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INTERNATIONAL COMPETITION NETWORK ANNUAL CONFERENCE

Breakout session *on "Theories of harm in digital markets"*

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Speech by

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INTRODUCTION

Let me start by saying how delighted I am to be here in Berlin, in-person and without masks. Freedom at last! Perhaps now more than ever we must value and cherish our freedoms, in their many forms, since they cannot be taken for granted. This endeavor forms a major part of our role as competition enforcers: to protect freedom of opportunity, freedom of enterprise, *freedom to compete*, as we have heard in yesterday's insightful keynote speech.

To a large extent competition policy is at the heart of the cultural transformation which is the digital transition and the many challenges – and opportunities – it brings to our societies.

Our investigations on unilateral conduct in digital, developed by our digital task force, have not yet reached the point of a statement of objections, so we thought it would be more appropriate to rely today on our advocacy work, in order to provide examples on a number of concerns that we have been identifying.

I refer to our *Issues Paper on Digital Ecosystems, Big Data, and Algorithms*, released already in 2019, together with the market enquiry we launched last year, with the purpose of raising awareness on the impact of digitalization on our economy, promoting compliance, besides, of course, our own capacity building.

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Illustrating The Theoretical Framework Behind Digital Cases – Examples of antitrust concerns

I will start with **exclusionary strategies** by incumbents.

Digital services compete for users and are organized in digital ecosystems. In order to protect their ecosystems, including their core revenue-generating services, and reduce market contestability, incumbent firms will have incentives to discourage entrants and discipline existing rivals.

These strategies are typically based on harnessing network effects to attract users and relying on switching costs to lock them in. Network effects and switching costs work as effective barriers to market entry and expansion. The ultimate goal for incumbents is to ensure that network effects are exclusive to a single platform, because they form a large part of the value of the digital services in question for consumers and business users.

To this end, firms may, for example, only supply a product, which is deemed as a "must-have" for consumers, on the condition that the buyer also purchases or uses a different (or tied) product, through **tying**. A quite straightforward example was the classic Microsoft case where the browser (Internet Explorer) was tied to the Windows operating system. This might sound like ancient history of antitrust, but history keeps repeating itself: a more recent example can be found in the European Commission's Google Android case, where Google required manufacturers to preinstall the "Google Search" app and browser app "Chrome" on Android devices, as a condition for licensing Google's app store "Play Store". Therefore, Google apparently leveraged its dominant position in mobile operating systems and app stores to protect its general search and data collecting capabilities.

Exclusionary conduct may be more subtle and rely on **the exploitation of consumer behavioral biases.**

Many digital players are platforms which mediate the interaction between the multiple sides of multisided-markets and set up the way how these sides interact:

how they find each other, how they communicate with each other, what they know about each other, how they materialize a transaction, etc. Some incumbents enjoy a central role in the marketplace; they have the means to determine market outcomes and to shape how competition therein actually develops.

The algorithms they use for ex. to make online rankings or recommend products may exploit consumer biases to their advantage, diverting consumers from certain products to others.

In effect, our Issues Paper has shown that 75% of platform users in Portugal (the highest value for the whole European Union) considers the order in which search results are displayed does affect their consumption behavior (and these statistics are pre pandemic).

There may be inherent conflicts of interests in the case of vertically integrated platforms or hybrid marketplaces that also compete with independent sellers that resort to their platforms.

This allows firms to **divert consumers in a way that favors their own products** or **services**, raising the risk that they leverage their market power to neighboring markets, with potentially adverse effects for consumers and rivals. For ex. a product that is worse in terms of price or quality may still outcompete others in the market, just because of how it is displayed to consumers.

The European Commission's Google shopping case is a good illustration of this type of scenario. But the importance of default options was also made clear in the Google Android case.

Furthermore, digital markets are very data intensive. Market power today is often based on **access to big data**. The common insight is that data, and not oil, is currently the planet's most valuable resource, the currency that people give away to gain access to certain web services, supposedly for free. Incumbent platforms may also **restrict rivals' access to the data** they need to carry out their activities, or by **limiting compatibility or interoperability** between competing services and their own services.

