

Anti-cartel enforcement in the next decade: priorities and new trends

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Good afternoon.

It is a real pleasure to be here today, in Berlin, to take part in the ICN Annual Conference.

Lieber Andreas, dir und dem Bundeskartellamt vielen Dank für die Organisation dieser Konferenz. Es ist schön, dass wir alle wieder zusammen sein können.

Can leniency applications increase?

In the recent past, enforcers have looked at leniency trends with apprehension. Although this can be justified, I see a **positive correlation between leniency and enforcement**. Stronger enforcement goes hand in hand with more leniency applications.

The AdC received in the first quarter of 2022 three leniency requests for full immunity from fines and one leniency request for a reduction of fine. This is an increase from our previous numbers.

This alone does not mean that there is a new trend. But I believe this is correlated with the fact that the AdC maintained its determination to investigate during the pandemic.

Indeed, during the pandemic, the AdC continued to actively carry out dawn raids – an important part of its enforcement activity. The Authority carried out 10 such raids in the past 24 months, with lockdown periods affecting the agency but not holding it back.

Recently, in 2022, three dawn raids conducted by the AdC concerned investigations for price fixing and market sharing including in the health sector.

Trends in cartel enforcement

Given the characteristics of the recent crisis, there is potential for detecting cartels in areas such as: (1) public procurement, because quick and large amounts of financial support by countries may give rise to bid-rigging; (2) sectors that could benefit from the pandemic's exceptional circumstances, e.g. health services; (3) e-commerce and the digital space, because a lot of business shifted to that area during lockdowns - and stayed there; and (4) in no-poach and other wage-fixing agreements.

We are seeing evidence of potential cartels which arose in the context of the pandemic crisis. Some may be classical crisis cartels, which as you know are those in which firms affected by a crisis agree to reduce overcapacity and maintain or even increase prices. Taking a wider look into cartels, there may also be some

which are formed between firms that wish to “profiteer” from the crisis – thereby colluding to increase prices of goods and services which are in high demand during a crisis.

This is why it is important for consumers that antitrust agencies maintain high vigilance toward anticompetitive behavior in this period. Because all of this occurs when many households and firms are in a financially vulnerable situation.

You may have also read that the AdC has created strong awareness for competition and **labor markets**.

Why are labor markets important? Because open and flexible labor markets allow for new opportunities. They support a resilient, innovative and inclusive economy. This is what we all need after the 2020-21 economic shock. Topics such as barriers to professional mobility and no-poach agreements between firms are just a couple of examples where the interplay between competition and labor markets arises.

The topic had been on our agenda since at least 2018-19. The AdC took time to analyze it and then shared its accumulated knowledge through the publication of a Report and Best Practices Guide¹ on anticompetitive agreements in the labor market, last September.

In this Report, the Authority emphasizes that agreements between firms regarding no-poach and wage fixing may have negative effects on markets, for example through the decrease in mobility, on innovation, a negative impact of downstream markets, to mention just a few. They limit the individual freedom of firms to define their strategic commercial conditions (e.g. hiring and/or setting wage and benefits conditions) and may be responsible for negative effects on workers and consumers.

The AdC seeks to ensure that employers adopt an independent and competitive behavior in labor markets, thereby contributing to more opportunities for workers, and favoring innovation.

The AdC’s enforcement activity has also targeted anticompetitive behavior in labor markets. The agency just recently sanctioned the Portuguese Professional Football League and 31 sports companies².

On another type of agreement, we recently investigated a series of **hub-and-spoke agreements**.

Over the past two years, the AdC issued six hub-and-spoke decisions with fines over €500mn in large retail distribution for consumer goods.

As you know, in the competition law context, a hub and spoke is a hybrid type of arrangement, combining both vertical and horizontal elements. Competitors exchange sensitive information but only indirectly, through a common trading partner that operates at a different level of the production or distribution chain. The result is typically similar: higher prices for the consumer.

¹ Report and Best Practices Guide on anticompetitive labor market agreements: https://www.concorrenca.pt/sites/default/files/Issues%20Paper_Labour%20Market%20Agreements%20and%20Competition%20Policy.pdf and

<https://www.concorrenca.pt/sites/default/files/documentos/guias-promocao-da-concorrenca/Best%20Practices%20in%20Preventing%20Anticompetitive%20Agreements%20in%20Labor%20Markets.pdf>

² Press release (April 29th, 2022): <https://www.concorrenca.pt/en/articles/adc-issues-sanctioning-decision-anticompetitive-agreement-labor-market-first-time>

The AdC cases investigated whether several supermarket chains resorted to their vertical relationships with common suppliers so as to promote horizontal price fixing of their own retail prices.

Regarding this type of infringement, let me share a few take-aways:

- First: the available evidence in each given case is crucial to understand whether one should pursue it as RPM-only³ or as a hub-and-spoke arrangement between retailers. The AdC could have investigated and fined these cases as pure RPM cases. Nevertheless, there are several elements, such as the market structure and the vast evidence collected, that indicated that the RPM framework did not capture the real nature of the interaction and of the arrangement between involved firms.
- Second: the AdC's experience shows that this type of practice is common in retail distribution and it affects various consumer goods. In our investigated cases, this included different types of drinks, spirits, household products, personal care products.
- Finally, although the facts date back to the pre-pandemic period, our enforcement will hopefully be beneficial to consumers, given that the behavior is very harmful to them. Even more so in a crisis situation.

The time is right for combatting bid-rigging

As mentioned earlier, combatting cartels is one of the AdC's main priorities, given the harm they cause to the economy and to consumers. A particular focus is given to public procurement as in general it represents 10% of the country's GDP and 20% of public spending. These figures can be higher in many non-OECD countries. Moreover, in the context of so-called resilience and recovery plans, these figures may be even more important in the coming years.

The AdC's strategy was devised in 2016⁴ and has since been regularly carried out. The strategy is directed at public procurement officials and focuses on practical ways to detect and prevent bid-rigging. By Q1 2022, the AdC had reached over 3,100 procurement officials in different agencies, leading to a significant increase, both in terms of quantity and quality, of the complaints received on public procurement.

Part of this strategy is to engage in regular meetings with the main entities involved in public procurement, selecting the largest spenders. We also find that informal partnerships are very helpful to keep our market expertise updated. For example, just last week we held a meeting with the Court of Auditors, the agency that manages the public procurement database, the Ministry of Finance and the public procurement agency.

Moreover, access to data is of course important. The AdC was granted unfettered access the nation-wide database for public procurement. The data is electronic and goes back to 2009⁵.

This means that there is a long and comprehensive set of data on public procurement that the AdC can investigate for collusive patterns. We use statistical screens to detect suspicious patterns of behavior which in turn may be relevant in the scope of ongoing investigations. And this has produced tangible results for our enforcement activity.

³ I.e. as a series of RPM agreements between a supplier and different retailers.

⁴ Combatting bid-rigging in public procurement: <https://www.concorrenca.pt/en/fighting-bid-rigging-public-procurement>

⁵ In 2009, the Portuguese legislator implemented an e-procurement system, under which tender participants submit information through electronic platforms. As a result, a significant number of procurement procedures take place online.