FROM FINTECHS TO INSTANT PAYMENT: A COMPARATIVE APPROACH TO FOSTERING COMPETITION IN THE FINANCIAL SECTOR*

*Daniel Favoretto Rocha***, ***

Abstract *This paper proposes a framework of three categories to qualify policy implementation challenges in regulated sectors: path dependence, unseen development and big bang approach. While path dependence is a phenomenon in which policy objectives are not reasonably fulfilled due to a previous set of persistent reinforcing mechanisms, unseen development occurs when policy objectives are reasonably achieved under a discreet and slow manner. The big bang approach means to reasonably achieve policy objectives by an unprecedented policy intervention, capable of shifting the status quo. Based on this framework along with an unprecedented dataset, the paper analyses Portugal's recent efforts to enhance competition in its financial sector, argues that Portugal is in a position of unseen development, and provides a comparative perspective from Brazil. To avoid both overenforcement and underenforcement, suggested measures include enhanced institutional dialogue between competition, data protection and financial sector regulators, with multi-layered remedies, updates of existing rules on data portability, regulatory sandboxes, creation of think-thanks,*

* A previous version of this paper took part in the 2021 Portuguese Competition Policy Awards ("*Prémio AdC*"). The author wishes to thank Peter Behrens, Priscilla Koo Wilkens, Caio Mario da Silva Pereira Neto and Ricardo Ferreira Pastore for their valuable comments to previous versions of this paper.

** Advogado, Consultor do CADE no Programa das Nações Unidas para o Desenvolvimento (PNUD) e Consultor Não-Governamental perante a International Competition Network (ICN). Mestre (cum laude) em Direito & Desenvolvimento e Bacharel em Direito pela FGV Direito SP (Fundação Getúlio Vargas). Bruxelas, Bélgica. E-mail: favoretto.it@gmail.com
Competition lawyer, Consultant for the Brazilian Competition Agency (CADE) under the United Nations Development Programme (UNDP) and Non-Governmental Advisor at the International Competition Network (ICN). Master (cum laude) in Law & Development and Bachelor in Law, FGV Law School (Fundação Getúlio Vargas). Brussels, Belgium. E-mail: favoretto.it@gmail.com

*** The author clarifies that the law firm to which he was once associated advised players of the electronic payments industry before the Brazilian Competition Authority, in some of the proceedings mentioned in this paper. However, this paper was exclusively based on publicly disclosed information and it only describes these cases, with no opinion issued on their merit whatsoever, so the author has not verified any conflict of interests. Additionally, this paper reflects the author's own opinion and independent judgment, and it has not received any form of funding from third parties.

as well as a mix of regulatory strategies, such as settlements, third-party interventions, occasional quick blocking injunctions, and wide-reaching discovery measures.

Table of Content 1. Introduction. 2. Fostering competition in the Portuguese financial sector: path dependence, unseen development or a big bang approach? 2.1. Categories of policy implementation challenges. 2.2. Portugal's competition policy in the financial sector. 3. Comparative perspective from Brazil. 3.1. CADE's competition policy. 3.2. Brazilian Central Bank's role in fostering competition. 4. Concluding remarks.

Keywords Financial sector, Competition policy, Digital innovation, Regulatory challenges, Comparative law.

JEL K21, K22, K23.

1. INTRODUCTION

This paper analyses how Portugal's competition authority (*Autoridade da Concorrência* – "AdC"), under European Union ("EU") law, has been attempting to foster competition and innovation in the financial sector, comparing its policy strategies with Brazil, a jurisdiction that has been adopting key initiatives over this topic. Open banking and fintechs are just a few examples of how digital innovation has taken a crucial role in the financial sector and, as the pandemic impacted national economies, the digitalization of financial services has boosted to compensate social distancing and facilitate consumer access to these services[1].

Despite this importance, Portugal has admittedly been facing challenges to boost competition in its financial markets. Besides the AdC's own ascertainment in this sense[2], the concern with the financial sector as one that has

1 Regarding the EU, according to the European Commission's communication on digital finance strategy for the EU (24 September 2020), "*digital finance has helped citizens and businesses tackle the unprecedented situation created by the Covid-19 pandemic*" and "*fintech solutions have helped to broaden and speed up access to loans, including loans supported by government in response to the Covid-19 crisis*". Regarding Brazil, according to a survey conducted by the Brazilian State of São Paulo and the Brazilian Federation of Banks (locally known as "Febraban"), 58% of the interviewed citizens declared that, during the Covid-19 pandemic, they increased the use of digital tools for the consumption of banking services. Page 28 of the research report, available in https://cmsportal.febraban.org.br/Arquivos/documentos/PDF/OBSERVAT%C3%93RIO%20FEBRABAN%20-%20DESTAQUES%202020%20E%20EXPECTATIVAS%202021%20DEZEMBRO%202020_V1_iD%20-%20FINAL%20v3.pdf>.

2 AdC, 2018: 4: "*Contudo, Portugal tem tido uma resposta lenta na adaptação aos desenvolvimentos do mercado face a outros países. Em Portugal, os novos entrantes associados a estas tecnologias têm enfrentado barreiras à entrada e à expansão que condicionam a sua capacidade para oferecer serviços que apelam*

particular struggle with competition in Portugal was also raised in the Portuguese parliament, during the recent hearing of the new president of the AdC[3]. Although these challenges may result from factors other than the country's competition policy, its design and strategies of implementation undoubtedly play a role in enhancing competition and innovation in this sector.

For the purposes of this paper, the broad term "financial sector" comprises a wide range of financial services, including banking, underwriting, investment intermediation, insurance and payment services. Although these segments are not necessarily subject to the same rules and regulators, their basis on credit and financial transactions lead to similar regulatory challenges, reason why this paper will provide an overview of this sector, notwithstanding the peculiarities of each specific segment. As for the terms "competition" and "innovation", this paper considers both to be reasonably interchangeable, although a sector could experience innovation without significant competition (more on section 2 below).

The strategies and challenges of implementing policy objectives analysed in this paper can transpose to other regulated sectors and jurisdictions. A comparative analysis on competition policy for digital innovation in the financial sector provides an interesting interface between sector regulation, competition defence and new technologies, aiming for useful lessons about weighting different policy objectives in the context of fast-paced innovation and heavy information asymmetry. Thus, this paper should not be misunderstood as destined exclusively for financial sector regulators or practitioners, neither as applicable only to Portugal.

The comparative approach adopted in this paper focuses on Portugal and Brazil, as well as the EU in what concerns its influence over Portuguese law. A comparative approach on Brazilian strategies may add to this debate for the two following reasons. Firstly, a lot has been written about competition in the financial sector from U.S., United Kingdom and European perspectives, but few under a comparative approach between Portugal and Brazil.

aos consumidores." Author's translation: "*However, Portugal has been experiencing a slow response in the adaptation of the market in comparison to other jurisdictions. In Portugal, the entrants that make use of such technologies have been facing entry and expansion barriers that limit their capacity to supply their services to consumers*."

3 On 24 January 2023, during the hearing of Nuno Cunha Rodrigues for the position of president of the AdC at the Commission of the Economy, representative Hugo Carvalho, from the PSD party, declared that, different from other market segments in Portugal, financial services lack competition and suffer from heavy fees (e.g., "*não temos uma prática de concorrência aberta, como temos em outros setores, nas transações financeiras* (…)"). Recording available in https://www.youtube.com/watch?v=xG1Fyw9XleE [21:30]

Secondly, given that social sciences do not enjoy the possibility of comparison under controlled environments such as those in laboratories (Dimoulis *et. al.*, 2013: 9), Brazil suits as an ideal midway position between distance and proximity from Portugal for a comparative approach[4]. On one hand, both jurisdictions have been historically close in terms of culture, diplomacy and international trade. On the other hand, Brazil is a large-scale developing economy and, as such, it can provide a comparative perspective distant enough from Portugal and the EU. Thus, the comparison of different policy initiatives under closer cultural, political and economic contexts may provide better applicable solutions[5].

Moreover, a comparative approach should avoid a mere legal transplant of a certain framework, which would disregard the social, political, and economic peculiarities of each jurisdiction, thus, diminishing the effective outcome of comparative law (Mota Prado, 2010: 1; Berkowitz *et. al.*, 2003). Applying this notion to the subject at hand, every recommendation raised along this paper should consider the differences of regulators' institutional constraints and enforcement capacity, cultural resistance or acceptance to State intervention, the size of the economy of each country, and their level of integration with a regional supranational regulatory framework, for example.

This paper's object of study (competition in the financial sector) is a trending topic in both of these jurisdictions. In Portugal, the AdC has clearly made effort to study this sector and recommend pro-competitive arrangements. In late-2018, the AdC issued a paper to recommend measures on mitigating entry barriers for innovation in the financial sector ("2018 paper")[6]. Three years later, the AdC issued a follow up report on the status of the financial sector in relation to its 2018 paper's pro-competitive recommendations ("2021 follow up report")[7]. Additionally, in 2021, the AdC published its comments on the Bank of Portugal's bill of Banking Activity Code, encompassing not

4 Considering that financial services tend to be heavily regulated and competition tends to be among the sector's policy objectives, regulatory and competition issues are easily interfaced. Considering this inevitable interface, to focus on the competition aspect of the public policies addressing digital innovation in the financial sector, this paper will encompass both competition and sector-specific regulation in Brazil.

