

# PORTUGAL

*Tânia Luísa Faria\**

## A COMPETITION POLICY IN THE DIGITAL ECONOMY: A SHIFT IN FOCUS?

### **1. What are the main cases dealing with the digital economy (focusing on digital businesses or on the competition between digital businesses and incumbent operators) initiated and completed by your competition authority?**

First of all, it is important to determine what we are referring to when we mention the digital economy. In fact, at this stage, as digital technology is adopted across the economy, segmenting the digital economy is increasingly challenging, i.e., since digital economy is progressively becoming the economy itself, it would be difficult to “ring-fence” the digital economy from the rest of the economy.

However, within this context, we will focus on markets which are based on information and communication technology, in particular, business models which have emerged due to the widespread use of the Internet, such as e-commerce, online payment services, app stores, online advertising, cloud computing and participative platforms with user-created content.

We will focus our assessment on the decision practice of the Portuguese Competition Authority (“PCA”), under Law 19/2012, of 8 May (“Portuguese Competition Act”) as we are not aware of any developments resulting from the case law of the specialized competition court, the Competition, Regulation and Supervision Court headquartered in Santarém, and decisions from common civil courts are, in general, difficult to perceive.

From the publicly available information, the PCA practice, in terms of actual cases regarding digital businesses, is rather scarce and we are not aware, from public sources, of ongoing investigations specifically concerning digital markets<sup>1</sup>.

This scenario could change in the near future, as the PCA has included in its priorities for 2019, the assessment of new methods of coordination between competitors and the abuse of dominance, in particular by deepening the understanding of the use of algorithms

---

\* Head of Competition and European Union Law Practice at Uría Menéndez - Proença de Carvalho, Lisbon, Assistant Lecturer at the Law Faculty of the University of Lisbon, PhD Researcher. All web pages in this report were last accessed on February 26, 2020.

1 At the end of 2019, the PCA issued statement of objections addressing telecommunication operators that may have digital market implications, but we do not have further information on the specific infringements allegedly at stake. Please refer to the Press Release 25/2019, of 20 December 2019.

or artificial intelligence by undertakings, which may facilitate anti-competitive practices. This document also stated that the PCA was going to-- pay particularly close attention to barriers created by legislation or by anti-competitive behaviour on the part of incumbents in sectors where innovation brings most benefit to consumers<sup>2</sup>. The PCA's priorities for 2020 continue to include big data, algorithms and digital ecosystem and this authority has announced the creation of an internal task force to tackle issues related to digital markets<sup>3</sup>.

There were, however, some cases in the past, related to certain aspects of the digital economy that could be further developed in the future that we would like to refer to at this stage, irrespective of further references in the sections below.

As regards investigations of restrictive practices, it worth mentioning the PCA's decision of 2013 concerning alleged vertical restraints related to online commerce<sup>4</sup>. In this case, Sera Portugal, a supplier of aquarium products, allegedly restricted the prices offered by its online retailers (resale price maintenance – "RPM"), according to a complaint submitted by one of its online distributors Pet4you.

Even though this complaint concerned prices pertaining to the online offer, the medium by which the price monitoring took place was more or less traditional, *i.e.*, by means of emails sent by the supplier to the retailer recalling the "recommended prices", without the utilization of more advanced mechanisms based, for instance, on algorithms<sup>5</sup>. Nonetheless, it is relevant to point out that the increase in transparency brought about by online retail channels makes it easier for suppliers, sometimes with the assistance of other retailers, to detect deviations from the unlawful pricing requirements.

However, while providing favourable conditions for price alignment and monitoring, the transparency allowed by the presence of businesses on the Internet, besides increasing consumers' capacity to compare commercial conditions, also permits the competition authorities to gather evidence of restrictive commercial practices more easily, even when undertakings refuse to provide such damning information.

In fact, the transparency provided by the Internet was relevant for the PCA's investigation in the cases involving unlawful maintenance contracts in the automobile sector, where the PCA decided to proceed with the investigation after visiting the infringing companies' websites, as the disputed contracts were available online<sup>6</sup>.

---

2 Competition Policy Priorities for 2019, available at [http://www.concorrenca.pt/vEN/News\\_Events/Noticias/Documents/AdC%20Competition%20Policy%20Priorities%20for%202019.pdf](http://www.concorrenca.pt/vEN/News_Events/Noticias/Documents/AdC%20Competition%20Policy%20Priorities%20for%202019.pdf).

3 Competition Policy Priorities for 2019, available at [http://www.concorrenca.pt/vPT/A\\_AdC/Instrumentos\\_de\\_gestao/Prioridades/Documents/Ano%20de%202020.pdf](http://www.concorrenca.pt/vPT/A_AdC/Instrumentos_de_gestao/Prioridades/Documents/Ano%20de%202020.pdf).

4 PRC/2019/12 – Sera GmbH e Sera Portugal – Unipessoal, Lda, of 21 March 2013.

5 PRC/2019/12, para 31.

6 PRC/2013/5 – Peugeot Portugal, of 30 December 2014, para 27.

In the case of merger control, the first case worth mentioning was the joint acquisition of Tradecom by the banking entities BES, CGD and by the telecom company PT in 2009. The target company was active in the management of online commerce business-to-business (“B2B”) platforms and electronic data interchange services (“EDI”)<sup>7</sup>.

In this case, the PCA considered that B2B platforms were autonomous from traditional commerce, as well as from business to consumer (B2C) and consumer to consumer (C2C) platforms, as was the management of said platforms. In turn, the EDI market was characterized as a tool to disclose data, for instance, data related to order processing, invoices and payments, i.e., the technology used is apparently similar to electronic mail, but has a higher level of security.

