New Challenges to Competition Enforcement in a Much More Online and Greener World

European Competition Day

October 10, 2022

Margarida Matos Rosa

(please check against delivery)

Competition law enforcement hand in hand with sustainability – has the challenge been already sufficiently accepted?

Let me start with what we have achieved together.

I believe that two years on this debate, we have reached greater awareness that, more often than not, competition and sustainability go hand-in-hand.

The compatibility between competition and sustainability will depend on the specifics of the market. So, we need to delve deeper and avoid broad strokes.

Competition is a driver of sustainability through green innovation.

Developing new technologies and products, reducing waste, recycling, using alternative materials, spending less energy. These are all forms of green innovation.

Pursuing sustainability means pursuing green innovation. That is the catalyzer that will bring about the green transition.

Competition ensures market players have the incentives to innovate. As such, it is key for harnessing the potential of the green economy.

Competition also furthers sustainability through the demand side of the market.

We find an increasingly larger segment of sustainability conscious consumers.

Their concerns are reflected in their purchasing habits. They buy and pay for green.

Pursuing sustainability in this context requires firms to respond to this demand for green. And firms respond better and more promptly to consumer demand in a competitive environment where markets are contestable.

In some specific cases, however, firms may need to pursue sustainability initiatives alongside competitors.

For example, competitors may want to increase the environmental reputation of their industry and for this purpose agree on measures, such as eliminating single-use plastics in their business premises, or limiting printed materials per day.

The role of competition authorities in these scenarios is to make it clear to firms what they can and cannot do.

Firms should not assume all agreements between competitors are bad, nor that competition authorities see them that way.

In fact, many agreements may be neutral for competition or even pro-competitive. Competition law is flexible enough to give room to all these cases. It is not aimed at all agreements but at anticompetitive agreements.

The draft new guidelines for horizontal agreements, which are currently under discussion, include a dedicated chapter for sustainability. This chapter highlights the flexibility in competition law regarding sustainability agreements.

It follows a two-tier system.

Some sustainability agreements can be greenlighted in a streamlined fashion, as they are assumed to be neutral for competition.

Others may require an in-depth assessment into their effects on consumers.

The new draft guidelines are a good effort to reconcile the different perspectives, and accommodate sustainability concerns without compromising the mandate of competition enforcers.

Competition enforcers' mission is to pursue the competition policy goal. This mission has been entrusted to competition agencies by the legislator.

And as we move towards implementation of these achievements we have reached together, we must be mindful of the risk of greenwashing. Experience has shown us that firms may resort to sustainability claims as a cover for cartels.

These illegal agreements not only harm consumers but can also crowd out green investment. And that would be a poor outcome.

Effectivity of tools used for competition law enforcement (the look beyond ECN+) - do we need more?

To the question "do we need more than the ECN+ Directive", I believe the answer in this moment is that, before looking beyond the Directive, we need to ensure that the new powers given by the Directive are applied.

The ECN+ Directive is a key and innovative legislation to ensure the effective and harmonized enforcement of competition rules in the EU.

It defines a minimum core set of operational investigative tools and decision-making tools across the EU, supported by effective sanctions.

This is an essential moment for competition enforcement in the EU.

The ECN+ Directive was recently transposed into national law in Portugal.

This transposition strengthens the powers for the authority, namely concerning its independence, cooperation and coordination powers, dawn raids (for instance, access to digital evidence), effectiveness of fines, among other issues.

The discussion concerning the implementation of the ECN+ Directive could not come at a better time than the European Competition Day: this is an instrument that contributes to a strengthened European cooperation in the area of competition policy.

And, at a time of global uncertainty, European cooperation is crucial to strengthen Europe's resilience and its citizens' confidence in the European social model, promoting a European Union based on shared values of solidarity, convergence and cohesion.

In this context, the European Commission has a decisive role in ensuring the effective implementation of the ECN+ Directive across the EU.

Both the European Commission and the NCAs in the European Competition Network need to ensure not only that the transposition is taking place in Member States across the EU, but also that the transposition makes the powers attributed by the ECN+ Directive truly effective.

In a system where the European Commission and NCAs have parallel powers to apply Articles 101 and 102 TFEU, close and mutual cooperation are a must.