5 The use of a comparative approach toward closely related jurisdictions results from the concern that competition policies vary due to political choices and different policy objectives in each jurisdiction, since "*there is no one size fits all standard to competition policies*", while "competition policy is not an exact science solely focused on maximizing consumer welfare" (Lancieri, 2018: 10-11).

6 See at https://extranet.concorrencia.pt/PesquisAdC/EPR_Page.aspx?Ref=EPR_2018_33.

7 See at https://extranet.concorrencia.pt/PesquisAdC/EPR_Page.aspx?Ref=EPR_2019_2.

only suggestions of conformity to EU competition law, but, also, measures of fomenting competition in the Portuguese financial sector[8].

In Brazil, differently from the Portuguese context, the financial sector has been experiencing intense innovation, along with numerous antitrust investigations and merger review cases by the Brazilian competition authority ("CADE") and key regulatory initiatives by the Brazilian Central Bank ("BCB"), such as regulatory sandboxes for market players, open banking regulation, partnerships with universities and fintechs to discuss innovation, and an instant payment system operated by BCB itself.

Finally, in the case of the EU, the European Commission ("Commission") has taken an important role of debating and proposing key regulatory initiatives to enhance innovation in the financial sector and protect consumers under a digital-friendly context. Distinctively, key initiatives on this subject are the 2018 Fintech Action Plan[9] and the 2020 Digital Finance Package[10], which included a digital finance strategy for the EU and legislative proposals on cryptocurrency and retail payments' regulation. Though focused on innovation and not necessarily on competition issues, the instant payment system launched by the European Central Bank (Target Instant Payment Settlement – TIPS) also reveals the commitment of European authorities to accompany the fast-paced transformation of this sector.

In addition to being a trending topic in these jurisdictions, this object of study is also of great relevance to consumer welfare and economic development. Given its impact on peoples' wealth and income, financial services are essential to provide legal certainty in the exchange of goods and services in any society. The financial sector, including the securities market, provides capital to entrepreneurs, thus, creating jobs and driving innovation (CVM, 2022: 15).

The financial sector has also been considered key for the promotion of sustainable development and defence of social and environmental values[11], as the mainstream term "ESG" expresses in the corporate world. In relation to Portugal, fostering competition in the financial sector becomes even more relevant in the context of the economy's recovery from the Covid-19 pandemic, as a mean of

8 See at https://extranet.concorrencia.pt/PesquisAdC/EPR_Page.aspx?Ref=EPR_2021_7.

9 See at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0109&from=EN.

10 See at https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en.

11 "*Financial institutions will play a key role in contributing to sustainable development through promoting responsible business conduct amongst their clients and financing projects that can have positive sustainability impacts*." (OECD, 2019: 7).

promoting sustainable growth (AdC, 2021*a*: 4-6). Considering that barriers to access resources for economic activity is among the main reasons for Portuguese companies' low competitiveness compared to other European players (Lourenço, 2022), competition in the financial sector can play a key role in Portugal.

Given this context, the question this paper seeks to respond is: what lessons can the Brazilian competition policy provide to Portugal in regard to promoting competition and innovation in the financial sector? To address this question, it is necessary to qualify Portugal's enforcement challenges before identifying potential solutions under a comparative approach. Categorizing each jurisdiction according to their challenges of achieving competition policy objectives was chosen as the applicable methodology, based on the categories of path dependence, unseen development and the big bang effect.

As further detailed below, path dependence is a phenomenon where the policy objectives are not reasonably fulfilled due to a previous set of persistent reinforcing variables, diminishing attempts of reform. Unseen development, on the other hand, is a phenomenon where, despite non-evident policy outcomes, the policy objectives are reasonably achieved over time, under a discreet and slow manner. The third category is the big bang approach, where the policy objectives are reasonably achieved by an unprecedented policy intervention, capable of shifting the status quo.

Thus, this paper has been structured in three sections, besides this introduction. Section 2 will firstly explain the three categories of policy challenges proposed by this paper – path dependence, unseen development and the big bang approach – and then apply them to Portugal's competition policy in the financial sector. Qualifying an agency's effort according to these categories is key to identify possible solutions, since, as detailed below, a matter of path dependence demands deeper changes of policy, unseen development usually demands an enhancement or emphasis on the ongoing policy strategy, and a big bang approach calls for policy designed to preserve the achieved developments against strong backlashes.

Based on these challenges, section 3 will provide a comparative perspective of Brazilian policies related to the same issue, by a description of antitrust cases and regulatory initiatives, to identify rules and strategies that can help Portugal address its challenges. As argued in this paper, Portugal appears to face a challenge of unseen development, reason why Brazil's policy strategies can serve as additional benchmarking for a diversified Portuguese policy intervention. Finally, section 4 concludes this paper, with a summary of the analysis and an indication of relevant remaining research agenda to study the topic at hand.

2. FOSTERING COMPETITION IN THE PORTUGUESE FINANCIAL SECTOR: PATH DEPENDENCE, UNSEEN DEVELOPMENT OR A BIG BANG APPROACH?

2.1. Categories of policy implementation challenges

Competition is knowingly an essential element to promote incentives to lower prices, better quality of goods and services and higher innovation on a free market (Whish and Bailey, 2011: 4-5). In the financial sector, these benefits would translate into lower service fees and lower interest rates, as well as innovative products, for example. However, competition is hardly the only policy objective of any sector's regulation. When studying challenges of fostering competition in a given market, one should always avoid an obsession with competition as if it were the only goal, disregarding other important elements that provide consumer welfare and a due functioning of the market, such as addressing externalities and information asymmetry. Otherwise, one's work risks being detached from the concrete dynamics and multifactorial variables of the studied market.

The financial sector illustrates this concern. For example, even if a market of financial services had perfect competition, the information asymmetry between consumers and service providers would lead to probable adverse selection (consumers would not adopt plainly informed decisions due to insufficient information about the offered products and services). On the other hand, if a market had a *quasi* monopoly, the incumbent might still be highly innovative and use its information pool in favour of better risk assessment, despite the lack of effective competition.[12] In summary, competition is not an universal solution to all concerns of the financial sector, but, nonetheless, it is an essential element for a consumer-friendly market (Claessens, 2009), especially after the 2008 U.S. crisis[13].

In relation to Portugal, it is initially important to identify what challenges it faces in attempting to foster competition in financial services and whether such challenges are persistent. The analytical tools used in this paper to approach

12 A similar concern is addressed by Kahn (2017).

13 The apparent ineffectiveness of gatekeepers' reputational concern to prevent fraud in the capital markets in the U.S. 2008 sub-prime crisis shed light to the importance of competition to pressure for better rating services in this sector, while, on the other hand, it has also shown that too much competition in some financial segments may lead to lower lending standards and excessive risk-taking (Claessens, 2009: 4, 6). Therefore, the U.S. 2008 crisis "*reopens the question of what is the role of competition policy in this sector*" (OECD, 2009: 3).

these challenges are the concepts of path dependence, unseen development and the big bang approach. In simple terms, to qualify challenges as persistent or not demands looking into the past and comparing it with the regulator's strategies[14].

Path dependence is a longstanding concept in the academic literature of the Law & Development field, particularly in regard to institutional reforms for development[15]. A matter of path dependence is one in which every attempt of reform is limited due to a previous set of economic, political and social variables that, while having shaped the current framework, have created self-reinforcing mechanisms and switching costs, leading to the persistence of a certain situation (Prado and Trebilcock, 2009: 350-2).

Applying this concept to Portugal's financial sector, a matter of path dependence would be verified if financial services' markets remain predominantly unsensitive to innovation and competition while Portuguese authorities have attempted different policy reforms to foster these qualities in this sector. Self-reinforcing mechanisms could be, hypothetically, the lobby of an interest group (*e.g.*, dominant financial institutions) over enforcement agencies or protectionist policies that increase entry costs.

On the other hand, unseen development is the situation in which the policy objectives are reasonably achieved, though discretely and slowly. Unseen development would be verified in Portugal if policies have significantly, though discreetly and slowly, lead to better conditions of innovation and competition in the financial sector. Contrary to path dependence, the term "unseen development" and its concept are particular to this paper, since they do not come from previous academic literature and have, at most, been mentioned rarely, in different contexts[16].

The third category is the big bang approach, in which an attempt of reform is achieved through an intensive process of policy intervention.

14 This choice of analysis – *i.e.*, looking into the past along the regulator's strategies – is inspired in the Law & Development literature, according to which path dependence analysis is a backward-looking activity that may fail in guiding future reforms if no lesson is taken from the past. Mota Prado and Trebilcock (2009: 353, 366): "*path dependence studies are largely backward looking. The concept helps us understand what has happened in the past and is particularly useful in clarifying events that are otherwise hard to explain, but these mechanisms do not allow us to make predictions about the future, because we do not know which arrangements or self-reinforcing mechanisms will prevail. (…) Thus, in addition to being backward looking, the concept has no direct normative implications, and it might therefore be thought to be of limited value in informing future reforms. (…) Path dependence theory should encourage those concerned with development to take seriously the importance of time and history in designing future institutional reforms.*".

