

# Protecting Consumers' Freedom in the Digital Era:

## *Participative Antitrust - ex-ante and ex-post approaches*

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I would like to thank BEUC, the European Consumer Organization, for the invitation to engage in a discussion that brings together competition enforcers and consumers. It is a real pleasure to be here.

### *When is ex-ante intervention more appropriate than ex-post enforcement?*

We know that competition **enforcement can be very effective**. Fines can have a deterrent effect on those who consider breaching competition rules. By deterrent, I mean both financially and reputation-wise.

But competition enforcement is **not a universal panacea**.

Imposing fines may not be deterrent enough. It **may still pay off to breach the law** if a company's profits resulting from the breach are much higher than the fines.

Also, antitrust **investigations may be too slow to materialize**. In the end, consumers have been harmed and, sometimes, it might have been preferable to use regulation in order to protect consumers by avoiding any issues from arising at all.

If we want to **set a standard**, regulation may be more effective. Because enforcement can prohibit and deter, but not set the rules **in detail**.<sup>1</sup>

So, in my opinion, regulation and enforcement are **more complementary than substitutes**. In the end, the best way to protect our interests – as consumers and as citizens – may be a combination of competition policy and regulation.

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<sup>1</sup> “[I]f, as a society, we want to lay down fundamental standards – if we want to define the market, to set out what’s acceptable and what isn’t – then what we need is not more competition enforcement. We need regulation.”, M. Vestager, “Security and trust in the digital world” (September 2019), [https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/security-and-trust-digital-world\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/security-and-trust-digital-world_en)

But in general regulation should only be used if it is **able to address an issue more effectively** than a case-by-case analysis.

### *What about digital markets?*

First, there is one important caveat in this discussion: we should **not use competition to address issues which are unrelated** to the goals of competition law.

Digital markets are complex and involve many different angles and stakeholders, but it is **important not to pollute the debate about enforcement and regulation**.

For example, issues relating to **privacy, intellectual property or industrial policy** should be addressed by rules in those particular areas if there is no connection whatsoever between those issues and competition law.

So we should use competition enforcement only to tackle anticompetitive **agreements, abuses** of dominance and anticompetitive **mergers**.

Second, digital markets are, like many, always evolving: they are a **moving target**. This means that if antitrust cases move too slowly, it could be better to use regulation to **anticipate market failures**. But we should ensure that regulatory intervention does **not hinder innovation**. Be aware that the burden of compliance is usually higher on smaller businesses.

### *FinTech: the AdC's experience in the digital area*

Promoting competition in sectors that benefit from digital innovation has been set as one of the **AdC's policy priorities<sup>2</sup> in 2019**.

In particular, the AdC seeks to **raise awareness to barriers** that can prevent the entry of new competitors or distort competition in markets affected by digital innovation.

For example, the AdC has advocated for better regulation in **FinTech**, which refers to new services and business models in the financial sector, based on technological innovation.

At the end of 2018, the AdC published an **issues paper on Technological Innovation and Competition in the Financial Sector<sup>3</sup>**. The paper identified barriers to entry and expansion that FinTech companies might face in the provision of payment services and

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<sup>2</sup> AdC's Competition Policy Priorities for 2019:

[http://www.concorrenca.pt/vEN/News\\_Events/Noticias/Documents/AdC%20Competition%20Policy%20Priorities%20for%202019.pdf](http://www.concorrenca.pt/vEN/News_Events/Noticias/Documents/AdC%20Competition%20Policy%20Priorities%20for%202019.pdf)

<sup>3</sup> Issues Paper on Technological Innovation and Competition in the Financial Sector in Portugal (2018):

[http://www.concorrenca.pt/vEN/Estudos\\_e\\_Publicacoes/Estudos\\_Economicos/Banca\\_e\\_Seguros/Pages/Executive-Summary-Issues-Paper.aspx?lst=1](http://www.concorrenca.pt/vEN/Estudos_e_Publicacoes/Estudos_Economicos/Banca_e_Seguros/Pages/Executive-Summary-Issues-Paper.aspx?lst=1)

crowdfunding. In addition to the issues paper, the AdC has contributed to the **legislative process** through written opinions and parliamentary hearings.

The AdC has also called upon the sector regulators to explore the potential of solutions, such as **regulatory sandboxes**, to mitigate barriers to entry and innovation.

These solutions allow FinTech companies to **test, in a real market environment**, genuinely innovative, efficiency-enhancing and welfare-increasing products, while safeguarding consumer rights and system security. They have been put in place, for example, in the UK, and have delivered benefits for consumers and the economy.

The AdC has been a **forerunner in sparking a much needed debate on the topic**, and the **results were visible** in our jurisdiction.

The rhetoric used by both incumbents and regulators is nowadays noticeably different from when the AdC began its advocacy initiative, with the publication of the draft issues paper in April 2018. Regulators, in particular, have **implemented a number of initiatives** with the potential to make the financial services ecosystem more open to innovation and competition.<sup>4</sup>

### ***How would the creation of a separate digital market regulator impact the daily work of the AdC?***

Let me turn to the issue of the impact of a digital market regulator on the daily work of the AdC.

