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Remedies in practice: views from the Member States and beyond

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(Check against delivery)

Intro - Portuguese legislative framework regarding remedies

- Before I start, let me give you a quick overview about remedy procedures in Portugal.
- In essence, the AdC's remedy powers are similar to those of the European Commission.
- Regarding **mergers**, the notifying parties may submit commitments, during phase 1 or phase 2, to address any competition concerns resulting from the deal. These may be either behavioral or structural.
- In **antitrust** cases, the investigated parties may also **submit** behavioral or structural commitments in order to address competition concerns raised by the AdC. In this case, the final decision will have no finding of infringement, i.e. it will be a decision to close the case with commitments
- In addition, the AdC may also **impose** behavioral or structural remedies on infringers as part of a final antitrust infringement decision, irrespective of whether it also imposes a fine or not.
- In its antitrust proceedings the AdC also has the power to impose **interim measures** if there is a risk of serious and irreparable damage to competition.
- Finally, what the AdC cannot do is to impose remedies through market studies. We can make recommendations, but not impose remedies in this case.

1. Behavioral remedies

1.1. Design risks, circumvention risks, monitoring

Behavioral remedies and the risks they involve

- I would particularly like to discuss the risks of behavioral remedies with a focus on merger proceedings. In any event, many of the risks I will speak about also apply to antitrust proceedings.
- As we know, structural remedies, such as asset divestments, have a direct impact on the market structure and typically are implemented immediately or with a reasonable lag. On the other hand, behavioral remedies are designed to influence the behavior of the companies active in the market, in particular the merging parties, changing their **ability and incentives** in order to promote market contestability.
- It is fair to say that our experience shows that behavioral remedies entail significant risks. Indeed, a number of mergers have fallen because the remedies submitted by the notifying parties did not dispel those risks.

The AdC's Guidelines on Merger Remedies

- Remedies usually involve risks, which have to be mitigated so as to ensure that they are an effective means to address the competition concerns identified by the competition authority.
- When assessing remedies proposed by parties, we carry out an assessment of risks according to the specific circumstances of the case. The acceptance of remedies will take into account the principles of effectiveness[1], efficiency[2] and proportionality[3].
- This structured approach to remedies was consolidated in our Guidelines on Merger Remedies, published in 2011. These guidelines were based on our experience, as well as international best practices.
- Since then, the AdC has seen an increase in the submission of structural remedies, which are clearly a preferred solution by the competition authority.[4]
- In fact, 80% of the mergers approved with remedies since the Guidelines were published (last 7 years, 2012-2018) included structural remedies, which contrasts starkly with the 50% of mergers approved with structural remedies in the years preceding the Guidelines, since the creation of the AdC in 2003. Evidence shown yesterday in one of the panels indicated the overwhelming preference for structural remedies across competition authorities.

Risks of behavioral remedies

- This is because we observe that, as a rule, structural remedies are more effective, as they have a direct impact on the market structure, less monitoring costs and less difficulties in assessing the implementation.

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[1] Remedies are accepted when they eliminate the competition concerns identified, are implementable and can be monitored.

[2] Less burdensome solution to competitive concerns. Costs accounted for: market distortion (especially in behavioural remedies) and reduction of positive effects resulting from the merger and passed through to the customer.

[3] Balance between the purpose of the elimination of competition concerns and the remedies' costs.

[4] Paragraph 41 of the Guidelines on Remedies: "*Tendo em conta os objectivos ou princípios normativos que orientam a avaliação de compromissos e em face dos riscos supra referidos, a AdC, em regra, manifesta uma preferência clara por compromissos de natureza estrutural face a compromissos de natureza comportamental*".