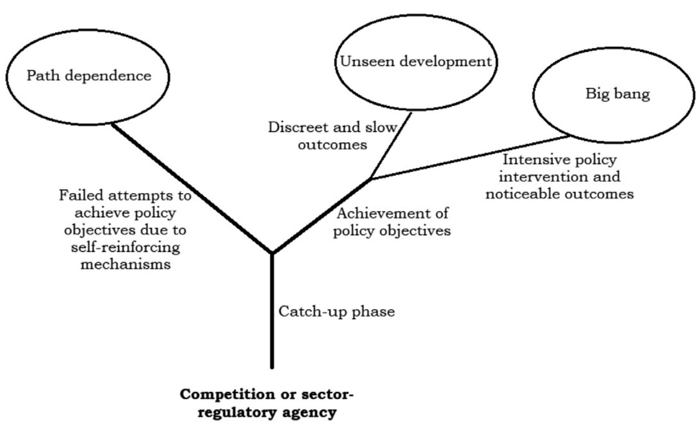
15 *E.g.*, Prado and Trebilcock (2009), Davis and Trebilcock (2008), North (1991), Evans (2005).

16 In research at scholar online platforms, the term "unseen development" was found only in Rajkovic (2008).

Different from path dependence, a big bang approach achieves a shift in the status quo and, different from unseen development, the policy objectives are achieved in a noticeable and profound way. The concept of a big bang approach used herein is inspired in the anticorruption literature[17]. An example of a big bang approach is Brazil's anticorruption movement known as *Operação Lava Jato* ("Operation Car Wash"), which consisted of a multifront anticorruption effort (criminal, antitrust, administrative anticorruption, federal accounting, among other policies) that lead to convictions and indictments of major politicians and businesspeople in only a few years' time, producing cross-border effects[18].

These three categories enable an observer to identify the challenges of achieving policy objectives in a certain regulated market. Since categorizing demands a backward-looking approach, new regulated issues do not allow the use of these categories. New regulated issues should fall under a "catch-up" phase. It is the earliest stage of an enforcement process, in which the agency is familiarizing itself with the regulated subject and trying to catch up to the social and economic phenomena that are usually more dynamic than the law. To illustrate this framework, image 1 below systematizes these categories:

Image 1



Source: Author's creation

17 Specifically, Rothstein (2011).

18 *Lava Jato*'s effects included money-laundering investigations by Swiss authorities, class action lawsuits by U.S. investors and imprisonment of Peru's former presidents. For more on *Lava Jato*, including backlashes and controversies, see Jones and Pereira Neto (2021).

Categorising the challenges of an enforcement or regulatory agency is key to determine what steps it needs to take to achieve its policy objectives. In a case of path dependence, one needs to identify the self-reinforcing mechanisms that result in the failed attempts of reform and overturn them by policy strategies that either shift the status quo or accommodate new outcomes with the support of the sustaining interest groups. In a case of unseen development, one needs to maintain the successful policies and adopt complementary strategies that can enhance the outcomes. Finally, in a big bang effect, one needs to protect the outcomes from backlashes of interest groups from the previous status quo and intensify democratic accountability to promote a stabilised and legitimate post big bang scenario.

Given that Portugal is admittedly facing challenges of implementing competition and innovation in the financial sector, the big bang approach is hardly applicable. In summary, defining the challenges of fostering competition in Portugal's financial sector as a matter of path dependence or unseen development is an attempt to measure how persistent are these challenges, whether there are self-reinforcing mechanisms, and how successful have Portuguese policies been to foster competition. Though relevant to assert policy effectiveness and to define the next steps of a policy agenda, differentiating path dependence from unseen development in a concrete case preferably demands empirical research, notwithstanding alternative forms of gathering evidence-based assertions, as done below.

2.2. Portugal's competition policy in the financial sector

Based on Portugal's 2021 follow up report, there appears to be (i) numerous recommendations from the 2018 paper still pending to be implemented and (ii) significant barriers to entry in several financial services' markets. As for the pending recommendations, there are, for example, alternative forms of fintechs accessing clients' banking data for competition purposes, a regulatory sandbox program, and net neutrality in public procurements (AdC, 2021*b*: 4), where the Portuguese banking authority may play an important role.

As for standing barriers to entry, there is significant concern on anti-competitive discrimination of fintechs or other third-party providers that necessarily have to access the inter-banking compensation system (in Portugal, known as SICOI) through incumbents (AdC, 2021*b*: 10-13). With the SICOI being considered an essential input for fintechs to compete with incumbent banks in Portugal, this leads to a known antitrust discussion of vertical discrimination – *i.e.*, incumbent financial institutions could refuse to deal or elevate entrants' costs to access an essential input in order to gain competitive advantage.

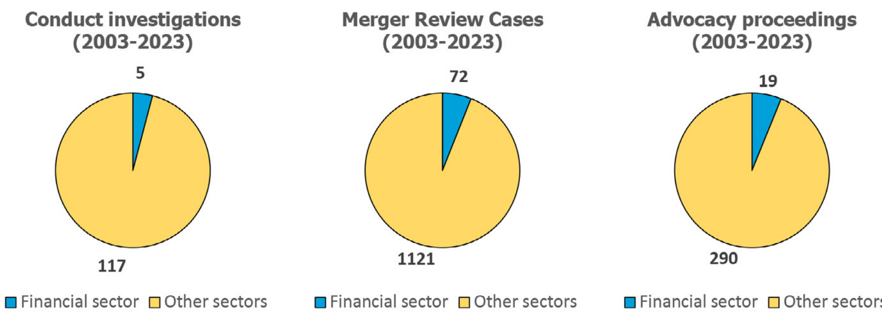
According to a 2020 survey carried out by the AdC, through the issuing of requests for information to 130 fintechs, where 88 of them provided the requested information and 70 of these already operated in Portugal, the conditions most commonly referred by the interviewees as entry barriers to the Portuguese financial sector were incumbents' position, the reduced size of the Portuguese market, elevated entry costs, difficulty in gaining initial capital funds, and too demanding or too unclear regulatory framework (AdC, 2021*b*: 7-8).

Thus, the competition scenario of the Portuguese financial sector appears resilient to entrants and innovation, suggesting some self-reinforcing mechanisms to the current scenario of weak competition – for example, incumbents who may resist policy attempts to open the market. From a backward-looking perspective, the AdC has made some effort to change this scenario in previous years. This effort may be analysed under a quantitative approach – *e.g.*, through the number of cases where the AdC acted in this sector and the number of occasions in which the AdC interacted with financial sector regulators – and under a qualitative approach – *e.g.*, how deep were AdC's discovery in its investigations in this sector or how impactful has AdC's policies been to competition and innovation in the sector.

Since the AdC's creation in 2003, in the financial sector, the competition agency has initiated only four proceedings on anticompetitive conduct, analysed 73 merger review cases, including ongoing cases, and launched 14 advocacy proceedings, such as market studies. The numbers are significant, but they should be compared to the total amount of cases in the same timeframe, so one could assert the proportion of cases related to the financial sector and, thus, the importance of the financial sector among the agency's policy priorities. The numbers are set below, based on the AdC's database[19]:

19 Research made in AdC's online database, on 14 June 2022 and 21 January 2023, based on a comparison of search results without filters per sector and with the filter per sector "banking, financial markets and insurance" ("*Banca, Mercados Financeiros e Seguros*"). Database available at https://extranet.concorrencia.pt/PesquisAdC/SearchNew.aspx?IsEnglish=False

Graph 1



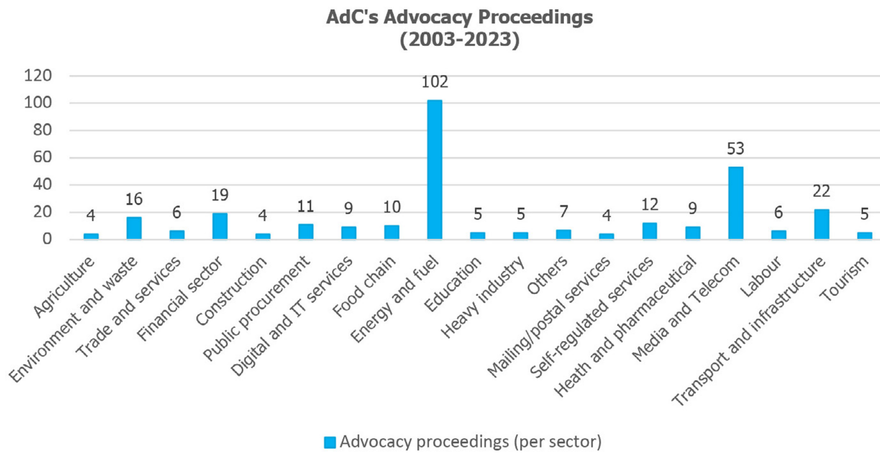
Source: Author's creation

The graphs above show that the financial sector is only a small portion of the AdC's daily work: roughly, only 4% of antitrust investigations, 6% of merger review cases and 6% of advocacy proceedings. These numbers could suggest that the institutional efforts toward enhancing competition and innovation in the financial sector could have been greater, diminishing the chances of a path dependence diagnosis (*i.e.*, the lack of the desirable competition could be due to a lack of enforcement focus in this particular sector rather than to self-reinforcing mechanisms).