Whatever the institutional format of a separate digital market regulator, **cooperation and consultation would be crucial**. But I am convinced that **cooperation would not be difficult to implement**, as it already happens on a daily basis with a number of other sector regulators.

This is because the Portuguese Competition Act **already requires that the AdC and sector regulators cooperate** in the enforcement of competition law. For example, sector regulators may **comment on any information** received through the AdC which relates to their respective sectors.<sup>5</sup> They also have the right to issue a **non-binding opinion** before the AdC adopts a decision regarding markets in the respective sectors, including interim measures.<sup>6</sup> These obligations and rights go both ways, as the AdC also has the right to

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<sup>4</sup> In **May 2018**, the Bank of Portugal launched the FinTech+ contact channel on its institutional website, to clarify issues related to innovation in financial products and services. In **July 2018**, the Securities Market Commission (CMVM) launched a FinTech survey aimed at technology companies, financial intermediaries and trade associations. In **September 2018**, the three financial sectoral regulators (Bank of Portugal, CMVM and the Insurance and Pension Funds Supervisory Authority), in collaboration with the Portugal Fintech association, created the Portugal FinLab innovation hub. Portugal FinLab is a communication channel between the regulators and market operators on matters concerning innovative projects in the Portuguese financial sector. The first batch of FinLab participants was announced in November 2018.

<sup>5</sup> Article 35(1) of the Portuguese Competition Act.

<sup>6</sup> Articles 35(2) and 34(4) of the Portuguese Competition Act.

comment on competition issues arising during the supervisory and regulatory work carried out by sector regulators.<sup>7</sup>

In addition, the AdC has signed a number of **MoUs** (or cooperation agreements) with other regulators, such as in public procurement or in pharma, which reinforce this cooperation.

Therefore, the AdC regularly consults and cooperates with other regulators. So I believe a new digital market regulator would not have a big impact on the daily work of the AdC.

### *Is a separate regulator for digital markets desirable?*

There may be **advantages** in the creation of a separate entity to oversee digital markets, in particular regarding regulation.<sup>8</sup> This makes sense if we want to set standards for a practice that is recurrent and generally seen as negative for society. But the powers of such an entity should not overlap with those of a competition authority.

### *What can competition authorities do to protect consumers?*

Competition and consumer protection are **different**: they have different **immediate objectives**, a different **scope**, and they make use of different **legal instruments**.

The mission of competition authorities is to protect **consumer welfare** by enforcing competition rules. Some authorities, but far from all, are also tasked with consumer protection.

In Portugal, these policies have a distinct constitutional **basis**, separate **legislative instruments** and different **bodies** in charge of their execution.

However, while the AdC is focused entirely on the **promotion and enforcement of competition**, according to its bylaws the AdC shall pursue this mission “*with a view to promoting the proper working of the markets, the efficient distribution of resources and*” – here comes the hook – “*in the interest of consumers.*”

In addition, our bylaws also reinforce the ties between the AdC and the interest of consumers by requiring the AdC to **provide information, orientation and support to consumers**, in cooperation with the Government’s Directorate-General for Consumers and consumer associations<sup>9</sup>.

### *How to reconcile competition and consumer policies?*

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<sup>7</sup> Article 35(3) and (4) of the Portuguese Competition Act.

<sup>8</sup> See Furman report: setting out a code of conduct with set of standards that define the boundaries of anti-competitive conduct in digital markets; fomenting adoption of open standards including for allowing data portability; open up and provide access to data held by digital businesses on reasonable terms.

<sup>9</sup> Article 47 of AdC’s bylaws.

Now, while both competition and consumer protection may share an ultimate goal and act in the interest of consumers, their **approaches are quite different**: competition policy operates on the supply side, whereas consumer protection focuses on the demand side.

**This does not mean that these policies move in opposite directions.** In competitive markets, suppliers have the indirect incentive to protect consumers, by providing them with information that allows for an increase in customer switching. Reciprocally, consumer rights enforcement allow for active and informed consumers which in turn enhance the search for options – within the competition. This, in turn, plays a key role towards more competitive markets.

However, competition and consumer protection may sometimes have **conflicting views**. For example, consumer policy may result in restricting commercial offers by suppliers, which may lead to less consumer choice.

It may therefore, in some circumstances, be a **challenge to reconcile** competition policy and consumer protection. Some circumstances, such as market structure and the social importance of a given product, may justify consumer protection measures which have a negative impact on competition, but it is desirable that such negative effects are at least mitigated.

### ***Should a competition authority be entrusted with consumer protection?***

In general, I would argue that the **benefits** of tasking a competition authority with consumer protection **do not necessarily outweigh the risks and limitations**.

