts control over prices, literally locking out competitors of a specific location. If the incumbent has enough labels, consumers of that region will not encounter a different brand. Dynamic competition is fast, uncertain and based on constant (and expensive) innovation. The risk of technological replacement is a form of contestability. As Sidak and Teece highlight, innovation and technology are at the core of dynamic competition. Firms designed for rapid response with internal capabilities will be able to seize market opportunities.⁷³Even though every case is different, static competition enjoys increased efficiency by exclusivity, but the harms are clearer to define. Likewise, dynamic competition can have decreased efficiency. Under the rule of reason, authority must establish market foreclosure and effects balance before deciding whether exclusivity is anti-competitive or not.⁷⁴It is now clear why analysing multi-sided structure on dynamic competition poses greater challenges. Because the iFood case settled with agreement,⁷⁵CADE made no precedent of formal test. Although, during the investigation, the interviewed restaurants stated some advantages of the exclusive modality that could be used on an effects balance analysis: (1) discount on commission rates⁷⁶; (2) consulting services; (3) jointly financed advertising programs (sometimes subsidized by the platform, other times by the restaurant); and (4) greater visibility within marketplace.⁷⁷⁶⁹US Supreme Court, 'Ohio et. al. v. American Express Co. et. al., Case n° 16–1454 (2017).⁷⁰Evans & Schmalensee, *supra* n. 21, at 5.⁷¹CADE, Administrative process n° 08012.007423/2006-27 (2006).⁷²CADE, Administrative process n° 08012003805/2004-10 (2004).⁷³J. Sidak & D. Teece, Dynamic Competition in Antitrust Law, 5 *J. Competition L. & Econ.* 603–604 (2009), doi: 10.1093/joclec/nhp024.⁷⁴D. Geradin & C. Pereira Neto, For a Rigorous 'Effects-based' Analysis of Vertical Restraints Adopted by Dominant Firms: A Comparison of EU and Brazilian Competition Law 6 (Competition Policy International 2013).⁷⁵Signed in 2023.⁷⁶Fees are not disclosed in the investigation, however, according to a Brazilian newspaper the difference between exclusive modality (17% fee) and non-exclusive (23% fee) would be around 6% (Folha de S. Paulo, Restaurantes acusam iFood de ameaçar aumento de

taxa para quem não renovar exclusividade (2023).⁷⁷These were stated by restaurants during investigation, e.g., Esfiha Imigrantes, at 1.150; Grupo Mani, at 1.188; Piú, at 1.201; and Forneria Original, at 1.217.³⁹² WORLD COMPETITION

Additionally, small restaurants claim higher operational costs when dealing with several delivery platforms simultaneously,⁷⁸ while large chains may not adhere to exclusivity for logistics reasons.⁷⁹ Some restaurants said they would operate with only one partner regardless of commission discount, but with discounts they become more competitive against big chains. This illuminates some positive aspects of exclusivity and shows how it can facilitate entrance into the market (by restaurants), as well as how it can lower prices for users. Another aspect to consider is the existence of a practical multi-homing between delivery platforms and ‘real’ market food (physical meals), since users’ ultimate goal is to eat. The delimitation of Relevant Market could exclude this possibility, for example, by considering only online delivery platforms as competitors, as it happened in the mentioned Brazilian case *Nasper/Delivery Hero*. However, it was a matter of Concentration Act, when it comes to conducts, the notion of multi-homing between online and physical can help to understand the dynamics and impacts for restaurants, given most of them operate in both online and physical markets. Regarding this hybrid performance, some restaurant owners said in Ecker and Strüver study that ‘delivery platforms are not profit-making machines with which restaurants can smoothly connect’, but that changed during pandemic when platform sales became the main source of economic survival.⁸⁰ In Van Veldhoven et al., the authors investigated the impact of joining a delivery platform on the restaurant’s financial performance and concluded for significant performance increase, especially for short term and liquidity.⁸¹ Still in Ecker and Strüver restaurants emphasized the ‘advertisement’ effect of being in a delivery platform. In this matter, iFood may be a dominant player in the delivery market, but for the general food’s market the outcome is differently. Delivery platforms are not purely digital, they are complements of the physical market, so consumers switch between eating at home and eating out – which is precisely what multi-homing means. For instance, exclusivity with iFood allows for remote sales, such as phone/Whatsapp and private apps, preventing only simultaneous operation with other platforms. This is a distinct situation from the *Apple v. Epic Games* case, in which contracting outside Apple’s system was prohibited.⁸² *Zamp S.A. (BK and Popeyes)*, in operation with iFood, Rappi, ninety-nine food and its own app, stated this costs, at 1.210. As well, other restaurants expressed that: *Lig Lig Restaurant*, at 1.094; *Cacau Show*, at 1.232; *Poke Garden*, at 1.283; *Mani Group*, at 1.188; and *Piú Restaurant*, at 1.201.⁷⁹ *iFood AI*, supra n. 33, at 1.238 (*Giraffas*); at 1.210 (*BK and Popeyes*); at 1.329 (*Pizza Hut, KFC and Olive Oil*).⁸⁰ Ecker & Strüver, supra n. 16, at 7.81. Z. Van Veldhoven, P. Aerts, S. Ausloos, J. Bernaerts & J. Vanthienen, *The Impact of Online Delivery Services on the Financial Performance of Restaurants*, 7th International Conference on Information Management 17 (2021).⁸² District Court of California, Case 4:20-cv-05640-YGR (2021), Document n° 407, *Epic Games Findings and Conclusions*, at 13. MULTI-HOMING LIMITATIONS IN THE BRAZILIAN 393