However, it is natural and even desirable that a competition agency does not dedicate most of its resources on a single sector, given that competition defence is a trans-sectoral policy (Marrara, 2015: 249). In addition, when comparing the number of cases in each sector – thus, giving a step forward from the graphs above, where non-financial sectors were bundled for comparison purposes –, one can notice that the financial sector is actually among the sectors with greater advocacy activity by the Portuguese competition authority (in fourth place, in terms of quantity)[20], as the graph below demonstrates:

20 The choice to analyze advocacy proceedings specifically is based on methodological rationale, which is the fact that advocacy proceedings are initiated by the agency's own initiative (differently from merger review cases) and tend to have relevant policy implications (differently from conduct investigations, that regard case-specific elements). In addition, it is worth remarking that there is some overlap of data in Graph 2, due to some advocacy proceedings approaching more than one sector, thus appearing repeatedly among the search results per sector. This overlap, however, does not relatively change the distribution of advocacy priority between the sectors.

Graph 2



Source: Author's creation

These data indicate that the financial sector received significant attention by the AdC since the agency's creation, but this sector is far from being among the authority's policy priorities, since the two sectors with the highest quantity of advocacy proceedings (energy and fuel, and media and telecommunications) have from triple to nearly six times the number of proceedings.

An additional quantitative criterion to measure the efforts of an agency to foster competition and innovation in a given sector is the number of interactions with other policy-relevant actors, such as requests for sector-specific opinions and policy implications. In the Portuguese institutional framework, these actors are the Bank of Portugal, which supervises credit, banking and payment institutions,[21] and the Securities Market Commission ("CMVM", for its Portuguese acronym), which regulates the Portuguese securities market.

Since 2003, when the AdC was created, the competition agency had four interactions with the Bank of Portugal in conduct investigations, 16 in merger review cases, and five in advocacy proceedings, while, with the CMVM, the AdC had no interactions whatsoever in conduct investigations,

21 Jurisdiction based on articles 14 to 16 of Portuguese Law n.º 5/1998.

nine interactions in merger review cases, and three in advocacy proceedings.[22] Considering the total amount of cases involving the financial sector, as exposed in Graph 1 above, these interactions are significant, but, when the timeframe is taken into consideration (20 years of competition policy), these numbers show little institutional dialogue between the Portuguese competition authority and the Portuguese financial sector regulators.

Finally, as for a qualitative approach, considering that numbers do not show all the aspects of a certain policy, a look at the decisions taken by the AdC in those cases can also reveal its effort in the financial sector. Analysing each case individually would overrun this paper's scope, so a landmark case to look at is the 2019 market study launched by the AdC[23]. This market study is precisely the proceeding that led to the 2021 follow up report mentioned above, demonstrating a close accompany of the competition authority to the sector's development.

However, a closer look into the situation of the advocacy proceedings related to the financial sector shows that all 19 of them are currently closed, meaning they have allegedly fulfilled their purposes and are, thus, archived. Although the 2021 follow up report concluded that relevant measures to foster competition and innovation in financial services are under the jurisdiction of other institutions, like the Bank of Portugal, the AdC should still have an ongoing advocacy proceeding related to this sector, given the challenges referenced in the 2020 survey. Additionally, in its statement of policy priorities for 2023[24], the AdC did not reference the financial sector, preferring issues such as competition in the labour market.

Despite these standing concerns, some relevant development took place in Portugal, since the 2018 paper. For example, as mentioned in the 2021 follow up report, incumbents are currently required to provide at least a secure interface to communicate with third-party providers, having most financial institutions chosen to provide such interface in the form of application programming interface access to new entrants (AdC, 2021*b*: 16). In addition, the

22 These numbers were found in the AdC's online database, on 14 June 2022 and 21 January 2023, through the search filter of cases per AdC's interaction with sector regulators ("*articulação com reguladores setoriais*"), available at https://extranet.concorrencia.pt/PesquisAdC/SearchNew.aspx?IsEnglish=False.

23 The 2019 market study was initiated *ex officio* by the AdC and is registered as proceeding EPR/2019/2. The case records are available at https://extranet.concorrencia.pt/PesquisAdC/EPR.aspx?Ref=EPR_2019_2&isEnglish=False. Accessed 14 June 2022.

24 Available at https://www.concorrencia.pt/sites/default/files/Prioridades%20de%20política%20de%20concorrência%20para%202023_0.pdf

creation of a unit specialised in digital markets at the AdC, in 2020, brings expectations of greater achievements, since the financial sector is part of the digital economy, meaning this unit tends to provide faster and expert discovery in cases concerning financial services, through profound knowledge of players' incentives and market transformations.

More importantly, the recent European Payment Services Directive (Directive EU 2015/2366), which provides a normative framework to foster competition through, *e.g.*, the oversight of payment initiation service providers and asymmetric third-party access requirements to closed property payment systems, has been incorporated to Portugal's national legislation through the decree-law n.º 91/2018.

As a supranational and intergovernmental legal sphere where Portugal is inserted in, the EU must not be overlooked. The EU has implemented policies of competition and innovation in the financial sector as a mean of strengthening European economic and monetary union[25]. Although the policies are applicable to all Member-States, their effects are not necessarily the same in every jurisdiction. This reveals the importance of an effective national policy.

At the EU level, among recent initiatives in this field are the European banking authority's Single Rulebook[26], which harmonized rules for financial institutions across Member-States. However, the Single Rulebook was principled-based and left some uncertainty as to digital operational resilience. This perception was among the factors that lead the Commission to propose a regulation on digital operational resilience for the financial sector[27]. Other

25 According to the European Commission, in its digital finance package communication, "*As digital finance accelerates cross borders operations, it also has the potential to enhance financial market integration in the banking union and the capital markets union, and thereby to strengthen Europe's economic and monetary union. A strong and vibrant European digital finance sector would strengthen Europe's ability to reinforce our open strategic autonomy in financial services and, by extension, our capacity to regulate and supervise the financial system to protect Europe's financial stability and our values.*" See at https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en.

26 The Single Rulebook is an online tool that bundles relevant directives and regulations regarding capital markets and banking activity at the EU. See at https://www.eba.europa.eu/regulation-and-policy/single-rulebook.

27 European Commission, 2020: "*While the post-crisis changes to the EU financial services legislation put in place a Single Rulebook governing large parts of the financial risks associated with financial services, they did not fully address digital operational resilience. (…) For example, they were often devised as minimum harmonization directives or principled-based regulations, leaving substantial room for diverging approaches across the Single Market.*"

relevant initiatives include the FinTech Action Plan[28], which updated the EU regulatory framework for financial service providers, both to favour innovation and enhance cyber security, as well as the TIPS for the development of instant payments. Whether these initiatives had a significant impact to Portugal's financial sector and why were they insufficient to tackle competition in Portugal are issues that go beyond this paper's scope.

Thus, although it may still be early to provide an assertive answer to the question of whether Portugal lives in a condition of path dependence or unseen development, the Portuguese effort to foster competition in the financial sector has been considerable and harvest some positive outcomes, although there is no consolidated experience in this sector, discrete institutional dialogue between competition and sector-specific authorities, and no policy priority to this sector in the competition agency's advocacy activity. Therefore, Portugal appears to face unseen development, rather than a situation of path dependence.

3. COMPARATIVE PERSPECTIVE FROM BRAZIL

Over the last years, Brazil had numerous events in regard to digital innovation in the financial sector, one of the reasons why, contrary to the scenario seen decades ago, various segments are experiencing intense competition and digital transformation. To address this topic, this section will encompass the competition policy promoted by both CADE and the BCB[29].

3.1. CADE's competition policy

Regarding CADE, pursuant to the Brazilian Competition Act (Law n.º 12,529/2011), the competition authority has jurisdiction for merger control, administrative persecution and punishment of anticompetitive conduct (*ex post* conduct control), and a cooperative role with other bodies to improve public policies under an antitrust perspective (advocacy

28 European Commission, *FinTech Action plan: For a more competitive and innovative European financial sector*, 08 March 2018, https://ec.europa.eu/info/publications/180308-action-plan-fintech_en

29 Although CADE is the cross-sector competition authority in Brazil (under the terms of Law n.º 12,529/2011), the BCB has jurisdiction to "*regulate the competition conditions between financial institutions, refraining abusive conduct through the application of sanctions*", pursuant to article 18, §2nd, of Law n.º 4,595/1964. This is an overlapping jurisdiction between CADE and the BCB, both of which must defend and promote competition in the Brazilian financial sector.

activity). Thus, CADE's performance in the financial sector involves these three roles.

Although CADE has approached various segments of financial services, noticeably, its main policy focus in this sector is the electronic payments' segment. At a first glance, one may have the impression that Brazil faces a situation of path dependence, given that, over the years, numerous antitrust investigations come up, suggesting an everlasting pattern of anticompetitive conducts in this segment. According to then commissioner João Paulo Resende's opinion in the Itaú/Ticket case, "there seems to be an eternal and tormenting cycle of players finding a new way to foreclose the market every time we believe to have closed a settlement to assure clean competition in this sector"[30].

However, policy goals have been reasonably achieved. Over the last decade of regulatory interventions and competitive pressure from innovating entrants, the Brazilian electronic payments industry has become increasingly competitive, with new acquirers gaining market share – for example, in 2018, 28% of the market belonged to recently entered players like *Stone*, *Getnet*, *Safrapay*, and *Pagseguro* (Mckinsey & Company, 2019: 115). In addition, the use of electronic payment methods has increased significantly during the last years in Brazil (Perez and Bruschi, 2018: 11; Mckinsey & Company, 2020: 6; CADE, 2019*c*: 22).

