ASOCIACIÓN LATINOAMERICANA DE INTERNET

Designation in the substitute text to Bill 4,675: what changed and what remains unanswered

The rapporteur's new text changes the list of criteria and requires a reasoned analysis, but leaves in the regulator's hands the concepts that define who will be regulated and, as a result, the reach of the regulation

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Every regime of asymmetric regulation of digital markets is settled before the first obligation takes effect, at the point where it chooses who will be regulated. This is designation: the act by which the authority identifies the players subject to the special regime. Designated companies will be exposed to enforcement risks, rules and regulations that many of their competitors will not need to worry about. Designation alone creates a chilling effect: even before any obligation is imposed, a designated company operates under the permanent threat of new, undefined restrictions that can be added at any time. The design of this stage matters because the effects of a poorly calibrated scope accumulate. Criteria that are too broad will capture many firms, raising an uncomfortable paradox: if many players qualify as "systemically relevant," the term loses all meaning, and with it the justification for intervention on competition grounds.

In Brazil, this discussion is taking place in Bill 4,675/2025, sent by the Executive to the Chamber of Deputies in September 2025 and now moving under a fast-track procedure. The bill amends the Competition Law (Law 12,529/2011) to empower Cade to designate economic players of systemic relevance in digital markets and impose special obligations on them, with a dedicated superintendence to conduct these proceedings. On July 8, the rapporteur, Representative Aliel Machado (PV-PR), released a preliminary version of a substitute text.

ALAI, the association of internet companies operating in Latin America, has followed the bill since its introduction. Examining each successive revision (its purpose and the problem it purports to solve), the conclusion is largely the same at every turn: the designation decision hinges on criteria the text does not define, and the task of defining them has been delegated to the very regulator, which leaves economic agents in legal limbo.

The original wording of Article 47-C made an explicit choice: it favored the authority's discretion.

The provision listed seven qualitative characteristics to be considered "on a non-cumulative basis," so that any single one of them suffices to ground a designation, and the phrase "among others" let the regulator invoke, in its case-by-case analysis, criteria that did not even appear on the list. Two of the listed characteristics, a "significant number of users" and the "offer of multiple digital products or services," described almost any large firm with digital operations.

The only objective filter was the economic group's annual gross revenue (R$50 billion worldwide or R$5 billion in Brazil), figures that two ministers could change by joint ministerial act, with no benchmark set in law. The cost of this discretion is predictability, and it was not an abstract cost: legal uncertainty has clear and direct impacts on investment decisions.

Because these revenue thresholds are alternative (global or domestic), a company can be designated based solely on its size abroad, even if it has limited presence in Brazil. This means CADE would spend scarce enforcement resources on companies that are large elsewhere but may be competitively irrelevant in the Brazilian market. That diverts attention from actual

competition problems affecting Brazilian consumers. The problem is compounded by the breadth of CADE's existing definition of 'economic group' under its merger control filing regulation, which captures any entity in which the relevant company holds a voting or non-voting stake of 20% or more, including passive minority investments with no control, influence, or voting rights. Conflicting interpretations in CADE's own precedents on the scope of 'economic group' add a further layer of legal uncertainty for companies attempting to assess their exposure.

The substitute text attempts to close the list of qualitative criteria by removing "among others" from the original wording of Article 47-C.

At the same time, it bars any broadening of the designation grounds by Cade resolution (Article 18-A) and prohibits the regulation from creating grounds not provided for in law (Article 48), in an attempt to prevent the intended scope of the regime from expanding below the statutory level. The non-cumulative application of the qualitative criteria was replaced by a requirement for a "joint and reasoned analysis" of the qualitative characteristics. The criteria were rewritten around the logic of "digital ecosystems", with a characteristic centred on activity in more than one multi-sided market, attention to the "dependence" created for third parties, and the introduction of the figure of a "gatekeeper". None of these terms are defined; their inclusion therefore fails to narrow the designation process and continues to leave the discretion to Cade.

The remaining changes address the machinery around the designation criteria. The revenue threshold is now to be adjusted annually by an act of the new Superintendence according to IPCA inflation index (§ 3), replacing the ministerial adjustment that had no legal benchmark; designation comes before obligations unless urgency is requested (Article 47-C, § 5; the urgency exception is set in Article 87-D, § 6), which are subject to separate proceedings, preceded by economic justification and bounded by service or product according to the risks identified (Article 87-B, § 1 and 2); the designation term fell from ten to six years, with review possible after two (Article 87-A, §§ 1; 4); the opening of a proceeding is now accompanied by a call for input open to any interested party; and the new Article 87-K creates a non-punitive digital-market review procedure, along the lines of the market studies used in other jurisdictions.

