What's hot under the Iberian sun

Women@Competition Iberia – launch event

CNMC, Madrid, 27 September 2018

*Speech by Maria João Melícias (*Check against Delivery*)*

Ladies and Gentlemen:

Let me start by saying how excited I am to be a part of this launch. The AdC has been supporting the work of Women@Competition for several years now, notably by participating in the network's annual conferences in Brussels and by promoting its presence at the ICN annual meeting, which the AdC organised last year in Porto. Thank you CNMC, Cuatrecasas and Compass Lexecon for hosting this event, which we hope to reciprocate in the near future in Lisbon.

On criminalisation and the situation in Portugal

A classic but always stimulating question. Like everything else in life, there are pros and cons.

The first and most powerful argument in favour of criminalising cartel offences is, of course, additional deterrence: besides the reputational effects, there cannot be, I suppose, a more frightening prospect for a CEO than spending some time behind bars.

Secondly, criminalization contributes to embed in the DNA of the business community and citizens the perception that behaviour like price fixing and bid rigging is pure antitrust evil, with no redeeming virtues and that the people that perpetrate it are nothing more than well-dressed thieves.

On the other end of the spectrum, there are a number of arguments against it:

Criminal sanctions bring an additional layer of complexity to the procedure, due for example to coordination issues between different responsible authorities, which may lead to lengthier investigations, disproportionate administrative costs and, ultimately, to under enforcement.

In fact, in the overwhelming majority of jurisdictions where cartels are a crime, the level of enforcement is relatively low, which defeats the purpose of criminalising and undermines the deterrence effect.

More importantly, criminalising cartels requires a proper interplay between criminal sanctions and leniency, that is to say, it becomes imperative to protect individuals which cooperate under leniency programs from criminal prosecution. This is actually one of the key goals envisaged by ECN+ Directive. But this interplay may not be easy to reach, at least within jurisdictions, like the Portuguese, which do not accommodate a similar immunity program in the criminal sphere.

Moreover, there are other enforcement tools or intermediate solutions that may achieve similar results in terms of deterrence, without the drawbacks of criminalisation, notably parental liability, on the one hand, and sanctions for individuals, on the other hand. Actually, the AdC has been consistently using these tools in recent times. Just last month, we accused a total of 26 board members and directors in different antitrust cases.

In Portugal, though there are no criminal sanctions for competition law infringements as such, managers and board members may be subject to individual fines, for example, if they knew or ought to know of the infringement and did not take measures to terminate it immediately.[1]

Finally, I personally consider that in a democratic society, based upon the respect for individual liberties such as Portugal, prohibitions, including any type of criminalisation, should ideally be 'bottom up' and not 'top down', in the sense that there first needs to be a large consensus in society about the harmful, criminal nature of the conduct at issue.

In Portugal, I think we have come a long way, since there is an increasing perception that cartel offenses are not materially different from other forms of business crime. Though I do not rule out that in the medium term such an approach may be appropriate, I also believe we are not quite there yet.

Are the EU, Spanish and Portuguese competition toolbox fit for purpose in the digital economy?

First, a word of context. There has been an emerging concern as to whether antitrust is capable of curbing the growing economic power of today's largest firms, notably Big tech. However, this concern has been mostly felt in the US – it is important to put things in its right context –, in light of the high levels of market concentration and profit margins, wealth and income inequality supposedly observed in that part of the world.

[1] Articles 73(6) in conjunction with Articles 73(2)(a), 69(4) and 68(1)(a)-(g) of the Portuguese Competition Act.

Indeed, for the past decades, antitrust in the US has been regarded as "consumer welfare prescription", meaning that a conduct cannot be deemed as anticompetitive unless it is shown that it is capable of causing short-term negative effects on prices or output. And in the digital economy this is often hard to establish, since web services are usually provided supposedly for free. And big tech are certainly innovative: they have created products and services that consumers love.

This approach has also led to a "laissez-faire" competition enforcement, and more importantly to the creation of tech giants that only keep on growing by leveraging their economic power and because of network effects. This scenario has given rise to strong criticism on the limits of such a strict welfare standard and calls for more vigorous enforcement.

By contrast, I think the EU legal framework, including the Portuguese, is not facing this limitation. Actually, the scope of the so-called "consumer welfare standard" has always been more widely understood in the EU as encompassing negative effects not only on prices and output, but also on quality, innovation and choice. The ECJ has never even used the notion "consumer welfare standard" as such. Anyway, the ECJ has stated quite clearly that antitrust covers not only conduct that may harm consumers directly, but also conduct that may harm them indirectly, by affecting a competitive market structure. The focus here is thus on protecting the competitive process. Once you accept this, antitrust rules offer a wide range of possibilities to accommodate the realities of how, for ex., the dominant firms of today gain and exercise market power (exploitative abuses for example – the existence of which the US does not even acknowledge). In short, our competition law toolbox is indeed up to the challenge.