- Our Guidelines on Merger Remedies outline four types of risks entailed by behavioral remedies.
- The first is the **risk of lack of specification**, when the remedies are not sufficiently clear and raise doubts of interpretation for implementation or monitoring. For example, a commitment to provide access "under fair and reasonable conditions" or "at market conditions" involves concepts which are prone to issues of interpretation.
- A second risk is the **risk of circumvention**. A limitation on the behavior of the merging parties may lead to other restrictive behavior not foreseen in the remedies. For example, capping prices may increase the parties' incentive to reduce supply or product quality. On the other hand, trying to cover all potential restrictive scenarios may lead to very complex remedies, too difficult to monitor and therefore unlikely to be accepted.
- Another potential risk associated with behavioral remedies is the **risk of distorting the market**, with an impact on the effectiveness, costs and proportionality of the remedies. For example, a commitment not to enter into long-term contracts may reduce the incentive to acquire new customers and invest in the relationship with the customers.
- Finally, behavioral remedies involve **monitoring risks** resulting from a high information volume or complexity required for the monitoring exercise, information asymmetry between the parties and the competition authority or the monitoring trustee, as well as the long duration of the remedy. Not to mention the extra costs to both the parties and enforcers.

The Altice/Media Capital merger

- One example of a recent merger case in which the AdC rejected behavioral commitments was the proposed acquisition of Media Capital by Altice. This was one of the main vertical media merger deals of last year.
- Media Capital is a media conglomerate, owner of one of the main Portuguese generic TV channels and leading TV content producer, whereas in Portugal Altice owns one of the top 2 telecom and pay TV operator.
- We had **concerns** with potential (input) foreclosure of pay TV retailers competing with Altice, concluding that the merger would significantly strengthen Media Capital's bargaining position in carriage negotiations with pay TV retailers competing with Altice.
- In those proceedings, Altice proposed a number of behavioral remedies. These aimed at addressing the AdC's primary concern, input foreclosure, as well as customer foreclosure. However, the proposed remedies were considered unsatisfactory by the AdC.
- Now, the deal ultimately fell through because Altice pulled out the notification, so I cannot go into much detail.
- This said, the remedies where behavioral in nature and consisted mainly of provisions envisaging:
    - "Must offer" – through a regulated offer – regarding the merging parties' channels to the rival pay TV platforms;
    - "Must carry" – rival channels on Altice's platform;
    - Non-exclusivity for TV channels broadcasted on Altice's platform;
    - FRAND[5] access to advertising space on Media Capital's TV channels; and
    - Chinese walls to prevent exchange of sensitive commercial information.

[5] FRAND: fair, reasonable and non-discriminatory.

- This remedies package is a good example of the risks and challenges of behavioral remedies outlined in the AdC's Guidelines on Merger Remedies. The AdC found that these remedies were too vague, could easily be circumvented, were likely to create distortions in the market,[6] would be difficult to monitor and allowed for too much discretion for the merged entity.
- This said, we do not reject behavioral remedies from the start and our remedy assessment is done on a case-by-case analysis, taking into account the effectiveness, efficiency and proportionality of the commitments submitted by the notifying parties, as well as the risks that I have described.

1.2. Use of behavioral remedies in competition enforcement (i.e. antitrust) cases

- As I mentioned earlier, the legal framework in Portugal allows for a broad range of remedies in antitrust investigations. The AdC may accept commitments from the investigated parties or it may impose remedies on infringers as part of a final antitrust infringement decision.
- These scenarios include behavioral remedies, which may go beyond the typical cease and desist.
- I would argue that the use of behavioral remedies, whether in antitrust or in merger cases, is prone to a number of (similar) risks (design, circumvention, market distortion and monitoring).
- Finally, we have recently accepted behavioral commitments in an antitrust case concerning the postal sector, about which I will speak in a minute.

1.3. Use of behavioral remedies in regulated markets

Remedies in regulated markets: risk of conflict with the regulatory framework

Goals of competition law and regulation

- As we know, competition law and regulation do not always serve **the same goals**, which can cause some tension or friction when competition authorities intervene in regulated markets.
- While competition law ensures customers can benefit from lower prices, improved choice and better products, regulation can serve a number of different purposes, such as market supervision or ensuring market coverage.
- This said, it is also true that in many circumstances competition law and regulation are **complementary instruments**. For example, in some sectors, regulation has been used as an instrument for market liberalization, in order to open markets to competition.