These policy outcomes result from various measures, the main of them being CADE's settlements in the late 2000s. CADE shaped the electronic payment methods segment in Brazil through settlements with *Visa* and *Visanet*, in 2009[31]. With these settlements, the Brazilian market moved from a single payment scheme-acquirer model to a full acquirer model, considering that the major payment scheme owners, *Visa* and *Mastercard*, had exclusivity practices with their vertically integrated acquirers.

Before diving in CADE's policy approach, considering how electronic payments are particularly subject to digital innovation and public policies in Brazil, a brief explanation of how this market works seems adequate[32]. To attend

30 Author's translation from the excerpt: "(...) *parece haver um ciclo eterno e atormentador de que, toda vez que acreditamos ter fechado um acordo para garantir uma concorrência limpa nesse setor, as empresas encontram uma outra forma de fechar o mercado.*" CADE, 2019*c*.

31 Settlement procedures n.º 08700.003240/2009-27 and n.º 08700.003900/2009-70, Reporting Commissioner Olavo Chinaglia, ruled on 16 December 2009.

32 Electronic payment methods are types of payment methods that can be used by market agents to intermediate the exchange of value in transactions for goods and services. In other words, while payment his-

to, on one hand, greater security for transactions and, on the other hand, greater efficiency in increasing trades, the Brazilian segment of electronic payments is structured by a set of organizing rules commonly known as a payment scheme. Payment schemes compete to attract more transactions into their environment.

Regarding the agents that participate in these schemes, firstly, there are merchants and consumers. Merchants (sellers) provide goods and services in a free market, demanding a value through a generally accepted payment method in return. To pay merchants in return of demanded goods and services, consumers (buyers) hold cards or digital devices through which they authorize the transfer of their corresponding funds to the merchants.

In this process of transferring funds to merchants, there are basically three main intermediaries: issuers, acquirers, and payments scheme owners[33]. Issuers (known in Brazil as "*emissores*") are institutions that issue payment cards for consumers and oversee their payment ability and financial obligations (CADE, 2019*c*: 12). Examples of issuers are banks, such as *Itaú Unibanco* (major private bank) and *Banco do Brasil* (major State-owned bank), and payment institutions, such as the digital payment service provider *Nubank*.

Acquirers (known in Brazil as "*credenciadoras*") are institutions responsible for integrating merchants into payment schemes and, in each specific payment transaction, requesting issuers to confirm the consumer's corresponding funds for the transaction's conclusion (CADE, 2019*c*: 11). Examples of these institutions are *Cielo*, *Rede*, and *Stone*. Finally, payment scheme owners (known in Brazil as "*bandeiras*") are the institutions that own the payment card brand and define the rules and procedures that govern the payment scheme (CADE, 2019*c*: 10-11). Each payment scheme has its own internal regulation, defined by its owners. Examples of such companies are *Visa*, *Mastercard*, and *American Express*.

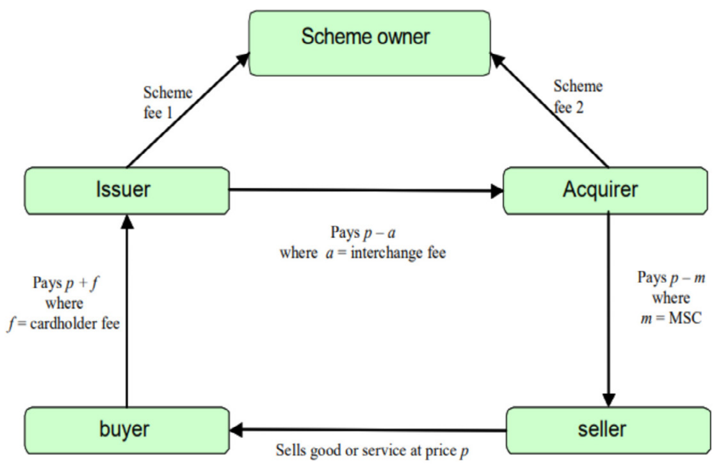
---

torically began with customers trading rice, cattle, salt or metal for goods and services (Estrela, 2011: 14), society's technological development and mass consumption lead to a more complex and efficient framework of intermediation between customers and merchants.

33 On some occasions, there is a fourth intermediary in payment schemes, namely, the subacquirers (known in Brazil as "*subcredenciadoras*" or "*facilitadores*"). These institutions generally operate in e-commerce and act as acquirers, integrating merchants into the schemes (CADE, 2019*c*: 11). However, contrary to how acquirers operate, these market agents do not liquidate transactions before issuers, acting only as intermediates between some merchants and acquirers (CADE, 2019*c*: 12). Examples of subacquirers in Brazil are *PicPay*, *B2W*, and *Linx Pay*.

To systematize this transactional framework, referred to as the "Brazilian Payments System" in article 6 of Law n.º 12,865/2013, the image below provides a basic model (although, in some schemes, one agent may perform both the roles of issuer and acquirer):

Image 2



Source: Brazilian Central Bank, 2010: 02.

As to its merger control role, CADE has reviewed leading transactions involving electronic payment methods. Based on a proceeding launched in 2020, CADE and the BCB analysed the partnership between Facebook and Cielo for the creation of WhatsApp Pay[34]. Due to this partnership, WhatsApp users in Brazil can pay for goods and services through the digital messaging application, after a cautious analysis by both authorities.

The authorities' concern was whether the transaction, not filed by the parties, was subject to mandatory *ex ante* review. However, in order to understand the transaction in detail before the parties began to operate, the partnership was quickly barred by the BCB and CADE, which later reversed its blocking

34 CADE, 2023.

injunction and recently dismissed the investigation[35], while the BCB unconditionally cleared the deal.

This case demonstrated CADE's and BCB's symmetric approach, since both authorities simultaneously barred the partnership in its initial phase, for different reasons. Specifically, CADE was mainly concerned with *ex ante* merger control requirements, as well as that the major private messaging application WhatsApp could cause competition asymmetry between acquirers by occasionally favouring Cielo and foreclosing access to its base of users for Cielo's competitors. The BCB was concerned with the effects of the partnership to competition as well, adding its concern with consumers' data protection and spillover effects on the BCB's instant payment project (more details on section 3.2 below). As big techs start participating in the payments industry as intermediaries, their extensive database and network reach through their digital platforms may enhance efficiency, reduce costs for end-users, and stimulate competition, but, also, raise concerns of market foreclosure and data protection.

In summary, since the blocking injunctions were used to understand the transaction in-depth and quickly reversed by the authorities themselves, this case demonstrates that the fear of "false positives" or overenforcement should not always prevent the use of interim measures by the sector-specific regulator or the competition agency. More importantly, this case is a demonstration of institutional dialogue between antitrust authority and sector-regulator in a matter of innovation in financial services.

This case is only an example of how merger review and conduct investigations in Brazil started to experience greater symmetry between the competition agency and the sector regulator. In 2018, CADE and the BCB issued a joint rule to guide the analysis of conduct and merger cases that involve parties subject to the BCB's sector regulation[36]. According to this rule, notwithstanding the jurisdictional autonomy of each agency, CADE and BCB should exchange information about ongoing cases and regulatory rules that may impact competition. As for merger review specifically, the rule also determines that, in exceptional circumstances where the systemic risk and

35 The injunction was reversed by CADE's General-Superintendency through Order SG n.º 684/2020, on 30 June 2020, only seven days after it had issued it. The final decision on the case, dismissing the investigation of alleged gun jumping infringement, was issued on 19 January 2023, through Order SG n.º 94/2023.

36 CADE and BCB, Joint Normative Act n.º 1/2018 (https://www.bcb.gov.br/conteudo/home-ptbr/TextosApresentacoes/Ato%20normativo%20conjunto%205_12_2018%20limpa.pdf., accessed 20 June 2022).

liquidity of the financial market are at stake, CADE should clear the transaction under the terms set by the BCB.

Such a joint rule tends to induce intense institutional dialogue and symmetry between the competition and sector-regulatory policies, contrary to the scenario seen in the previous section, where the number of interactions between the AdC and the Bank of Portugal appears particularly small.

More recently, the acquisition of cloud-based software management provider Linx by electronic payments' acquirer and gateway provider Stone was unconditionally cleared by CADE[37], in June of 2021. The case was marked by litigation with intervening third parties and intense discussion on portfolio power arising from the merging parties' databases. Beside the alleged efficiencies arising from the intended transaction, CADE also mentioned its *ex-post* conduct control jurisdiction, the BCB's open banking regulation and the recently created Brazilian data protection authority ("ANPD", for its Portuguese acronym) as mitigating elements to the concerns presented along the proceeding. Once again, CADE made a competition assessment based on other agencies' performance (BCB and ANPD), indicating awareness of the institutional ecosystems in which it operates.

Other antitrust investigations are currently underway, demonstrating the authority's focus on competition in the financial sector. More importantly, regardless of their future outcomes, these current cases demonstrate how the authority works to accompany the market's fast-paced innovation and, thus, the complex new ways through which market players may challenge competition. To name a few ongoing cases, four of them seem particularly interesting, encompassing:

- Investigation on alleged refusal to deal with fintech;
- Investigation regarding the segment of electronic payment through automatic vehicle identification technology;
- Vertical discrimination probe on acquiring services; and
- Settlement on banking data portability.

