

LEAR COMPETITION FESTIVAL

Plenary Session - Competition Authority Roundtable

Wednesday, 25 September, 2:00 p.m. – 3:00 p.m.

Nuno Cunha Rodrigues

1. Introduction

Thank you, Pinar.

Dear Elisabetta, Dear Mirta,

Distinguished colleagues and dear guests,

It is a great privilege to be here today, at the Lear Competition Festival, sharing this space with so many brilliant minds dedicated to economics and competition law.

2. Achievements in 2024

Let me start by emphasising the permanent commitment of the Portuguese Competition Authority to pursue its mission of promoting and defending competition, supporting economic growth and the welfare of consumers.

In this regard, and specifically in terms of **enforcement**, there are a few decisions I would like to draw your attention to.

Among others, recently, the AdC sanctioned a cartel involving a business association and five of the main laboratory groups operating in Portugal for their involvement in a cartel that operated in the Portuguese market for the provision of clinical analyses and COVID-19 tests between, at least, 2016 and 2022.

The AdC, also, adopted an infringement decision for an abuse of a dominant position in the form of tying, in the payment services sector. The conduct involved obliging payment card issuers and acquirers who sought access to the group's payment systems to also contract its processing services.

This year, the AdC adopted another decision in the context of a settlement procedure, regarding anti-competitive practices in labour markets, namely in the IT consultants' sector, and issued another statement of objections, also related to "no poach agreements".

Decisions by association of undertakings have also been under our radar.

As far as **merger control** is concerned, there has been a significant increase in notifications of operations. Since the beginning of 2024, 57 clearance decisions have been adopted, as well as three decisions with remedies, and a recent prohibition decision in the telecommunications sector.

In July 2024, the AdC blocked the proposed acquisition by Vodafone Portugal of exclusive control over Cabonitel, S.A., which includes Nowo Communications. The AdC concluded that this merger would likely create significant impediments to effective competition in the identified relevant markets, thereby harming consumers.

We are also pursuing gun-jumping and issued a sanctioning decision this year, so far.

As we are all aware, competition law enforcement is also done by the **Courts**. Therefore, a relevant development was the decision by the Competition Court, last Friday, regarding the banking case, in which exchange of information between 14 banks over more than 10 years was investigated. This ruling follows the decision of the EU Court of Justice, which had

confirmed the AdC's legal approach to consider the practice as a by object infringement¹.

In fact, such as in this case, Portuguese Courts have been very active in referring questions for preliminary ruling to the European Court of Justice.

Moreover, when it comes to the substance of the cases, Courts, including the European Court of Justice, have been upholding the AdC's decisions.

Another important dimension of our work is **advocacy**.

AdC is pursuing a nationwide outreach initiative called "**20 Years, 20 Cities**", with the objective of explaining the benefits of competition and risks of illegal behaviour. It aims to spread the AdC's activity further, creating opportunities for close contact with the civil society, raising awareness of the importance of defending fair and competitive markets, as well as fostering the competition culture and compliance.

Moreover, the AdC is also focused on the **development and promotion of guidance documents**. Regarding to the topic of sustainability, I would like to emphasize our initiatives regarding the "Best Practices on Sustainability Agreements Guide", as well as the study on electric mobility.

We continue also to pursue our work on the interplay between Competition and Artificial Intelligence, and will have some news shortly.

3. AdC's Competition Policy Priorities

Now, I will focus on the AdC's **main current priorities**.

¹ Judgment of the Court in Case C-298/22 | Banco BPN/BIC Português and Others.

a. Ensuring the ability to detect and investigate anti-competitive practices - cartels and abuses of dominant positions

First and foremost, the main priority may seem obvious, but it is never overstated: the AdC is committed to promoting the **effective enforcement of competition law in Portugal**, acting firmly against anticompetitive practices that harm the economy and consumers.

Anti-cartel enforcement is on the top of our list of priorities. Therefore, we have been developing adequate means to proactively detect and investigate cartels – such as data screening and web scraping tools, which I'll come back to. In parallel, the AdC is promoting its leniency program, namely the online leniency portal that speeds up and encourages these applications.

At the same time, the AdC will also keep tackling abuses of dominant positions and will continue to actively monitor these practices. It is well known that abusive practices deeply damage competitive dynamics, producing adverse bottlenecks in the markets. This type of offence has prompted in-depth reflection, not only by academia (like the excellent article by Pinar), but also by the various competition authorities – namely under the discussion of the draft EU guidelines on abusive exclusionary abuses. These built from past experience and aim to strengthening transparency and legal certainty.

b. Effective merger control and detection of gun jumping practices

In addition, merger control is also a fundamental instrument for guaranteeing the proper functioning and contestability of markets. These control aims to prevent the consolidation of dominant positions in markets that we know are more prone to “*winner takes all*” results.