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The recommendations we set forth in our *FinTech Report of 2018* are quite illustrative of how exclusion may arise in digital, inasmuch as the mere introduction of additional authentication steps in a customer's journey when trying to use a new digital financial service (for ex. robot advising or payment services) may chill incentives for using those new products, therefore stalling market developments and entry by new by fintech providers. Indeed, exclusion in digital may just be a click away....

Digital players may also have an increased ability to engage in **exploitative behavior**. By combining multiple datasets, including very valuable information on consumers' habits and personal lives, together with their cutting-edge knowledge of AI, digital firms may know consumers better than they know themselves. The algorithms they use seem to predict every aspect of our daily lives.

This may be welfare enhancing when it leads to new efficient products, such as when we are able to better search online for whatever we are looking for or to discover new music to listen to. But these data combinations may also be detrimental to consumers, for example, if they enable dominant firms to extract consumer surplus, not only through **price discrimination,** but by other forms of discrimination such as **price steering**, that is, by using data to distort choices and steer consumers into buying more expensive products.

This is just a flavor of a few common antitrust concerns that can be found in digital to which enforcers should be mindful.

Indeed, even the Economist magazine has called for the need to tame the titans and regulate the net for they are deemed to be BAAD, an acronymic for too "Big, Anticompetitive, Addictive and Destructive to Democracy".

That said, as enforcers, we also need to be mindful of our own decision-making biases and avoid seeing antitrust problems everywhere we look in digital. Remember that saying: *When all you have is a hammer in your hand, everything looks like a nail?* One also needs to depart from this type of cognitive bias that involves an over-reliance on a familiar tool – which for us is antitrust!

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Indeed, big can be beautiful. Scale can bring efficiencies. And success is certainly not prohibited. Digital and the knowledge-based society created products and services that we enjoy, that have made the world a better place. This is important to preserve.

In effect, Big tech firms, or any other firm for that matter, do not produce innovative products and foster consumer welfare out of the kindness of their hearts. They need to have incentives to do so. And that is why we enforcers are here and are paying attention.

BEYOND UNILATERAL CONDUCT – A CASE STUDY ON BID-RIGGING IN DIGITAL

When one thinks of so-called "killer acquisitions" by big tech firms, these can sometimes be a pre-emptive move to maintain market power by systematically taking over rivals' innovations before they meaningfully reach the market. Therefore, there is no clear distinction from an economic standpoint between a killer acquisition and an exclusionary abuse. Their rationale can be similar. In fact, depending on the evidence, one cannot exclude addressing such types of mergers *ex post* as an abuse of dominance or as a form of monopolization.

But not everything that happens in digital, from an antitrust perspective, can be equated with unilateral conduct. There may be also, for ex., collusion concerns. There has been an intense debate on how pricing algorithms may facilitate collusion, either explicit or tacit, because with the help of AI they are increasingly self-learning. Our *Issues Paper on Algorithms* examines in detail certain forms of algorithmic-led collusion.

Additionally, I would like to draw your attention to one of our ongoing investigations in the telecom sector, since it offers a somewhat different perspective and provides relevant insights into how digital advertising markets work in practice.

In this case, search advertising and the way services are displayed to consumers online was seen as so influential by the companies concerned, that they decided to collude on the matter.

The case is based on evidence seized during a *dawn raid,* further to a leniency application, which shows that all the telecom providers in Portugal engaged in bid-rigging in auctions organized by Google Ads.

They collectively agreed to stop bidding for certain keywords, namely, the brand name of their competitors, and to treat rivals' names as negative keywords, with the purpose of ensuring that whenever consumers used Google search by typing one of their own brand names, competing offers or competing ads were not displayed or were displayed less frequently in the list of paid results. For example, if a person would search for "*X* company's" broadband prices, only that company's offers would be displayed because the participants collectively stopped bidding for their rivals' brand names.

Therefore, the firms abstained from targeting those potential clients precisely when they are probably more willing to change provider. The evidence indicates that the agreement affected the full range of telecom services: mobile, broadband, landline, paid-TV services and bundles.

We found that this collusion was likely to harm competition and consumers in several ways: Consumers were deprived of easier access to alternative offers (to which they would be exposed absent the agreement), thereby increasing their search costs and switching costs. One should bear in mind that comparisons between telecommunication offers are particularly complex for any consumer, given the numerous details that telecommunications packages may include (number of channels, internet traffic, and fixed telecommunications, among others). Consumer mobility was thus made harder. Certain users may have purchased offers less suited to their individual preferences or at a higher price.