These markets, in geographic terms, were defined as supra national, and potentially worldwide in scope, considering that these services were provided using the Internet, and therefore were accessible under similar conditions in different locations.

Subsequently, the attempt to merge the online marketplaces FixeAds and Custo Justo was also notified to the PCA, but this notification was withdrawn by the notifying party and, therefore, we cannot extract any relevant conclusions from this filing. However, as we will see below, the PCA often quotes this case as the first relevant case on mergers in digital markets<sup>8</sup>. The same can be said of the withdrawal of the notification of the proposed acquisition of the media group Media Capital by the telecom operator Altice, thereby not allowing the potential analysis that could have been conducted, on Internet content streaming<sup>9</sup>.

More recently the Portuguese retailer Sonae and CTT, the Portuguese postal services provider, have notified the PCA of the creation of a joint venture for the exploitation of an online marketplace<sup>10</sup>. The notifying party submitted that there could be a marketplace market in general, or one which was segmented into B2C or B2B. Nonetheless, the market definition was left open by the PCA. Even though the assessment of the joint venture was not in-depth, due to the absence of competition concerns, there was a reference to the relevance of network effects for online marketplaces, considering that the number of users on one side of the market affects the value of the services for the users on the other side of the platform.

As the marketplace will also make advertising spaces available, the PCA has, moreover, defined an online advertising market within this case. Therefore, it has left further segmentation between “search” and “non-search” advertising as an open question.

7 Ccent. 22/2009 ES TECH Ventures\*Caixa Web\*Portugal Telecom/ PT Prime Tradecom, of 23 July 2009.

8 Ccent. 26/2015 – FixeAds/Custo Justo, of 08 June 2015.

9 Ccent. 35/2017 – Altice/Media Capital, of 11 August 2018.

10 Ccent. 27/2018 – Sonae\*CTT / Empresa Comum, of 19 July 2018.

The geographic definition of the marketplace market was still considered national in scope, even though the exact market definition was left open, as the PCA highlighted that there is the possibility to offer different prices in view of the client's location and there are other relevant factors connected to national markets, namely linguistic factors and consumer preferences. Also, in terms of online advertising markets, the PCA has left the market definition open, but it considered that linguistic factors and consumer preferences may generate different advertising campaigns in view of the location of the Internet users.

In terms of competitive assessment, the PCA recognized as competitors of the new marketplace the generalist B2C platforms eBay, Aliexpress e Rakuten, and, in what concerns online advertising markets, large multinationals as Google e o Facebook were identified as the main players.

Moreover, the vertical aspects of this transaction were also mentioned, as marketplaces tend to expand to encompass payment and transportation services. In this case, CTT was present in both these activities, while Sonae was essentially a brick and mortar retailer entering into the digital environment.

More recently the PCA has assessed the acquisition of another online platform, this time relating to the provision of travel services in the *Siris/Travelport* concentration<sup>11</sup>. This platform (Travelport) connects travel service providers, such as airlines, cruise lines, hotels, rent a cars, among others, and travel services acquirers as travel agencies. As it is typical in these types of platforms, its services include price comparison, invoicing and payment tools, in a market that the EC has designated Global Distribution Systems ("GDS").

As regards geographic market definition, the PCA has followed the EC approach, without particular explanations, considering that that GDS supplier offer their services in the national market, while service providers that supply content to the platform operate in the EEA.

More recently, the assessment of the acquisition of the media Group Media Capital by Cofina, also active in the media sector, by the PCA also included the assessment of markets related to online news contents and online advertising in Portugal, even though the majority of the investment is channelled to multinational platforms<sup>12</sup>.

In sum, the cases decided by the PCA, on restrictive practices and merger control cases primarily concerned ecommerce businesses and did not entail in-depth discussions on the potential special features of the digital markets.

## **2. Has your competition authority adapted its enforcement practices in order to keep up with the pace of digital markets?**

---

11 Ccent. 1/2019 – *Siris/Travelport*, of 07 February 2019.

12 Ccent 47/2019 – *Cofina / Media Capital*, of 30.12.2019.

Following the international trends, within the last three years, the PCA has published reports on digital markets.

Firstly, the PCA issued a “Report on Competition and Regulation of Public Passenger Transport Services by Car Hire” in order to respond to the emergence of transport services based on electronic platforms<sup>13</sup>.

In fact, the emergence of this business model seems to have exacerbated the implications for competition of a restrictive regulatory model for taxi services, based on a limited number of licences. Therefore, banning alternative transportation business models could deprive consumers of the benefits of technological innovation and of the competitive pressure that such services may exercise on traditional taxi services.

Within this context, the PCA recommended an overall regulatory review that, rather than extending current regulatory provisions to new entrants, would serve to add flexibility to the framework applicable to passenger transportation services. This would be needed, as the current rules applicable to traditional taxi service providers limit the PCA’s ability to react to the competitive pressure brought by the new business models. According to this report, the regulatory review must comply with the principles of efficient regulation, in order not to risk aggravating or perpetuating the negative effects on market size.

These recommendations by the PCA had, apparently, some impact on the legislation allowing the new transportation platforms currently operating in Portugal, but the recommendation on the increase of flexibility of the taxi activity was not, up until now, implemented<sup>14</sup>.

Furthermore, in 2018, the PCA published the final version of the Issues Paper “Technological Innovation and Competition in the Financial Sector in Portugal”<sup>15</sup>. In this report, the PCA reiterates the need to keep up with the challenges posed by innovation in the financial sector, in particular in terms of access to data by new operators, such as Fintech and InsurTech players.

