Enforcing competition law in digital markets and ecosystems

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Introduction

Thank you for the invitation and the opportunity to share the views of the Portuguese Competition Authority with such a diverse group of speakers.

The digital sector has been a top priority of competition authorities for some years.

It is at the technological frontier and a source of many disruptive innovations that are defining and will continue to define our lives.

As such, it is both an exciting and challenging time to be a competition enforcer.

The digital sector is perhaps the only sector that is truly global. As such, trends and competition concerns cut across geographies.

Forums, such as this one, are of great value for us to share our experience and keep up with the latest developments and lessons from other jurisdictions.

Let me share the experience and lessons of a NCA within the EU and allow me to break the answer into 3 questions:

- What are the major competition concerns related to the digital markets?
- How have these concerns been addressed? and
- How can competition agencies use AI?

Major competition concerns

Firstly, the digital markets have a number of characteristics that foster market concentration. This results in large digital platforms which have a significant economic power.

The list is vast: **economies of scale**, **economies of scope**, **network effects**, **switching costs**, the organization into **digital ecosystems**, etc.

In the last few years, competition authorities all over the world went through the **growing pains** of dealing with these markets.

We have seen many examples of how these factors may materialise into **market entrenchment** and **bottlenecks** in the digital sector.

And we know that incumbents tend to have both the **incentives** and the **ability** to exploit these bottlenecks in a way that harms competition and consumers.

These anticompetitive effects may operate both **vertically** and in **adjacent** markets, due to how digital markets are interwoven into digital ecosystems.

One of the best of examples of this is the **Google Android** case from the European Commission. It mixes anticompetitive mechanisms and effects from operating systems and app stores to general search in a way that we can probably only find in digital markets.

In fact, there is the risk that incumbents **leverage their market power to neighboring markets**.

How have these concerns been addressed?

We have had a multi-pronged approach regarding competition issues in the digital sector.

Capacity building

In the beginning, there was a real push for capacity building. This included sector inquiries, as well as hiring and training people with expertise on digital markets.

This why, at the AdC, we created a digital taskforce back in 2020.

And, of course, this is an ongoing process.

Antitrust

But the intervention that immediately comes to our minds are the large number of abuse cases in the digital sector over exclusionary practices.

There are many noteworthy cases from the European Commission. For example, the already mentioned Google Android, the Amazon Buy Box or the most recent Microsoft Teams case.

In addition, the so-called "exploitative" cases are also resurging[1]. Let us remember the ongoing Facebook Marketplace case or Apple music streaming case, both from the European Commission.

European NCAs, like the AdC, also have many investigations underway and antitrust decisions.

To pursue these cases, international cooperation has been invaluable.

The European Competition Network is a success story.

The AdC's Google case (concerning self-preferencing behaviors at various stages of the digital advertising value chain which was recently taken by the European Commission) is a clear example of this European cooperation.

Another example of this cooperation is the current reflection on the first European Guidelines on exclusionary abuses of dominance (article 102 TFEU). These follow the evolution of the cases against abuse of dominance and aim to calibrate the existing instruments.

- Merger control

An existing cooperation tool that has been the subject of further considerations is Article 22 of the European Union Merger Regulation.

This referral mechanism[2] aims to ensure the review by the European Commission of transactions that would otherwise escape control by falling below the thresholds at the European Union level.

In this respect, regarding merger notification thresholds, it is worth noting that according to the Portuguese Competition Law, other than a turnover threshold, there are a market share and a *de minimis* market share/hybrid threshold.

In fact, these are quite unique thresholds, applicable for instance in Portugal and Spain (where notification is mandatory) and the UK (where notification is voluntary).

Other than a threshold based on the value of the transaction[3] or an *ex-post* merger

[1] Speech by EVP Margrethe Vestager at the Global Competition Law Centre, College of Europe - Article 102: The beating heart of antitrust in the EU, available at https://ec.europa.eu/commission/presscorner/detail/en/speech_24_1247.

[2] Article 22 referral might be used in case the transaction (i) affects trade between Member States; and (ii) threatens to significantly affect competition within the territory of the Member State requesting the referral.

[3] Applicable in Germany and Austria.

control mechanism[4], the market-share-based notification thresholds may, to some extent, mitigate the issues related to the so-called "killer acquisitions".

These criteria increase the likelihood that at least some of these mergers, including in the digital markets, will be assessed by the AdC.

Another significant development has been on the theories of harm. These have evolved to better reflect the dynamics of the new markets, namely the innovation effects.

In fact, developments in the digital markets reveal the importance of ensuring that mergers that are likely to raise competition concerns fall under the authorities' radar, which are attentive to the dynamics of competition and the potential effects of a merger.

- Regulatory efforts | DMA

Nonetheless, according to some, digital markets also exposed **disciplinary shortcomings**, for instance related to the length of the procedures or difficulties from the competition authorities related with the speed of the developments and the asymmetry of the information.

In fact, legislators have been called upon to act:

A clear example is the **European Digital Markets Act**.

The DMA incorporates the lessons learned from competition law enforcement.

The DMA is driven by **contestability and fairness considerations** – for instance by addressing the risk of leveraging to adjacent markets and preventing exploitative conducts.

The **DMA and antitrust enforcement are complementary**[5] and this is evident in the constant dialogue between the European Commission and the NCAs.

- Competition 2.0 (inter-policy dialogue)

Indeed, this era calls **for complementarity**.

Digital markets have created the need for new responses and public policies to further develop, such as data protection.

Therefore, there is a need for an interplay between competition policy and other

[4] Introduced in Italy.
[5] Recital 11 and no. 6 of Article 1 DMA.

fields of knowledge – what I call **Competition 2.0**.

Competition authorities can act as **nudges for other public policies**.

Competition 2.0 requires **dialogue**, not only with other regulators, but also among us – like what we are doing now in this privileged forum of discussion (UNCTAD forum for IGE on Competition Law and Policy).

I believe that this dialogue plays an important role in our advocacy efforts, nudging the behavior of firms, as well as enhancing our capacities.

The use of digital tools and AI by NCAs

As for our capacities, innovations in the digital sector may also become invaluable tools for competition authorities worldwide, in multiple ways.

Competition authorities have been making **great efforts to implement digital tools** in their enforcement pipeline.

The AdC, for example, has integrated **web scraping of online prices** and **screening tools of public procurement data** into its pipeline.

As such, web scraping and screening are now instrumental in making the AdC more efficient.

Another example is the work of many competition agencies in **integrating AI technologies into their toolbox**.

Competition authorities are now testing **large language models** and other natural language processing tools to review the large volumes of documents in both antitrust and merger control cases.

These tools may significantly increase the efficiency and effectiveness of investigations, and are bound to become a key part of competition enforcement in the future.

Conclusion

It is time to conclude.

As a competition enforcer, we want firms to experiment new ideas, business models and applications. The digital markets have brought a lot of benefits. Our goal is to overcome externalities, remove barriers, so that firms have the incentives and means to continue to innovate.

There is no efficient ecosystem without competition and there is no competitiveness without competition.

Therefore, competition enforcers must remain vigilant and active to keep the pace of innovation. Just last Friday, Commissioner Vestager highlighted the sense of urgency regarding competition enforcement, stressing that "*now is time to act*"[6].

Thank you for your attention.

[6] Speech by EVP Margrethe Vestager at the European Commission workshop on "Competition in Virtual Worlds and Generative AI", available at https://europa.eu/newsroom/ecpc-failover/pdf/speech-24-3550_en.pdf.