

## A NEW ERA OF CARTEL ENFORCEMENT

**ICN Annual Conference**

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Ladies and gentlemen, good morning.

It is a great pleasure to be in at the ICN Annual Conference, and share this plenary session with such distinguished speakers.

Let me begin by stressing that the fight against cartels remains one of the **main goals of the AdC in 2024**.

Last year, cartel cases amounted to **three quarters of the AdC's sanctioning decisions** [6 of the total of 8 decisions, concerning 4 cases].

This **enforcement action was developed hand in hand with advocacy initiatives**.

With **advocacy** actions, we are taking the AdC to the ground, in direct contact with firms and their legal or economic advisors, explaining the risks of breaching competition rules. For firms, we believe these outreach initiatives have often the **effect of a "warning shot"**, signaling areas that are more prone to infringements.

## **Labor markets**

A clear example is the multipronged action taken by the AdC in promoting competition in labor markets.

Following a vast “labor antitrust” – as it is sometimes known – in the US, where much work has been done in this area<sup>1</sup>, enforcement against restrictive labor market agreements has become a priority also in Europe <sup>2</sup>.

The **AdC issued its first sanctioning decision regarding an anti-competitive practice in the labor market in 2022**. The case was initiated *ex officio* in 2020 and led the AdC to issue interim measures and later to sanction 31 sports companies of the **First and Second Leagues** and the Portuguese Professional Football (Soccer) League (LPFP)<sup>3</sup>.

In 2021, the AdC issued a **Report** and a **Best Practices Guide on anticompetitive agreements in the labor market**<sup>4</sup>. Building on this Report and Best Practices Guide, the AdC has been conducting **advocacy sessions** across the country to raise awareness about these types of infringements and the risks they represent.

We believe that the outreach initiatives have triggered detection (and also deterrence) of these practices, leading to due diligences carried out by firms.

Since then, the AdC has sanctioned two multinationals in the technology consultancy sector for a no-poach agreement, following complaints. The AdC has other investigations underway, some of which based on leniency applications.

Hence, the **“warning shot” effect** that I mentioned earlier.

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<sup>1</sup> There has been a long way since the Anderson v. Shipowners Association of Pacific Coast (1926) to U.S. v. Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit, Inc., and Pixar (2011) or Deslandes v. McDonald’s USA (2018).

<sup>2</sup> [https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3\\_en](https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en)

<sup>3</sup> Through this agreement, sports companies abstained from hiring each other’s players (who unilaterally terminated their employment contract invoking issues caused by the Covid-19 pandemic), therefore renouncing to compete for the acquisition of human resources, in addition to depriving workers of labor mobility - a player who ceased his contract could not be hired by another club from the two main professional leagues in Portugal. The case is currently pending before the Court of Justice of the European Union, after the Court of First Instance in Portugal decided to refer a question for preliminary ruling to the Court in Luxembourg.

<sup>4</sup> [https://www.concorrenca.pt/sites/default/files/Issues%20Paper\\_Labour%20Market%20Agreements%20and%20Competition%20Policy.pdf](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>

### *Digital investigation tools for proactive detection and investigations*

Another approach to trigger cartel detection is to boost our investigation toolbox.

At the AdC, we are investing in **innovative and more advanced forensic IT tools**. We are truly reaching a new era of cartel enforcement, as this Plenary's title suggests<sup>5</sup>.

Innovation brought by Artificial Intelligence (AI), for instance, may help competition authorities worldwide in several ways.

On the one hand, **AI and machine learning tools may be used to optimize screening tools** that help them detect collusive patterns.

Competition authorities have long used behavioural screens to detect potential collusion in public procurement. That has been the case of the AdC.

Currently, AI and machine learning may help us to go further by **increasing the quality of the data, and the models that are used to detect collusive patterns**.

This applies both to the **detection of collusion in public procurement databases, or through web scraping of online prices**.