To sum up some of the main effects of exclusive clauses, the following table compares the general effects of exclusivity (static competition) with those identified in delivery by platforms (dynamic competition):

Table I Comparative: Exclusivity Effects in General Market v. Delivery Market

EXCLUSIVITY AGREEMENTS – POSSIBLE EFFECTS ON GENERAL MARKET

(static competition) Positive: Negative: a) incentives to promotions and investments on products and services; a) price increases caused by a reduction in supply (deadweight); b) prevention of free-riding effect; b) artificial increase in the dominant company's market share (not related to natural causes, such as quality); c) greater expansion on the distributed side by lower entry barriers and return facilities. c) exit of established competitors or discouragement of potential competitors (entry). EXCLUSIVITY AGREEMENTS – POSSIBLE EFFECTS ON DELIVERY MARKET (dynamic competition) Positive: Negative: a) reduction of operational costs for restaurants that can only fit one platform into their business model; a) market foreclosure, especially in relation to must-have restaurants; b) incentives to invest in the partnership, especially in terms of publicity and consultancy; b) reduction in the bargaining power of restaurants due to the scarcity of competing platforms; c) entry increase in competition in the market (restaurants), especially small ones that become more competitive against large chains that don't adhere to exclusivity agreements for logistical reasons. c) low entry in competition for the market (delivery platform). d) reduction in prices for consumers due to lower transition costs. d) increase in price due to lower bargaining power over commission rates. Source: authors As said before, every case has some pro- and anti-competitive effects that should be encompassed by authorities. With these benefits and harms in mind, the next

394 WORLD COMPETITION section addresses different authorities' decisions on exclusive clauses around the world. 3.3 INVESTIGATIONS FROM COMPETITION AUTHORITIES ON ONLINE FOOD DELIVERY Besides the Brazilian investigation, there are several other investigations by competition authorities in online food delivery markets because of exclusivity clauses. The chosen ones are from Spain, Norway and Hong Kong. The Spanish competition authority (Comisión Nacional de los Mercados y la Competencia – CNMC) opened an investigation into online delivery market in 2021 for the common use of exclusivity clauses by Deliveroo, Uber Eats and Glovo (market shares were kept confidential). In the summary report, CNMC did not consider exclusivity as a vertical restraint for competition, even though the relevant market was restricted to the national online delivery services – this means the direct channel of restaurants' own delivery was left out.⁸³ The CNMC's investigation found that restaurants actually gain from these clauses by paying 10% to 27% below the regular commission rate and enjoying larger coverage of delivery area in the partnership. Additional findings by CNMC were: (1) exclusivity clauses had between 3 to 18 months of duration; (2) relatively low share of exclusivity agreements across restaurants (only 10% of the restaurants in the market); (3) could not confirm obstruction on entry by potential rivals; and (4) absence of penalties for declining use of exclusivity. CNMC considered all reasons above and the moderate level of concentration in Spain's delivery market, which led them to close the case and conclude forenough market's contestability. The Norwegian Competition Authority (NCA) initiated an investigation against Foodora, the largest delivery platform in the market, in 2021. Although Foodora did not agree with the alleged competition concerns, a year later, the company signed an agreement to cease the use of exclusivity clauses in contracts with restaurants.⁸⁴ Under Norwegian law, dominant companies have the responsibility to not reduce smaller competitors' possibilities, which exclusivity clauses potentially did.⁸⁵ NCA noticed problems in competition since minor competitors, Wolt, Just Eat⁸³ Comisión Nacional de los Mercados y la Competencia, Parallel networks exclusivity platforms (S/0026/20) (2021).⁸⁴ Norwegian Competition Authority, Decision in Foodora Case: Exclusivity Agreements