But let me further illustrate this, by providing examples of our experience and policy approach in some of the main enforcement areas.

Starting with merger control

It is common ground that market power today is based, to a large extent, on access to 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. Hence, in the digital age, a company's data can actually be more valuable and attractive than its turnover. Tech companies' market power was often gained not only by innovating but also by systematically taking over rivals before they meaningfully reached the market. However, the turnover of some data driven start-ups may not be high enough to be caught by merger notification thresholds.

In Portugal, we have been able to deal with this concern without the need to fix our thresholds, because since 2012 they combine both turnover and market shares. This is a

case in which old rules proved to be quite handy in dealing with the challenges brought about by new tech.

For ex. we recently examined an interesting transaction between the two biggest online platforms for classified ad services in Portugal, which was only caught 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 novel issues *inter alia:* the multisided nature of these platforms; the fact that the notifying party was already integrating data from its other platforms, thus reinforcing network effects and rendering change very costly; moreover, the parties' market power was not assessed on the basis of turnover, but on users' traffic, notably, page visits and page views. Ultimately, in light of our concerns, the transaction was dropped just before we moved to phase II.

Now turning to collusion

The million dollar question here is whether we should fear the algorithm. It seems that algorithms can predict almost every aspect of our daily lives and with the help of Artificial Intelligence they are increasingly self-learning. What does this mean for antitrust? One of the main concerns is whether algorithms can render cartels more stable and, more importantly, whether they can dramatically facilitate tacit collusion, for example, as brick and mortar retailers and consumers go digital.

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 in the meantime 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".

We are also taking the path of humility here, by seeking to fully grasp what these softwares are capable of. As a result, we are planning to release in the near future an issues paper on algorithms and big data, which is basically the work product of the internal research we have been carrying out on the matter.

Allow me some final remarks on advocacy and state restraints

In effect, it is not only firms that can harm competition. Governments can do that as well quite effectively, even if involuntarily. In fact, following robust competition enforcement, firms often turn to the government to seek and obtain public intervention to accomplish exactly the same anticompetitive outcome. Effective competition advocacy directed at the government or other public authorities thus becomes a crucial part of our mission.

Actually, advocacy work is faster and more agile when compared to antitrust investigations and litigation, which is particularly helpful in the context of the fast pace of the digital economy.

After issuing several recommendations in 2016 and 2017 on taxi services, in April 2018, the AdC launched a public consultation on Fintech, as the financial regulatory landscape across Europe in undergoing profound changes, also brought by technological innovation, which of course can deliver significantly in terms of financial inclusion and increased choice for investors and consumers.

So we want to make sure that existing regulation neither becomes a disproportionate barrier to entry to Fintech players nor it is used by incumbent banks to strategically foreclose the market or stall market developments (for example, by refusing to share customers' banking data with new payment service providers). We also advocated for regulatory sandboxes and innovation hubs. Following our public consultation, some of our recommendations have been taken on board by financial regulators.

In short

Our policy approach in Portugal in the digital age is not different than before: it has always been about making sure that markets remain open and contestable, so that citizens remain in control of their choices. Because we believe that it is rivalry, coupled with vigorous competition enforcement, that provides the right incentives for innovation, whereas with scarce or no competition, including with monopoly or massive concentrations of economic power, society will most likely suffer. And we don't sit back and watch.

On keeping alive the incentives for leniency and settlements in the context of private enforcement

First and foremost, leniency is encouraged through vigorous enforcement. That is no secret.

Anyway, fortunately, there is life beyond leniency. We have been using a range of proactive articulated tools to supplement leniency and increase the likelihood of cartel detection. Let me give you a few examples:

Outreach initiatives. They have become a sort of trademark of the AdC. We usually have an advocacy campaign ongoing: our "FairPlay Roadshow – with competition everybody wins", our "Guidelines for Business Associations", our "Fighting bid-rigging campaign, our "Seminars for sector regulators", etc. The respective objectives are twofold: on the one hand, to raise awareness on the benefits of competition and its rules and, on the other hand, to feed our enforcement pipeline. Indeed, we use every outreach initiative to also "sell" our leniency program, with a view to prompt the cultural change needed to break down more traditional ways of doing business and establish open communication channels with potential informants, notably, procurement officers.

This field work has proved to be an important source of solid tipoffs on potential cartels that have been at the source of several of our investigations.