That is why I would emphasize the importance of the new cooperation mechanisms (with other European NCAs) foreseen in the ECN+ Directive, which ensure there will be no "safe havens" for anticompetitive practices.

For example, it allows NCAs to notify SOs and decisions in their territory on behalf of other NCAs, ensuring that companies do not get away if they are not established in a Member State in which they are operating.

Based on the ECN+ Directive, NCAs may also request that fines are effectively paid in other Member States to the competent authorities.

Accordingly, in Portugal, these provisions have been recently transposed into the Portuguese Competition Act (Law no. 19/2012, of 8 May), closing a legal gap that existed.

Gaps and limitations in the tools of NCAs undermine the European system of enforcement of Articles 101 and 102 TFEU, as well as the functioning of the European Competition Network as a whole.

As such, this strengthened mutual cooperation will play an essential role in ensuring a truly common competition enforcement area in the EU, contributing to the effectiveness of NCAs' activity.

In addition, this will be instrumental to ensure a level playing field for companies that operate in the EU internal market, ultimately benefitting consumers and the economy as a whole.

Hopefully, the example of the European Competition Network will also inspire other regions to foster international cooperation.

Other areas such as the financial sector have gradually reached a deeper level of cooperation at international level.

Building on the positive experience within the EU, it is time also to deepen international cooperation in antitrust enforcement worldwide. We need to ensure that members of cartels do not find safe havens.

Use of algorithms, machine learning and big data as possible infringement of competition law by undertakings and on the other hand by competition agencies for their policy and investigations – present or future?

In the last few years, we have undergone a prolific discussion on how the specific tools and characteristics of digital markets may be part of anticompetitive practices.

Monitoring and pricing algorithms, for instance, may be used to foster collusion in digital markets.

While it is true they may benefit consumers if they are able to track and compare prices more easily, these algorithms also increase market transparency for firms.

They may make it easier for firms to detect price deviations.

Markets become more predictable for everybody.

Using them, a retailer may monitor its partner in collusion and pre-commit to a pricing strategy through hard code. And a supplier may monitor whether its RPM is being followed by retailers.

There is also the concern that firms in highly concentrated markets may resort to a common algorithm developer to coordinate pricing strategies. Especially when these are marketed for their ability to increase margins.

For this reason, we should be wary of firms in highly concentrated markets using the same pricing algorithms.

Another important feature of digital markets is data.

Data is a key input in digital ecosystems. And collecting and extracting valuable insights from data is costly and may not be easily replicable by other firms.

Currently, this ability depends critically on having large pools of users, from which platforms can collect large volumes of data.

Active users are sources of data-driven network effects and of competitive advantage. This means firms compete on users.

Competition on users means platforms have incentives to create walled gardens – ecosystems of products aimed at attracting users and making sure they do not leave to competitors.

And these strategies are rooted in network effects and switching costs.

The interoperability and the data portability mandates in the DMA try to address these concerns. Rather than having data-driven network effects siloed in closed ecosystems, they are shared among market players. And consumers will find it easier to switch products and to multi-home.

Some digital players may also act as gatekeepers, taking a central role in the market and determining most if not all market outcomes.

The default options and rules they set may shape the market and how competition takes place. User interfaces, search results and recommendations may also be used to divert consumers from some choices to others.

We have already seen how these can be used to exclude competitors. And the DMA learnt from that.

Digital tools and digitalization also bring opportunities to competition authorities. They can be an ally in strengthening enforcement activity.

In 2020, the AdC created a digital task force. This is an interdepartmental team, responsible for the complaints and cases regarding the digital economy.

So far, the task force has led to an investigation for abuse of dominance and another for RPM (retail price maintenance) in e-commerce.

The digital task force has also developed web scraping tools through which the AdC has been collecting large volumes of data on online prices in several sectors. We are also using an extensive public procurement database.

This information is being used to verify whether there is evidence of price alignment, for example, following claims made in complaints to the AdC.

To assess this, the AdC has been developing screening techniques, focused, for example, on how many competitors charge the same price or on whether we consistently find the same retailers aligned.

This can be instrumental in investigations regarding horizontal or vertical agreements in an online setting. They have already proved useful at the AdC, in producing evidence to open an investigation and to obtain a warrant for inspections.

Thank you.