The PCA started by highlighting that the use of technologies in the financial sector provides significant opportunities to intensify the competitive dynamics in the market “*introducing competition in a market with high concentration levels and low contestability*”. It also noted that Portugal has allegedly been slower than other countries in adjusting to these market developments, as in the PCA’s view, new FinTech and InsurTech firms face

---

13 Press Release of 28 December 2016.

14 Law 45/2018, of 10 August 2018 is the framework applicable to the individual transportation of passenger in uncharacterized vehicles using electronic platforms.

15 Press release 15/2018, of 03 December 2018. This report was subject to public consultation including inputs from regulators (the Bank of Portugal and the Portuguese Securities Market Commission – CMVM), associations (Portuguese FinTech and InsurTech Association – AFIP, Portuguese Banking Association – APB, Associação Portuguesa de Empresas de Distribuição – APED, and the Portuguese Consumer Protection Association – DECO) and market players (such as Easypay, Mastercard, Mutuall and SIBS).

barriers to entry and expansion in the market that limit their ability to provide services to consumers. The PCA emphasised the risk of market foreclosure by incumbent banks concerning data and the infrastructure needed to provide payment services.

The PCA's specifically refers to the harm deriving from the delay in the transposition of the 2015 EU Directive on payment services, Directive (EU) 2015/2366 ("PSD2"), subsequently transposed into the Portuguese jurisdiction by Decree Law 91/2018, of 18 November 2018, as one of the key points of the PSD2 is that new market players should be granted access to account data<sup>16</sup>.

The PCA further highlights that, in Portugal, new entrants face increased difficulties due to the specificities of the Portuguese payment system, considering that the SIBS group, controlled by the main Portuguese banks, is an important player in the retail payment system in Portugal, as it holds the nationwide ATM network (*Multibanco*) and manages the settlement and clearing platform – SICOI.

After this rather unfavourable diagnosis, the PCA puts forward recommendations emphasising how the intervention of the legislator and of the sectoral regulator may mitigate risks that essentially correspond to market foreclosure.

As the PSD2, along with the General Regulation on Data Protection ("GDPR"), Regulation (EU) 2016/679, determine the end of banks' exclusive access to account data, and strengthen the security of the services provided, as well as client information, the PCA highlights the need for full implementation of this access obligation by legislators and regulators.

Regarding the barriers emerging from consumer behaviour, the PCA considers that the State, as a consumer of goods and services, may play a key role in shaping demand while procuring financial services. Therefore, the PCA emphasised the importance of designing public tender procedures with technologically neutral specifications, promoting participation by new FinTech firms.

Also, since crowdfunding has emerged as an alternative and potentially less costly source for SMEs and consumers to obtain credit and raise capital, thereby widening the availability of funding for projects and activities in the Portuguese economy, the PCA underlines the relevance of the sectoral regulator in what concerns legal certainty to FinTech operators. In this sense it is important that the sector regulator provides information on the proposal for a EU Regulation on crowdfunding and lending services providers, as well as on how this legislation will interplay with the national legal framework.

The growing digitalisation of the financial sector has led to the rise of automated or semi-automated financial dealing and advice provided by FinTech firms, commonly referred to as robo-advisors. In the insurance sector, InsurTech firms have introduced

---

16 As stated in the preamble of the transposition legal framework, the PCA was consulted for the preparation of the legislation.

customised services with new risk assessment solutions based on data and algorithms. At this stage, the PCA has not conducted an in-depth analysis into robo-advisors or InsurTech, even though it advocates for an efficient, proportional and non-discriminatory regulatory framework that would promote competition and protect the interests of consumers, together with effective monitoring of potential incumbent strategies aimed at undermining the entry of new market players.

The PCA has also recommended the creation of innovation hubs to allow FinTech and InsurTech start-ups to request information from the regulator more easily, and to obtain guidance as to how to enter the market and set up their business model in compliance with the existing regulations. The PCA also highlighted the relevance of a regulatory sandbox regime that allows FinTech and InsurTech firms to test innovative products, services and business models in the market, whilst safeguarding consumer interests and the integrity of the system. A sandbox implies eligibility criteria and a set of regulatory or authorisation exemptions that are applied for a limited period of time (similar to a testing phase). The regulator(s) that implement(s) the regulatory sandbox accept(s) applications by FinTech and InsurTech firms: either from start-ups or incumbents.

Finally, the PCA stated that it is fully available to cooperate with the legislator and sectoral regulator in the implementation of these alternatives, so that competition issues are accounted for, particularly with regard to preventing the risk of foreclosure.

In July 2019, the PCA published the “Issues Paper on Digital Ecosystems, Big Data and Algorithms”, aiming to analyse, in a more comprehensive manner, the competition impact of the emergence of new business models based on multi-sided platforms<sup>17</sup>.

The PCA starts by presenting important statistics on the digitalisation of the economy in Portugal. According to this report, in 2019, Portugal apparently ranked 19th among the 28 EU Member States in terms of digital performance. Compared to the EU overall, Portugal was above average in the utilisation of digital public services and the integration of digital technologies in firms. It was below the EU average, however, in human capital and in Internet use.

Furthermore, according to the report, in 2018, 94% of the Portuguese residents with Internet access made at least one online purchase, considering a wide range of product categories. The report also evidences an increase in the number of online retail purchases.