Algorithms and AI may also improve the efficiency and effectiveness of investigations in other ways, for example helping with the analysis of the data collected.

At the moment, the AdC uses **screening tools** to identify collusive behavior between companies in public procurement.

We also use **web scraping techniques**, namely by collecting online data to monitor prices charged by online sellers and identify signs of price fixing.

These tools may benefit from AI models to determine whether they are effective (i.e. quality control) and to improve the accuracy of results.

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<sup>5</sup> And as it will later be discussed in the CWG BOS: (1) When companies don't comply; (2) Using intelligence to make better informed decisions in cartel detection; (3) Algorithmic collusion and other digital challenges in cartel enforcement.

On the other hand, digital tools may also be used to **improve communication with the stakeholders**, namely by developing new communication channels.

In 2022, the AdC launched a **new whistleblower online platform** with anonymous and encrypted communications, allowing the AdC to exchange information with the whistleblower throughout the investigations.

According to our experience, the existence of an open and safe communication channel with the complainant/whistleblower is relevant for the success of the investigations.

Last year, the AdC created an **online leniency portal** to speed up and encourage leniency applications, specifically from international stakeholders – even the language barrier has been eased, as the portal is also available in English.

### *Leniency*

Leniency continues to be a relevant tool to detect cartels.

The expansion of leniency programmes worldwide may have a positive effect in fostering detection of multi-jurisdictional cartels.

The **national trend of leniency applications is steady** [last year the AdC received 4 relevant leniency applications and this year we have already received 2 applications.]

According to our experience, especially regarding the second and subsequent leniency applicants, it has been quite relevant to **coordinate the leniency application with settlement procedures**. We believe these are complementary tools that may be used together in the same cases.

But make no mistake: for these detection tools to be effective, especially the leniency program, they must be **combined with robust enforcement, ex officio detection, and solid advocacy efforts**.

The AdC's advocacy activity has actually been feeding the enforcement pipeline, creating a virtuous detection circle.

Therefore, the AdC will continue to pursue relevant outreach initiatives, communicating with new audiences, including the “**Fighting Bid-Rigging in Public Procurement**” campaign, as well as the “**Anticompetitive agreements in the labor market**” campaign.

### *Importance of international cooperation*

Even if there are divergences among competition law systems worldwide, we can say there is an international consensus on the harmful nature of cartels<sup>6</sup>.

In the absence of a single global competition enforcement system, **international cooperation** emerges as of **undisputed importance** for the detection, investigation and sanctioning of cartels, both cross-border and domestic.

- *Regulation 1/2003 and the ECN*

A good example of a successful cooperation system is the European Competition Network, the ECN.

At the European level, there is a legal basis, Regulation 1/2003 (Reg 1), which establishes **formal mechanisms of cooperation in investigations**, such as the exchange of evidence and confidential information, the possibility to carry out inspections on behalf of other agencies and launch requests for interviews. Through the ECN, national competition agencies and the European Commission also inform each other of new cases and envisaged enforcement decisions.

**The AdC has had a positive experience with the European Competition Network**, namely by performing joint and simultaneous dawn raids with other Member States (CNMC)<sup>7</sup>, making joint interviews, and exchanging confidential information, for instance

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<sup>6</sup> Marek Martyniszyn.

<sup>7</sup><https://www.concorrenca.pt/pt/artigos/autoridades-da-concorrenca-portuguesa-e-espanhola-realizam-buscas-em-simultaneo> e <https://www.concorrenca.pt/pt/artigos/autoridades-da-concorrenca-portuguesa-e-espanhola-realizam-buscas-em-simultaneo-sobre>

through requests of information sent by AdC and vice versa. This cooperation is in fact embedded in the daily life of our investigations.

- **Beyond the ECN**

Beyond the ECN, we are, collectively, the heirs of the discussions on the approach to international competition enforcement.

