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**USING MARKET STUDIES TO TACKLE EMERGING COMPETITION ISSUES –  
Contribution from Portugal**

**- Session IV -**

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This contribution is submitted by Portugal under Session IV of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: [oe.cd/mstei](http://oe.cd/mstei).

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## *Using market studies to tackle emerging competition issues*

### **- Contribution from Portugal –**

#### **1. Introduction**

1. The Portuguese Competition Authority (AdC), under the Portuguese Competition Act<sup>1</sup>, may undertake market studies (and sector inquiries) on all sectors of the Portuguese economy. Market studies are usually initiated *ex officio*, but they may also follow a request from the Government.
2. Many of today's emerging competition issues have a common thread. They are linked to rapidly evolving digital, often multi-sided markets where innovation is a significant dimension of competition, and to business models that may be complex and heavily reliant on data and network effects. There often exists a significant degree of asymmetry of information between competition authorities and firms operating in these markets. Moreover, competition authorities may have little or no enforcement experience regarding these issues.
3. The motivations of competition authorities for undertaking market studies may be varied. An important goal is competition advocacy, where competition authorities try to shape how markets work by advocating for measures promoting measures that promote competition between firms and reduce barriers to entry and expansion. In addition, competition authorities may undertake market studies in order to gain experience and knowledge about specific markets, so as to improve their competition enforcement activity.
4. The use of market studies as tool for competition advocacy is discussed in section 2. In turn, section 3 deals with how market studies may be useful in capacity building. Lastly, section 4 discusses some of the recent market studies by the AdC regarding emergent competition issues.

#### **2. Market studies as competition advocacy**

5. The AdC has a strong record of competition advocacy. Since 2018, the AdC has issued more than 50 opinions and recommendations and published 4 market studies on several sectors of the Portuguese economy, including electricity, ports, telecommunications, the digital economy, healthcare, liquid petrol gas, financial services, transportation, among others.
6. Market studies are most often used to analyse potential structural and regulatory competition concerns in specific markets. Upon identification of competition concerns in a given market, a market study may include recommendations, for example, proposing legislative changes to the government, the parliament or sectoral regulators, in order to promote competition in the market. The recommendations put forward by the AdC are non-binding, under the Portuguese Competition Act.

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<sup>1</sup> Article 61 of the Portuguese Competition Act.

7. Market studies also signal to market players a commitment of the AdC to tackle competition issues in a market, and informs on how the AdC views competition in the markets at stake. Market studies, therefore, may raise awareness and inform the business community about what they can and cannot do to comply with competition law.

8. In this sense, market studies serve as a prevention tool against anticompetitive conduct, a role that is especially pertinent in rapidly evolving markets, as market studies are generally quicker to use than competition enforcement tools, but still have a significant deterrence effect.

9. Signalling commitment and raising awareness about possible competition issues in a market may also encourage consumers, firms and other stakeholders to engage with the AdC, and bring important information regarding how competition is unravelling in the market. Indeed, this has been one of the most useful roles of market studies for competition advocacy. These stakeholders may reveal further details about the market under study that would be otherwise unknown, present the difficulties they face in the market. Stakeholders can come forward by their own initiative or be invited to share their views through public consultations and sector inquiries.

10. Drafting a market study requires multiple interactions with firms and other stakeholders. Following a first contact, firms become immediately aware that the AdC is looking at competition in the sector, bringing competition and potential competition concerns to their awareness.

11. Since the AdC is part of multinational competition networks, market studies are a means through which it can contribute and be part of a wider international discussion on competition policy. This role may be particularly important in the context of today's competition issues, as they often have a global scale and apply to global firms.

### 3. Market studies as capacity-building

12. In the context of the emergence of new markets, business models and business strategies, competition authorities have been investing resources on building up knowledge and capabilities to better handle the competition issues that arise in these markets. Market studies are an important tool to gain experience and knowledge about these markets, and close the information gap that may exist between competition authorities and firms.

13. As noted above, the AdC engages in multiple interactions with firms and other stakeholders during the preparation of market studies. This includes incumbents, recent entrants and potential entrants. The information that the latter two may provide is often invaluable to understand the functioning of the market. These are firms that may be experiencing barriers to entry and expansion that may exist in the market.

