

Enforcers' Summit

Whole of Government Competition Policy: Lessons for Interagency Collaboration

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(please check against delivery)

Good afternoon to everyone.

The questions we address today are the following:

- How can competition enforcers work with local, state, and federal market regulators to curb anticompetitive mergers and conduct and pursue shared goals?
- What are opportunities and best practices for enforcers and regulators to collaborate, harnessing respective areas of expertise and legal tools?
- How might these partnerships help keep our analytical tools and market expertise fresh and relevant?

I will start by discussing the framework that the Portuguese Competition Authority uses in working with other agencies, including sector regulators. I will distinguish between cooperation mechanisms provided for by law, and informal cooperation, which takes place in addition to legal mechanisms.

1. Enhancing cooperation between agencies with different objectives

Formal cooperation mechanisms established by law

Duty to communicate

The Portuguese Antitrust Act foresees a number of formal cooperation mechanisms which ensure a close collaboration between the AdC and sector regulators.

First, all public entities, including sector regulators, have the duty to inform the AdC of any facts which may constitute a competition infringement [Article 17(3)]. And if a regulator is looking at issues which may also constitute a competition infringement, it must inform the AdC, which provides an opinion on the draft final decision [Article 35(3) and (4)].

Likewise, if the AdC investigates an alleged competition infringement in a regulated area, it must seek the opinion of the regulator. The first step, when it becomes aware of the relevant facts, is to immediately inform the regulator, which may then provide a first opinion on the matter [Article 35(1)]¹. A second step, before the AdC adopts a final decision, is to ask the regulator to issue a formal opinion [Article 35(2)]. Those opinions are not binding, but naturally the AdC takes them into account in the decision-making process.

¹ For further detail, see Portuguese Competition Act:

https://www.concorrenca.pt/sites/default/files/documentos/legislacao/Law_19_2012_bilingual_en_0.pdf

In merger control, the AdC has a duty to seek the regulator's opinion when the merger takes place in a market that is subject to sector regulation [Article 55(1) LdC]. This includes the financial sector, communications, energy, transportation, among a few others. This opinion is not binding for the AdC, except in the case of a negative opinion from the media regulator, which ensures plurality of opinion in the media and may therefore oppose a merger that would significantly reduce this.

Public consultations and advisory committees

In addition to the formal duties of information and consultation in investigation procedures, the law also foresees the participation of the AdC in public consultations and advisory committees organized by sector regulators, and vice-versa.

The framework law for sector regulators [Law 67/2013] provides that these shall cooperate and collaborate with the AdC in order to ensure the adequate application of competition rules. In this context, the AdC issues opinions, recommendations, studies and proposals aimed at adopting new regulations [Article 11].

The participation in public consultations is very relevant for example to preempt any new legislation that could negatively affect competition, for example by increasing barriers to entry.

Likewise, when we carry out market studies and sector inquiries in regulated areas, our conclusions are preceded by a non-binding opinion from the relevant regulator [Article 61].

The AdC regularly participate in advisory committees from regulators in various areas, such as communications, media, energy and health sectors. We also try to ensure that representation is ensured at Board level, to reinforce collaboration and interinstitutional relationships.

Informal cooperation mechanisms

In addition to these formal cooperation mechanisms, our experience shows that it is also beneficial to establish closer working relationships with sector regulators through informal initiatives.

The reality is that the existing general legal obligation may still leave a significant untapped potential for cooperation. So the Authority has, over time, created communication channels with sector regulators, as we will see below.

MoUs

First, the AdC has signed cooperation agreements, i.e. MoUs, with other agencies, such as the communications regulator [ANACOM, 2003], the agency that manages the public procurement nation-wide database [IMPIC, 2017] and the pharma regulator [Infarmed, 2018]. The purpose of these agreements is to facilitate information sharing, particularly regarding antitrust investigation.

In practice, the MoUs open a direct communication channel between staff from both authorities at case handler and management levels. Such agencies meet regularly to exchange views and information.

The idea is that the MoUs serve as a starting point for detecting anticompetitive behavior. Sometimes the information is publicly available, but a close cooperation with the regulator provides reliable information, as well as a valuable insight into how the market works in a given sector.

Finally, signing an MoU also sends a strong message to the market about the Authority's intention to proactively track anticompetitive behavior in a given sector.

These are good examples of the AdC's cooperation with other agencies, which have different mandates, in order to protect competition.

Informal groups of discussion & seminars

In addition to MoUs, the AdC has set up informal groups of discussion with other regulators. Such is the case of a task force on public procurement, which includes the agency responsible for the public procurement database [IMPIC], the Court of Auditors [the equivalent to the US Government Accountability Office], the Ministry of Finance [IGF] and the public procurement agency [eSPap]. Cartels in public procurement are particularly harmful to the State and citizens, and tax-payers at large. And we find that this type of partnerships is very helpful to keep our market expertise updated.

Competition seminars with other agencies

Finally, the AdC organizes seminars and workshops for regulators on a regular basis.

These seminars and workshops reinforce institutional cooperation and focus on the main infringements to competition law and on opportunities for cooperation between the AdC and sector regulators in their respective economic sectors.

For example, the AdC just recently organized a seminar with the authority responsible for labor conditions, within the Ministry of Labor, with the purpose of raising awareness for no-poach agreements.

Again, it is about creating additional communication channels to increase the level of cooperation and the chances of detecting anticompetitive behavior – and I will give practical examples later on.