With Restaurants notAllowed, Konjurranse Tilsynet (2022), <https://konkurransetilsynet.no/decision-in-foodora-case-exclusivity-agreements-with-restaurants-not-allowed/?lang=en>.⁸⁵Concurrences, The Norwegian Competition Authority Closes an Investigation into Restaurant Food OrderingPlatforms (Foodora) (2022), <https://www.concurrences.com/en/bulletin/news-issues/january-2022/the-norwegian-competition-authority-closes-investigation-into-restaurant-food>.MULTI-HOMING LIMITATIONS IN THE BRAZILIAN 395

and smaller rivals, were way below Foodora's market share. Different from theSpain case, Foodora applied longer periods in its contracts and more extensivecoverage.⁸⁶An interesting observation about Norwegian's food market is that for manyyears –before Covid or Ukraine's war –there have been concerns about highprices and limited product. NCA took a close look at all food supply chains,leading to several investigation cases. They notice a strong consumer price increasefor food and non-alcoholic beverages in the period of 2013–2023. Also, 'NCAfound no similar practices in other Norwegian industries, nor in foreign grocerymarkets. In addition, the Swedish and Danish grocery markets did not exhibit thesame price fluctuations as the Norwegian grocery market'.⁸⁷This may explain thesteady position of NCA regarding exclusivity clauses.The Hong Kong Competition Commission (HKCC) investigated between2022 and 2023 the use of exclusivity clauses by the two largest platforms inoperation, Foodpanda (50–55% of market share) and Deliveroo (40–45% of marketshare).⁸⁸Differently from Spain's measurement, HKCC considered as part of therelevant market all orders made via the platform or directly through the restaurant'sonline channel. As for benefits, exclusive deals provided lower commissions andother direct advantages for restaurants, such as marketing initiatives and analysis ofthe restaurant's sales.Considering the high market share of both together (almost 90%), HKCCconsidered exclusivity as a restriction to smaller platforms'competition. Also, theauthority found hard penalties on exclusivity breaches:(a) prevent the partnering restaurant from approaching competing OFPs for talks ornegotiations;(b) require a relatively long notice period of 90 days for partnering restaurants to switch(in the case of Foodpanda), or provide no option for partnering restaurants to switch at all(in the case of Deliveroo);(c) require partnering restaurants to pay back the difference between the exclusive andnonexclusive commission rates from a date which may be significantly prior to the switch;and(d) (in the case of Deliveroo only) cease all marketing activities on behalf of thepartneringrestaurant, remove the partnering restaurant from its platform, restrict thepartnering restaurant from procuring the Relevant Services or suspend or terminate therelevant OFP/Restaurant Agreement.⁸⁹⁸⁶Kivisto, supra n. 67, at 62.⁸⁷OECD, Competition in the Food Supply Chain –Contribution from Norway, Session IV of the GlobalForum on Competition (2024).⁸⁸Hong Kong Competition Commission (HKCC), Notice issued under Section 2 of Schedule 2 to theCompetition Ordinance Regarding the Commission's Proposal to Accept Commitments in the Online FoodDelivery Platforms Case (EC/03JJ) 14 (2023).⁸⁹HKCC, supra n. 88, at 8.396 WORLD COMPETITION

Even so, exclusivity clauses were allowed to Foodpanda and Deliveroo since theycomply with some requirements made by HKCC, such as: restaurants should beable to freely switch from exclusive to non-exclusive terms without previousnotification,⁹⁰and restaurants subject to exclusivity were able to partner withLow Market Share Platforms⁹¹despite the exclusivity

agreement – a strategy applied to mitigate foreclosure in the market. All three cases end up with different solutions for local issues. Spain’s authority sees gains from these clauses and chose not to prohibit it; Norwegian’s authority took a firm stand regarding incumbent’s practices which led Foodora to cease it; and Hong Kong’s authority identified a case of duopoly and came up an alternative remedy, allow exclusivity since it don’t apply to lower competitors. Face-to-face type of competition on core digital markets is one aspect of many dimensions in the competitive process. The difference in solutions presented by authorities shows that food delivery dynamics can change in different geographical markets, consequently, remedies in one jurisdiction may not fit in others. Therefore, in the next section we will present the context of the Brazilian iFood case.⁴ THE BRAZILIAN IFOOD CASE In 2020, CADE opened an investigation against iFood due to Rappi’s complaint, the second largest competitor in Brazil’s delivery market, for the alleged anti-competitive conduct of adopting exclusivity clauses despite its notable dominant position.⁹² Under Brazilian law, exclusivity clauses are not prohibited per se and the authority can investigate it in case of reasonable suspicion or complaint regarding (1) attempts to limit, distort or harm free competition; (2) attempt to dominate the relevant market; (3) arbitrarily increase in profits; and (4) abuse of dominant position.⁹³ As seen, this type of clauses is common in Brazil’s market and around the world. In Brazil, almost all players used it: iFood, Rappi, UberEats (while in operation), Aiqfome, ninety-nine and Shipp, as stated in the iFood IA.⁹⁴ CADE’s economy team prepared several Technical Notes with a detailed analysis of the efficiencies and harms, also taking into consideration the restaurant’s.⁹⁰ For it, contract must clearly defined the commission rate under each set of terms (HKCC, supra n. 88, at 23).⁹¹ The report considered low market share those platforms with a monthly market share of 10% or less measured by order value (HKCC, supra n. 88, at 24).⁹² iFood AI, supra n. 33, at 33.⁹³ Brazil, Law n° 12.529/2011 (Competition Code), Art. 36.⁹⁴ iFood AI, supra n. 33, at 1.303 (Rappi); at 349 (UberEats); at 1.294 (Aiqfome); at 1.269 (99); e at 1.263 (Shipp). MULTI-HOMING LIMITATIONS IN THE BRAZILIAN 397