14. Market studies may also provide competition authorities a better understanding about whether the tools at their disposal are adequate to meet the challenges posed by emerging competition issues, as well as to discuss potential solutions to the shortcomings identified.

#### 4. Recent market studies by the AdC covering emerging competition issues

15. In the context of the digitalisation of the Portuguese economy, the AdC has undertaken market studies regarding “*Competition and Innovation in financial services*” (FinTech Issues Paper) and “*Digital Ecosystems, Big Data and Algorithms*” (Digital Issues Paper). These market studies aimed at assessing barriers to entry and innovation, as well as risks for competition.

##### 4.1. FinTech Issues Paper

16. The AdC published, in 2018, an Issues Paper on the FinTech and InsurTech sectors in Portugal<sup>2</sup>. Considering the high level of concentration in financial services in Portugal, the FinTech and InsurTech pose important opportunities to improve the competitive conditions in these markets. For this reason, the AdC analysed the market entry conditions for these sectors, with a focus on payment services and crowdfunding.

17. The AdC held meetings with several stakeholders in the financial sector: sectoral regulators (i.e. the Portuguese Central Bank, the Portuguese Securities Market Commission), entrants, potential entrants, incumbents and business associations. These meetings aimed at better understanding what new services are being offered and what barriers to entry and expansion are faced by new players in the market. In particular, these meetings sought to collect information as to what inputs are necessary for providing FinTech products and services, and the extent to which new FinTech operators were dependent on incumbents for access to key inputs. The meetings were also useful to identify what regulatory hurdles entrants and potential entrants face, in terms of licensing requirements and the waiting time required to start their activities in Portugal.

18. The AdC concluded that firms in the FinTech and InsurTech sectors faced significant barriers to innovation and entry and that there was a risk of market foreclosure by incumbent banks, by hindering FinTech entrants’ access to key inputs, namely client account data and settlement and clearing infrastructures.

19. Access to client account data (via APIs) and access to the clearing and settlement systems may be necessary for FinTech firms to be able to provide payment services and effectively compete in the market. However, the AdC warned that access to these inputs entails a dependency from incumbent banks that therefore have the ability and the incentive to create obstacles to new entrants.

20. Several of the identified barriers were regulatory. In particular, regarding the access to client account data, the AdC highlighted that the delay in the transposition of the Second Payment Services Directive (PSD2) in Portugal could provide a first mover advantage to incumbent banks and raise barriers to entry for certain payment services in Portugal. Furthermore, the AdC warned that secondary regulation to PSD2 would be necessary to mitigate the foreclosure risk and ensure that banks cannot hinder access to data.

21. On the access to the clearing and settlement systems, the AdC noted that, while PSD2 legislation allows payment institutions to access to these infrastructures indirectly, direct access would make them less dependent on incumbent banks, thus promoting competition.

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<sup>2</sup> *Technological Innovation and Competition in the Financial Sector in Portugal*. The English version of the issues paper can be found [here](#).

22. To address the competition concerns identified, the AdC put forward a list of recommendations. These recommendations aimed at making FinTech firms less dependent on incumbent banks for accessing the clearing and settlement systems, and on ensuring that PSD2's secondary legislation reduced banks degrees of freedom so that they could not jeopardize access to data and interoperability by new FinTech providers.

23. With regards to crowdfunding and peer-to-peer lending, the AdC identified a number of disproportionate regulatory requirements for investment via crowdfunding. For this reason, the AdC highlighted the need for legal requirements for these services to be suitable and proportionate. It also recommended that the regulator envisaged the possibility of granting for service providers licensed in other EU member states to provide crowdfunding services in Portugal.

24. The AdC recommended that sectoral regulators mitigated the existing barriers to entry and expansion by promoting innovation through the introduction of regulatory sandboxes and innovation hubs.

25. The AdC is currently developing a follow-up analysis on the implementation of the recommendations it put forward in the 2018 Issues Paper. To that end, the AdC designed and implemented an extensive survey to FinTech providers, focused on assessing what and how barriers to innovation and entry persist, and how these sectors developed.