As it would be expected (and even desirable), both at European² and national level, the vast majority of mergers have not led to any constraints on competition.

In 2023, we saw a significant increase in notifications of these operations, and we made a record number of decisions. 82. This year we are close to reaching 60 notified mergers.

We will continue to proactively investigate failures to notify the AdC of notifiable operations or to carry them out before a no opposition decision is adopted (the so-called "*gun jumping*").

We are also monitoring developments closely in the context of global control of concentrations, including new theories of harm, interplay with other public policies (such as environmental or data protection measures), and different notification thresholds.

These forms of competition assessment have recently been reflected in well-known merger cases, including Towercast, Microsoft/Activision; Booking/ETravelli; Illumina/Grail, Nvidia/Arm, Sika/MBCC and Norsk Hydro/Alumetal.

The focus has been on how to ensure that the system is able to capture the notification of relevant transactions and the timely intervention of the authorities when it is truly necessary, including situations where it is important to preserve potential competition, such as regarding the so-called 'killer acquisitions'.

c. Internal Challenges: Forensic IT tools

² 90% of mergers at European level have resulted in no-opposition decisions.

Moving on to a different priority: At the AdC, we are placing an emphasis on the deployment of **innovative and advanced forensic IT** tools, such as web scraping tools or the detection of suspicious behaviour patterns through screening. We believe that these tools can play an essential role in the investigation of anticompetitive practices and the detection of non-notified mergers.

In the context of the digitalisation of the AdC's activity, we have been engaged in the research and dissemination of international best practices.

Furthermore, there is a recognition of the necessity to enhance the modalities of interaction with stakeholders. To this end, the AdC has initiated the implementation of an online leniency portal, with the objective of accelerating and facilitating the submission of these requests, which are now received by the AdC through fully digital and secure means. This initiative is complemented by the online whistleblower tool, which is also available.

Additionally, in 2023, the STEP platform was completed, thus enabling the conduct of antitrust proceedings in an electronic format.

These tools have the potential to markedly enhance the efficiency and effectiveness of investigations and are poised to become a pivotal component of future competition enforcement strategies.

4. Challenges

“Change in changing”.

This expression might make sense to us all. Nonetheless, for change to actually happen markets must remain open and contestable.

It is widely acknowledged that competition law plays a pivotal role, particularly in an era of rapid transformation. Technological advancement,

growing environmental concerns and evolving market dynamics are driving global changes that present new challenges and call for continuous adaptation of our policies.

We can say that instead of a competition pendulum we now seem to have a competition rollercoaster.

In light of this dynamic landscape, it is crucial to revisit the current agenda on challenges.

The President of the European Commission refers the need of “a new approach to competition policy”³. We have also the recent Draghi Report from which we may draw inspiration as to the next challenges: on how competition policy fits into a new industrial strategy for Europe, promoting economic growth, built innovation, while avoid creating national champions.

Notwithstanding, competition being a precondition for innovation and competitiveness, we are witnessing the emergence of what I call a **Competition 2.0**, which demands the competition community to rethink its role and way of working, in particular, in what concerns the intersection of competition with other policies.

a. Artificial Intelligence

I would start by addressing Artificial Intelligence (AI).

This sector is at a technological frontier and is a source of disruptive innovation, with a transversal impact on the economy, productivity and people's daily lives, with very significant potential.

³ See “POLITICAL GUIDELINES FOR THE NEXT EUROPEAN COMMISSION 2024–2029 “ by Ursula von der Leyen, available at https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf.

Some estimates point to a 7 per cent increase in global GDP and an increase in productivity of 1.5 per cent over a period of just 10 years. In fact, generative AI has an overall impact: from the medical and pharmaceutical industries to software development and customer services, to name but a few examples.

However, we are still at the beginning of the journey. There is a lot of experimentation going on and, although the potential attributed to generative AI is already palpable, much has yet to be realised.

It is in this gap between the potential and the realisation of the technology that authorities such as the AdC can play an essential role.

The existence of this gap means that there are countless opportunities for innovation. Only in a competitive and contestable environment can all the players in the sector maintain the incentives to innovate.

Taking advantage of this window of opportunity means avoiding the crystallisation of barriers to competition and innovation.

For this reason, the AdC has been monitoring this sector with particular attention, starting with the publication of the Issues Paper in November 2023, which mapped the essential inputs for the development of artificial intelligence, the main determinants of competition and risks to competition in the sector.

Indeed, over the years, and especially on the basis of experience in other digital markets, the Competition Agencies have been consolidating knowledge that allows us to identify potential risks to competition in the market.

