

“A W@CompetitionIberia Talk: what now, a change of course or business as usual?”

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** Check against delivery **

Introductory remarks

Good afternoon, ladies and gentlemen. Let me start by saying how happy I am to be once again part of this event. The AdC has been supporting the work of Women@Competition for several years now and this initiative shows that, despite the circumstances, the platform remains very active.

It gives me a special pleasure to greet on this occasion, besides my fellow panellists, Cani Fernandez, now as the new President of CNMC, since Cani Fernandez was also one of the ‘godmothers’ of the project W@CompetitionIberia. I have no doubts that the excellent cooperation between CNMC and the AdC will continue throughout her mandate and that, building on the legacy of chairman José María Marín, CNMC’s work will thrive under her leadership. So I wish Cani and her fantastic team the best of luck and success in this endeavour. You know you can count on your friends on this side of the “border”.

The AdC’s recent experience in response to the Covid-19 outbreak

We are living unprecedented times – this crisis has unique features for its speed, severity, cross-sectoral and worldwide nature. Because it is still too early to draw big lessons, as the main challenges are yet to come, I simply propose to share with you our experience over the past three months, by providing examples of the measures we have been taking, both in the field of competition advocacy and enforcement, in order to infer some key take-aways on our approach to date.

Given the Government’s recommendations on social distancing, followed by the declaration of the state of emergency around mid-March, we quickly found ourselves

in a scenario where 100% of our staff began working remotely - teleworking became the rule.

We felt it was important to issue policy statements informing the market that, despite the confinement and the general suspension of administrative deadlines ordered by Parliament, we remained fully operational and open for business.

In fact, with regard to merger control, notifications and other related documents are submitted to the AdC via an online platform. This was already the system in place for several years. There was thus no need to implement any major changes to the usual procedure. Between mid-March and mid-June we issued 10 merger decisions in an average period of 40 days. There was a slight impact in the average duration of our merger proceedings – which was of 25 calendar days in February – due to the need, in some cases, to obtain information from the market or to ensure the right of interested third parties to intervene and considering the suspension of administrative deadlines. However, I believe this did not compromise our timely action, and that we will be able to recoup throughout the year in order to meet our key performance indicator (KPI) in this respect, as submitted to Parliament, which is 30-35 calendar days.

On the antitrust forefront, on March 16, we issued another policy statement indicating that, in the period of great collective effort that the country was going through, the AdC remained particularly vigilant in the detection of anticompetitive behaviour that exploits the current situation to the detriment of the people and the economy, as that will tend to worsen the economic consequences of the pandemic. This was meant to create incentives for goods and services to remain available at competitive prices.

We also acknowledged that the context might trigger the need for temporary business cooperation in order to prevent scarcity, for example in the supply of essential goods or to address other market failures.

The AdC has made itself available as a result to provide individual guidance to companies. This was a natural process since these requests for informal guidance and approval started reaching the AdC and other competition agencies in the EU, which led us to consider to be fair and appropriate to provide guidance.

A week later the ECN issued, on March 23, a joint statement to the same effect, which the AdC also endorsed and published.

Let me now give you a few examples on what we have been doing on a more operational level:

In the **banking and financial sector**, we issued written guidance to the Portuguese Banking and Consumer Credit Associations related to the adoption by these associations of the main conditions of private moratoria to be applied by their members – banks and other credit institutions – on loan operations – that is, a suspension of debt payments, in the context of the crisis. This was not exactly a comfort letter, but the truth is that, at this stage, we decided not to open an investigation on this matter.

This type of joint action had been encouraged by the European Banking Authority and by the Portuguese Central Bank in order to allow banks to help the economy without disregarding their prudential duties.

We warned about the risks of exchanging confidential information and the importance of ensuring that banks and credit institutions remained free to grant their clients more favourable conditions than the ones set under these moratoria.

In the **pharma** sector, the AdC issued guidance addressed to the Pharmacies National Association. Following the sudden price increase of face masks, alcohol gel, certain medicines and medical devices – this occurred to a certain extent throughout the world –, the association had recommended that pharmacies should comply with a specific maximum resale margin for these products.