At least, save from some exceptions (e.g. spill-over reputational effects, since a consumer protection authority may be closer to the public's hearts), **it does not seem obvious that  $1+1=3$** ; that is, adding consumer protection to the portfolio of a competition authority would not necessarily result in added value to the enforcement of competition and consumer policies. It may even be that  **$1+1<2$**  if competition enforcement is hampered by a lack of resources.

For example, in practice, **economies of scope** which could be attained by a single agency are arguably **limited by the different tasks** involved in enforcing competition and consumer policy.

Competition authorities which are also in charge of consumer protection might be vulnerable to pressure from consumers towards price caps and so-called unfair practices.

In any event, if competition and consumer protection enforcement powers are split between multiple agencies, it would be important for the **competition authority to have a say, or at least be informed, about consumer policy decisions** that have material competition implications.

In the end, **consumers may be better served by multiple agencies which cooperate**, keep each other informed and possess in-house expertise which allows them to keep oversight about the other policy.

### ***Are competition enforcers fit for the digital economy?***

Do competition authorities need new tools to investigate competition issues in digital markets? Our experience says maybe not.

In 2015, the AdC assessed a merger in the national market for **online platforms for classified ads**<sup>10</sup>. The deal involved two major players and a **multi-sided market with three sides** – sellers, buyers and advertisers.

This was the first time the AdC analysed the effects of a merger in the so-called “digital economy”.

As regards the economic instruments used in the evaluation of this operation, there was no need to resort to “innovative” instruments but to adapt the already existing ones to the challenges the “digital economy” poses when compared to the more traditional markets.

For example, the existence of “**two-sided markets**” has been recognized and discussed for so long in the economic literature and by NCAs. However, because its existence is more frequent in the “digital economy” era when compared to the more traditional markets, “two-sided markets” have become increasingly important.

In the presence of such markets, as was the case in the aforementioned operation, the **SSNIP test had to be redesigned** since it has been designed for “one-sided markets”, where only the price level is relevant, and there are no indirect network effects.

In a “two-sided market”, the application of the SSNIP test will have to take into account the existence of that indirect network effect, since a change in the price charged on one side may have repercussions, not only on the number of customers/volume on that side, but also in the number of customers/volume on the other side, via network effects.

In this context, attention should also be drawn to **network effects**. Again, this is an economic concept already known and used, but that gains a new dimension when applied to digital markets.

This new dimension may be associated, for example, with the relationship between those effects and access to a vast and diversified set of information (**big data**).

It may, therefore, allow the creation of databases that can enable companies to control, influence and anticipate market behaviours, which might result in a decrease in

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<sup>10</sup> Proposed acquisition of part of CustoJusto’s assets by FixeAds (Ccent. 26/2015 – FixeAds / Custo Justo Assets).

competition. Thus, this is an important aspect that NCAs need to take into account (see, for example, the purchase of Whatsapp by Facebook).

In the aforementioned deal in online platforms for classified ads, the AdC concluded that, for example, **FixeAds made a feed-in of information from each of its platforms to the others.**

In its draft decision<sup>11</sup>, the AdC reached the preliminary finding that the transaction could substantially lessen competition in the domestic market for classified ads. The merging parties had **high market shares, competed very closely** and their multi-sidedness meant **large indirect network externalities.**

Overall, the analysis of the AdC in this merger case suggests that, to some extent, competition authorities **may not need new analytical tools** to deal with the digital economy; rather, the existing tools **may need to be adapted.**

#### Reinforcement of detection capacity: forensic IT, skills, ECN+ Directive

Besides looking at potential tweaks to the competition assessment, there is **another angle to analyze the impact of digitalization** on competition enforcers.

This is about the need to strengthen detection capacity in the context of increased digitalization.

Overall, dawn raids are **increasingly focused on computers, e-mails, mobile phones and the cloud** rather than paper and physical files.

Since each dawn raid may include sifting through thousands of digital documents, the **duration of dawn raids and of the data review may vary significantly** (depending on the tools and skills we have).

We have tackled this issue as part of our enforcement priorities with significant **investment in forensic IT equipment** to collect and assess data from dawn raids, as well as in **training of staff.**

In addition to the investment already done in forensic IT, the **AdC's detection capacity** will also be reinforced by the changes brought by recent European Union legislation, the ECN+ Directive.

One important goal of the Directive, which links with the digital economy, is to enable national competition authorities from the European Union to **access and gather all the necessary digital evidence.**

This is crucial because right now we are **more likely to find evidence of a cartel over emails or chat services** rather than on paper and in physical agendas.

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<sup>11</sup> The case was closed by request of the parties following the publication of a draft decision of the AdC to initiate an in-depth investigation.

*Organizational design and the creation of units dedicated to the digital sector: which configuration*

It is particularly **challenging for smaller competition authorities** to set up separate units dedicated to the digital sector given resource limitations (headcount and budget). Time will tell whether such skills and resources will be embedded in each traditional unit or, rather, united in a separate unit.

This said, adapting competition authorities to the challenges of the digital markets is unavoidable and is in progress in most of them.