answers on exclusivities – in this case, specifically with iFood. For most, the benefits were (1) discounts on commission rates, (2) consultation services, (3) jointly financed ad programs, and (4) preferred visibility.⁹⁵ Another relevant aspect is that exclusivity did not affect remote or direct sales by the restaurants. After a thorough investigation, in 2023 CADE and iFood settled the case by agreement, Cease and Desist Agreement (‘TCC’, as it stands for the acronym in Portuguese), which allows iFood to use exclusivity as long as it complies with the following requirements. To address a scope problem, the TCC prohibits the adoption of exclusivity with large chains, thirty spots or more (item 4.8 of the TCC); and prohibits iFood from exceeding the percentage of 25% of gross revenue from exclusive restaurants at a national level, and 8% at a local level, if the municipality has more than 500,000 inhabitants⁹⁶ (clause 4.2).⁹⁷ This addresses a sensitive matter pointed out during the investigation: although the number of restaurants with exclusivity was low, they actually account for a significant percentage of iFood’s turnover.⁹⁸ A cornerstone point of Rappi and UberEats argument against iFood was that large chains are ‘must-have’; any exclusivity with them could severely compromise the competitor’s operation.⁹⁹ Indeed, this phenomenon is known. The HKCC report said ‘premium restaurants and popular restaurants that have a large consumer base and corresponding order value [...] appear to generate higher than average order value or drive end customers to the platform’.¹⁰⁰ In addition, IDEA institute provided a survey into iFood IA which observed how must-have restaurants attract the attention of 82% of consumers

willing to use delivery platforms.¹⁰¹ Consequently, the inability to secure contracts with them poses a real obstacle to competition, as CADE's economy team concluded in Technical Note No. 3.¹⁰² 95 See n. 79. 96 According with government's data released in 2024, Brazil has forty-eight cities with more than 500,000 inhabitants, which means 30% of all the Brazilian cities (IBGE, *População do Brasil chega a 212,6 milhões de habitantes*, aponta IBGE, Social Communication Secretariat of Brazil (2024)).⁹⁷ iFood AI, *supra* n. 33, at 4–6. 98 The public version of the IA omits economic information. So, the exact number of restaurants with exclusivity is unknown, but from it, we can conclude that iFood did not manage such a huge number. On at 733, iFood says: 'In other words, more than [Restricted Access to iFood and CADE] of the total market is available to competitors on any metric'. This statement was not contested throughout the IA and even confirmed by the CADE's economic team on Technical Note No. 4 (para. 49).⁹⁹ iFood AI, *supra* n. 33, at 76 (Rappi's complaint); at 1306 (Rappi's questionnaire); at 364 (UberEats).¹⁰⁰ HKCC, *supra* n. 88, at 16. ¹⁰¹ iFood AI, *supra* n. 33, at 858 (field research carried out by the IDEA institute on the use of online delivery apps). ¹⁰² CADE, Requirement of Agreement on Cease n° 08700.005597/2022-17 (2022), hereinafter referred as 'TCC iFood', at 23. 398 WORLD COMPETITION