Under normal circumstances, a recommendation of this sort from a sector association, even if apparently benign, may actually serve as a focal point and, therefore, lead to a price alignment in the market, besides discouraging innovation. We had many previous investigations and fines imposed on trade and professional associations for the exact same reason.

However, we decided not to open an investigation in this case since in the meantime the Government approved legislation precisely on this matter establishing, on a temporary basis, maximum retail margins for these products.

It is also worth mentioning that **during this period**, we closed a **gun-jumping case** for failure to notify a merger in the hospital sector, which was settled with the acquirer. We accepted to receive the fine in instalments due to the potential liquidity constraints relating to the pandemic argued by the notifying party.

In the football sector, our approach was different though. We opened an investigation against a decision by Portugal's Football League involving the clubs of the first and second leagues, whereby they agreed not to hire football players who terminated their contracts, for reasons related to the COVID-19 outbreak. In this case, we have also imposed interim measures ordering the immediate suspension of the agreed decision. Our preliminary view – because the main investigation is ongoing – is that this decision constitutes a no-poach horizontal agreement, thus leading to a reduction of workers' bargaining power and wage level, besides depriving them of labour mobility.

This type of agreement can also harm competition between rival clubs in the hiring of 'inputs' that are relevant for the quality and competitiveness of their teams, therefore also having the potential of depriving consumers of sports events of greater quality.

The football sector actually continued to provide reasons for intervention. Just last week we issued a recommendation – this time targeting the Portuguese Football Federation – regarding a draft Regulation, which had been subject to consultation, establishing rules on the functioning of the feminine Football league. This draft Regulation included a wage fixing provision, i.e. a cap on the wages to be paid to female football athletes supposedly to attract new entries by clubs in this league in the context of the pandemic.

Of course, this project gave rise to a major social outcry for obvious discrimination reasons and we also added the competition angle – which was actually gender neutral –, warning the Federation about the anticompetitive nature of this project and of the serious antitrust liability that it might incur if such a clause or other equivalent provision was ever approved. So I suppose said provision of the Regulation will never see the light of day.

What trends or key take-aways may be drawn from this recent experience?

From the outset, we have strived to avoid the narrative that competition law might somehow be suspended during the pandemic. Quite the contrary, competition rules remain fully in force.

Although it is difficult to draw lessons from the past given the unprecedented nature of this pandemic, if there is anything that we could learn from the 2008 financial crisis

is that underenforcement is counterproductive. So far, the indications that are being given by other competition agencies and international organizations do not suggest any intention of relaxing the rules, which is reassuring.

In effect, competition enforcement plays a very important role as a driver for economic recovery, so that in the aftermath of the pandemic, conditions are created to swiftly emerge from this crisis with dynamic and competitive economies.

That being said, competition law is and has always been flexible enough to accommodate, when appropriate, different types of business cooperation. We have indeed showed this nuanced approach towards certain collaborations.

We have increasingly used our priority setting prerogative, which has led us, in certain cases, not to pursue investigations, particularly in case of temporary and necessary measures to face market failures or shortages of supply prompted by the pandemic – either because those measures would fulfil the requirements of a positive economic balance, generating efficiencies that would outweigh a restrictive effect, or because they are not even deemed to be anticompetitive in the first place (i.e. because they are necessary, temporary and proportionate).

But we have also shown that we do not tolerate opportunistic behaviour by companies that under the pretext of the pandemic seek to exploit the current situation by abusing their market power or colluding to the detriment of consumers. And indeed we have opened several investigations in this context and despite this context. Moreover, we issued recently several statements of objections relating to the investigations we have in our pipeline and there are several more to come.

There is a certain policy shift in this exceptional scenario that is noteworthy, which is our willingness to provide individual guidance to companies. It is true that we have always been approachable to a certain extent and never refused to hear companies' concerns, but we had been very reluctant up until now to provide written assurances, therefore relying more on the existing system of self-assessment. Written guidance and comfort letters were virtually non-existent.

We therefore adjusted this approach due to the need to provide some degree of legal certainty to the market, so as not to discourage firms from engaging in cooperation that might be welfare enhancing, that is, necessary to address shortages of supply or

other market failures, for fear of being investigated or fined by the AdC. This might cause an adverse chilling effect so we decided to provide specific guidance.

