Autoridade da Concorrência

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Plenary 5: Current and future issues for competition enforcers

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Check against delivery

Let me start by saying how honoured I am to be a part of this panel and how sad it is that I am not able to meet you in person, but my presence was required this this week in Lisbon. Congratulations to the JFTC for organizing such a topical Workshop.

I will start by addressing a couple of our recent antitrust cases in the energy sector.

On the AdC's recent antitrust work in the energy sector

The first case concerned an abuse of dominance by the electricity incumbent, EDP, for capacity withholding in the market for regulation services in Portugal, over a period of five years. We imposed a fine of 48 million euros, which was fully upheld by our Competition Court in 2022, both on the merits and the entirety of the fine. Currently, the case is pending with the Lisbon Court of Appeals.

Let me take you briefly through the details.

As to the relevant market: the case concerned the provision of secondary regulation services. These are ancillary services that balance the energy supply from generating units with demand. Therefore, they ensure that consumers always have available the electricity they require.

In Portugal, the demand side of the market is comprised by only one buyer: the transmission system operator, whereas the supply side includes electricity providers, which hold power plants that are equipped to provide secondary regulation services or tele regulation.

How are prices set in this market? Every day the system operator organizes an auction for purchasing secondary reserve band for every hour of the following day. Electricity producers submit bids indicating output and price. The selling price will be equivalent to

the price of the *last* bid that satisfies demand in that auction and, as such, it will the same for all units.

The dominant position: we concluded that, between 2009 and 2013, EDP was clearly dominant in this market of secondary regulation services, holding market shares, in terms of installed capacity and production, exceeding 80% and 70%, respectively, in a market characterized by inelastic demand.

The state aid regime (CMEC): another important aspect of the case was the State-aid scheme from which EDP benefited, which was a stranded costs mechanism. It consisted of a public compensation granted to the generating units that agreed to an early termination of the Power Purchase Agreements (PPAs).

This state aid scheme was meant to foster the transition into the liberalized electricity market, already in 2004. So, in exchange for an earlier termination of these fixed revenue contracts, the relevant power plants were paid, for an temporary period, as if these contracts were still in force. If the revenues generated in the market failed to meet that threshold, EDP would be compensated for the difference, whereas the revenues of the market-based power plants were fully exposed to market forces.

EDP was the only provider with a portfolio of power plants that included generating units under this state aid scheme, together with units that were market-based. This was a key element for the finding of *abusive conduct*. We concluded that EDP's strategy was twofold:

- between 2009 and 2011, it did not bid most of its units that were covered by state aid – so it materially withheld its capacity; and
- between 2012 and 2013, it actually submitted bids, but at prices that were so high that they were excluded from the market; we found here a form of economic capacity withholding.

That allowed EDP to divert demand from its power units, which were already being compensated through the state aid scheme, to its open market units, thereby obtaining higher revenues from the increased production of these latter plants (where it held a production capacity in excess of 70%; indeed, EDP set the price in over 89% of the auctions of secondary reserve band, since it was the bidder of the last offer that satisfied the demand in those auctions).

Needless to say, as a result, electricity prices increased. We estimated a negative impact of at least 140 million Euros of overcharge. During the same period, the prices of regulation services in Portugal were 65% higher than those in Spain, when the difference between the prices upstream in both countries was close to zero.

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Our findings were supported by a number of economic studies and empirical evidence, of which I would just highlight the following: the observation of EDP's behaviour in relation to a specific power plant, because it provided a powerful natural experiment and offered very persuasive insights. During the relevant timeframe, this unit had operated under the state aid mechanism and, once the fixed payment contracts were terminated, it also operated under the market regime. And EDP's bidding behaviour for that unit, during regulation services auctions, was substantially different depending on the applicable economic regime both in terms of prices and output, leading EDP to withhold capacity of the exact same generating unit while it benefited from the state aid scheme.

In short, from a policy perspective, this case is noteworthy for a number of reasons: we pursued the case not as an *exclusionary abuse* but as an *exploitative* one in the form of capacity withholding, that is, as a limitation of output or production within the meaning of Article 102, b) of the Treaty on the Functioning of the European Union – without necessarily qualifying the resulting prices as excessive.