---

17 The PCA characterizes multi-sided platforms by the large volume and diversity of data they collect about their users (big data) and strong network effects (i.e., the effect that a user of a product/service has on the value of the product/service for other users). Platforms can be integrated in digital ecosystems that supply a wide range of products and services, many of which not requiring a monetary payment. These ecosystems aim at capturing users and attention, so as to direct them to monetised markets of the ecosystem (e.g., online advertising). Available online at: [http://www.concorrencia.pt/vPT/Estudos\\_e\\_Publicacoes/Estudos\\_Economicos/Outros/Documents/Digital%20Ecosystems,%20Big%20Data%20and%20Algorithms%20-%20Issues%20Paper.pdf](http://www.concorrencia.pt/vPT/Estudos_e_Publicacoes/Estudos_Economicos/Outros/Documents/Digital%20Ecosystems,%20Big%20Data%20and%20Algorithms%20-%20Issues%20Paper.pdf).

Even though Portugal has one of the lowest percentage of individuals making online purchases in the EU (i.e., 37%, below the EU average of 60%), the proportion of individuals between 16 and 74 years old, who used the Internet to acquire goods and services, increased almost fourfold since 2018; one of the largest increases in the EU. As regards the business sector, Portugal ranks as 11th in the EU in an indicator on the integration of digital technologies within firms, even though the firms with an online presence are mostly large firms.

Once again, the PCA's main concerns in this report regarded market foreclosure by incumbent platforms.

As regards merger control, the PCA addresses the issue of pre-emptive mergers which may aim at expanding/strengthening the digital ecosystem by incorporating products/services or discontinuing/limiting the introduction of new products (*killer acquisitions*). The PCA considers that one of the challenges for competition policy in the digital era is avoiding the risk that pre-emptive mergers escape competition authorities' merger control due to not meeting notification thresholds, namely when the turnover of the target firm is small.

Even though the PCA mentions the adequacy of introducing additional notification criteria linked to the value of the merger, as was the case in Germany and Austria, it does not present a critical view on that possibility, nor does it reflect on the convenience of the market share threshold set forth in the Portuguese Competition Act<sup>18</sup>.

Apart from merger control, the PCA also calls the attention to the exclusionary strategies that incumbent platforms may adopt, for example, by restricting their rivals' access to the data they need in order to carry out their activities, even though they are legal and regulatory developments towards providing users with more control over their data, such as the abovementioned GRDP.

The PCA understands that exclusionary strategies in the digital area may take specific forms, namely based on the exploitation of users' behavioural biases, for example, through default options or the promotion of "salience effects" that divert consumers from certain products/services to others.

It also emphasized that big data has allowed the development of pricing, monitoring and ranking or recommendation algorithms. These may have positive effects through the reduction of transaction and search costs, and the promotion of product discovery and price comparison, but they may also facilitate reaching and sustaining explicit and tacit collusive equilibria in the market. Pricing algorithms may also enable personalised pricing

---

18 For further development on the potential advantages of the alternative market share threshold see, Faria Tânia Luísa, 'Reviewing of Portuguese Competition Act: The Seven Year Itch', *Revista de Concorrência e Regulação*, 2019, Vol. 39, p. 105.



strategies that, while potentially causing an output expansion, may also allow for an improved ability of firms to appropriate consumer surplus.

According to this report, algorithms used to monitor the online prices of competitors are already a widely used tool by firms in Portugal. In this sense, about 37% of a sample of firms active online in Portugal have reported using software to automatically track prices of competitors. These results are in line with those of the e-commerce sector inquiry of the European Commission (“EC”)<sup>19</sup>.

Regarding specifically pricing algorithms, the AdC has not found evidence of a prevalent use of pricing algorithms (7.9%) amongst the sample of firms questioned. However, even if algorithms are not widely used at present, the analysis developed raises issues as to the impact that they may already have, in some market contexts and marketplaces, or may have in the future as they become more widespread.

Nonetheless, the relevance of algorithms is demonstrated by the barometer on online platforms, which shows that, for 75% of the respondents in Portugal, the order in which search results are displayed affects their consumption behaviour. This introduces the risk of creating bottlenecks in the market, which grant a competitive advantage to certain products at the expense of others. In particular, this ability allows firms to leverage market power between products and services, especially if algorithms are used in ecosystems or by vertically integrated vertical platforms (e.g., marketplaces that also sell products).

The PCA warns that firms are responsible for the algorithms they use, and that the application of competition law, in Portugal, follows and incorporates the realities of the digital era and the use of these tools as a way to coordinate strategies in the market is not compatible with competition law.

In sum, these reports, especially the last two, follow the tendency of the reports on digital markets by other competition authorities, that are focused on the economics of these markets instead of the legal parameters. From these reports, it is also not clear that digital markets require new competition law related legal tools, but instead nuanced approaches to the traditional theories of harm, and the role of competition law and competition authorities is generally presented as a complement to regulatory intervention<sup>20</sup>.

### **3. Is your domestic competition law using the consumer welfare standard as its specific goal?**

In Portugal the competition law enforcers have increasingly relied on a consumer welfare standard, even though they still rely upon other standards typical of EU competition

19 Final report on the E-commerce Sector Inquiry, 10 May 2017, available at [https://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_final\\_report\\_en.pdf](https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf).

20 In what concerns the vague nature of these reports see Tânia Luísa Faria, Relatórios Minoritários, *Jornal Económico*, 2019, available at: <https://staging.jornaleconomico.pt/noticias/relatorios-minoritarios-472017>.

law, such as the protection of economic freedom, of competition in itself, the protection of the market as such and, in particular, the protection of the common market.

In the Sera case, mentioned above, the PCA understood that the RPM practices in the online channel eliminated or reduced competition, harming final consumers, who are limited in their options and cannot benefit from products at reduced prices<sup>21</sup>. Further along in this decision, the PCA focused on the idea that this alleged competition infringement corresponded to the restriction to the “*freedom of the resellers and retailers*” in establishing their prices<sup>22</sup>.