Cooperation is key

- In any event, when competition authorities deal with sectors which are regulated, they **need to take into account the legal framework** which regulates those markets. This does not mean that those authorities need to put a "sector regulator hat" and follow different principles. However, they need to consider whether their decisions are consistent with the law applicable to the sector.
- This can be a challenging exercise as sector regulation can be complex. Sector regulators rely on knowledge based on years of experience in a single sector, while competition authorities may not always have the required knowledge to deal with detailed sector regulation.
- This is why I believe that **close cooperation** between competition enforcers and sector regulators is key for a consistent and coherent enforcement.

[6] They would introduce a level of rigidity in the negotiations between telecom operators that control cable TV and the media channels.

- In Portugal, this principle is **enshrined in the Competition Act**, which obliges the AdC to consult with sector regulators before taking a decision related to the respective markets.
- Also, beyond what is required by the law, we have been conducting bilateral seminars with all sector regulators in order to foster mutual understanding. And sometimes the feeling on both sides of the table is that of facing a "brave new world"; this feeling is exactly what should prompt us to continue with a regular dialogue.

Example of CTT antitrust case in postal sector

- We recently concluded an investigation in the postal sector which is a good example of how important it is to cooperate with sector regulators in order to overcome the challenges I have just described.
- Early last year, the AdC accepted a set of commitments put forward by CTT, the incumbent postal operator, which offered to expand the scope of its Postal Network Access Offer.
- What is the context of these commitments?
- The Portuguese postal market was liberalized in 2012, in the aftermath of Directive 2008/6, which aimed to open the European postal sector to competition.
- Under the law that transposed the Directive, **CTT was bound to provide its competitors access to its delivery network**. However, they only made available a Postal Network Access Offer in early 2016.
- In the meantime, the AdC opened an investigation in early 2015, prompted by a **complaint from VASP**, a potential CTT competitor, who claimed that CTT was abusing its dominant position by refusing to provide access to its network.
- In the **summer of 2016, the AdC issued an SO** indicating that there were a number of obstacles to the development of effective competition in the market for standard mail services. These obstacles were closely related to the access to CTT's standard mail delivery network.
- In order to dispel these concerns, **CTT submitted commitments to the AdC in late 2017**.
- One of the challenges which the AdC faced when assessing these commitments was the fact that the sector regulator, **ANACOM, was also having a look at a dispute concerning access to CTT's network**.
- Under the Postal Law, ANACOM has the power to settle disputes concerning access to the network of the Universal Postal Operator, which is CTT.
- While VASP complained to the AdC about CTT's refusal to provide access, another potential competitor, Iberomail, requested the sector regulator to settle a similar dispute, also concerning access to CTT's network.
- So, the situation was the following: 2 complaints, from 2 different complainants, lodged with different authorities and a similar dispute. This obviously called for dialogue.
- In **June 2017, ANACOM issued a draft decision** (the equivalent to an SO), requesting CTT to expand their 2016 Postal Network Access Offer. Therefore, when assessing the commitments from CTT, we had not only to consult closely with ANACOM but also to take into account their detailed preliminary public views about how access should be granted.
- In **March 2018, the AdC eventually accepted a set of commitments** put forward by CTT, expanding the scope of CTT's 2016 Postal Network Access Offer.
- Now, as I mentioned before, the goals of competition authorities and sector regulators do not always coincide. In this case, while the AdC has a pure competition focus, ANACOM also has other goals, such as ensuring the proper financing of the universal postal service.

- So in the process which lead to the final decision, and even before we started discussing remedies, it was essential to closely **coordinate with ANACOM to ensure that our views would not be inconsistent** with their approach. In fact, we organized regular meetings with them from the beginning of the investigation to ensure coordination.
- ANACOM's final decision has not yet been published, but we expect it to be coherent with our final decision.