(I suppose that this approach is in line with the Commission's Temporary Framework Notice which came later – a Notice for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the COVID-19 outbreak – “Temporary Framework Communication”).

On whether comfort letters will become more common practice in the future: on the one hand, the pandemic has shown that other public policy concerns – from public health to industrial policy - may often get intertwined with competition policy economic goals. Competition policy does not exist – never existed - in a social and economic vacuum. On the other hand, as competition agencies need to address the challenges brought about, for example by digitalization, new theories of harm may be developed.

However, one must avoid that this leads to unpredictability in the decision making process or sends confusing signals to the marketplace. Because ensuring transparency, credibility in the decision-making process of enforcers is crucial in spurring the market confidence necessary for enterprise and investment. In order to be encouraged to enter the market and compete, companies need to be given a certain degree of predictability so as to how competition enforcers “do business”.

I am thus inclined to think that it may be sound and appropriate in specific cases to provide more individual informal guidance in the future, even in the aftermath of the covid-19 pandemic – to avoid the chilling effect that I mentioned earlier – that is, not to discourage firms from engaging in welfare enhancing behavior.

I personally do not see this taking the form of actual comfort letters though. In a small agency like the AdC, one must be particularly wary about the need to allocate resources efficiently. Therefore, it may not be wise to divert resources away from the investigation of serious anticompetitive behavior to allocate them to the full-fledged assessment of neutral or procompetitive business conduct.

Additionally, enforcers should endeavor to update their general guidelines and soft law as soon as sufficient experience is gathered on specific matters. In this respect, we hope to update in the near future our guidelines on merger remedies and issue guidelines on vertical mergers.

On the interplay between industrial policy and competition law in a time of crisis? The impact of the crisis on the goals of competition law

The antitrust community has debated for a long time whether there is a role for other public interest considerations in competition policy beyond its the core economic goals of protecting consumer welfare, such as public health, labour, sustainability, and of course industrial policy.

We are all aware that in the aftermath of the Siemens/Alstom merger prohibition, competition policy was in the line of fire, as some Member-States called for a reform of EU competition rules to foster “European champions”.

The pandemic has accentuated the taking into consideration of other public policy concerns and provided more ammunition to those calling for a stronger industrial policy approach in the EU.

In effect, the pandemic may have aggravated distrust on globalization, because to a large extent it was enabled by globalization. People do travel... The disruption of supply chains we observed may also be said to be triggered by the lack of a sufficiently strong industry in Europe being able to immediately respond to the surges in demand, together with Chinese suppliers of intermediary inputs being unable to respond to demand, e.g, of surgical masks or ventilators, due to confinement measures. As a result, the storyline here might easily be that the markets have failed us when we needed them the most...

Fortunately, there are lights at the end of the tunnel. We have not yet seen a reboot of competition rules or of merger control as some Member States had advocated. Those darker clouds went away hopefully for good.

Because it is not difficult to envisage how relaxing competition rules to bolster national or European champions could undermine competitive markets in the EU, harm other European companies and citizens alike.

That said, the pandemic has painfully reminded us that industrial policy may not be disregarded. The question which then remains is how to reconcile competition and industrial policy goals. In other words, **is there such thing as a procompetitive industrial policy?**

I think the answer must be yes. How can this be achieved?

First, insulating EU companies from fierce competition is not the way to go, as this annuls incentives for efficiency and innovation. Artificial champions will not prevail in

the long-run. It is precisely rivalry that will give them the necessary stamina to compete on a global scale.

Second, a sound industrial policy should not pick winners. In particular, it should not bolster the big, but quite the contrary: it needs to be as widespread, neutral and non-distortionary of competition as possible. Actually, most EU countries –, this is certainly the case in Portugal –, only have a few big firms. Most of the economy is made of micro, small or medium sized enterprises. Therefore, an industrial policy based on strengthening those that are already big is, at the very least, nonsensical.

Third, it is paramount to foster effectively the single market integration, and to encourage firms to actually take advantage of it, as an opportunity to scale up and gain the resilience to compete globally. Market integration has always been one of the goals of EU competition policy and it is a permanent work in progress.