The first case is the fintech payment institution *Nubank*'s complaint on refusal to deal (case n.º 08700.003187/2017-74). *Nubank* filed a complaint before CADE, in early 2017, against dominant banks *Banco do Brasil*, *Bradesco*, *Caixa Econômica*, *Itaú* and *Santander*. According to the complaint, these

37 CADE, 2021.

banks were elevating *Nubank*'s costs at the issuer market, by requiring heavy fees and refusing to provide banking services to *Nubank*. The complainant alleged that, without its clients' ability to use banking services of automatic payment orders ("*débito automático*") and reports of transaction recognition ("*extrato intraday*") provided by the incumbent banks, *Nubank* would have higher costs and become less competitive, reason why these banking services were allegedly essential facilities for the issuing activity.

The investigation is currently ongoing. After being investigated under a preliminary proceeding and an administrative inquiry, the case has been converted into an administrative proceeding and is currently at the discovery phase. When the discovery phase ends, the defendants will have the opportunity to present their final arguments and the General-Superintendency – CADE's investigative unit – will issue its decision, either dismissing the case or suggesting the defendants' conviction, occasion in which the case will be sent to CADE's Administrative Tribunal's final ruling.

The second case concerns automobile payment systems (case n.º 08700.001091/2020-77). Though not a typical case of the electronic payments industry, since it involves payment through automatic vehicle identification (commonly known as "AVI"), this case raises legal issues under the context of new technologies. In this market, vehicle owners hire financial services from companies, like *CGMP* and *Veloe*, to install electronic license tags in their vehicles to pay for services where such vehicles travel (parking lots, gas stations, car wash, toll booths and so on).

In early 2020, *CGMP* filed a complaint before CADE, by which it argued that banking institutions were favouring vertically integrated companies on the market of electronic payments through AVI. According to complainant *CGMP*, for its customers to pay their monthly AVI services without reiterated payment orders, *CGMP* had to hire banks to provide services of automatic payment orders ("*débito automático*") to those costumers' bank accounts. However, the banks allegedly favoured their vertically owned company *Veloe*, either by granting extreme discounts to customers who chose to hire *Veloe* (according to the complaint, such discounts tantamounted to cross-subsidy) or by elevating fees charged from customers who chose to hire *CGMP*.

The General-Superintendency issued requests for information, having the investigated banks alleged that the complaint regards regulatory matters that fall outside CADE's jurisdiction and that no anticompetitive conduct took place. According to these arguments, despite being vertically integrated, the banks had no influence over *Veloe*'s discount policy and, also, the conditions under which *CGMP*'s customers hired services of automatic payment orders were even more favourable compared to the conditions usually practiced with other companies.

The third case is the vertical discrimination probe (case n.º 08700.000022/2019-11). In late 2018, after CADE had initiated an investigation upon recommendation of the Brazilian Senate's Commission on Economic Issues[38], acquirer *Stone* presented an antitrust complaint against one of the bank *Santander*. According to the complaint, *Santander* favoured its vertically integrated acquirer *Getnet* by tying its banking and credit services with *Getnet*'s acquiring services, as well as by alleged abusive incentive agreements with merchants.

Specifically, *Stone* alleged that *Santander* forced merchants to adhere to *Getnet*'s acquiring services by tying them to merchants' bank account services provided by *Santander*. Supposedly, *Santander* also increased or threatened to increase bank fees for merchants who did not adhere to *Getnet*'s acquiring services, therefore, taking advantage of merchants' switching costs in migrating to other banks.

The second way through which vertical discrimination allegedly took place, according to the complainant, was by the so-called "*incentive agreements*", which consisted of imposing revenue goals to merchants and heavy fines for those who did not achieve those goals. According to the complaint, *Getnet* used these agreements to submit merchants into a *de facto* exclusivity. Additionally, *Santander* supposedly monitored the volume of transactions carried by merchants who, while had bank accounts in *Santander*, used acquiring services of *Getnet*'s competitors. The General-Superintendency is investigating the matter, having submitted requests for information for major issuers, acquirers, and payments scheme owners.

Finally, the fourth relevant case is the settlement celebrated between major private bank *Bradesco* and CADE, in 2020, regarding the investigation about an alleged attempt to impede clients from connecting with a third-party provider's personal finance application to their checking accounts, on the basis of privacy and security concerns[39]. Through this settlement agreement, the bank committed to develop secured application interface for connection by this third-party application to its banking environment, in order to enable

38 Brazilian Senate, 2018.

39 CADE, 2017.

the collection of clients' information through their consent. This settlement partially anticipated the implementation of the current Brazilian open banking regulation, being, therefore, a landmark settlement that combined cutting edge antitrust discussions and their interplay with data protection, technology and regulatory issues.

As the sample cases above demonstrate, in the last five years, CADE initiated various investigations about practices adopted in the financial sector, with vast discovery in order to understand the conducts at hand. The cases demonstrate a cautious approach to antitrust arguments in innovating business models, as indicated by their long and wide-reaching discovery measures, as well as cases of dismissal[40] and a common use of settlements[41], revealing a position that leans towards a greater concern to avoid overenforcement rather than to avoid underenforcement.

To conclude, as for CADE's advocacy role, the financial sector has not been among the agency's main priorities during the last decade. Considering its policy outputs between 2011 (year when the current competition act was enacted) and 2022[42], CADE, through its Department of Economic Studies, issued five documents related to the financial sector, in comparison to nearly 20 documents for each of its most focused sectors (energy and fuel, health and pharmaceuticals, and heavy industry and transports), as illustrated below:

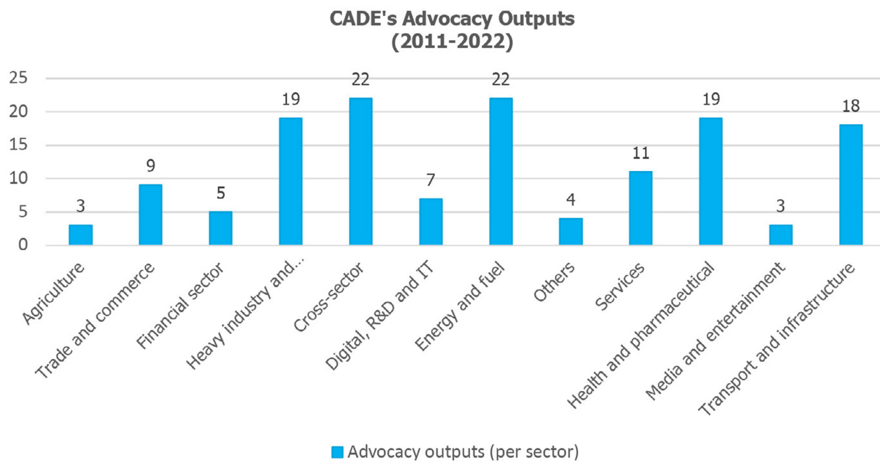
---

40 *E.g.*, case n.º 08700.003599/2018-95, in which CADE investigated whether incumbent banks had refused to provide bank account services to cryptocurrency brokers, thus, allegedly discriminating these investment intermediaries. The case was dismissed on late July 2022, on the basis of lack of evidence of anticompetitive infringement. There was also case nº 08700.006268/2018-15, concerning a complaint filed by *Veloe* against *CGMP* in 2018, based on alleged market foreclosure and refusal to deal in the market of electronic payments through AVI services. Specifically, the investigation encompassed *CGMP*'s exclusivity agreement with a major parking management company, *Estapar*, supposedly leading to customer foreclosure to entrants *Veloe* and *Greenpass,* and *CGMP*'s alleged refusal to deal with these entrants, by charging arguably high fees for antenna sharing at the locations where customers pay through AVI. The case was dismissed in December 2020, also based on lack of evidence.

41 Based on a study conducted by CADE's Department of Economic Studies (DEE), up until mid-2019, most of the cases involving the electronic payments segment ended up in settlements, summing a total of 13 settlements in seven investigations. See Technical Note n.º 20/2019/DEE/CADE in the merger review case CADE, 2019*a.*

42 Numbers gathered on 25 January 2023, in CADE's website, based on the documents available in the folders "Cadernos do Cade", "Notas Técnicas", "Documentos de Trabalho" and "Advocacy" of the webpage https://www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes-institucionais/estudos-economicos and the webpage https://www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes-institucionais/contribuicoes-do-cade.

Graph 3



Source: Author's creation

This scenario is similar to the AdC's advocacy, in which financial services are not among the agency's priorities, as indicated in Graph 2 above[43]. However, there is a major advocacy study underway, through which CADE will issue recommendations to the sector's competition enhancement for the BCB and the Brazilian Securities Commission (CVM, for its Portuguese acronym)[44]. This market study may be similar to the Portuguese 2018 paper, under a different context, however: digital financial services in Brazil have experienced a boom in the last decade, so the agency is adopting advocacy initiatives even in a situation of intense innovation, differently from the Portuguese context.

In summary, the mix of various regulatory strategies, such as the use of settlements, third-party interventions, quick blocking injunctions, and

43 Note, however, that both graphs refer to similar, but different issues and timeframes. While Graph 2 regards advocacy proceedings, Graph 3 regards advocacy outputs. In addition, while Graph 2 refers to a timeframe from 2003 to 2023, Graph 3 refers to a timeframe of 2011 to 2022, due to the limited information available in CADE's database. To enhance the comparison standards between both graphs, the author manually classified each document from CADE according to categories similar to those available in AdC's database.