In this context, the main competition concerns relate to the existence of strong scale and network effects, as well as potential obstacles to interoperability and multihoming. These could lead to possible blockages in the development and implementation of AI.

The very characteristics of these markets encourage high levels of concentration. This technology requires significant computing power, large volumes of data and specialised know-how.

In short, there are competition concerns that a small number of companies may control and exploit blockages for their own benefit, constraining the development of AI and limiting innovation, to the detriment of consumers.

These concerns are especially relevant in the case of foundation models. These are the first models developed by AI providers and are adapted downstream to specific functions in each artificial intelligence service. In fact, apart from OpenAI (GPT), Inflection (with the same name) or Anthropic (Claude), some of these models are owned by the incumbents, such as LLama from Meta, Gemini from Google or Phi from Microsoft.

There is a huge opportunity for contestability in digital markets today, as generative AI can affect many areas of the digital economy.

However, these markets have characteristics that make them prone to high levels of concentration.

Competition authorities are so far in agreement on the main determinants and concerns of competition in the sector and we must remain vigilant to ensure that strategic barriers to entry and the expansion of new operators are not crystallised. This phenomenon has also had a significant impact on merger control, which has faced numerous challenges in recent years, particularly in the digital market.

b. Merger control

This brings us to another point, which is to consider how policies on merger control might need to evolve to deal with these new realities.

The upcoming challenge is reflecting on how to make sure competition agencies are able to review potential harmful mergers, in the aftermath of the Illumina/Grail ruling regarding Article 22 of the EU Merger Regulation.

It is worth noting that these we have already a variety of notification thresholds, including in the Portuguese Competition Law regarding market share thresholds. Indeed, these are distinctive thresholds that are observed in Portugal, Spain (where notification is obligatory) and the United Kingdom (where notification is discretionary).

In addition, there are thresholds based on the value of the transaction and call-in powers. We believe that notification thresholds based on market share can, to a certain extent, serve to mitigate merger-related issues, namely regarding the so-called 'killer acquisitions' to a certain extent.

These criteria increase the likelihood that at least some of these mergers, including those in digital markets, will be subject to assessment by AdC. Another notable development concerns the theories of harm that have been developed to better reflect the dynamics of new markets, particularly the effects of innovation. Indeed, the evolution of digital markets demonstrates the importance of ensuring that mergers that could raise competition concerns are identified by the relevant authorities, who are attuned to the dynamics of competition and the potential effects of a merger.

c. Labour Markets

Another area in which the benefits of fair competition are felt is in the labour markets. The way companies exercise their power in the labour markets can have a potential impact on wages and other working conditions, as well as worker mobility.

It is important that anti-competitive practices, such as no-poach and wage-fixing agreements, are prevented to avoid negative effects on the markets, decreasing workers mobility and reducing innovation, for instance.

This matter is of great significance, as it connects citizens to competition law in two keyways: as consumers and as workers. In light of this, the AdC has been and will continue to investigate labour markets, pursuing both its advocacy and enforcement activities.

d. Sustainability

Finally, I would highlight the issue of sustainability, which has emerged as a key aspect of contemporary economic development.

In June of last year, the European Commission published revised guidelines on horizontal cooperation agreements, which included a chapter dedicated to sustainability agreements for the first time.

This chapter provides clarity and guidance for companies on how to act. It also recognizes the potential benefits of sustainability agreements in facilitating the necessary ecological transition. In this context, the guidelines streamline the assessment of common sustainability agreements with minimal adverse impacts. The objective is to encourage companies to establish sustainability agreements that advance the common good and society's welfare by improving the assessment process for these agreements.

As we look ahead to the implementation of these guidelines, it is important to be mindful of potential challenges associated with their implementation, namely the risk of greenwashing. Past cases have shown that firms may sometimes resort to sustainability claims as a way of concealing cartels.

Therefore, Competition Authorities must be vigilant and communicate regarding these agreements, with the aim of providing more clarity and legal certainty to businesses. In this regard, the AdC has prepared a Best Practices guide on sustainability agreements, to ensure that firms are aware of the interplay between competition and sustainability.

5. Conclusion

As we move into the **era of Competition 2.0**, as I like to call it, it is crucial that we are prepared to face the challenges and opportunities that this new paradigm brings.

I have covered some topics here, such as sustainability and AI. These are among the factors that are redefining the rules of the game and requiring us to consider how competition law should be enforced in the context of these changes.

In this context, there might be a greater value in fostering dialogue between competition policy and other policies. It is important to be mindful of the subtle shifts in the market and the evolving needs of consumers.

As enforcers, our responsibility is to ensure that competition continues to drive innovation, efficiency and, most importantly, consumer welfare.

Thank you.