In the abovementioned Issues Paper “Technological Innovation and Competition in the Financial Sector in Portugal”, the PCA stated that it considers it important to promote competition in the retail payment services market in Portugal “*for the benefit of efficiency and consumer welfare*”, even though we cannot fully understand how the efficiency criterion is distinguished from consumer welfare, and what does consumer welfare mean precisely.<sup>23</sup>

In turn, in the “Issues Paper on Digital Ecosystems, Big Data and Algorithms” when referring to pre-emptive mergers, the PCA considered that these discontinue or limit the scope of ongoing innovation projects or the introduction of innovative products in the market “*at the expense of consumer welfare*”<sup>24</sup>. Furthermore, when addressing the use of algorithms, the PCA stated that these may affect the market outcome “*for example, in terms of welfare distribution, if firms have an increased ability to appropriate consumer surplus*”<sup>25</sup>. Consequently, the focus seems to be clearly on the consumer welfare as consumer surplus, which is not necessarily coherent with the relevance of innovation and qualitative factors in digital markets.

## B MARKET DEFINITION AND MARKET POWER

### 4. How does your competition authority define the market with regard to digital economy players?

The PCA did not, so far, have the opportunity to thoroughly define relevant markets specifically related to digital markets.

In the Sera case mentioned above, related to RPM on online sales, the PCA entailed a market definition in rather “traditional terms”. As regards the product market definition, it used a demand substitutability criterion and the relevant product market was defined as the overall market for aquarium productions, not distinguishing the offline and the

---

21 Press release 15/2018, of 03 December 2018, para 342.

22 Ibid., para 441.

23 Ibid., para. 25.

24 See Issues Paper on Digital Ecosystems, Big Data and Algorithms, n 18, para 159.

25 Ibid., para 180.

online channel. The geographic market definition was defined as national in scope, considering that the distribution agreements are directed to the Portuguese market, where these products have the same legal and tax regime.

Within merger control proceedings, as previously stated, there were some attempts to define marketplaces and e-commerce markets, even though the market definitions were, in general left open. For instance, the PCA tried to define an online advertising market, but left scope for a possible distinction between search and non-search advertising. Also, in general the PCA has followed the EC approach, as in the case of the GDI market in the *Siris/Travelport* concentration.

The PCA's Horizontal Merger Guidelines of 2013, namely within the discussion of the specificities of multisided markets, outline the general principles that govern the analysis undertaken by the AdC in that context<sup>26</sup>. In this document the PCA highlights that the implementation of the SSNIP (Small but Significant Non-transitory Increase in Price) test is complex for platforms that supply services to two different groups of clients, generating indirect effects on the other side of the platform and different degrees of market power<sup>27</sup>.

In these cases the potential limitations in terms of structural indicators can, according to these guidelines, reduce the importance of the delimitation of relevant markets in the assessment of concentration in these markets. In the PCA's view, as included in this document, the focus should be placed on the analysis of the effects of the concentration, integrating the indirect effects of the platform and considering its implications in terms of market power.

More recently, the abovementioned PCA report on *Digital ecosystems, Big Data and Algorithms* also addressed this issue, highlighting that the definition of relevant markets for multi-sided platforms presents some challenges, as network effects should be taken into account to better frame the competitive environment in which firms interact<sup>28</sup>.

In this regard, it hints at the potential inadequacy of the quantitative implementation of the SSNIP test, as it may require additional information to estimate cross-elasticities of demand for the different sides of the platform and each side may have a different demand-side substitutability (i.e., for instance, social networks and search engines may be substitutable for advertisers but not for consumers).

Furthermore, the possibility of setting multiple prices, given the multi-sidedness of the market, poses additional challenges regarding the exact application of the SSNIP test, as the possibility of non-monetary transactions, as well as zero-pricing strategies, may also

26 *Linhas de Orientação para a Análise Económica de Operações de Concentração*, disponíveis em [http://www.concorrencia.pt/vPT/Noticias\\_Eventos/ConsultasPublicas/Documents/Linhas%20de%20Orienta%C3%A7%C3%A3o%20para%20a%20An%C3%A1lise%20Econ%C3%B3mica%20de%20Opera%C3%A7%C3%B5es%20de%20Concentra%C3%A7%C3%A3o%20Horizontais.pdf](http://www.concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Linhas%20de%20Orienta%C3%A7%C3%A3o%20para%20a%20An%C3%A1lise%20Econ%C3%B3mica%20de%20Opera%C3%A7%C3%B5es%20de%20Concentra%C3%A7%C3%A3o%20Horizontais.pdf).

27 *Ibid.*, para 1.6.15 and following.

28 See Issues Paper on Digital Ecosystems, Big Data and Algorithms, n 18, paras 65 to 67.

weaken the adequacy of market definition tools focused on price (since in these cases the compensation may correspond, for example, to data transfers or users' attention that is monetised by the platform in other business/services).

Within this context the PCA seems to follow the OECD approach, admitting that within the context of non-price competition other Hypothetical Monopolist Tests (HMT) may be used, such as the SSNDQ test (Small but Significant Non-transitory Decrease in Quality), which defines relevant markets by focusing on quality instead of price<sup>29</sup>.

However, it recognizes that the implementation of tests focused on quality have their own difficulties, as it is complex measuring the quality of a product. In any case, the PCA seems to argue that despite these limitations, the SSNDQ test could provide competition authorities with a conceptual framework for defining relevant markets.

The PCA invokes the EC approach on *Google/DoubleClick* or *Facebook/Whatsapp* mergers stating that it may be more advisable to resort to a more qualitative approach in market definition, based on the viewpoints of stakeholders and focused on how the different groups of users on the platform interact (*e.g.*, sellers, consumers or advertisers)<sup>30</sup>.