1.4. Use for broader public interest issues (SME encouragement, market entry and employment)

- In its substantive assessment, the AdC does not take account of public interest considerations going beyond the protection of competition, so I do not have relevant experience to share.
- Because this is also the current "talk of the town", I should say that I agree with views that competition policy must focus on competition concerns. Other public policy interests are better dealt with by other parties.
- This said, while the substantive assessment of mergers carried out by the AdC is guided solely by competition considerations, that assessment may be outweighed by other public interest considerations in two scenarios.
- First, when the media regulator issues a negative (binding) opinion against a merger in order to protect media freedom and plurality.[7] In this situation, the AdC must block the merger. There are no remedies involved.
- Second, the merging parties may appeal the AdC's prohibition decision to the Government, which can reverse the decision on grounds of fundamental strategic interests of the domestic economy.[8] The Government's decision to reverse the AdC's prohibition must include conditions, remedies, to mitigate the negative impact on competition. But again, such remedies are focused on competition considerations, so they are out of the scope of this discussion.

2. <u>Structural remedies</u>

2.1. Features, advantages, risks

- As we know, structural remedies, such as asset divestments, have a direct impact on the market structure and typically are implemented immediately or with a reasonable lag.
- Since the Guidelines on Merger Remedies were published in 2011, the AdC has seen an increase in the submission of structural remedies, which are clearly a preferred solution by the competition authority.
- This is because we observe that, as a rule, structural remedies are more effective, as they have a direct impact on the market structure, less monitoring costs and less difficulties in assessing the implementation.
- This said, structural remedies also involve risks: (i) **composition risks** — when the scope of the divestiture package may not be adequate to attract a suitable purchaser, (ii) **purchaser risks** — when there is a lack of a suitable buyer, and (iii) **asset risks** – when there is potential deterioration of the assets to be divested.

[7] Since 2003, there has only been one case in which a merger was prohibited following the negative opinion of the media sector regulator (Ccent. 41/2009, Ongoing/Vertix/Media Capital).

[8] The Government reversed a prohibition decision only once, regarding a merger in the market for management of highways (Ccent. 22/2005 – Via Oeste (Brisa) / Auto-Estradas do Oeste / Auto-Estradas do Atlântico).

2.2. Use in mergers

- Our most recent decisions approving the mergers subject to structural remedies concern a variety of sectors, including energy markets (e.g. LPG) or telecoms.
- When assessing structural remedies in mergers, the AdC carefully considers the risks involved which I mentioned before.
- To illustrate with an example, I would mention a merger case where the importance of identifying risks was crucial to ensure that the parties presented the most suitable remedies: the Powervia case in road freight transport (2012)[9], where the importance of identifying risks was crucial to ensure that the parties presented the most suitable remedies.
- In this case, there were no assurances that there would be an interested buyer for the divested assets. This risk was identified by the AdC following a market test on the remedies package. To clear the merger, the AdC required an upfront buyer to be found before the implementation of the deal. The parties were not able to divest within the time-limit set in the decision and the deal fell through.
- The facts of the case proved that the AdC had made a correct assessment of the risks involved when it required an upfront buyer solution. The case also shows the importance of carrying out market tests of proposed remedies as a way to better identify the risks involved.
- Note that none of the above has touched on the topic of time-sensitivity. The process that leads to the design of the best possible remedies necessarily takes time. This is of course a very sensitive issue for the notifying parties. But good remedies, both structural and behavioral, take time to be designed.

2.3. Use in enforcement (antitrust) cases

- As I explained before, in antitrust cases the investigated parties may submit behavioral or structural commitments in order to address competition concerns raised by the AdC. In this case, the final decision will have no finding of infringement.
- It is also possible to impose (behavioral or structural) remedies on infringers as part of a final antitrust infringement decision, irrespective of whether it also imposes a fine or not.
- This said, the AdC has no experience regarding structural remedies in antitrust investigations. Our antitrust cases have typically ended with a cease and desist order.