And our assessment was totally upheld by the Competition Court without the need for a reference to preliminary ruling to the Court of Justice of the European Union (ECJ), which has become more common in Portugal lately.

Again, the Competition Court ruled that (i) capacity withholding can be an exploitative abuse; (ii) it can be regarded as a production limitation within the meaning of the law, and (iii) we do not need to show that the resulting prices were excessive. Let us now wait for the Lisbon Court of Appeals judgment on the matter.

Since I mentioned the ECJ, allow me to add that just last week we received encouraging news from Luxembourg. Advocate General Rantos published his opinion in relation to yet another one of our antitrust cases in the energy sector (case C-331/21).

In 2017, we had sanctioned again the incumbent EDP and the company Sonae a total of 38 million Euros for entering a market sharing agreement, in the form of a non-compete clause, in the context of a partnership contract. Sonae is a major conglomerate in Portugal active *inter alia* in retail distribution, telecommunications, media, real estate and energy production.

We found that, as a result of the partnership with EDP, Sonae was prevented from entering the electricity supply market for 2 years. And this occurred at a crucial stage in the process of opening up the energy markets, with regulated tariffs for end consumers coming to an end after 2012. After those dates, new contracts could be concluded only on the liberalised market. So it was a particularly relevant moment for competition in the sector.

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Advocate Rantos concluded that in light of the circumstances of the case, which are for the referring court to assess, Sonae could be regarded as a potential competitor on the market for the supply of electricity. Since the parties could be taken as potential competitors, the non-competition clause that they had included in their partnership contract should be seen as a market sharing agreement, that is as a restriction of competition by object, without the need to demonstrate its harmful effects.

We could have pursued the case *also* as an abuse of dominance perpetrated by EDP, this time to prevent market entry, but decided instead to assess it just through the collusion lens. So let us now wait and see whether the ECJ follows Advocate Rantos opinion.

On the AdC's Report on competition and purchasing power in times of inflation[1]

In August 2022, as public decision makers were facing the surge in energy prices and inflation, we issued a Report addressing the interplay between competition and inflation. In a context of economic recovery marked by strong inflation, the report emphasizes the role that competition can play in protecting purchasing power.

Although competition policy is not a macroeconomic tool to fight rising inflation in the short term – this is a role entrusted to central banks –, it can protect purchasing power by deterring behaviour that, otherwise, would aggravate inflation. And also by encouraging competitive discipline between companies, to the benefit of consumers.

To foster competition in price, quality, and innovation, we advocated in particular for the elimination of unnecessary barriers to entry and expansion, as well as the reduction of switching and search costs. These recommendations are meant to reduce market power concentration and the likelihood of abuses, which may increase in the current context of supply-side bottlenecks.

In times of inflation, there is also a greater propensity for administrative price controls. We therefore advised about the risks that such measures may bring to competition, as price controls distort price signals in the market and may unintentionally lead to supply shortages and disruptions in the value chain.

[1] https://www.concorrencia.pt/sites/default/files/Competition%20and%20purchasing%20power%20in%20times%20of%20inflation.pdf

On the AdC's investigations of unilateral conduct in digital markets

We have been prioritizing digital throughout the years with many relevant outputs, *inter alia* the unilateral conduct investigations opened in adtech markets, against Google and in the payment services sector, of which I will be speaking today.

Investigation in adtech markets

Our investigation of Google's behaviour was triggered by a complaint lodged by the national association of media publishers relating to possible abuses along the ad tech value chain, namely in the markets for publisher ad servers and for supply-side platforms.

- Ad servers allow publishers to manage and run online advertising campaigns, that is, to define which ad space to sell and how to sell it; ad servers connect publishers with ad tech intermediaries and, ultimately, advertisers.
- Supply-side platforms are intermediaries that sort the demand for ad space coming from advertisers, ranking bids for ad space through real-time auctions.

The AdC's preliminary assessment found that Google holds a dominant position in the publisher ad server market and in the supply-side platforms market in Portugal.

What is striking is that in these markets, Google plays both the role of bidder and auctioneer.