Automatic inflation adjustment by the Superintendence itself, without legislative oversight, means the thresholds will erode in real terms over time and will progressively sweep in additional companies without any deliberate policy decision by Congress.

The six-year designation period (still longer than CADE's usual term for behavioral remedies in merger or conduct cases), combined with obligations that can be expanded over time, creates a

regulatory straitjacket without any guarantee of proportionality. The bill also lacks even instruments already designed for Brazilian regulatory agencies, such as the Regulatory Impact Analysis (AIR), that aim precisely at limiting the power of agencies to single-handedly reshape business outcomes. The voluntary proposition mechanism introduced by the substitute text is non-binding: CADE can reject any company proposal without consequence, which makes it a process step rather than a meaningful safeguard.

What remains to be examined, however, is what each of these changes actually delivers in a concrete case.

In almost every instance, the answer depends on how CADE will interpret the bill text, which does not provide adequate certainty for designated companies or those who could be designated as they continue to grow.

The most visible change in the new text is the closed, exhaustive list of qualitative criteria. Despite the changes, the concepts that make up that list remain open for interpretation: the text does not define what constitutes a "digital ecosystem," when a player acts as its "gatekeeper," what "significant amount of data" counts, or what degree of "dependence" by third parties marks a strategic position. Without legal guideposts, each of these terms will be filled in case by case by the authority, and the discretion that the closed list appeared to have removed reappears when the time comes to interpret each of those concepts. The international references did not have a similar gap: the DMA paired a closed list of core platform services with quantitative presumptions, among them 45 million monthly active end users; the DMCC requires a demonstration of substantial and entrenched market power in a dedicated investigation. The Brazilian text took neither path.

Even the DMA, with its clearer criteria and quantitative thresholds, is barely one year into enforcement and is already producing unintended consequences: degraded user experiences, redirected consumer traffic to intermediaries, delayed product launches, and regulatory uncertainty that is chilling investment across the EU. European startups and scale-ups increasingly cite regulatory complexity as a barrier to growth. The DMA's data portability requirements are disproportionately benefiting foreign operators: over 75% of applicants seeking data access are non-European entities, not local SMBs. Brazil would be importing a model that even its architects are reconsidering.

The list itself is still broad. Item III of § 2, after mentioning vertical integration and activity in adjacent or complementary markets, includes "other elements that show the player's relevant embedding in a digital ecosystem," a catch-all clause that reintroduces openness inside a list

that is exhaustive in name only. The two least selective criteria from the original text were not eliminated but recast in similar qualitative language. The requirement of a “significant number of users” no longer stands as an independent ground, yet no quantitative parameter replaced it anywhere in the new list. The multiple-products criterion survives, redistributed across items III and VI and now framed as “ecosystem”. How much that framing actually restricts depends, again, on how “digital ecosystem” is interpreted: are two complementary products or services enough? The authority continues to have the discretion to decide one way or another.

The same reality check applies to the clause that replaced non-cumulativeness. A “joint and reasoned analysis” removes the textual basis for a designation grounded on a single criterion, but it does not say what takes its place: there is no minimum number of characteristics, no weighting among them, and no evidentiary standard. A designation resting, in practice, on one well-drafted criterion is not barred: the authority can conduct a “joint” and “reasoned” analysis of all the criteria and conclude that a single one suffices. And if the reasoning is thin, the available remedies are the general ones of administrative law: approval by Cade’s Tribunal and, later, judicial review resting on the duty to give reasons (Article 50 of Law 9,784/1999) and on Articles 20 and 21 of the LINDB, provisions whose application against regulators’ decisions remains largely untested before a Judiciary historically deferential to so-called technical discretion.

From an economic standpoint, this is the feature with the greatest potential to distort the scope of the regulation. For the firm that orbits the edge of the test, the relevant question comes before any proceeding: “am I in or out?”. With no minimally foreseeable answer, the rational course is to provision for compliance costs as if designation were coming, which spreads the cost of the regime across a set of firms far larger than the one actually regulated. Decisions to integrate products and services, a classic source of efficiency and benefit to consumers, come to be read as a regulatory risk factor, since it is precisely that architecture that supports the ecosystem reading and that the new test treats as a sign of systemic relevance. Studies commissioned by ALAI further indicate that compliance costs of this order do not stay where they fall: they tend to be passed on, at least in part, to consumers and to the small businesses that sell and advertise on the platforms. Predictability has economic value only if it exists before the decision to invest. When it is built case by case through administrative practice, it arrives too late to guide those who needed it. Ultimately this harms investment, innovation and economic growth.