Consequently, the PCA has not adopted, so far, market definitions based on different criteria for digital markets, but it has hinted at the possible need for some adjustments, quoting the EC *Google* and *Facebook* decisions as good examples of a more qualitative approach.

## **5. How is market power established in the practice of your competition authority in cases relating to digital economy players?**

Market shares are typically considered relevant by the PCA in order to establish the existence of market power.

In terms of merger control, the Guidelines on Horizontal Mergers recognize that market shares reflect the relative positioning of the undertakings in the market and are an “auxiliary” element in the assessment of market power and on determining the existence of competition pressure. Even though the PCA's Guidelines consider that the relationship between a high market share and market power is not unequivocal, the market share is the starting point to assess market power, in particular in the case of homogenous products<sup>31</sup>. The Guidelines emphasized that the innovation and technological evolution have important implications for market shares, as historic market shares in a technology that has become obsolete are not particularly relevant, while potential competitors are preparing more advanced products or services<sup>32</sup>.

---

29 Ibid., para 70.

30 Commission Decision of 11 March in Case No. COMP/M.4731 - *Google/DoubleClick*; Commission Decision of 3 October 2014 in Case No COMP/M.7217 - *Facebook/Whatsapp*.

31 Para 2.2.8 and following.

32 Para 2.2.20.

In the merger control cases related to digital markets mentioned in our reply to question 1, the assessment was rather swift, precisely because the market shares at stake were limited, in markets that were, in some cases, wider than the national market. According to the public information made available by the PCA, in the 2015 case FixeAds/Custo Justo – even though the proceedings were terminated after the withdrawal of the merger by the undertakings – apparently the PCA raised concerns based, not only on the high market shares of these platforms, but also on the strong demand-side substitutability of the services provided and in the presence of cross-side network effects<sup>33</sup>.

As mentioned, to date we have not had abuse of a dominant position cases related to digital markets. However, traditionally, the market shares are relevant for determining the existence of a dominant position. For instance, in the decision related to the alleged abuse of a dominant position by CTT, the Portuguese postal service, the existence of a qualified form of market power, corresponding to a dominant position, was established based on an alleged market share of 90% in the retail market for traditional mail, express mail and packages<sup>34</sup>.

The PCA's 2019 report on *Digital ecosystems, Big Data and Algorithms* highlights, even though inconclusively, that the existence of cross-side network effects introduces additional difficulties when assessing the market power of a multi-sided platform. According to this report, market shares and concentration indexes must be assessed in light of the network effects on the different sides of platforms.

In this regard, a high market share on one side of a platform may entail, on another side of the platform, a market power higher than the market share would originally suggest. The interdependence between the sides of a multi-sided market also introduces specificities regarding the calculation of market shares and concentration indexes, as other measures of volume may be used, such as the number of active users on the platform, the number of queries to servers, page views or the number of user sessions.

The issues paper recalls that market power assessment may be complemented with additional elements. Some strategies adopted by a platform may indicate market power, namely strategies that reduce the magnitude of network effects. This may be the case in a scenario where search engines, for example, have an incentive to distort search results, decreasing the quality of the search for consumers, in order to maximize the value of revenues obtained from advertisers. In addition, according to the PCA, the absence of market entry attempts may also signal the existence of strong barriers to entry and, as such, be an indicator of the incumbent's market power<sup>35</sup>.

---

33 Issues Paper *Digital ecosystems, Big Data and Algorithms*, n 18 para 133.

34 PRC/2015/04, of 13 February 2015, para 81.

35 Paras 126 to 133.

In view of the above, we can reasonably conclude that market shares are still relevant to ascertain market power in digital markets, even though network effects may quickly amplify or reduce market power, and the basis for the market power calculation cannot be, in many cases, value, but other digitally adapted criteria.

**6. Can you notice a difference in ex post assessments (abuse of dominance cases) and ex ante assessments (concentration merger control cases), both in relation to defining markets and conceptualizing market power?**

So far we have no knowledge of abuse of dominance cases specifically related to relevant markets. As concerns merger control, as demonstrated above, we cannot determine a notable change of paradigm to date.

We understand that the doubts expressed in the issues paper on digital markets applied both to ex ante and ex post competition assessment.

**C ANTICOMPETITIVE BEHAVIOUR IN THE DIGITAL ECONOMY**

**7. Which practices in digital markets or involving digital businesses have been analyzed in the decision-making practices or case law of your jurisdiction?**

The most relevant cases involving digital markets were described in the reply to question 1, above. The PCA has not dealt yet with abuses of dominant position related to digital markets and the mergers analysed were, in general, non-problematic or in view of potential issues, the notification was withdrawn.

The Sara Lee case addressed vertical RPM conduct, which as mentioned, has the particularity of being related to the online channel, but that was implemented based on “traditional tools”.

The issue of vertical RPM is addressed in the *Digital ecosystems, Big Data and Algorithms* issues paper, in the sense that monitoring and pricing algorithms may also be used to implement vertical agreements and may be used to detect deviations from an explicit vertical agreement which pre-determines fixed or minimum resale prices. Additionally, if suppliers put pressure on retailers to follow “recommended” prices, monitoring algorithms may be used by suppliers to detect whether retailers depart from these prices. Also, the PCA notes that if pricing algorithms are used by competing retailers outside a RPM agreement, they may stretch the impact of RPM agreements on the market. In particular, if retailers outside the RPM agreement set their prices as a function of the price of the retailers covered by the agreement, they will emulate the price set by the suppliers<sup>36</sup>.