Historically, we have seen efforts to develop an approach based on convergence or harmonization, defending the creation of common principles and rules of competition policy adapted to a globalized context, detached from territorialism<sup>8</sup>. And another approach based on international cooperation<sup>9</sup>, focused on cooperation to simplify international enforcement of national rules.

At the moment, we can observe there has been a certain degree of convergence based on international cooperation, mainly driven by our joint work at the ICN, OECD, UNCTAD and other *fora*.

The current system seems basically multi-tiered:

Firstly, the existence of multilateral platforms for **cooperation and development of mutual trust** between NCA's. International *fora*, of which **the ICN** is a vibrant example, promote relevant debates, capacity building experiences (e.g. between younger and more experienced agencies) and create tools to facilitate exchanges of information. Take, for example, the ICN model waiver for the exchange of confidential information (with which the AdC has had a positive experience) or the recent ICN Technologist Forum.

Secondly, the bilateral or regional instruments: the so-called 1<sup>st</sup> and 2<sup>nd</sup> generation agreements<sup>10,11</sup> and regional organizations.

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<sup>8</sup> Cf. MONTI (2019) and DEMEDTS (2012).

<sup>9</sup> V. DAMRO (2006) and DEMEDTS (2012).

<sup>10</sup> Which “aim to preempt any potential frictions relating to extraterritorial application of domestic rules and to facilitate engagement between parties.” Marek Martyniszyn, “Extraterritoriality in EU Competition Law”.

<sup>11</sup> These allow for “different types of information exchange and include confidentiality safeguards, limitations on use or further disclosure of the information” – see OECD, <https://www.oecd.org/daf/competition/competition-inventory-provisions-exchange-of-information.pdf>. For instance the one between the EU and Switzerland.

To illustrate this point, let me share with you the excellent experience within the **Lusophone Competition Network**. The authorities of the Portuguese-speaking countries have promoted regular meetings and technical assistance projects regarding the detection, investigation and sanctioning of antitrust cases – creating direct channels of communication between the enforcers and paving the way for a more robust enforcement in our jurisdictions.

These platforms of international cooperation feed into the enforcement experiences at national level regarding concrete cases, for instance when tackling cross-border cartels.

Just recently the AdC investigated an alleged multinational cartel in the woodchips market<sup>12</sup>. The investigation started after a leniency application from a company based outside the Portuguese territory involving companies based in Japan – which applied for leniency<sup>13</sup> - Brazil and Uruguay. In this case, the AdC used international enforcement cooperation tools, such as the ICN cartel leniency model waiver and followed the OECD 2014 Recommendation concerning International Co-operation<sup>14</sup> when reaching out to the undertakings.

Let me conclude by reaffirming the importance that we, at the AdC, attach to international cooperation, be it the ECN, ICN, OECD, UNCTAD, as well as with the Lusophone Competition Network. Strong cooperation ties are a priority for the AdC.

These *fora* have allowed for **multi-jurisdictional cooperation to flourish** and for the development of **mutual trust** between NCAs, **which is essential when tackling cartels**<sup>15</sup>.

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<sup>12</sup> The case was filed on 25 October 2023, as the evidence gathered during the investigation did not allow to confirm, with a sufficient degree of certainty, the direct exchange of information initially indicated.

<sup>13</sup> [https://www.concorrenca.pt/sites/default/files/processos/prc/PRC\\_2022\\_05%20-%20Decis%C3%A3o%20de%20Arquivamento\\_0.pdf](https://www.concorrenca.pt/sites/default/files/processos/prc/PRC_2022_05%20-%20Decis%C3%A3o%20de%20Arquivamento_0.pdf)

<sup>14</sup> [OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings - OECD](https://www.oecd.org/competition/2014-recommendation-concerning-international-co-operation-on-competition-investigations-and-proceedings/)

<sup>15</sup> <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/CWG-Leniency-Coordination-Guidance.pdf>

We are aware that some gaps remain, so we look forward to continuing to work together on developments to address our shared challenge of fighting cartels worldwide.