The consequences of designation extend beyond uncertainty about scope.

Once designated, a company faces obligations under Article 47-E (broad prohibitions on self-preferencing, tying, and cross-service data use) that, unlike ordinary antitrust enforcement, do not require CADE to demonstrate a link between the conduct, market power, and actual harm to competition. Unlike the existing Competition Law, which requires a finding of anticompetitive effects and recognizes that market position

achieved through superior efficiency is not itself unlawful (Article 36, §1), the new framework imposes obligations based on structural designation alone. The substitute text does require CADE to weigh innovation, especially for small businesses, and the public interest in competitive development (Article 47-E, § 2), and to state an economic justification for the obligations (Article 87-B, § 1); but it stops short of a genuine efficiencies defence, giving companies no dedicated stage to show that a practice reflects legitimate competition on the merits. Conduct that is legal, procompetitive, and common across industries (retail private labels, integrated product experiences, loyalty programs) would become a violation if practiced by a designated company, regardless of whether consumers benefit. International organizations including the OECD and ICN have warned about the harms of overenforcement and the chilling effect it has on competitive business practices. The bill ignores these warnings.

There remains the question of the regime's boundaries.

Reorienting the criteria toward the logic of ecosystems is argued to lower the chance of capturing players already subject to their own sector regulation, such as those in the financial system, but it does not actually prevent it. There is no express carve-out, and a case against a large group that combines payments, credit, and investments on a single digital platform could still be built under the new text. The silence on coordination with the Central Bank is repeated in relation to the data protection authority and consumer protection, a subject that the superintendence created by the substitute text bears in its own name. Overlaps of this kind multiply compliance costs for private companies, result in inefficient and duplicative spending of public resources, and open room for contradictory decisions across authorities.

The institutional concern runs deeper than coordination gaps. The renamed body ('Special Superintendence of Systemic Relevance, Free Competition and Consumer Protection in Digital Markets') puts consumer protection in its name, even though the body's operative competences (Article 18-B) remain strictly competition-related and grant no consumer-protection enforcement power. The label nonetheless encroaches, at least nominally, on a competence that belongs to SENACON under the Ministry of Justice. CADE is a competition authority; it lacks the institutional expertise, mandate, and accountability structure to make consumer protection determinations. Rather than strengthening consumer protection, a name that promises more than the competences deliver invites confusion over roles between two bodies with different mandates, expertise, and enforcement cultures, with no rule defining how any overlap would be resolved.

What the legislative process can still deliver at this stage is, to a good extent, already mapped.

Legal definitions or minimum evidentiary parameters for the qualitative criteria would close the interpretive window that today undoes the closed list in practice. An explicit requirement for a cumulative review (or, at the very least, operational content for the "joint and reasoned analysis," with a minimum number of characteristics, a weighting, or an evidentiary standard) would in our view be the change with the greatest impact on the predictability of the regime. The procedure would gain from mandatory steps and, above all, from a link that is missing today: Article 87-K states expressly that market review is not a mandatory prior step to designation (§ 6); however, making it a prior requirement for the opening of a designation proceeding (or at least requiring that any waiver of a previous market study be reasoned) would restore to the process the stage of evidence-based economic analysis that a regime of this scale and potential economic impact demands.

Finally, it is worth noting that CADE already possesses, and has recently exercised, the tools needed to address anticompetitive conduct in digital markets. The Apple iOS settlement (2025) and the WhatsApp for Business API injunction (2026) demonstrate that CADE can and does impose timely behavioral remedies on digital platforms using existing powers, through an evidence-based process with proper safeguards. CADE has successfully intervened in cases involving Gympass, iFood, Apple, Google Android, and Meta without new legislation. The prohibitions contemplated in Article 47-E closely mirror conduct already covered by Article 36 of the Competition Law, but strip away the requirement to demonstrate harm. Brazil should strengthen and resource its existing enforcement framework rather than importing an untested regulatory model that is already showing cracks in Europe.

What the substitute text did, in short, was to move where the reach of the regime will be decided: the openness appeared to leave the express text, where it was visible, but remained embedded in undefined concepts and lack of clear standards, where it is harder to spot and will only be detected once the practical challenges of enforcing the new bill come to light, when the burden of changing the text will be higher, requiring an entire new legislative process. A criterion whose meaning depends on interpretation by the very party it is meant to limit does not perform the function of limiting. The definitions will come from the regulator, built case by case, and each change in the new text will be worth, in practice, whatever that construction allows it to be worth. Congress still has the opportunity to decide, itself, the reach of the regime it is creating.