In short, the agreement meant that each competitor refrained from targeting specific customers of rival companies, thus restricting competition both in the national telecom markets in which they are active and the national market for paid search advertising, by reducing the number, variety and quality of ads viewed by users of Google search. Therefore, it reduced the quality of this service as well.

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It seems that one of the parties' objectives was also to reduce investment in search advertising and the fees paid to Google Ads. Indeed, the specific investment in search advertising by the participants in proportion to their total investment in online advertising decreased quite significantly from 46% in 2010 to about 21% in 2018. But we found it unlikely that this reduction in advertising costs could be welfare enhancing, that is, that it could translate into lower prices or more innovation, because this is an oligopoly, with stable market shares, high barriers to entry, etc.

As such, we found that the object and outcome of the agreement was rather that consumers became less informed and were less exposed to rivalry, i.e., they were less disputed by the firms concerned. As a result, we reached the preliminary finding that the agreement was akin to client sharing in breach of the Portuguese Competition Act and the EU Treaties.

We have not yet taken a final decision on the matter though. We have given the undertakings concerned the opportunity to submit their defenses which we are now assessing.

In any event, the case illustrates the significance of search advertising for businesses today as a vital instrument for competition and differentiation, since it targets consumers when they are more willing to buy and perhaps change provider (the so-called *performance phase*); however, it can also be misused to undermine that competition and not only by the usual suspects.

On the interplay between the DMA and competition enforcement

Last March, the European Parliament, the Council of the European Union and the European Commission reached a groundbreaking political agreement on the so-called *Digital Markets Act (DMA)*, an initiative which is the result of a reflection process on the impact of digitalization on our economies and societies that, like competition policy, seeks to achieve open contestable markets in the digital sector.

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Last year, throughout the Portuguese Presidency of the Council and as part of the Chairing team of the Working Party on Competition, the AdC co-chaired the negotiations of this legislation between EU Member States which were now concluded by the French presidency.

The goal of the DMA is to prevent so-called "gatekeepers" from imposing unfair conditions on businesses and end users. Once a company that provides at least one "core platform service" is designated as a "gatekeeper", it will have to comply with a series of dos and don'ts in its daily operations. This list of obligations draws on the experience of competition law enforcement across Europe in the last decades. Indeed, the list is largely based on antitrust investigations opened by the European Commission or NCAs, in areas such as interoperability, access to data, side loading, data portability, tying or self-preferencing.

Moreover, the DMA will be an ex-ante complementary tool to the case-by-case antitrust enforcement work of competition agencies in the future. It will, therefore, 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.

The interplay between the DMA, which will be enforced by the Commission, and competition rules, which will continue to be enforced by national agencies, will require an even closer cooperation between these institutions, to avoid, for example, conflicting decisions or remedies imposed on gatekeepers. Therefore the DMA includes provisions whose purpose is to coordinate DMA proceedings with antitrust proceedings, and on exchanging information between enforcers within the framework of the European Competition Network (ECN).[1]

[1] 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].

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The ECN is a decentralized but articulated system of enforcement, whereby the European Commission and the competition agencies of EU Member States, such as the AdC, work together and hold equal powers to enforce competition law consistently and in full across the EU.

The interplay between the DMA and antitrust enforcement will be no easy task, but I remain optimistic because the ECN has proven to be an effective forum of cooperation.

Concluding Remarks

International cooperation and coordination are instrumental to achieve a high enforcement standard in digital, that is, to ensure that antitrust decisions, either behavioral, structural remedies or fines, are truly complied with.

In the EU, the European Competition Network provides a strong coordination mechanism that ensures this outcome across the EU. Given the current level of substantive convergence taking place on a transatlantic level, there appears to be scope for this to happen on a wider basis. Policy statements from both sides of the Atlantic are using a similar narrative. 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.

International fora such as the ICN and the OECD have made international enforcement cooperation a priority in their work in recent years, so I hope this will also translate into increased cooperation in the digital sector.

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. The point is to preserve incentives for companies to do the right thing – compete – by making sure that markets remain open and contestable, so that new businesses, ideas and creations can flourish, so that people remain in control of their data, of their choices and of their freedom.

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