---

36 Paras 252 to 254.

The case sanctioned by the PCA corresponded, apparently, to the second hypothesis described in the issues paper, but apparently without the use of algorithms. In any case, the PCA's paper points to the increase in efficiency brought about by digital tools used to implement "classic" infringements, as the EC has also demonstrated in their latest investigations regarding vertical limitations in ecommerce<sup>37</sup>.

#### **8. What reasons have been offered by the businesses concerned to justify (prima facie) anticompetitive behaviour?**

The existing PCA cases, up until now, did not entail in-depth analysis by the PCA, nor an in-depth justification by the undertaking allegedly in breach.

In the Sara Lee case, the supplier has employed the "classical" justification for RPM practices, i.e., it stated that the prices were merely recommended prices and that the distributors, both traditional and online, applied lower prices.

The PCA's issues paper on *Digital ecosystems, Big Data and Algorithms* hints, however, to several possible theoretical justifications.

For instance, the new goods and services that have arisen in the context of big data may increase the efficiency of the market and consumer welfare. These data may be used to increase the quality of the goods and services they provide in the market, as well as to inform their strategic decisions. They also reduce transaction and search costs for both consumers and other firms, and suppliers may also provide goods and services that are better adjusted to consumers' needs, if the information gathered on consumers is subsequently incorporated into final products. Furthermore, these advantages can only be obtained by creating significant economies of scale and scope related to data gathering, storage, processing and analysis, as well as software development, which require considerable investments in both specific infrastructure, such as data centres, and human capital<sup>38</sup>.

Consequently, we understand the fine line between efficiency enhancing strategies in digital markets, which are typically vertically integrated and require strong investment in innovation and potential restrictive practices will continue to be tested in the future,

#### **9. Have you witnessed the emergence of specific theories of harm tailored to digital markets?**

So far we cannot determine the emergence of specific theories of harm related to digital markets, as we understand that the main concern expressed by the PCA in its reports

---

37 See e.g. the EC's cases AT. 40465 (Asus), AT. 40469 (Denon and Marantz), AT. 40181 (Philips), AT. 40182 (Pioneer).

38 Issues Paper *Digital ecosystems, Big Data and Algorithms*, n 18, para 76.

pertains to the risk of foreclosure, a classic theory of harm, whose principles are the same irrespective of the particular means for its implementation.

From the PCA's board Members public interventions on this matter, the PCA seems to consider that it has the right framework to deal with the digital economy. It states, for example, that the existence of two-sided markets is something that has been recognized and discussed for a long time in the economic literature and by the national competition authorities. 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 mentioned for instance, in the case of mergers, it is possible that classic tool, as the SSNIP test, have to be provided with additional nuance, since it has been designed for one-sided markets, where only the price level is relevant, and there are no indirect network effects.

The Issues Paper on *Digital ecosystems, Big Data and Algorithms* also suggests nuances worth mentioning.

First of all the Issues Paper refers to recommendation no 10 of the Furman Report, which proposes a change in the UK's legal framework to allow for a test which takes into account the scale, as well as the likelihood of harm a merger may bring to competition. This report argues that theories of harm should be revisited to properly assess specific cases, such as the acquisition, by dominant platforms and/or ecosystems protected by strong network effects and data access, of target firms with low turnover, but with a large or fast-growing user base and with a high potential for future growth.

Without committing to a view on this matter, the PCA highlights that merger control faces challenges and uncertainty in highly concentrated markets, characterised by strong network effects and significant barriers to entry and mergers occur in the beginning of the life cycle of the target firm's products<sup>39</sup>.

In turn, the risk of collusion resulting from common algorithms has been framed according to the hub-and-spoke theories of harm. In this sense, resorting to the same algorithm or the same third-party provider of pricing algorithms will be viewed with suspicion by the PCA, when done by competing firms in the same relevant market. This will particularly be the case in markets more susceptible to coordinated behaviour, to the extent that the choice by competitors of using a common algorithm may be conscious and deliberate<sup>40</sup>.

Finally, as regards access to data, and potential abuse of a dominant position, the Issues Paper refers to the debate regarding the suitability of the essential facility doctrine in the

---

39 Ibid., paras 174 to 176.

40 Ibid., paras 268 and 269.



case of access to data. The PCA admits the need to revisit the principles underlying the balance of interests in the essential facility doctrine and put forward some adaptations for the case of access to data.

It is important to demonstrate the indispensability of data to effectively compete in the market, as well as to undertake a case-by-case assessment of the specific circumstances taking into account, on the one hand, the relevance of preserving the dominant firm's incentives to invest and, on the other hand, the relevance of those strongly entrenched market positions, protected by high barriers to entry. In this analysis, the exclusionary effect associated with a refusal to grant access is particularly high when (i) the degree of concentration in the market is high and translates into a high degree of data concentration; and (ii) when data access grants an important competitive advantage in servicing neighbouring markets. The exclusionary effect, in these cases, may argue in favour of mandatory access to data, especially when this access is not granted by other regulatory mechanisms<sup>41</sup>

In short, the classic theories of harm are essentially the same, adapted to digital ecosystems. The PCA highlights, however, that the impact of digitalization on competition enforcers should be focused on detection tools, as dawn raids are increasingly focused on computers, e-mails, mobile phones and the cloud rather than paper and physical files<sup>42</sup>.

#### **10. What kind of remedies have been employed in cases relating to digital markets. Do you see any differences to remedies in other markets?**

Enforcers had no opportunity to apply actual remedies to digital markets cases, even though the PCA has made several recommendations in its sectoral digital reports.

In fact, the PCA has been focusing, so far, on its advocacy role, since antitrust investigations often take several years and the question may arise as to whether enforcers can move quickly enough to make a difference in very dynamic markets.