3. <u>Broader issues</u>

3.1. Remedies in the digital era: challenges for enforcers

- What are the challenges which enforcers face when designing remedies in the digital era?
- In this debate, we typically hear **two radically opposite arguments**. One arguing that competition enforcers should not intervene in digital markets, as these markets are subject to self-correcting dynamics, i.e. Altavista was replaced by Google, and MySpace was replaced by Facebook; Microsoft was found dominant on desktop operating systems, but how relevant is Microsoft Windows for the future? So it is argued that today's leading tech companies may also be replaced by someone else in the mid-future. On the other hand, from the opposite side, we hear voices arguing for regulation and sometimes even a call to break-up tech giants.
- **The enforcer's dilemma is**: how best to contribute to this debate in a timely fashion: in the media? With recommendations for more regulation? With antitrust investigations? Perhaps all of these, depending on the issues.

[9] Ccent. 16/2011, Powervia / Laso*Auto-Laso*Probilog*Laso Ab.

- If we consider antitrust intervention and possible remedial action, we must ask ourselves **whether we need new tools** to address competition issues in digital markets? Our (rather limited) experience says maybe not.
- In short, my current belief is that we are well equipped and that the current antitrust principles and tools are still adequate to address digital markets. Rather than looking for new instruments, we may just need to adapt the ones we have.

CustoJusto/FixeAds example

- Let me give you an example. In 2015, the AdC closed proceedings regarding a merger between two online platforms for classified ads and auctions[10].
- This was the first merger operation in the so-called "digital economy" to be analyzed by the AdC.
- The proceedings were closed by request of the parties following the publication of a draft decision of the AdC to initiate an in-depth investigation.
- In its draft decision, the AdC identified potential significant impediments to competition that could occur as a result of the proposed concentration given (i) the high concentration levels in the national market of online platforms for classified ads, (ii) the high market shares of the parties and (iii) the fact that they were the closest competitors. The AdC also identified high barriers to entry and expansion due to strong network effects.
- As regards the economic instruments used in the assessment of this deal, there was no need to resort to "innovative" instruments. Rather, we adapted the existing instruments to the challenges posed by the "digital economy".
- For example, the existence of **"two-sided markets"** has been recognized and discussed for long in the economic literature and by competition agencies. 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** has 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.

Interim measures

- Another option which may be available to competition authorities for dealing with digital markets is the adoption of **interim measures**.
- A few months ago, in October last year, a Portuguese court imposed this type of measure in a digital market. The court accepted an injunction against Google and requested by Aptoide, a Portuguese app store competing with the Google Play Store on Android smartphones.
- Based on press articles, the complaint came after Google started warning Android users that Aptoide was potentially harmful. It appears the court ordered Google to stop removing the Aptoide app from users' mobile phones without their knowledge.

[10] Proposed acquisition of part of CustoJusto, Unipessoal, Lda.'s assets by FixeAds – Serviços de Internet, S.A. (Ccent. 26/2015 – FixeAds/ Custo Justo Assets).

- In this case, as far as we know, the court made use of its powers based on civil law, following a request from Aptoide. As I mentioned before, the competition authority also has the power to adopt similar measures based in the Portuguese Competition Act.[11]
- Naturally, one should consider carefully whether interim measures are justified, but the principles and tools to deal with this type of issues already exist and can be used by courts and competition authorities of many jurisdictions.
- And indeed, the recent ECN+ Directive requires Member States to ensure that their competition authorities have the necessary powers to impose interim measures, where there is a risk of risk of serious and irreparable harm to competition. This is an important step forward.

3.2. Market inquiry remedies, particular issues

- In Portugal the competition authority does not have the power to impose remedies based on its market inquiries.
- The typical consequence of a market inquiry is a recommendation to the legislator, sector regulators or other entities.
- For example, last December the AdC recommended to the Government and port authorities the adoption of measures to promote competition in the market for port terminal concessions, the liberalization of market access for towing and piloting services, and the redefinition of the port governance model.
- While we can check with the addressees of our recommendations whether they have implemented our recommendations, compliance is not in our hands. In short, we count on our own efforts, as well as those of the competition community, i.e. stakeholders, to be persuasive.

3.3. International cooperation in merger remedies (scope, limits, etc)

- It is my belief that it is consensual that cooperation between competition authorities in multijurisdictional merger proceedings is desirable and, in certain cases, necessary.
- Regarding remedies, cooperation is particularly important for example when there is a competition concern regarding a market whose geographic scope is wider than national. In those cases, competition authorities may need to find (and hopefully agree on) a remedy which addresses competition issues in more than one jurisdiction. Cooperation is also important to ensure that a remedy envisaged for one jurisdiction does not affect the effectiveness of a different remedy in another jurisdiction.

