

Fordham Competition Law Institute

Heads of Authority:

a discussion on enforcement during the pandemic, digital tools and sustainability

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I would like to thank Fordham Competition Law Institute for the invitation to participate in this edition of the International Antitrust Law and Policy Conference.

On our priority in the short and medium run

As a starting point, I would like to take this opportunity to highlight the role of our antitrust community of enforcers and the many legal and economic professionals, in this field, at this particular point in time.

If we focus on the times ahead, I see a renewed and critical opportunity to put our best efforts into seeing antitrust policy embedded in other policies.

Other policy-makers are currently focused on health, on the economy, on social and labor policies. And rightly so. But without competition policy underlying other policies, that focus can have a cost that will slow down progress in those same policies. This cost will very likely materialize if we relax competition rules.

It is widely acknowledged that if you shield markets from competitive pressure, you will end up with less innovation, with higher prices, with less consumption and thus with slower economic growth.

So society has an interest in ensuring that competition policy becomes one of the pillars of the economic recovery.

For this to occur, we - the antitrust community of enforcers, lawyers, consultants and academia – must reach out beyond our comfort zone, our inner circle, present here today. We must be more eloquent about the positive role of competition policy.

On antitrust in times of pandemic

A few words on how we, at the AdC, insured business continuity.

Remote working proved possible and relatively seamless. Our systems, which had not envisaged such a massive remote working scenario, proved adequate. Our stakeholders also fully embraced paperless communication.

So the only hindrance to our cases was when, at the early stages of the pandemic, Parliament ordered a general suspension of administrative and judicial deadlines.

This caused some delay to our activity in the April to June period. But given the circumstances, it was not a significant delay.

Then, regarding our antitrust activity, these were (and still are) times that require our attention. We issued a statement earlier in March informing the market that the AdC remained particularly vigilant in the detection of possible anticompetitive practices.

We also subscribed to similar statements from the European Competition Network -the ECN-, which gathers the European Commission and the competition authorities from the EU Member States, and the International Competition Network -the ICN-, which gathers over 130 competition authorities.

At EU level, we also coordinated with the EU Commission regarding any matters which could potentially also be relevant in other EU Member States.

Then, in terms of enforcement, these have also been busy times.

For example, we imposed interim measures concerning a no-poach agreement involving the Portuguese Professional Soccer League (LFPF) and the clubs of the First and Second Leagues. And we have kept our investigations going, including opening new ones, and more recently conducting unannounced inspections.

At the same time, we showed availability to provide informal guidance to companies and associations regarding cooperation under limited circumstances, for example in the banking, insurance and health sectors.

Regarding the flailing and failing firm analysis, I would argue that competition authorities should continue to carefully scrutinize this type of defense.

So far we have not seen these arguments in our current merger control activity.

But it is worth mentioning that in mid-March we settled a case for failure to notify a merger in the hospital sector. We accepted instalments regarding the fine because of the potential liquidity constraints related to the pandemic.

On new tools for digital ecosystems

Because digital markets are crucial for our economies as a source of innovation and welfare to the consumer, agencies must fully understand the drivers and incentives behind such new business models.

Our approach was to set up a two-fold digital strategy.

By the end of 2018, it was obvious that we needed to gather knowledge and capacity to deal with an expanding digital transformation. Which, by the way, was occurring across virtually all sectors.

And so, starting in 2019, we added a new angle to our priorities. And this meant focusing on new – digital – strategies that had an element of coordination between competitors, as well as unilateral conduct.

In particular, we deepened our understanding of the use of algorithms and artificial intelligence that may facilitate anti-competitive practices.

The main outcome of this was the publication, in July 2019, of an *Issues Paper on Digital Ecosystems, Big Data and Algorithms*¹.

This research laid the ground for moving from theory to practice.

¹Issues Paper on Digital Ecosystems, Big Data and Algorithms (AdC, 2019):
http://www.concorrenca.pt/vPT/Estudos_e_Publicacoes/Estudos_Economicos/Outros/Documents/Digital%20Ecosystems,%20Big%20Data%20and%20Algorithms%20-%20Issues%20Paper.pdf

Then, at the end of 2019, it became obvious that we were going to handle potential cases with digital features. So, we promoted internal capacity-building in this field. We created a digital task force, particularly suited to screen and investigate digital cases.