Even so, it is worth remembering that not all big chains adhere to exclusivity due to operational area restrictions, as stated by Giraffas, Zamp S.A. (BK and Popeyes), and International Meal S.A. (Pizza Hut, KFC, and Olive Garden).¹⁰³ CADE expressly recognized this point: 'large restaurant chains or brands have little or nothing to benefit from the quid pro quo for exclusivity eventually offered by iFood', and adds, 'in addition to their public recognition, they have achieved such maturity and expertise that decisions on priority investments, as well as their financing, are made independently'.¹⁰⁴ Naturally, some large chains, such as McDonald's, Outback and Habib's, indeed had exclusivity with iFood.¹⁰⁵ For them, the new rules apply from signature onwards and could increase competitiveness in the delivery market.¹⁰⁶ The final analysis on this point is regarding the percentages: 25% at a national level and 8% at a local level, if it has more than 500,000 inhabitants. This was probably a strategy to address both instances of the relevant market comment earlier. To inhibit iFood to 'play' with this restriction (iFood could tactically allocate the 25% percentage into large cities, where it will be more profitable), CADE set the 8% cap for large municipalities, spraying the use of exclusivity across national level. To deal with a duration problem, the TCC imposed a maximum period of two years for exclusive contracts, followed by a 'quarantine' period of one year before renewal (clause 4.5).¹⁰⁷ This is known as a cooling-off period, and the restaurant has to operate without exclusivity –consequently without its benefits –to increase opportunities for new partnerships with other platforms. However, an exception exists based on iFood's performance target (clauses 4.5.2). In order to perpetuate the contract without quarantine, iFood must guarantee an increase in the partner's revenues (for sales within the platform) of at least 40% above the delivery market growth in the previous year. This exception can only be applied to 50% of the contracts (clause 4.5.2), even if the performance target has been met in 100% of them. Furthermore, if iFood does not achieve the order volumes, compensation is due for loss on profits expectations (clause 4.5.2.2).¹⁰⁸ Since performance and financial numbers were sealed in the public version, our understanding on this matter is that CADE saw exclusivity with iFood as a valuable business strategy for both the platform and restaurants. Real effort and investment are deployed into the relationship, to which the exception helps to secure

investments –therefore increasing incentives –and helps to sustain the wave¹⁰³iFood AI, *supra* n. 33, at 1.238 (Giraffas); at 1.210 (Zamp S.A.); at 1.329 (International Meal S.A.).¹⁰⁴TCC iFood, *supra* n. 102, at 28, our translation.¹⁰⁵iFood AI, *supra* n. 33, at 1.318 (McDonald’s); at 1.323 (Habib’s); at 418 (Outback).¹⁰⁶To avoid abruptly changes, CADE granted a period of six months for this transition, with the end of the commitments in place no later than 30 Sep. 2023.¹⁰⁷TCC iFood, *supra* n. 102, at 28.¹⁰⁸*Ibid.*, at 85.

MULTI-HOMING LIMITATIONS IN THE BRAZILIAN 399 of economic success experienced by restaurants. Of course, since 40% is a high number, iFood will not be able to keep it forever, but the measure could be enough to secure this investment-success trade when restaurants are going through a strategic year. As Victor Fernandes (CADE’s commissioner) states in his vote, this conditional maintenance of exclusivity is a way of passing on some efficiencies back to the market through a minimum volume guarantee.¹⁰⁹The authority acknowledges that some harm to multi-homing in competition for the market is worth in favour of lower prices in the competition in the market. This measure was also taken in Gympass case that ended with TCC signed in 2022 to limit exclusive gyms contracted by the Brazilian fitness app.¹¹⁰A critical point on this matter is that if iFood fails, monetary compensation may be charged. Even if iFood meets 100% for all contracts, only 50% are allowed to continue. This may encourage some discrimination between partners in the sense of favouring those with the greatest potential for meeting the target. The final thought on this is why 40% is worth sacrificing multi-homing for the restaurant’s benefit and not 35% or 45%. The numbers are not available, but it is assumed there is an economic rationality for the decision. Unfortunately, the present study could not find the technical reason for it. No explanation about this is available on the public version of the iFood IA. Finally, to deal with the last problem highlighted in the case, a *de facto* exclusivity issue, TCC prohibits disguise exclusivity (clause 4.6), such as preventing restaurants from engaging in promotions with competing platforms, prohibiting restaurants from mentioning other delivery services in their publicity material, tying incentives or discounts and binding advantage if the partnership gets ‘stronger’ (i.e., leads most of the business with it).¹¹¹Presumably, with these requirements, CADE has tried to restore pressure among platform competition without negatively affecting restaurants’ operations. It’s not an easy task given the cross-effects between sides. While imposing broad restrictions on exclusive contracts might negatively affect some small and medium-sized restaurants, banning exclusivity with large chains is a sound decision to reduce barriers to entry. Effectively monitoring these compliance measures is a challenge for CADE, especially considering the complexities embedded in restrictions.

As mentioned earlier, multi-homing is a critical concept for the case. Competition authorities are typically concerned with single-home users (when they have the opportunity for multi-home) because this behaviour can signal harm to competition. After all, when users have only one app installed, no price comparison will occur, allowing the dominant to capture the entire market and foreclose opportunities for future competition. Thus, there is a justifiable preference for multi-homing. That said, preference for multi-homing is one thing; pursuing it at all costs is another and can be detrimental.¹¹³Users may enjoy single-homing for various reasons, and platforms can promote it pro-competitively through discounts, coupons, and loyalty benefits. Furthermore, food delivery platforms overlap with traditional distribution methods regarding multi-homing options. A restaurant might allow customers to pick up orders, request delivery by phone, or order through the restaurant’s own website. In this context, an exclusivity clause applied solely to other delivery

platforms has some pro- and anti-competitive effects, which are discussed in the next section.⁵