We have *reinforced our relationship with the Public Prosecutor's office*. Given the obvious interplay between collusion and corruption and other forms of business crime, we realised that we can help each other in many ways, including by sharing intelligence.

International cooperation, particularly with your neighbours, is also obviously key.

We are also running *targeted screens on e-procurement data*. Our investment here is cautious and realistic. Hence, our data analysis usually follows a suspicion.

We are *interacting better with complainants*. Last year we streamlined and modernised our electronic complaints website, together with a dedicated phone line, with the view not only to screen out irrelevant complaints, bringing greater operational efficiency to the AdC, but also to allow us to focus, as a result, on those complaints that do bring us added-value information. This intelligence usually comes from business partners or disgruntled employees, former or current, who know all too well about the wrongdoing inside their organizations and may be interested in informing us. To encourage these complaints, we routinely protect the identity of informants.

It goes without saying that, in the digital age, we have been using *faster and smarter IT forensic tools* to help us collect and assess large amounts of digital evidence throughout an investigation and we provide regular staff training on the full use of these tools.

We are also putting together an *online leniency application***.**

Last but definitely not least, we have dramatically *intensified our actions on the ground***.** Last year we carried out 8 times more dawn raids than in the previous year. Last month alone we issued four SOs and have many more in the pipeline.

By bringing together different sources of intelligence has enable us, without leniency, to build consistent narratives to bring to the public prosecutor and obtain the necessary warrants to raid companies. And once you are out there, anything can happen. For example, in some of these occasions we have seized a body of compelling evidence allowing us to open different new investigations.

This intense field work is also meant to destabilize cartels as much as possible. To create a credible threat of detection. It signals a strong message to the marketplace that we will get to the bottom of every reliable piece of information we receive; that sooner or later we will get to them.

As a result, leniency applications keep coming in.

So, in brief, we need to leave the comfort of our offices and literally hit the road. Improving intelligence capabilities is key. Ultimately, I am convinced that pro-active detection, leniency and settlements will cross-feed each other.

Fairness and Competition

Although there has been a revival of fairness, e.g. under the mandate of Commissioner Vestager, it is undisputed that the notion has been a part of the antitrust language for decades. The EU Treaty forbids *unfair* prices. The FTC Act outlaws *unfair* combinations of trade.

In effect, citizens are entitled to expect that the enforcement of antitrust rules will yield fair outcomes; that, as a result, "they will get a fair deal" as Commissioner Vestager puts it. To a large extent the recourse to fairness is a way of engaging citizens and firms on the benefits of competition and open markets, which is particularly important in this day and age of increasing populism and distrust on the social benefits of open markets with free competition. Fairness, therefore, signals a simpler, clear-cut message, which is easier to understand by the public at large than the economic, often intricate jargon, of dynamic, productive or allocative efficiencies.

Indeed, efficiency as such has never been an easy selling pitch. Amongst firms, rivalry is usually perceived as a very good idea, so long as it is happening in someone else's backyard, whereas "fair play" can be more meaningful for businesses and consumers alike. Which is why one of the AdC's advocacy campaigns already in 2014 was entitled "*Fair Play – With competition, everybody wins*."

The scepticism that has been voiced against this language is based on the concern that resorting to fairness may lead to arbitrary decisions or pre-determined outcomes. For ex. might enforcers prohibit a merger just because it is perceived as unfair? Could they find an antitrust infringement because the conduct seems unfair? Well, of course not. There are always requirements or standards that need to be met in each given case.

Anyway, I think one may accept some influence of fairness in enforcement – because, after all, this is the law –, while ensuring legal certainty and predictability in the decision-making process. How? This is where *procedural fairness* and due process comes into play, including all the guarantees it encompasses, *inter alia:* transparency in decision-making, well-reasoned decisions, grounding decisions on sound economics, safeguarding rights of defence and the right to be heard, the right of access to file, the right to representation by counsel, the timely resolution of investigations, independent judicial review, etc. In fact, procedural fairness is key in ensuring accountability and credibility of competition policy as a whole.

Let me just add that the success rate of the AdC's decisions in court – which is one of our key performance indicators – has significantly increased in recent times. For ex. in 2017, it was of 89% in total and 100% on the substance. This means that the courts have upheld our cases entirely on their merits. And it is noteworthy that our system of judicial review is

not purely administrative or based on a control of legality. In Portugal, the courts hold powers of full jurisdiction and apply rules and principles of criminal law, so the standards of proof and judicial review are very demanding. Anyway, judicial scrutiny is of paramount importance for us – we often deliberately seek it to obtain legal clarity. For us, due process is like breathing; it is naturally (perhaps too) embedded in our DNA.

Thank you.