And not surprisingly, we found evidence of self-preferencing behaviour by Google at various stages of the digital advertising value chain, including the so-called "last look" advantage, where Google's supply-side platform would be given privileged information about competing bids before making its own bid. As a result, it could outbid competitors in every auction by bidding marginally higher than the highest competing bid.

This "last look" advantage was coupled with Google's ability to identify the auctions where competition was strong or weak. This way, Google could pursue a dual strategy depending on the degree of competition, bidding more competitively where competition was stronger, by charging just cents above the next best offer, and relaxing when competition was weaker, by increasing its bids to earn a higher margin.

The theory of harm therefore focused on the idea that Google reduced the ability of competing supply-side platforms to win auctions and their incentives to participate in future auctions.

This obviously raised a strategic barrier against Google's rivals, by reducing the ability of competing supply-side platforms to win auctions and by placing them at a competitive disadvantage.

As a result, Google may have prevented effective competition in the ad tech value chain. Moreover, this may also have affected the revenues and increased the costs of media publishers, including online press. Hence, it cannot be excluded that this type of anticompetitive behaviour could ultimately have an impact on media plurality and freedom of expression.

We also uncovered other possible anticompetitive practices implemented by Google, namely:

- Google may have hampered the development of innovative ad tech alternatives, such as Header Bidding, which would allow all players, not just Google, to bid in real-time.
- Google may have distorted competition by (i) providing its publisher ad server for free to publishers; (ii) making exclusivity payments to publishers; or (iii) making long-term exclusivity agreements with publishers.

Following the formal opening of our investigation, the European Commission informed us that it intended to extend the scope of its own investigation against Google to include the behaviour and markets that we were examining.

As you may know, under the rules of the European Competition Network in the EU, when the European Commission initiates an investigation it relieves the national competition authorities of the Member States of their competence to investigate the same facts. [Article 11 (6) of Reg 1/2003] Therefore, in September 2022, we closed our investigation and passed it on to the European Commission, including all the findings and evidence gathered.

- ***Investigation in the payment services sector***

In July last year, we issued a Statement of Objections for abuse of dominance In the payment services sector, against the domestic card scheme provider, which is a joint venture owned by most banks established in Portugal.

This joint venture provides a card payment scheme, processing services to card issuers and acquirers, and it owns and manages the largest ATM network.

We found evidence of *tying*, that is, card issuers and acquirers who wanted to have access to the card payment scheme were also required to purchase all or most of their processing services from this JV.

Another interesting aspect of this case is the interplay with financial regulation – the behaviour we investigated might also entail a breach of an EU Regulation which determines the unbundling of payment card scheme and processing entities.[2]

The Portuguese central bank is responsible for enforcing this Regulation in Portugal. Therefore, the AdC and the central bank have been cooperating closely and sharing information throughout the AdC case investigation.

We believe that the conduct raised barriers to entry to new players, including those based in digital technologies, like fintech providers.

It is key that incumbents do not use their position to strategically forestall market developments in digital, thereby depriving consumers from the benefits that innovation and digitalization can offer.

- ***On RPM in e-commerce and the use of AI to detect it***

We have been using AI techniques such as web scraping and other screening tools, to help us detect anticompetitive behaviour in digital markets, notably algorithmic led collusion and Resale Price Maintenance, on the one hand, and to provide additional empirical evidence – that is, corroboratory evidence – to ongoing cases in digital, on the other hand.

E-commerce has significantly reduced search costs for consumers who can easily compare prices across different sellers. But, the transparency of online prices has also made it easier for firms to monitor each other. It may for example help suppliers enforce RPMs downstream.

The same tools, however, may be used by enforcers to detect anti-competitive behaviour. This work, which is carried out by our Digital Task Force, allows us to assess the relevance of complaints we receive in the context of e-commerce, that is, to sort out indicia or evidence, that is less likely to be viable, from indicia that deserves further action. For ex. once we receive a complaint alleging an RPM in e-commerce, we can take a first look on its potential within hours, the time it takes to collect the data.

So the good news is that these tools are not very time consuming; it is the miracle of AI! It is about giving a few parameters to the code and then running it. So it allow us to allocate our resources more efficiently.

[2] Article 7 of Regulation (EU) 2015/751.