26. The AdC engaged with more than 100 companies and received responses from 88 companies, covering more than ten types of services, different regulatory frameworks and multiple geographies. Of the 88 responses received, 70 concern companies that have indicated that they offer services in Portugal.

## 4.2. Digital Issues Paper

27. In 2019, the AdC published an Issues Paper on the digital economy<sup>3</sup>, covering a wide range of competition issues in digital markets and their potential implications for competition enforcement.

28. In particular, the Issues Paper highlights how and why digital firms organize in ecosystems, the role of data and, especially, data-driven network effects in their business model, as well as developments brought about by monitoring, pricing, search and recommendation algorithms.

29. Digital markets have characteristics that make them prone to concentration, most notable the strength of direct and indirect network effects, the synergies between products within the same ecosystem, and switching costs.

30. Data is often the driver of the feedback effect created by these characteristics. Network effects may be data-driven, if as more data is collected, the greater the value of the product. In addition, data collected during the provision of one product may increase the value of other products, creating incentives for firms to provide products within ecosystems, which consumers are encouraged not to leave. To do this, firms may induce or take advantage of switching costs, namely psychological ones, which came to the forefront with the recognition of the power of default options and consumer inertia.

31. Business models built around data tend also to be complex, often involving zero-pricing strategies meant to leverage synergies between products within an ecosystem.

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<sup>3</sup> *Digital Ecosystems, Big Data and Algorithms*. The English version of the issues paper can be found [here](#).

32. These considerations have significant implications for competition enforcement. First, firms may have incentives to implement merger policies aimed at staving off potential competition, either by shutting down competitors following acquisition, or by absorbing them within the incumbent ecosystem. Moreover, incumbents may adopt exclusionary strategies, either by restricting access to their data or interoperability or by leveraging market power between products of their ecosystems. Lastly, the complex nature of business models may make it more difficult for competition authorities to do competitive assessments, due to, for instance, difficulties in identifying and determining the boundaries of markets, pinpointing market power or identifying potential impacts on innovation.

33. These trends in digital markets also point to underlying structural issues that have led to calls for the revision of current competition law (*e.g.*, for revising merger thresholds or merger analysis), for a reinforcement of the powers of competition authorities or for the creation of regulatory bodies (*e.g.*, as put forward in the Furman Report).

34. The increasing number of transactions in digital settings has allowed for the development of monitoring and pricing algorithms of varying degrees of sophistication. Monitoring and pricing algorithms may facilitate reaching and sustaining collusive equilibria in the markets where they are used. These algorithms may assist firms in implementing explicit collusive agreements, by improving the ability of the parties to detect deviations from the agreement, and serving as a commitment device. Monitoring algorithms may also decrease the cost of enforcing resale price maintenance agreements.

35. In addition, monitoring and pricing algorithms may significantly increase market transparency. This may be the case if firms' pricing behaviour is so simple that it becomes too predictable (*e.g.*, price matching), or if firms are using the same algorithms. Nonetheless, market transparency may also increase for consumers and prices may become more salient, intensifying price competition.

36. In order to assess the extent to which firms use pricing and monitoring algorithms, the AdC undertook a survey among 38 Portuguese firms, across different sectors of the economy, with online retail activity in Portugal. Amongst the inquired firms, 37% reported tracking the online prices of their competitors using monitoring algorithms and 7.9% reported using software that sets prices automatically.

37. Search and recommendation algorithms have also become widespread in digital settings. These algorithms may allow firms to divert consumers from certain products to others, namely by exploiting consumers' behavioural biases. This introduces the risk of bottlenecks in the market, especially in cases where firms are able to leverage market power between products, if these algorithms are implemented in ecosystems or implemented in vertically integrated platforms.

38. In its Issues Paper, the AdC raised awareness of the business community by warning they will be held responsible for the algorithms they use, if it is found that algorithms are instrumental in an anticompetitive conduct.

39. Following the publication of the Issues Paper, the AdC set up a dedicated digital task force, joining up the market monitoring and the anticompetitive practices teams. This task force aims at internal capacity-building to more effectively tackle the challenges in the digital economy.