MULTI-HOMING AND VISIBILITY The previous sections presented a landscape of competition interventions in online food delivery markets, and the goal of competition authorities is to enhance competition by avoiding the lock-in effect. With it, the main issue is multi-homing analysis, either for consumers or restaurants. More rigid interventions, such as the proposed EU Draft Guidelines, goes back to a structural presumption of illegality, even in the face of rebuttal evidence of positive effects by the company. In digital markets, as for online food delivery, the illegality of exclusivity clauses makes multi-homing possible. Multi-homing is not a new concept for competition law debate or an issue exclusively connected to the digital. The question of multi-homing can be traced back to the beginning of the telephone market before mandatory interconnection, in the rise of national networks in the US.¹¹⁴ In some industries, the possibility of multi-homing made mandatory inter-operability or interconnection less necessary, such as credit card payments or game consoles. After all, interoperability and multi-homing are tools that increase users' choices. In the case of mandatory interconnection, several costs are associated, such as choosing a pattern, imposing it, and monitoring compatibility or interoperability as technology advances. These tasks are generally assigned to a sector-specific¹¹³ Hovenkamp, *supra* n. 41, at 1976.¹¹⁴ T. Doganoglu & J. Wright, *Multihoming and Compatibility*, 24 *Int'l J. Indus. Org.* 46 (2006), doi: 10.1016/j.ijindorg.2005.07.004.

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regulator –for instance, a telecommunications agency –or to an industry body that operates under some degree of state supervision –open banking governance in Brazil, for example.¹¹⁵ On the other hand, mandatory interoperability can lower firms' costs and prevent redundant investments, as it discourages the creation of unused standards and allows companies to benefit from incremental technical improvements they did not directly fund. Imposing interoperability has been a topic in digital markets debate,¹¹⁶ even though it is not yet a reality. However, the effects on rivalry and competitive pressure are far from straightforward,¹¹⁷ and the possible negative effects on innovation –when adopting a single standard –can be significant in fast-moving environments, like digital ones. Our focus in this article is on multi-homing, which has clearly become a relevant issue for authorities. As presented, a dominant platform that imposes exclusivity aims to avoid multi-homing, since users will not be able to switch to another competitor with better offers for services or products. If exclusivity is imposed on both sides, the consequence is total single-homing. In the case of online food delivery, imposing exclusivity by contract on consumers is legally impossible on account of consumer protection legislation in most jurisdictions. Therefore, platforms use fidelity programs to harm multi-homing on this side, offering discounts and other advantages to consumers. Also, if network effects are high enough, multi-homing will be irrelevant due to the loss of consumers' welfare from disengagement with the dominant player.¹¹⁸ Another factor is inconvenience, which is a source of higher customer switching costs even when a regulator imposes multi-homing.¹¹⁹ Switching platforms imposes inconvenience and time consumption that can make it unlikely. In a mandatory multi-homing scenario, the task is not only to make multi-homing possible but also to make it easier and smoother for users. Data collection is also essential for both technological purposes and network effects in the digital market.¹²⁰ It is not necessary to deepen the analysis of the role¹¹⁵ V. Klein & R. Farias, *Open Banking on Different Sides of the Atlantic: A Comparative Study Between Brazil and the United*

Kingdom, in *Central Banking in a Post-Pandemic World: Challenges, Opportunities, and Dilemmas* 127–144 (M. Yagci ed., Routledge 2023).¹¹⁶I. Graef, *Mandating Portability and Interoperability in Online Social Networks: Regulatory and Competition Law Issues in the European Union*, 39 *Telecomm. Pol’y* 502–514 (2015), doi: 10.1016/j.telpol.2015.04.001.¹¹⁷D. Awrey & J. Macey, *Open Access, Interoperability, and DTCC’s Unexpected Path to Monopoly*, 132 *Yale L.J.* (2023).¹¹⁸Doganoglu & Wright, *supra* n. 114, at 62.¹¹⁹B. Marinoso, *Technological Incompatibility, Endogenous Switching Costs and Lock-in*, 49 *J. Indus. Econ.* (2001), doi: 10.1111/1467-6451.00150.¹²⁰C. Tucker, *Digital Data, Platforms and the Usual [Antitrust] Suspects*, 54 *Rev. Indus. Org.* 683–684 (2019), doi: 10.1007/s11151-019-09693-7.⁴⁰² WORLD COMPETITION