Fourth, while there are strong disadvantages in bypassing competition rules, or in using them as an industrial policy tool, that does not mean that competition rules cannot be fine-tuned in light of the challenges of digitalisation and globalisation. DGCOMP's ongoing review of its Market Definition Notice goes precisely in that direction, as some other initiatives like the (NCT) New Competition Tool.

Finally, there are sound industrial policy strategies that are not incompatible with competition policy, such as improving reciprocity requirements regarding access to public procurement in foreign countries, or public investment in innovation. The State can have an important role in the development and initial funding of new technologies.

Indeed, during the Covid-19 outbreak we have seen massive capital injections in the economy by Member States, which were important not only to help research relating to the coronavirus, but also to mitigate panic, and alleviate more adverse social and economic consequences of the crisis.

I think it is somewhere along these lines that we will be able to build a procompetitive industrial policy that is capable of spawning competitive firms, while bringing benefits to Europeans.

There has been some scepticism voiced against these uneven injections of State aid in the Member State's economies but I am certain that Maria Munoz will explain how the European Commission is making sure that the EU State aid control system works effectively, even in this context, so that the level playing field in the single market is preserved.

Otherwise peoples' trust in the Union might be undermined. More than competition policy, it is the European project itself that is being tested in this pandemic context.

And I am glad to notice that the EU is being able to respond with more (and not less) integration, cohesion and, above all, *de facto* solidarity – the main principle upon which it was founded. The recent Commission's proposal for a recovery fund of 750 billion euro to prop up Member States' economies hammered by the pandemic is a testament to this.

There have been, in the meantime, other EU initiatives that also have the effect of shielding EU companies, and which can be read as part of a wider industrial policy strategy. For example:

- Just last month, the Commission opened a public consultation on Foreign Subsidies¹, a White Paper calling for legislative measures to prevent foreign subsidies from distorting the EU market, including in the context of mergers.
- The Commission has also asked Member States to apply FDI screening regimes more fiercely, or to introduce such regimes in Member States where they do not yet exist, in particular having in mind the protection of the health industry assets in the EU.²
- The Commission has even called on MS to buy shares in European companies made weaker by the crisis to prevent hostile non-EU acquisitions.³

Some of these measures are to a certain extent expected in this context. Once Member States and the EU inject massively capital in the economy it is natural that they may wish to make sure that this help actually stays with the beneficiaries and is not diverted abroad through, for example, imports or takeovers by foreign firms.

A similar protectionist trend was observed in the aftermath of the 2008 financial crisis.

We cannot exclude that similar measures are adopted worldwide by other countries under different configurations, e.g. either through direct barriers to trade like customs barriers or through a reinforcement of foreign direct investment screening mechanisms.

¹ White Paper on levelling the playing field as regards foreign subsidies, 18 June 2020.

² Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), 25 March 2020, available at: https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf.

³ Financial Times, "Vestager urges stakebuilding to block Chinese takeovers", 12 April 2020, available at <https://www.ft.com/content/e14f24c7-e47a-4c22-8cf3-f629da62b0a7>.

This trend is quite different from what has been Portugal's approach throughout its history as an open economy, and I suppose Spain as well, as pioneers of globalization. For example, though Portugal has had a FDI screening mechanism in force since 2014, governments have so far never used it in practice despite the high levels of foreign direct investment in the country, which helps to show that Portugal does walk the talk of open markets with free competition for all.

Conclusion

As this protectionist trend develops across the world, domestic economies will become less exposed to international competition and the respective consumers more vulnerable. This will reinforce the role of national competition authorities. Effective enforcement domestically will become even more relevant to create incentives for companies within our jurisdictions to do the right thing: compete on the merits to deliver innovative products and services at competitive prices. This also entails a greater advocacy role of competition authorities, by advising governments and other public bodies to adopt measures that have the least possible impact on competition conditions.

There is also an underlying question of legitimacy of competition policy here. In an era of increasing distrust on globalization, anxiety about the future of Europe and the planet, competition agencies will need to step-up to regain people's trust on the benefits of the free market system, with competition for all, upon which our economies are based as an engine for prosperity for everyone.

In my perspective, this is the major challenge that competition policy will face in the near future – and which the pandemic has further accentuated.

Thank you for your attention.