44 Based on the author's inquiry to CADE, in 2020 and in 2023, this sector study is being conducted by the competition authority due to Presidential Order n.º 44/2020, to evaluate the sector after the execution of the settlement between CADE, major private bank *Itaú Unibanco*, and major investment platform *XP Investimentos* (merger review case n.º 08700.004431/2017-16), which expired on 31 December 2022.

wide-reaching discovery measures, seems to be a current trend. Although it is hard to make any causal link between CADE's competition policy and concrete market aspects, this policy seems reasonably successful, as indicated above. In general, these competition outcomes suggest that CADE's approach may diversify the AdC's competition policy in the financial sector, thus, moving from a borderline status between path dependence and unseen development to an escalating achievement of policy objectives.

3.2. Brazilian Central Bank's role in fostering competition

The BCB's effort to foster competition in Brazil's financial sector in the last years can be considered distinguished. In 2016, the BCB launched a package programme called *Agenda BC +* (in an adaptation to English, the "Central Bank plus" agenda). This agenda has evolved since then, currently ongoing under the name of *Agenda BC #*,but, generally, it has the same founding principles, which are (i) inclusion (or financial democratization, as occasionally referred by the BCB), (ii) competition, (iii) transparency (such as information symmetry and free price formation), (iv) financial education (finance awareness for citizens in general), and (v) sustainability (goal of stimulating financial activities that protect natural resources and promote sustainable growth).

Naturally, as principles, these elements are broad and may be understood and implemented in a wide variety of ways. Specifically in regard to the competition pillar of the BC# Agenda, the BCB adopted the following measures,[45] among others, most of them still ongoing:

a) Creation of the Department of Competition and Structure of the Financial Market ("Decem", for its Portuguese acronym) at the BCB;
b) Proposition of a federal decree to simplify the authorization process for the installation of branches of foreign financial institutions in Brazilian territory, as well as the increase of accepted foreign investment cap in Brazil's financial institutions' equity (through decree n.º 10,029/2019);
c) Effort to adhere to the Organization for Economic Cooperation and Development (OECD);

45 The measures adopted by the BCB for competition purposes, in the BC# Agenda, are listed at https://www.bcb.gov.br/acessoinformacao/bcmais_competitividade.

d) Proposition of a citizens' registration database of positively classified payers as an additional criterion of transparency for credit supply (through Law n.º 166/2018);
e) Provision of standards and requirements for financial institutions to hire external cloud computing services and structure internal cybersecurity policies (through BCB's Resolution n.º 4,893/2001);
f) Publication of preliminary general directives on the plan of issuing a central bank's electronic currency, resulting from an interdepartmental study group organized by the BCB[46].

Four other measures stand out among those being implemented under the scope of competition in the financial sector, namely, the regulatory sandboxes, the creation of a think-thank with universities and market players, the open banking and open finance regulations, and the recent Brazilian instant payment system, as detailed below.

The regulatory sandbox is an ongoing regulatory environment, where regulated players may attempt innovative financial products and services under a transparent, controlled and specific context, mitigating occasional spillover effects of unsuccessful innovations over the market's systemic risk and allowing entrants to develop their products and services until further consolidation[47]. The BCB's regulatory sandbox encompasses a wide variety of segments of Brazil's financial sector, including electronic payment solutions, currency exchange, rural credit, and banking services in general.

Through the regulatory sandbox, financial services providers submit their projects to a committee formed by civil servants of various departments of the BCB, according to Resolution n.º 77/2021. Once the projects are admitted, the service providers can supply their products and services to real clients, under a predetermined timeframe, as long as prudential and anti-money laundering rules are observed.

The Brazilian regulatory sandbox is similar to the Portugal Finlab, where Portuguese banking, securities and insurance authorities cooperate to provide guidelines for innovative appliers[48]. Both programmes allow for a close accompany of innovative projects by sector regulators, after which a

46 See at https://www.bcb.gov.br/detalhenoticia/17398/nota.

47 More details at https://www.bcb.gov.br/estabilidadefinanceira/sandbox.

48 More details at https://www.portugalfinlab.org/.

non-bidding report will be issued to each participant, with guidance of regulatory limits and allowances to each project.

However, there is a major difference between them: while Portugal Finlab is a programme where the regulators' feedback to innovative players results from an analysis of the participants' submitted documents[49], the Brazilian sandbox involves an analysis of innovative projects in action, after an exceptional authorization to operate under a controlled environment[50]. The Brazilian sandbox, thus, provides an empirical glance of innovative projects, which serves as better input for the regulator's decision in authorizing disruptive projects and editing current regulation.

The second regulatory initiative is the creation of a think-thank to discuss innovation in the financial sector. To enhance transparency and dialogue between stakeholders, regulated players and regulator, the BCB created, in 2018, the Laboratory for financial and technological innovation ("LIFT", for its Portuguese term), where scholars, market players and other stakeholders discuss these cutting-edge issues through annual meetings ("LIFT Day"), live transmissions of interviews and debates ("LIFT Talks"), and production of works ("LIFT Papers")[51].

A third measure is the fact that the BCB is gradually implementing an open banking and open finance regulation in Brazil. As for the open banking, it seeks to enhance competition between credit institutions through banking consumers' data portability among credit suppliers. Specifically, the BCB has structured a complex regulation to tackle incentives to data-driven innovation among credit service providers vis-a-vis consumers' data protection and cybersecurity, in accordance with Brazil's data protection law (Law n.º 13,709/2018). With the open banking regulation, consumer's switching costs and lock-in effects tend to lower, while entrants, such as fintechs, can benefit from greater transparency to offer better-quality and lower-price services.

The open finance regulation, which has recently received the Central Banking Award at the category "Data Management Initiative"[52], adopts the

49 The procedural rules of the Portugal Finlab are set at the Terms and Conditions, available at https://www.portugalfinlab.org/terms-conditions (accessed on 18 June 2022)

50 The rules that govern the BCB's regulatory sandbox is set at BCB Resolution n.º 50/2020, available at https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=Resolu%C3%A7%C3%A3o%20BCB&numero=50(accessed on 18 June 2022).

51 More details at https://www.bcb.gov.br/estabilidadefinanceira/lift.

52 Results available at https://www.centralbanking.com/awards/7949321/the-fintech-and-regtech-global-awards-2022-virtual-ceremony (accessed on 18 June 2022).

same approach towards other types of financial services, such as investment and currency exchange, applying to them the same principles and strategies adopted in the open banking project[53].

Finally, the fourth relevant initiative is the recent instant payment system, called "Pix". This system was released on October 2020 and is managed by the BCB itself. Through this system, individuals and businesses can receive and pay instantly, at any time of the day and year, with greater simplicity and data security, for any type of service (civil services included) and through any mobile device (for social inclusion, the BCB structured the system as to accept not only smartphones, but simpler and older devices as well).

For payment institutions that wish to participate in this system, some objective requirements need to be previously observed, including minimum capital, minimum operational capacity, and regulatory duties for risk management[54]. As for consumers who wish to use this system, they must register not necessarily through a bank account, reducing traditional banks' role in electronic payments.

The main aspect of this new system, for this paper's purposes, is that the BCB has imposed rules that tend to promote more competition than the payment schemes seen in section 3.1 above. By allowing instant payment without an individual bank account attached to the digital identity of the payer, the BCB attempted a big bang approach to lower barriers to entry in the electronic payments industry and increase consumer adhesion to electronic payments, as the first year of the system's operation has already demonstrated[55].

4. CONCLUDING REMARKS

As seen in the previous sections, Portugal appears to be experiencing a situation of unseen development rather than a proper path dependence. However, many pro-competitive recommendations given by the AdC are still pending to be implemented and significant entry barriers still exist in Portugal,

53 The Brazilian open finance project is governed by the Joint Resolution n.º 4/2022, issued by the BCB and the National Monetary Council.

54 Brazilian Central Bank (2020).

55 Based on official statistics by the BCB, there were over 550 million user codes ("*chaves Pix*") on 31 December 2022, demonstrating wide consumer adhesion to this new digital service. Up to 31 December 2022, nearly BRL 3 billion were transacted through the Pix system, which had begun operating on November 2020. Data available at https://www.bcb.gov.br/estabilidadefinanceira/estatisticaspix (accessed on 25 January 2023).

challenging the supply of new financial products and services to Portuguese consumers.

The Brazilian experience in this topic provides a useful comparative perspective on strategies to promote competition and, thus, innovation in this sector. Among others, the use of a mix of regulatory strategies, such as settlements, third-party interventions, quick blocking injunctions, institutional dialogue with data protection and financial sector regulators, and wide-reaching discovery measures, may be an interesting policy approach, notwithstanding the peculiarities of each case. Multi-layered problems demand multi-layered remedies, thus, demanding interdisciplinary approaches. However, this mix of strategies does not implicate great risks of overenforcement, as CADE's cautious approach through market studies demonstrate.

In addition, the use of regulatory sandboxes as real innovation hubs, the creation of think-thanks to interact with various stakeholders and experts, as well as a regulatory reform to update existing rules on data portability, can be considered.

Although, on one hand, a competition authority should not focus on only one or few sectors of the national economy and, on the other, the choice of policy priorities may vary from each country, a possible strategy for the AdC is to allocate more of its enforcement effort to the financial sector, so that it reduces the gap between the efforts applied to this sector compared to that applied in the two most prioritized sectors, as seen in Graph 2 above. Considering the importance of financial services for Portugal's development, the suggested advocacy focus can be an optimal choice of policy.

