

LEAR COMPETITION FESTIVAL

Plenary Session - Competition Authority Roundtable

Thursday, 25 September, 15:00 – 16:00

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LABOUR MARKETS

Good afternoon to all,

It is a real pleasure to take part in this session with such distinguished competition enforcers.

For competition authorities, antitrust enforcement in labour markets is increasingly becoming a priority¹.

At the AdC, we have set labour markets as an area of focus following important empirical literature. These studies highlighted the decreasing labour share in GDP and put forward that the strengthening of employer's bargaining power with regard to workers could be at the root of this trend.

Moreover, we were also looking carefully at developments at international level, in particular the important cases and policy developments by the US DOJ and FTC with regard to labour markets.

The protection of competition in labour markets must be perceived by competition agencies and firms as being just as important as in other input markets.

¹ https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en

I have no doubt that practices like no-poaching or wage-fixing agreements fall squarely within our mandate. Their harmful effects in suppressing job mobility, firm entry, innovation, wages and productivity jeopardize the existence of competitive market conditions.

As a result, the role of competition authorities is essential within labour market - not only to protect citizens as consumers, but also as workers and entrepreneurs.

Drawing from our experience at the AdC and also looking at experience from the EU and beyond, we can say that probably no market is immune to anticompetitive behaviour, including in labour markets.

Real cases show that no poaching and wage-fixing agreements are pervasive in the economy, ranging from high to low skilled workers.

We may point to several examples that illustrate this diversity, from football players to IT consultants, to health professionals, models and many other professions. We have compiled numerous examples in the AdC's Issues Paper.

Moreover, we also see the importance of considering labour issues in the **digital sector**. Take for instance the example of agreements in the Gen AI sector, in which we observe strategies by digital incumbents to obtain talent from smaller startups, the so-called “reverse acquihires”. This entails acquiring entire teams and their knowledge, instead of entering into a merger. These strategies are different from “acquihires”, where a firm is bought due to its labour force.

The AdC has recently published a paper precisely on **Competition, Generative AI and Labour Markets**².

The most famous example of a reverse acquire is probably Microsoft/Inflection. Inflection is a technology company that developed a machine learning and Gen AI foundation model and an AI chatbot. Microsoft hired two of the co-founders of Inflection, as well as most of the startup's staff. This case was assessed by the European Commission³, the German Bundeskartellamt⁴ and the UK CMA, as well as the US FTC.

Therefore, the intersection between competition and labour markets is wide-ranging, from agreements to potential abuse, and merger assessment.

AdC's strategy to labour markets – advocacy and enforcement

To address these practices effectively, we must make the best use of the full range of the agency's toolbox. This means pursuing robust enforcement, as well as carrying out wide-ranging advocacy initiatives.

It is crucial to recognise that these two approaches – *ex ante* and *ex post* – go hand-in-hand. Our aim is to create a virtuous circle of raising awareness, preventing infringements, and enhancing detection.

²

<https://www.concorrenzia.pt/sites/default/files/documentos/Competition%20and%20Generative%20AI%20-%20Labour%20Markets.pdf>

³ https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4727

⁴

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/29_11_2024_Microsoft.html

Allow me to illustrate this virtuous circle with the multi-pronged strategy we are carrying out at the AdC in Portugal.

First, the AdC focused its **advocacy action** in removing barriers to professional mobility. Allow me to recall the important joint study done with the OECD regarding self-regulated professions, which has in fact lead to important legislative reforms carried out by the Government and Parliament in Portugal.

As part of our **advocacy action**, we published the well-known **Report "Labour market agreements and competition policy"**⁵ and **Best Practices** on “Preventing anti-competitive agreements in the labour market”⁶.

These documents outline a set of principles and recommendations that firms should adopt, while informing them about the risks of entering into anti-competitive agreements when hiring employees and setting wages and other conditions.

In the same vein, we pursue a dynamic approach by establishing direct contact with relevant stakeholders through outreach initiatives across the country.

These initiatives allow us to engage directly with firms, business associations and worker organizations (such as unions), as well as public institutions, who are overseeing labour conditions, at regional level.

These sessions allow relevant stakeholders to gain insights on competition rules, and risks of infringement. Equally important,

⁵<https://www.concorrencia.pt/sites/default/files/Issues%20Paper%20Labor%20Market%20Agreements%20and%20Competition%20Policy%20-%20final.pdf>

⁶ <https://www.concorrencia.pt/sites/default/files/documentos/guias-promocao-da-concorrencia/Best%20Practices%20in%20Preventing%20Anticompetitive%20Agreements%20in%20Labor%20Markets.pdf>

these sessions have allowed the AdC to understand the concerns, risks and behaviours of regional business communities.

I will share an interesting example in a moment.

The outreach initiatives happen, of course, in parallel with our **enforcement activity**, actually triggering a feedback loop between advocacy and enforcement.

On the **enforcement front**, the AdC is pursuing a number of cases related to no-poach infringements, in various sectors, from highly specialized workers (such as football players and IT consultants) to low-skilled workers.

The infringements are also diverse in nature, from stand-alone no poach agreements to decision by associations of undertakings.

This in fact the interesting example I wanted to mention. It was precisely in one of our outreach sessions that we were made aware of the real impact on workers' lives caused by the decision of the association that was preventing workers' mobility.

As a result of this increased awareness about the interplay between competition and labour markets, we are also receiving an increased number of leniency applications in this field, that have prompted new investigations. We have also concluded cases based on the settlement procedure.

One of the most famous cases by the AdC is the football case, which is now known as the Tondela case. A preliminary ruling is pending in the European Court of Justice. I will come back to this case shortly.