of data in digital markets. However, it is essential to notice that multi-homing imposed by regulators needs to come with access to data to be effective. The presence on another platform does not automatically generate the network effects and achieve visibility inside the platform rankings demands data collection, and platform rules could punish sellers, making it impossible to collect data when they are multi-homing. In that scenario, multi-homing will lose the ability to generate competitive pressure. As said, exclusivity with restaurants affects the other side (customers), making them more prone to single-home. However, while multi-homing may promote competition between platforms, it does not necessarily address competition inside the platform. In some situations, multi-homing can reduce rivalry since firms will not be able to retain customers even with low prices. In a single-homing situation, competition can actually be more intense. The reason is that a dominant firm will earn higher profits if it is chosen by a consumer in a decision that excludes its competitors during some specific amount of time.¹²¹ On the other side, after the decision the competitive pressure will be reduced at least for the period of time the exclusion works. Therefore, the solution of exclusivity for a limited time used in the Brazilian iFood decision can produce positive net effects if the period is enough to incentivize an intense battle for the market and not so long that the effects of the exclusion are compensated by a more intense rivalry in the beginning of the period. In the competition between platforms, exclusivity can induce users to single-home, not just because they favour a particular platform but also due to exclusive access to certain restaurants. A sports channel within a TV provider’s portfolio attracts a specific consumer profile, which in turn attracts advertisers on the other side of the market. By matching consumers with related advertising, the channel enhances ad assertiveness.¹²² Exclusivity becomes problematic when a sports channel holds exclusive rights to a highly popular event, leaving no substitutes and thus concentrating all advertising demand on one channel. In the chosen case of food delivery, the Brazilian food sector is constantly recycling itself and new restaurants enter the market completely untied. Also, it is hard to find a restaurant that would be completely unreplaceable. Therefore, in most cases, exclusivity has less effect on the contestability of the delivery platform than in the case of a unique product such as a popular sport championship. Another relevant aspect is the mentioned fact that online food delivery has substitutes, such as phone orders and WhatsApp, and exclusivity does not encompass.¹²¹ Doganoglu & Wright, *supra* n. 114, at 54.¹²² In Brazil, the national soccer championship has been debated on this aspect, see C. Mattos, *Broadcasting Football Rights in Brazil: The Case of Globo and ‘Club of 13’ in the Antitrust Perspective*, 42 *Estudos Econ.* 337–362 (2012), doi: 10.1590/S0101-41612012000200005. MULTI-HOMING LIMITATIONS IN THE

BRAZILIAN 403 these channels (in iFood's case). Therefore, in case of inefficiency by a delivery platform, customers of a given restaurant may switch to other delivery channels. Likewise, if a customer is not particularly attached to one restaurant, they may opt for another online delivery platform. In this context, robust positive network effects become critical. As already mentioned, one specific feature of platforms is network effects. The ability to achieve a desirable level of network effects relies on enough users and data. For that, superior performance, differentiation, or adjacent markets may represent real threats to incumbents. The dynamic feature of the market makes feasible the possibility of attracting restaurants with better service or with a specific community that fits in with the restaurant or customer profile. The ability to bring users and data from adjacent markets can also be a path to overcome network effects. In the iFood case, the remedy focused on differentiating large chains from other restaurants. This decision aligns with the idea that the first ones are hard to replace by entrants. Therefore, a new player could lose relevant positive network effects if it cannot include these popular restaurants in its portfolio. However, the impact on consumers is not the same with small restaurants. From the restaurant's perspective, one often-overlooked issue becomes clear: the role of visibility. Simply being listed on a platform does not guarantee fair competition, especially for those users who search on the platform without a particular restaurant in mind. When these users browse the platform to discover new options, there is an intra-platform competition. To be visible, restaurants need to be on the first pages or at least well-placed. Reputation on the platform's ranking is algorithmically based on user's preferences and previous evaluations, and this plays a key role in achieving consumers. Therefore, the presence of restaurants on an online food delivery platform without visibility can be ineffective for both restaurants –that will not reach consumers –and consumers –who will miss some potential good restaurants or offers. Of course, not all restaurants can be on the first page. That's why algorithms use preferences to adjust offers. Style, quality and price may be insufficient in this dynamics, as the platform controls the system architecture by its own rules. With it, it is possible to see changes in the nature of the competitive battle itself,¹²³ where visibility becomes a decisive weapon. The Amazon Buybox case highlights whether the product or seller's visibility inside the platform is relevant to competition and how visibility could be a decisive factor in consumer decisions. After all, even a better offer might go unnoticed if buried at the end of search results since¹²³ Parker et al., *supra* n. 5, at 204.404 WORLD COMPETITION