Merger remedy cooperation in Europe

- Our experience of international cooperation in merger review at the Portuguese Competition Authority is essentially at the European level. Last year, for example, 26 % of our merger cases were also notified to other Member States of the European Union.[12]
- The AdC operates within a European framework (ECA for those who know the system), whereby an agency notifies its European counterparts of mergers notified to it which will also be notified to other jurisdictions. This notification is circulated to pre-defined contact points within agencies and provides

[11] The AdC adopted interim measures once, in 2009, when it requested a company dominant in the cinema market and also active in the cable TV market to stop providing free cinema tickets to current and new cable TV customers (Press release 1/2009). Ultimately the AdC dropped the interim measures without further action.

[12] 12 out of 46 notifications were also notified in other EU Member States (Spain, Germany, Austria).

basic information on the case – parties involved, relevant economic sectors and geographic area, date of notification, provisional deadline and case handlers.

- With this exchange, case handlers can start engaging from the outset. To know which jurisdictions might be relevant for effective cooperation, the AdC's merger notification form requires parties to inform the AdC of the jurisdictions in which the case is notifiable.
- This approach promotes pick-up-the-phone cooperation, where case handlers can discuss the basic elements of the merger, before issues of confidentiality arise and the need for information exchange occurs.

ECN Best Practices

- Also at the European level, the need to foster increased consistency, convergence and cooperation among EU merger jurisdictions led to the creation, within the **European Competition Network**, of a Merger Working Group in 2010, which developed **Best Practices** on Cooperation between EU national competition authorities in merger review, published in 2011.
- These Best Practices provide the Member State National Competition Authorities with a framework to cooperate when necessary.
- In particular, regarding cooperation in remedy discussions, the ECN Best Practices foresee that the competition authorities will keep each other informed about the launch and progress of remedies discussions. They may also conduct these discussions jointly, or exchange views concerning any remedies received from the parties, if necessary.

Merging parties' contribution

- We must also not forget the importance of the merging parties for the success of international cooperation between agencies. Effective cooperation between competition authorities requires the active assistance of merging parties at all stages of the review process.
- Of course, in order for competition authorities to cooperate closely, they need **waivers** from the parties, which are requested on a case-by-case basis so as to discuss confidential information. In any event, this option is also in the interest of the parties because, in the absence of full cooperation, competition authorities may reach conflicting decisions.

AdC cooperation examples

- In Portugal, so far most cooperation has taken place in the initial phases of the investigation. Discussions typically focus on the definition of the relevant market and possible theories of harm without committing to any particular model of cooperation.
- In this phase, confidential information is not necessarily being discussed or shared, and waivers are not usually necessary. However, when this was necessary, the AdC obtained waivers from the merging parties. For example, this was the case in the **acquisition of the clearing house LCH.Clearnet by the London Stock Exchange Group** in 2012, with the waivers allowing for deeper cooperation between the AdC and the UK competition authority (OFT at the time, now CMA).
- This said, even though we may expect that multijurisdictional merger cooperation would lead to the discussion of remedies when competition concerns are identified, this is not always the case.
- From our experience, even if the merger is multijurisdictional, the competition concerns and the remedies to address them do not necessarily have an international dimension.
- Indeed, most of those mergers actually relate to geographic markets which were national or sub-national in scope, requiring different solutions by different jurisdictions.

- This was the case in the assessment of a merger in the outdoor advertising market, between **JC Decaux and Cemusa** (2015). Whilst this case was cleared without remedies in Spain, in Portugal, the AdC identified significant competition concerns in local markets, where the deal would lead to a reduction from 3 to 2 players in the market, with a concentration of the two largest and closest competitors.
- The AdC opened an in-depth investigation which led to the submission of remedies by the merging parties. However, the AdC considered that the remedies were not satisfactory and the parties withdrew their notification.