Inevitably, fostering competition through innovation in sectors with longstanding market failures, such as those related to financial services, generates challenges of, on one hand, avoiding excessive intervention that could undermine innovation and, on the other hand, avoiding consumer and stakeholder harms due to abusive conducts and entrenched market structures. Questioning whether competition is an end to itself or a mean for other policy objectives is also an important self-critical guidance for a reasonably successful policy in dealing with innovation.

BIBLIOGRAPHY

AdC – Autoridade da Concorrência

2018 *Inovação tecnológica e concorrência no setor financeiro em Portugal*, of 16.04.2018, available at https://extranet.concorrencia.pt/PesquisAdC/EPR_Page.aspx?Ref=EPR_2018_33 (accessed March 19, 2023)

2021*a* *Concorrência na Implementação da Estratégia de Recuperação Económica*, of June 2021, available at https://www.concorrencia.pt/sites/default/files/2021-Contributo-AdC-recuperacao-economica.pdf (accessed March 19, 2023)

2021*b* *Concorrência no setor financeiro em Portugal: acompanhamento das recomendações da AdC no âmbito do Issues Paper FinTech*, of 15.03.2021, available at https://extranet.concorrencia.pt/PesquisAdC/EPR_Page.aspx?Ref=EPR_2019_2 (accessed March 19, 2023)

Berkowitz, Daniel; Pistor, Katharina; Richard, Jean-Francois

2003 "Economic development, legality, and the transplant effect", in *European Economic Review*, vol. 47, n.º 1, pp. 165-195., available at https://doi.org/10.1016/S0014-2921(01)00196-9 (accessed March 19, 2023)

Brazilian Central Bank

2010 *Report on the Brazilian payment card industry*, of May 2010. Secretariat for Economic Monitoring and Secretariat of Economic Law, available at https://www.bcb.gov.br/Pom/Spb/Ing/Payment_Cards_Report.pdf (accessed March 19, 2023)

2020 *Apresentação da 10ª Reunião Plenária do Fórum Pix*, of 20.08.2020, available at https://www.bcb.gov.br/content/estabilidadefinanceira/pix/Forum_Pix_Plenaria/20200820-ForumPix.pdf (accessed March 19, 2023)

Brazilian Senate

2018 *Inovação e competição: novos caminhos para redução dos spreads bancários* (Report of the Commission on Economic Issues' working group), of December 2018, available at https://legis.senado.leg.br/sdleg-getter/documento?dm=7891618 (accessed March 19, 2023)

CADE – Conselho Administrativo de Defesa Econômica

2017 Case n.º 08700.003187/2017-74, Defendants: Banco do Brasil S.A., Banco Bradesco S.A., Caixa Econômica Federal, and Banco Santander Brasil S.A., General-Superintendency, initiated on 25 May 2017 (ongoing)

2019*a* Merger review case n.º 08700.006345/2018-29, Parties: Itaú Unibanco S.A. and Ticket Serviços S.A., Reporting Commissioner João Paulo de Resende, ruled on 26 June 2019

2019*b* Case n.º 08700.000022/2019-11, Defendants: unspecified, General-Superintendency, initiated on 07 January 2019 (ongoing)

2019*c* *Mercado de Instrumentos de Pagamento*, of October 2019, available at https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/mercado-de-instrumentos-de-pagamento-2019.pdf (accessed March 19, 2023)

2020 Case n.º 08700.004201/2018-38, Defendant: Banco Bradesco S.A., General-Superintendency, suspended due to settlement on 07 October 2020 (ongoing)

2021 Merger review case n.º 08700.003969/2020-17, Parties: STNE Participações S.A and Linx S.A., Reporting Commissioner Sérgio Ravagnani, ruled on 16 June 2021

2023 Case n.º 08700.002871/2020-34, Parties: Cielo S.A. and Facebook Inc., General-Superintendency, ruled on 19 January 2023

Claessens, Stinj

2009 *Competition in the financial sector: overview of competition policies*, IMF Working Paper, of March 2009, available at https://www.imf.org/external/pubs/ft/wp/2009/wp0945.pdf (accessed March 19, 2023)

CVM – Comissão de Valores Mobiliários

2022 *Direito do mercado de valores mobiliários*. 2nd ed., available at https://www.gov.br/investidor/pt-br/educacional/publicacoes-educacionais/livros-cvm/direito-do-mercado-de-valores-mobiliarios/view (accessed March 19, 2023)

Davis, Kevin E. & Trebilcock, Michael J.

2008 "The relationship between law and development: optimists versus skeptics", in *The American Journal of Comparative Law*, vol. 56, n.º 4, pp. 895-946

Dimoulis, Dimitri; Vieira, Oscar V.; Lunardi, Soraya; Ramos, Luciana de O.; Nassar, Paulo A.; Glezer, Rubens E.

2013 *Resiliência constitucional: compromisso maximizador, consensualismo político e desenvolvimento gradual*, in Série Pesquisa Direito GV, available at https://bibliotecadigital.fgv.br/dspace/handle/10438/10959 (accessed March 19, 2023)

Estrela, Márcio Antonio
2011 *Moeda, Sistema Financeiro e Banco Central*: *Uma abordagem prática e teórica sobre o funcionamento de uma autoridade monetária no mundo e no Brasil*, Rio de Janeiro: Fundação Cesgranrio

European Commission
2020 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU*, COM(2020) 591, of 24.09.2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0591&from=EN (accessed March 19, 2023)

Evans, Peter
2005 "The challenges of the institutional turn: new interdisciplinary opportunities in development theory", in Nee, Victor & Swedberg, Richard (ed.), in *The economic sociology of capitalism*, Princeton: Princeton University Press, pp. 90-116

Jones, Alison & Pereira Neto, Caio Mario da S.
2021 "Combatting corruption and collusion in public procurement: Lessons from Operation Car Wash", in *University of Toronto Law Journal*, vol. 71, n.º1, pp. 103-150

Kahn, Lina
2017 "Amazon's antitrust paradox", in *The Yale Law Journal*, vol. 126, n.º 3, pp. 710-805

OECD – Organisation for Economic Cooperation and Development
2009 *Competition and the Financial Crisis*, available at https://www.oecd.org/competition/sectors/42538399.pdf (accessed March 19, 2023)
2019 *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises*, available at https://mneguidelines.oecd.org/final-master-due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf (accessed March 19, 2023)

Lancieri, Filippo Maria
2018 "Digital protectionism? Antitrust, data protection and the EU/US transatlantic rift", in *Journal of Antitrust Enforcement*, vol. 7, n.º 1 pp. 27-53, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3075204 (accessed March 19, 2023)

Lourenço, Mário; Martins, Fernando; Magalhães, Cloé; Pereira, Manuel Coutinho; Reis, Hugo

2022 *Uma análise da competitividade das empresas em Portugal e em alguns países europeus*, in Bank of Portugal, of April 2022, available at https://www.bportugal.pt/sites/default/files/anexos/papers/re202207_pt.pdf (accessed March 19, 2023)

Marrara, Thiago

2015 "Defesa da concorrência x regulação setorial: o que mudou com a lei de 2011?", in *Revista de Direito Público da Economia*, vol. 13, n.º 50, pp. 245-261

Mckinsey & Company

2019 *Brazil Digital Report*, April 2019, available at https://www.mckinsey.com/br/~/media/McKinsey/Locations/South%20America/Brazil/Our%20Insights/Brazil%20Digital%20Report/Brazil-Digital-Report-1st-Edition_Portuguese-vAjustado.pdf (accessed March 19, 2023)

2020 *The 2020 Mckinsey Global Payments Report*, of October 2020, available at https://www.mckinsey.com/~/media/mckinsey/industries/financial%20services/our%20insights/accelerating%20winds%20of%20change%20in%20global%20payments/2020-mckinsey-global-payments-report-vf.pdf (accessed March 19, 2023)

North, Douglass C.

1991 "Institutions", in *Journal of economic perspectives*, vol. 5, n.º 1, pp. 97-112

Perez, Adriana H. & Bruschi, Cláudia

2018 *A indústria de meios de pagamento no Brasil: movimentos recentes*, Insper, 08.03.2018, available at https://www.insper.edu.br/wp-content/uploads/2018/09/industria-meios-pagamento-brasil-movimentos-recentes.pdf (accessed March 19, 2023)

Prado, Mariana Mota & Trebilcock, Michael

2009 "Path Dependence, Development, and the Dynamics of Institutional Reform", in *University of Toronto Law Journal*, vol. 59, n.º 3, pp. 341-380

2010 "Presidential Dominance from a Comparative Perspective: The Relationship between the Executive Branch and Regulatory Agencies in Brazil", in Rose-Ackerman, Susan & Lindseth, Peter (ed.), *Comparative administrative law*, Edward Elgar, pp. 1-24, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690815 (accessed March 19, 2023)

Rajkovic, Nikolas M.
2008 "The Visual Conquest of International Law: Brute Boundaries, the Map, and the Legacy of Cartogenesis", in *Leiden Journal of International Law*, vol. 31, n.º 2, pp. 267-288

Rothstein, Bo
2011 "Anti-corruption: the indirect 'big bang' approach", in *Review of International Political Economy*, vol. 18, n.º 2, pp. 228-250

Whish, Richard & Bailey, David
2011 *Competition law*, 7th ed., Oxford: Oxford University Press