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W@Competition Conference 2.0: Is Disruptive Competition Disrupting Competition Enforcement?

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Our lives are being disrupted by change. This is not a unique feature of our time, rest assured. Disruption itself is not a new concept. There are numerous examples of advances in the history of civilisation that have been prompted by disruptive inventions.

But there is, in effect, a distinguishing trait of innovation nowadays – which is its infuriating pace. Not that humankind is particularly more creative today: this speed is triggered by the unprecedented availability and flow of information, data and knowledge throughout the planet. We are in the Information Age, meaning that we live in a knowledge-based society enabled and fostered by technological change, because the world has gone digital.

In this context, it is useful to remind ourselves that disruption can take many faces, many forms: it is not only about new business models, new competitors, new products; it is also about new social realities, new cultures and new people. One of the major challenges of our time consists precisely in deciding how one should address these cultural changes. You can choose to fear the unknown, aversion to change, take the path of scepticism and denial like the Prince of Salina in Lampedusa's novel 'The Leopard', when he states that "everything must change so that everything can remain the same". I am afraid nothing will remain the same. Indeed, change means unpredictability as regards the future; it can give you a sense of unrest, which is highly disturbing. Or you can take the path of humility and curiosity towards what is new and different. This means of course to be ready and open to embrace change and innovation, in its many forms.

You may wonder but what the heck does this have to do with competition policy? Well everything. So it happens that to a large extent competition policy is at the heart of this cultural transformation. Competition can make a difference. To illustrate this, I propose to take a bird's-eye view over the main pillars of competition policy – that is, collusion, merger control, state restraints and dominance – by providing examples of the Portuguese Competition Authority's (AdC) experience and policy approach in each one of these areas, as they are being tested by the change brought about by the digital economy.

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Perhaps the sunny landscape and wide ocean that surrounds Portugal has got under our skin and it has made curiosity to discover what is out there, willingness to embrace new challenges, new people, other cultures and other markets, part of both our history and our DNA.

Let me start with collusion

Should we fear the algorithm? As we have heard today, it seems that algorithms can predict almost every aspect of daily life and with the help of AI they are increasingly self-learning.

As a result, the AdC's priorities paper for 2018 highlights that we will remain vigilant when it comes to algorithmic pricing and of course that companies cannot escape liability by hiding behind the argument that "my computer did it".

But we are also taking the path of humility here, by seeking to fully grasp what these softwares are capable of. Whether or not we will need to stretch the boundaries of antitrust to cover certain forms of algorithm-led collusion remains to be seen, but I would rather highlight in this respect how we are also taking advantage of "Big Data" and algorithmic methods to actually fight anticompetitive behaviour.

E-procurement is a good example. Portugal is at the forefront of e-procurement, which has been mandatory in the country for almost a decade now, meaning that every bid for a government contract needs to be submitted via online platforms. This has given rise to huge amounts of data, including pricing information which is being constantly collected in a central government website. Last year, the law has granted the AdC permanent and direct access to this huge database, enabling us to run targeted screens and apply algorithmic methods, in order to help cartel detection, bid-rigging in particular, something that would have been impossible or at least very costly and time consuming just a few years ago. Therefore, "Big data" and algorithms can also be an opportunity for competition enforcement.

Let me turn to merger control

We are well aware that, in the digital economy, a company's database can actually be more valuable and attractive than its turnover. However, the turnover of some data driven start-ups may not be high enough to be caught by merger notification thresholds. Nonetheless, we have been able to deal with this concern and catch mergers involving online platforms, without the need to fix our thresholds, because Portugal's notification thresholds since 2012 combine both turnover and market shares. This is a case in which old rules proved to be quite handy in solving novel questions brought about by new tech.

For example, we recently examined an interesting transaction between the two biggest online platforms for non-professional classified ads in Portugal, which was only caught

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because it would lead to the reinforcement of a market share in excess of 50%, even though the target's turnover was marginal.

In this context, we dealt with a number of original issues *inter alia:* (i) the multisided nature of these platforms; (ii) the fact that the notifying party was already integrating data from other platforms, thus reinforcing network effects and rendering change very costly; moreover, (iii) the parties' market power was assessed on the basis of traffic, notably, page visits and page views.

Ultimately, the transaction was dropped just before we moved to phase II.

The digital landscape is also creating a merger trend towards convergence and vertical integration in the media industry and telecommunications, the enablers of the digital economy. Over-the-Top TV services, like Netflix, have transformed the ways how consumers access and watch audiovisual content. Netflix alone delivers content to more than 100 million users. Media executives have understood that they need to scale up both in terms of distribution and content. Digital is also encouraging a disintermediation trend, whereby specific content is not provided through paid TV or free to air channels but directly to final consumers over the net.

In turn, telecom operators are dreading the fact that they may become irrelevant, like mere commodities. More than to merely own the pipes through which media content travels, they are realising that they need to control the content as well, in order to be able to influence consumers' preferences.

The attempt of AT&T to buy Time Warner or of Altice to buy Media Capital in Portugal provide good illustrations of this trend.

Since these mergers involve the media industry, one can imagine the kind of media exposure they are receiving, which actually helps to bring antitrust to the public eye and engage the common citizen on the importance of competition.

I will now turn the wheel to state restraints

It is not only firms that can harm competition. Governments can do that quite effectively as well, even if involuntarily.