users may opt for more prominently displayed alternatives.¹²⁴ In the digital landscape, some clicks away can be, paradoxically, far away. A restaurant's visibility does not come entirely from quality or price. The first point is access to data, which is not always the same for every restaurant. Secondly, the role of paid advertising and self-preference distorts consumer search queries and can undermine fair intra-platform competition in favour of those who invest more in paid advertising. Consequently, consumers can buy inferior products, thinking it was the best offer. As in brick-and-mortar markets, consumers are unlikely to choose the best product in the context of highly asymmetric information (lack of details on price or product features). Therefore, visibility is needed to make a restaurant enjoy the positive network effects of engaging with a community of online users. The mere presence of a user in a two-sided platform does not ensure these effects of relating with a dominant platform since the platform owner can make users profit asymmetrically from that network. Differences in the positive network effects enjoyed by restaurants on food delivery platforms may stem more from platform-design decisions than from genuine competitive merit. In

voluntary negotiations for platform access, the terms and conditions accepted by a restaurant largely determine the extent of its positive network effects. However, in the case of a remedy that forbids exclusivity and allows presence in several platforms, including the dominant one, if this remedy fails to address fair access to data, rankings, and visibility, the practical possibility of competition inside the platform could be harmed. At the same time, the said presumption against exclusivity clauses by dominants (EU's path of choice) could reduce gains for small and medium restaurants because it also removes all the benefits aggregated with it, especially when compared with large chains and their natural visibility. In that context, the cost of coordinating delivery and their treatment of consumer data will be too expensive for small and medium restaurants. As pointed out by Stylianou, 'most scholarship has focused almost exclusively on the economic aspects and special features of exclusion in digital markets, not the technological ones'.¹²⁵ Simply being on a platform does not suffice – visibility is crucial in this scenario. The Brazil iFood case demonstrates how a more flexible approach can illustrate the limits of multi-homing as a remedy to enhance competition dynamics in digital markets, even though the features of Brazilian food delivery markets make generalizations harder to achieve.¹²⁴ J. Newman, *Antitrust in Digital Markets*, 72 Vand. L. Rev. 1518–1520 (2019).¹²⁵ Stylianou, *supra* n. 9, at 183.

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6 FINAL CONSIDERATIONS

Multi-homing in the context of digital platforms has been a desirable goal for competition policy, repeatedly mentioned in cases and formal communications by competition authorities. However, a structural presumption aiming to impose multi-homing as always beneficial could be ineffective and impose unnecessary costs for some players. Therefore, a contextual analysis encompassing market dynamics can be helpful. This article focused on online food delivery market to illustrate this argument. The limitations and possibilities of multi-homing have been explored. Imposing multi-homing as an absolute rule is not necessarily the best approach for all markets. Online food delivery platforms are two- or multi-sided platforms, and the dynamics of network effects are critical to understanding the competition process. On the user side, a vast portfolio of options is a concrete way to experience positive network effects. Conversely, a relevant number of consumers is a concrete picture of positive network effects for restaurants. If consumers single-home because of a specific restaurant with exclusivity, the possibility of using rival platforms is harmed. However, considering this same proposition, loyalty to some restaurants increases the chance of users bypassing phone/WhatsApp orders or even the restaurant's own app. This is not harmed by exclusivity. Meanwhile, a new entrant can emerge even if some restaurants remain exclusive to an incumbent, provided there is sufficient diversity to attract consumers unaffiliated with any single restaurant. However, exclusivity can hinder market contestability when not enough restaurants are left to join the new platform. In the case of the wide availability of restaurants and even dark kitchens, this possibility becomes weaker or more unlikely. From the restaurant's perspective, simple multi-homing may be an inefficient remedy. The first point presented in the article is that the mere presence on a platform does not ensure the symmetrical experience of positive network effects. The reason is that platform owners can treat data and

consumer insights differently across participants using their own terms and conditions. That input is essential in digital market dynamics. Visibility also matters: restaurants need fair rankings or search positioning to benefit from network effects. When some restaurants secure premium visibility (through paid ads or special deals), those without similar arrangements may not gain meaningful exposure. The algorithm's architecture can have a neutral approach, offering every (or most) restaurant the same level of visibility. Thus, the ability to reach consumers at the other end should depend more heavily on competitive variables such as price and quality.⁴⁰⁶ WORLD COMPETITION

Therefore, if multi-homing is imposed as a competition remedy, a restaurant might appear on several platforms but receive less visibility on each. This scenario disproportionately affects small and medium-sized businesses that rely more often on platform-driven customer discovery. Furthermore, data access and platform-provided support – usually tied to exclusivity – can be crucial for those businesses that lack their analytics infrastructure. The iFood case showed that this situation, and, in this context, making exclusivity illegal could again harm small entrants, favouring large chains with sophisticated software that can treat consumer data by themselves. The Brazilian decision in the iFood case is an example of a flexible approach to exclusivity clauses and multi-homing matching the dynamic of online food delivery markets. The decision could be improved regarding specific points, but the flexible approach was successful. The limits and desirable consequences of multi-homing debated here are relevant to promote caution. In the case of other digital platforms markets, the question remains open to debate and research agenda.

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