This is a task force which is cross-departmental. We believe that this design combines different angles, which are needed for this purpose.

The mission of the task force is to follow all the policy initiatives and potential enforcement cases which relate to digital areas. It also includes close cooperation and discussions with other authorities on these topics.

The team includes staff with experience in case handling from our antitrust investigation department. It also includes tech-savvy staff from the Studies and Market Monitoring Bureau, which have a more analytical focus. And to this group we recently added a data scientist profile.

The establishment of our digital task force has contributed to opening an investigation on collusion in digital markets.

On developing internal digital tools

Alongside the establishment of a digital task force, we have taken advantage of the digital revolution to develop new tools and increase the effectiveness of investigations and to streamline internal procedures. Let me give you some examples.

First, we moved a few years ago to very performing forensic IT equipment and software. With this, we strengthened our detection capacity in the context of increased digitalization at our targets.

This means that computers, e-mails, cell phones and the cloud can be swept more rapidly than paper and physical files.

Second, we have also moved toward a software which enables case teams to review and assess evidence in a more efficient way.

Third, we focused on implementing fully digital-based procedures in the interface with our stakeholders. As an example of this, merger control has been paperless in about 85% of cases for several years.

With the experience we had during lockdown, we know this percentage is possible to increase. So, we are currently working on moving this rate even higher. Then, a similar solution is underway for antitrust proceedings.

Fourth, the AdC has a complaints' website, with a dedicated tipline, launched in 2017, which aims to facilitate the job of complainants who want to bring valuable information to us. The website includes a feature for anonymous whistleblowers to contact and communicate with the AdC.

Finally, we have strengthened our detection capacity by developing a cartel screening tool for public procurement procedures.

This can be done because for over ten years, Portugal has had an encompassing public e-procurement system.

This means that there is a very comprehensive set of data, to which we have access. There are numerous data points, covering the entire procedure, from the publication of the notice to the contract closure. Then,

in parallel, the Authority carries out statistical tests on these large sets of data. The aim of course is for the tool to detect possible collusive tendering - based on those screens.

And, indeed, this has been useful in recent bid-rigging investigations.

On competition and sustainability

It is indisputable that there is, at the global level, an increasing concern with the need to ensure a sustainable development in our planet. This seems critical to the survival of the human species.

UN Sustainable Development Goals from 2015 (*Agenda 2030*) were the blueprint to achieve a more sustainable future for all.

At EU level, the Commission launched the European Green Deal in December 2019. This is a roadmap to make the European Union's economy sustainable, aiming at building a climate-neutral Europe by 2050.

As the push for a green planet continues, there is a growing debate as to whether and how competition rules can help the transition to the green economy.

What does this mean for antitrust policy?

Companies may feel discouraged from working together to become greener as they risk breaching competition rules that prohibit anticompetitive agreements and possibly facing severe fines.

Typically, merger control focuses on assessing the impact of M&A deals on consumer welfare – leaving public interest considerations (i.e. environment, labor, security) to Government policy and decisions.

In Europe competition authorities have started to think about how to provide guidance for businesses.

In June 2020, the Dutch competition authority published draft guidelines on sustainability agreements.

In September 2020, the Greek competition authority published a discussion paper on sustainability issues and competition law.

The EU Commission has also signaled that it will launch a public consultation on how competition rules and sustainability work together, covering both antitrust and state aid rules.

It may indeed be easier to integrate sustainability concerns in some areas of competition enforcement than others.

For example, state aid is an area, in the EU, where environmental concerns are already taken into account².

In merger control, it is more advisable that competition authorities focus their assessment on consumer welfare. If we want to take into account other criteria of public interest – security, foreign investment or the environment, to mention of few – we should in my opinion leave those decisions to Governments based on clear and transparent rules. This is a system which has worked well in many jurisdictions.

And finally, regarding cooperation agreements, we should be very cautious.

² Last year, more than 30% of all Commission's approval State aid decisions in each of October, November and December alone related – at least in part – to environmental or sustainability initiatives. <https://www.linklaters.com/pt-pt/insights/publications/2020/january/competition-outlook-for-2020/sustainability-goals-is-competition-law-cooperating>

One redline should remain: cooperation on sustainability should not cover up cartels. Competition enforcement must remain vigorous and effective.