How does it work? Web scraping involves extracting pricing data in an automated fashion from online stores, marketplaces or price comparison websites, and converting it into readable formats.

We select the product categories or brands to be scraped on the basis of some sort of previous intelligence – either a complaint that draws our attention to a specific brand or product category, or because there has been an investigation in another jurisdiction, or some other source.

After collecting the online pricing data, we apply a screening technique to confirm whether the results are consistent with an antitrust theory of harm, for example RPM. This is also done automatically and in a matter of seconds.

If we find sufficient hits of price alignments, we may deem a complaint to have a high potential and deserve further analysis.

So far, by using this tool, we have obtained two search warrants and opened 2 investigations on resale price maintenance in e-commerce, relating to the supply of pharmaceuticals and food supplements, one of which was already successfully concluded through a settlement.

This is of course just an example of the proactive methods of detection we have been consistently using throughout the years and it shows how we can also take advantage of digital and AI to actually boost our efficiency and enforcement record.

On future developments

The interplay between the EU's Digital Markets Act and antitrust enforcement

One of the key developments to look for in the near future will be the interplay between the EU's Digital Markets Act and antitrust enforcement.

The DMA will be an ex-ante complementary tool to the case-by-case antitrust work of competition agencies. It will not replace competition enforcement in digital, which will continue, and perhaps may even intensify, given the acceleration of the digital transition and the burst in e-commerce.

This interplay between the DMA, which will be enforced by the European Commission, and competition rules, which will continue to be enforced by national agencies, will require an even closer cooperation between agencies, to avoid, for example, conflicting decisions or remedies imposed on gatekeepers. This is why the DMA includes provisions

meant to allow such a coordination, and on exchanging information between enforcers within the framework of the European Competition Network (ECN).3

This interplay will be no easy task, but I remain optimistic because the ECN has proven to be an effective forum of cooperation, as the previous example I gave on our investigation against Google also illustrates.

The fact that the AdC will also be part of the DMA enforcement process as a member of the DMA Advisory Committee, as representative for Portugal, will facilitate this coordination4, such as the fact that it will also hold investigation and fact-finding powers, together with other national competition authorities.

More broadly speaking, international cooperation and coordination are instrumental to achieve a high enforcement standard in digital, that is, to ensure that antitrust decisions, either behavioural, structural remedies or fines, are consistent and truly complied with.

In the EU, the European Competition Network ensures this outcome across the Union. Given the current level of substantive convergence taking place on a at a wider level, there appears to be scope for this to happen more broadly. Policy statements, at least from both Europe and the US have been using similar narratives. The digital economy is thus facilitating global antitrust convergence; it is bridging the so-called transatlantic gap, something that would seem unlikely just a few years ago.

We need to do this together if we want to ensure that people and businesses, either big or small, are able to fully seize the benefits of digital, so that new ideas and creations may flourish, so that people remain in control of their data, of their choices and of their freedoms.

ChatGPT and competition

Another exciting development to watch closely is how the use of AI technology, for ex. based on natural language models, may influence competition in digital, notably in search advertising, such as ChatGPT. Will this be the 'creative destruction' that we world was waiting for so long that will weaken Google's monopoly in search? However, this exciting product has been championed by another big tech dinosaur, Microsoft, and is being integrated into Bing... Google has replied with its own AI chatbot, *Bard*, while Baidu

[3] These provisions on the DMA were deemed necessary also to prevent allegations of hypothetical breaches of the *ne bis in idem* principle, that is the prohibition of double jeopardy in the case of future parallel proceedings against the same behavior [especially considering the recent CJEU's judgements in cases C-117/20 bpost and C-151/20 Nordzucker and Others, where the principle ne bis in idem was revisited].

[4] The Advisory Committee will issue non-binding opinions about future Commission decisions enforcing the DMA against gatekeepers.

in China has also released its chatbot, *Ernie*, which serves to show that competition, besides regulation, is keeping big tech companies on their toes and creating incentives for innovation.

These technologies still need much improvement and raise many questions beyond antitrust, but they do seem to render online information more useful and easier to access, so whoever develops the best AI technology may be the next tech giant…

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