As mentioned, at the end of 2016, the PCA published a report identifying the main constraints to competition in public passenger transport services by car hire, including a set of recommendations aimed at promoting competition in the sector.

Within this context, the PCA defended a regulatory review that seeks not favouring a given type of service provider over the others, but rather one that promotes a level playing field capable of yielding the benefits of competitive interaction, highlighting the need to undertake a regulatory review that would not entail replicating the existing regulation for new entrants but rather to make the set of rules currently applicable to taxi services in

41 Ibid., paras 143 and 144.

42 Margarida Matos Rosa, 'Competition Law and the Digital economy', Closing Speech of 05 April 2019, available at [http://www.concorrenca.pt/vPT/Noticias\\_Eventos/Intervencoes\\_publicas/Documents/Themis%20Margarida%20Matos%20Rosa.pdf](http://www.concorrenca.pt/vPT/Noticias_Eventos/Intervencoes_publicas/Documents/Themis%20Margarida%20Matos%20Rosa.pdf).

Portugal more flexible. As mentioned, these recommendations had a direct impact upon legislation, which permitted ride-hailing services, but they remain to be implemented for taxis, which could benefit from more flexible rules.

The PCA has also been actively advocating the benefits of FinTech and InsTech for competition in financial services, stating that competition authorities and other regulators must ensure that financial markets remain contestable, such that these benefits from innovation have room to materialize.

In relation to payment services, the PCA identified a market foreclosure risk by incumbents with respect to the fundamental inputs that new entrants need: payment account data and banking infrastructure and recommended, among other measures, that (i) access to information by third-party providers should not be subject to charges, and (ii) any dependence that new payment service providers may have vis-à-vis banks in accessing technical infrastructures should be eliminated.

In view of the above, even though the PCA has not, to date, employed remedies in digital markets competition cases, it has undertaken a relevant advocacy role that seems to have, to a certain extent, had some favourable impact in ex ante regulation.

## D REGULATORY OVERLAP AND ENFORCEMENT CHALLENGES

### **11. Has there been any overlap in practice between ex ante regulation aimed at controlling market behaviour – such as, but not limited to, consumer protection legislation, the proposed platform Regulation, the GDPR, the geo-blocking Regulation, the ePrivacy Directive and/or proposed ePrivacy Regulation, or similar national instruments of legislation in relation to most favoured nation clauses– and the enforcement practice of competition authorities?**

The advocacy role that the PCA seems to have chosen, up until now, has successfully avoided overlaps. As mentioned, the PCA considers it important to ensure the existence of adequate, ex-ante legislation and regulatory intervention.

For instance, in the FinTech 2018 report, the PCA expresses its availability to contribute to the process, in cooperation with the legislator and sectoral regulator, in order to account for competition policy issues, particularly the prevention of market foreclosure risks<sup>43</sup>.

In fact, the abovementioned Decree-Law 91/2018, transposing PSD2 into Portuguese Law, expressly states in Article 68(4) that the Portuguese Central Bank is responsible for the enforcement of the access obligations imposed in this legal framework, but emphasised that this was to be undertaken “*without prejudice to the competences of the Portuguese Competition Authority*”.

---

43 See Press release 15/2018, of 03 December 2018, p. 23.

In the same sense, setting forth provisions regarding coordination and cooperation between the relevant entities, the recent Decree-Law 80/2019, of 17 June 2019, which implemented Regulation 2018/302, prohibiting geo-blocking in Portugal, (in the entities responsible for its implementation and the sanctioning regime), was drafted with the input of the PCA.

Furthermore, Article 23 (4) of this legal framework expressly stated that considering that some of the conducts prohibited by the Regulation can consubstantiate indicia of an infringement of the Portuguese Competition Act, mainly infringements related to distribution agreements which limit passive sales, the entities responsible for the implementation of the Regulation have the duty to communicate, to the PCA, the existence of indicia susceptible of determining the opening of a restrictive practice procedure.

## **12. Which authorities are responsible for enforcing competition law in the digital economy in your jurisdiction?**

In Portugal the entity responsible for the enforcement of competition law in all markets is the PCA. The relevant judicial bodies are the Competition, Regulation and Supervision Court (which is the court with exclusive competence to hear appeals from the PCA's decisions, as well as private damages actions solely based on competition infringements), and the Portuguese Civil Courts.

As mentioned, *ex-ante* legislation has been implemented in order to overcome access and market segmentation issues with competition law impact, and, in this sense, the entities entitled with the enforcement of this *ex-ante* legislation also deserve to be mentioned within this context.

The enforcement of the GDPR, implemented in Portugal by Law 58/2019, is monitored by the National Data Protection Commission (*Comissão Nacional de Proteção de Dados* – “CNPD”).

Decree-Law 91/2018, transposing PSD2 into Portuguese law, expressly states that the Portuguese Central Bank is responsible for the enforcement of the access obligations.

In turn, Regulation 2018/302, prohibiting geo-blocking, implemented in Portugal by Decree-Law 80/2019, will be enforced by the Economic and Food Safety Authority (*Autoridade de Segurança Alimentar e Económica* – ASAE). Also, the transposition law designates the European Consumer Centre as the competent entity to provide assistance to consumers in the event of a conflict between a consumer and a seller, as a result of the implementation of the Regulation. As undertakings are not considered consumers, they may only require assistance from the General Directorate of Economic Activities.

In sum, even though the PCA and competition courts are responsible for enforcing competition law also in the digital markets in Portugal, other regulators have specific competences in what concerns access to data as well as to geographic. The PCA is expected to cooperate with the relevant sector regulators pertaining to these issues.