After issuing several recommendations throughout 2016 and 2017 on the legal framework for transport services, in particular taxi services, the AdC is now paying particular attention to Fintech, as the financial regulatory landscape across Europe in undergoing profound changes.

Financial technology has the potential to reduce operating costs while increasing consumer and investor choice. It can also deliver in terms of financial inclusion, as new products are developed specifically targeting consumers and firms with current reduced access to financial services. But the complexity of the financial world also

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requires extensive regulation, as the financial crisis has painfully taught us. However, we want to ensure that national regulation in this respect does not stifle innovation and efficiency, so that markets remain open to new entrants. Therefore, we are looking closer at certain financial markets, like payment services, crowdfunding, crowdlending, and automated financial advice (so-called robo-advisors) to make sure that existing regulation neither becomes a disproportionate barrier to entry nor it is used by incumbents (like banks) to strategically foreclose the market or stall market developments (for example, by refusing to share customers' banking data with new payment service providers).

Let me wrap up by making a few comments on dominance and competition policy convergence across the globe

Companies act globally expecting regulation to be of course, if not uniform, at least coherent across jurisdictions, even more so in the context of the digital economy.

For a long time, and particularly when it comes to the assessment of unilateral conduct (that is, abuse of dominance or monopolization, depending on the side of the Atlantic where you stand) there has been a transatlantic divide and convergence proved to be difficult. In my opinion, the digital economy seems to be bridging the gap between both worlds.

Just a quick word on context: in the United States (US), antitrust has usually been regarded as a "consumer welfare prescription". Some think that competition policy has been feeding for too long "on a thin diet of efficiency" to quote a dear professor of mine, Harry First, meaning that red flags would never be raised, unless palpable consumer harm could be shown in the form of higher prices or reduced output. And in the digital economy this is hard to establish, since innovative services are often provided supposedly for free.

This approach has been based on the paradigm of free enterprise, seen as the engine of opportunity and in light of the idea free societies require free markets. There is also an underlying ideological foundation to this approach, notably Schumpeter's theory of socio-economic evolution consisting of a never ending process of creative destruction, led by technological change and grounded on the belief that monopolistic structures may actually help to foster dynamic efficiencies and economic growth.

This ecosystem has led to a "laissez-faire" competition enforcement, under the assumption, perhaps a correct one in the US context that markets usually remain open and contestable and that at any moment a new technology could disrupt the status quo.

However, the fact remains that this relaxed approach, besides causing antitrust to become almost politically irrelevant, has arguably also led to high concentration levels

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in many industries in the US and more importantly to the creation of tech giants that only keep on growing because of network effects.

This means that barriers to entry are getting higher and that the digital economy has resulted in markets perhaps not being as contestable as they were thought to be.

Market power here is based on access to oceans of data, including valuable information on consumers' preferences and personal habits. An emerging insight is that data – and not oil – is currently the most valuable resource on the planet and it is the currency that we give away to have access to certain web services.

It is noteworthy that this market power was often gained not only through "superior skill, foresight and industry" but also by systematically taking over rivals and innovations, before they meaningfully reached the market.

And this is where we start bridging the gap and there appears to be room for more convergence, as we have seen, for example, the Department of Justice challenge vertical mergers – something that would seem unlikely in the recent past, or The Economist magazine calling for more intervention and for the need to regulate the net and "tame the titans", for they are thought to be "BAAD", i.e. too "Big, Anticompetitive, Addictive and Destructive to Democracy".

Hence, it seems that even in the US, there is a sense that people might not be in full control of their economic destiny, so that freedom of opportunity and the entrepreneurial spirit might be under threat. To a certain extent this scenario is reminiscent of the foundations of antitrust. When the Sherman Act was born as a popular response to the increased concentration of power in the hands of the trusts that was beginning to be perceived as endangering the pillars of democracy and the individual freedoms.

Don't get me wrong: size is not a bad thing. Scale brings efficiencies. The knowledge-based society created products and services that have made the world a better place. It has enhanced humankind. Furthermore, it seems that other industries, such as banking, healthcare and pharma are also getting uneasy on account of Big Tech. And I confess: I tend to like it when I see companies getting nervous.

But let's face it: innovative companies do not produce innovation and foster consumer welfare out of the kindness of their hearts. Companies, even those that are truly immersed in a corporate culture of social responsibility and compliance, hate to compete. They hate their rivals and "dream of monopoly"; if they could they would get rid of competition in order to freely dominate the market. And this is actually good, even greed is good, the urge to profit is good – so long as it is disciplined through the competitive process.

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Regardless of the specific remedy one may envisage to solve competition concerns triggered by the digital economy where they exist – from divesture to utility regulation, to data portability and interoperability, like the solutions imposed on Microsoft a decade ago (Case T-204/04 Microsoft) and such as banks are being required to do in relation to Fintech –, our underlying policy approach in Europe has always been about the need to preserve incentives for companies to do the right thing – compete – by making sure that markets remain open and contestable, so that citizens remain in control of their fates, of their choices and of their data. So that we do not lose confidence in the social contract.

This is a very basic old insight that goes back to Adam Smith really, but which I find it also holds true in the digital environment: it is rivalry, coupled with vigorous competition enforcement, that provides the right incentives for innovation, whereas with scarce or no competition, society will most likely suffer. And, at least in Europe, we will not allow that to happen.

Thank you.

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