Importance of a precise definition of powers

A final point, to mention that the AdC is the only administrative authority entrusted with cross-sectoral powers over the Portuguese economy for the enforcement of competition rules, including over regulated sectors.

Each sector regulator has specific powers to regulate economic activities in its respective sector.

With this framework, understanding the complementary nature of competition rules and economic regulation, due to their common interests and objectives, is crucial to guarantee a vigorous antitrust enforcement. And once more, it is key to ensure a close cooperation with sector regulators.

2. The AdC's success story: combatting bid-rigging outreach initiative

The AdC considers that combatting cartels is one of its main priorities, given the harm they cause to the economy and consumers. A particular focus is given to public procurement as in general it represents 10% of the country's GDP and 20% of public spending. These figures can also be found in several other OECD countries.

Therefore, in the past five years, combatting bid-rigging in public procurement has been one of the priorities of the AdC². Bid-rigging is a serious infringement to competition law, punishable by a fine of up to 10% of turnover of firms.

In 2016, the AdC issued a Guide of Best Practices in Combatting Bid-Rigging in Public Procurement³, which foresees various strategies that contracting authorities can — and should — adopt to reduce the risk of collusion and further promote competition in tenders.

The publication of this guide was followed by a countrywide outreach initiative - Combatting bid-rigging in public procurement - with the aim of raising awareness for signs of bid-rigging in public procurement and for promoting competition in this field through a more efficient design in procurement.

This initiative is directed at public procurement officials and focuses on ways to detect and prevent bid-rigging:

- How to identify potential collusive behavior in public procurement;
- How to design public procurement procedures which are less vulnerable to bid-rigging;
- Create privileged communication channels with public procurement officials so as to strengthen AdC's enforcement;
- Procurement officials as AdC's "eyes on the ground" to detect cartels.

By Q1 2022, the AdC had reached over 3,100 procurement officials in different agencies, leading to a significant increase, both in terms of quantity and quality, of the complaints received concerning public procurement.

Agreement with the agency that manages the public procurement database [IMPIC]

Advocacy is important, but as I mentioned earlier it is even better to create additional communication channels with sector regulators and increase the level of cooperation.

The AdC did just this with the agency that manages the nation-wide database for public procurement. The data is electronic and goes back to 2009⁴.

This means that there is a very comprehensive set of data on public procurement that we can investigate for collusive patterns. We use statistical screens to detect suspicious patterns of behavior which in turn may be relevant in the scope of ongoing investigations. And it has indeed produced tangible results for our enforcement activity.

In case of direct awards, the information is less detailed. But in the other cases, there are numerous data points, covering the entire procedure, from the publication of the notice to the contract closure.

Until 2017, the Authority was only able to access portions of this e-procurement database, on the basis of specific information requests, which was a relatively cumbersome procedure.

However, in 2017 the Public Procurement Code changed, ensuring the Authority now has direct and unfettered access to that online database.

² For further detail on the AdC's priorities for 2022 see:

https://www.concorrenca.pt/sites/default/files/Priorities%202022_0.pdf.

³ See Outreach Initiative for Combatting Bid-Rigging in Public Procurement in: <https://www.concorrenca.pt/en/fighting-bid-rigging-public-procurement>

⁴ In 2009, the Portuguese legislator implemented an e-procurement system, under which tender participants submit information through electronic platforms. As a result, a significant number of procurement procedures takes place online.

Following that change, in December 2017, the Authority established a cooperation agreement with the agency that manages the database. In practice, this agreement, or MoU, facilitates access to the data⁵.

Tangible results

Our outreach initiative, together with the strengthening of our cooperation with the regulators have made a significant impact in our investigations.

For example, the AdC investigated a cartel in railway maintenance, following a communication from the Court of Auditors, the equivalent to the US Government Accountability Office. This led to a confirmed price fixing and market sharing agreement and sanctions of €3.4 million, applied on five undertakings and respective board members and directors.

In addition, based on the data gathered from the public procurement database, the AdC has been able to request a judicial mandate to organize inspections in another public procurement cartel case, related to surveillance and security services.

3. Challenges in working with other agencies and promoting competition

We have discussed above how to make other agencies more aware of anticompetitive behavior in their sectors. That can be a challenge in itself because the focus of such agencies is, understandably, not on competition.

Yet, post-pandemic, another challenge has arisen. Because our economies were severely affected in the past two years, and supply chains continue to be affected, governments have set up measures to help the economy recover as quickly as possible.

With this in mind, in 2021 the AdC issued its own contribution, focused on competition principles, which can guide policymakers in economic recovery efforts⁶. Such principles include:

1. Ensuring competitive neutrality in public financial support to firms;
2. Removing, across sectors, unnecessary barriers to entry and expansion, so as to unleash the full potential for recovery and growth;
3. Combatting bid-rigging and ensuring competitive and efficient public tenders, given the sizeable public spending and investment head.

The AdC is very confident that by enhancing competition policy in those areas, recovery will be *amplified*. We must remain mindful that implementing such principles will require *determination* to change legislation as we might have known it for decades. It will require careful *consideration* in designing efficient procurement procedures. And it will require *impartiality* in applying state support.

⁵ See AdC's press release (Nov. 15, 2017): <https://www.concorrenca.pt/index.php/en/articles/adc-signs-memorandum-understanding-impic-access-public-procurement-data>

⁶ AdC (2021) *The role of competition in implementing the economic recovery strategy*. <https://www.concorrenca.pt/sites/default/files/2021-AdC-contribution-on-economic-recovery.pdf>