So, in a nutshell, at the AdC we are making use of our full toolbox to promote and protect competition in labour markets, encompassing *ex post* and *ex ante* powers.

Legal analysis and justification

The protection of competition in labour markets is just as important as in other input markets.

Practices like no-poach or wage-fixing suppress job mobility, firm entry, innovation, wages and productivity, therefore harming competition in multiple ways.

Just recently, the European Commission issued its first decision in the labour market, with the Glovo case⁷, after flagging labour market collusion as a priority in its 2024 Policy Brief⁸.

As the Commission restated in *Glovo*, no-poach agreements are restrictions by object and akin to a buyer's cartel. The European Commission had already stated clearly in its 2024 Policy Brief that *“both wage-fixing and no-poach agreements will in most cases qualify as restrictions by object under Article 101 TFEU and are unlikely to meet the requirements to qualify as ancillary restraints”*. As to possible justifications, the Commission adds that *“they are unlikely to meet the requirements for an exemption under Article 101(3) TFEU”*⁹.

As I mentioned before, the AdC's first sanctioning decision in the labour market is pending in the European Court of Justice for

⁷ https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1356

⁸ https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en

⁹ https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en

preliminary ruling. The Tondela case involved a non-poach agreement between the 31 football clubs and the Portuguese Professional Football League, during the COVID-19 pandemic.

Irrespective of the details of the case, Advocate General Emiliou has clearly confirmed, in his Opinion, that no-poach agreements should be considered *prima facie* restrictive of competition ‘by object’, at least when entered into between actual and potential competitors, and unless they are ancillary to a legitimate transaction which is itself not anticompetitive (paragraph 49). This is so because, as mentioned, no-poach agreements are a form of sharing a source of supply (*in casu*, a supply of labour) (paragraph 50).

Advocate General Emiliou also recalls that these agreements result “*inevitably, in suboptimal allocation of human resources, loss of efficiency and/or innovation and, quite clearly, lower wages for staff*” (paragraph 52).

Therefore, labour markets are no exception in the intervention of a competition authority, nor in the application of competition law.

I do believe that these are important markets where our actions resonate with citizens and contribute to the economic growth.

CARTELS

Looking at our enforcement track-record, we observe that classic price-fixing and market-sharing cartels, namely bid-rigging, are still a common type of conduct that we have sanctioned.

However, cartels, like any other anticompetitive practices, are not locked in time. The digital transformation affects the way collusive behaviour develops, and consequently also the way in which detection and investigations is carried out.

In fact, digitalization can drive efficiency, open up markets, and enhance our enforcement capabilities. But it can also be used to enable new, more sophisticated forms of anti-competitive behaviour. This requires competition authorities to be prepared to deal with both sides.

I do believe that competition authorities need to make the best use of their toolbox to tackle the challenges of cartel enforcement. This involves keeping pace with digitalization and adapting our approach accordingly.

Digital evidence is, of course, a crucial element, and detection needs to be strengthened with updated tools.

I will briefly touch upon these two aspects.

Seizing digital evidence

In order to dully investigate, competition authorities need to have at their disposal an adequate toolbox, enabling **effective enforcement**, as well as **deterrence**.

The ECN+ Directive is clear in including the **power to seize and use digital evidence** as part of the NCAs toolkit.

The recognition of the power to seize and use digital evidence by national competition authorities is mandated by the duty of interpretation in conformity with EU law.

In fact, the power to seize digital evidence and to effectively apply EU law is currently under the assessment of the ECJ in three preliminary ruling cases sent by the Portuguese Courts.

According to our experience, having **IT specialized experts** is crucial to undertake a solid enforcement, and overcome these challenges. Hiring data scientists, engineers and technology experts should be part of the **enforcement toolkit** of any competition authority.

At the AdC, we have been strengthening our team with these professionals, as well as furthering IT training across various areas.

We have even been able to recruit an expert from the criminal police.

Additionally, the AdC is about to establish a **protocol with the criminal police**.

Cooperation with the criminal police has already shown its value in recent ongoing investigations. One notorious example concerned corruption and collusion in public tenders for aerial firefighting resources. In this case, the AdC conducted joint search and seizure operations with the Portuguese Criminal Investigation Police (Polícia Judiciária)¹⁰.

¹⁰ <https://www.concorrencia.pt/pt/artigos/adc-confirma-participacao-em-buscas-da-pj-por-suspeitas-de-cartelizacao-em-concursos-para>

This cooperation is key in the context of investigations, as competition authorities and criminal police form a more complete response.

Detection

Additionally, cartel detection needs to be strengthened with updated tools.

At the AdC, we have been developing two major tools:

- **Screen-IT**: a screening tool to identify collusive behaviour between companies in public procurement; and
- **Scrap-IT**: a web scraping tool to collect online data, monitoring markets, namely online prices, and spotting signs of potential price fixing.

Competition authorities have long-used behavioural screens to detect potential bid-rigging. The AdC has been able to secure the search warrants building on data analysis of suspicious patterns.

We are now seeking to improve the accuracy of the tools by training AI models based on the data obtained.

These tools help us to engage in a more proactive detection, along with the pursuance our **advocacy** efforts to spark complaints.

The focus on digital evidence and detection does not mean that “bread and butter” cartels have been fallen off our radar. On the contrary. Collusion today is taking new forms, and agencies

adapting to changing market structures and emerging technologies. Enforcement must evolve alongside these changes.

At the same time, old-fashioned cartels have gone digital too. This means digital tools must be used across the board.

This is a path that requires persistence, investment and resilience, but the truth is that game changing improvements might be just around the corner.

This means that we might be getting closer than ever in transforming sophisticated technics into an everyday part of our enforcement toolbox.