CHALLENGES TO THE JUDICIARY IN THE ENFORCEMENT OF COMPETITION RULES IN THE DIGITAL AGE

*José Luís da Cruz Vilaça**

Some of you might be aware of the close, almost parental, ties that I maintained with the Portuguese Competition Authority at the moment of its birth. I am thus more than happy to be here to celebrate your 15th anniversary. The Authority was able to find its own way, among many difficulties, along the last 15 years. It became adult and mature, but it still looks young, energetic and plenty of ideas as regards the future!

Congratulations for having been, along these years, the driving force behind the antitrust policy in Portugal.

But, if I may, please do not forget that "strong enforcement" goes hand in hand with "legitimate enforcement". In that regard, I am perfectly comfortable: the distinguished lawyers assisting the Autoridade are fully aware of the risks for a "successful enforcement" which may be associated with overlooking *procedural fairness* and the full respect of the *rights of defence* of the companies involved.

Now, moving to my chosen topic, I would like to talk about some of the challenges that the enforcement of competition rules in the digital age is confronted with, notably as regards the judiciary.

Indeed, it is common ground that judges face great challenges when judicial review is carried out in a complex economic environment. The rise of the digital economy – which has been the major economic transformation

* Former Judge of the Court of Justice of the European Union (2012-2018). Keynote speech at V Lisbon Conference on Competition Law and Economics, delivered on 18 October 2018. The author thanks his former legal assistant Carla Abrantes Farinhas for her valuable assistance in the preparation of this text.

of our time – adds a substantial layer of complexity to the enforcement of competition law.

Markets are going through enormous changes as a result of continuing technological developments.

Most commentators tend to agree that the current competition law framework is, generally speaking, sufficient to tackle the new challenges for the time being.

In the same vein, Commissioner *Margrethe Vestäger*, in charge of competition policy, has noted, on several occasions, that competition rules are flexible and designed to adapt to new realities.

Nevertheless, on March 2018, the Commission appointed a panel of 3 external experts to advise on changes in the digital world that will affect markets and consumers, as well as on the impact of those changes on EU competition policy.[1]

The outcome of the expert group is expected to lead to new legislative proposals, relating, for instance, to online platforms or merger control thresholds as concerns start-ups in fast-moving markets.[2]

In any event, in order to deal with digital markets, it is necessary to better understand the distinctive characteristics of these markets. This is a challenge for both competition authorities and the judiciary, as courts will be called upon to review the validity of the authorities' findings.

I.

A number of decisions taken by the Commission in recent years illustrate how the assessment of whether a given conduct is anticompetitive frequently turns on highly technical questions.

This summer (2018), in the *Google Android case*[3], the Commission found that Google had engaged in conduct aimed at protecting and strengthening its dominant position in general internet search through various restrictions in relation to its Android mobile operating system.

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1 Also, in a report of April 2018, OECD experts opined that current tools are not always appropriate to assess the economic realities of multi-sided (online) markets. See: http://www.oecd.org/daf/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm

2 The turnover of, for example, online platforms at the time of such transactions does not necessarily reflect their market power.

3 http://europa.eu/rapid/press-release_IP-18-4581_en.htm

It was the first time the Commission comprehensively assessed the effects on competition of pre-installation of mobile software applications, which are commonly known as apps. Google was fined € 4.34 billion!

The Commission stressed the fact that it undertook an empirical analysis of the positive or negative effects for competition and consumers on the basis of an "effects-based approach".

On September 2017, the Court of Justice set aside, for the first time, an Article 102 judgment of the General Court, in the Intel case. In particular, the Court clarified that where a dominant firm puts forward credible evidence challenging the capability of its conduct to exclude rivals, the Commission is required to consider "all the relevant circumstances".

The ruling has been generally praised as a revitalisation of a kind of "effects-based approach" in competition law.

Also last year (2017), in the *Google Shopping case*[4], the Commission fined Google € 2.42 billion for abusing its market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service.

The Commission held that Google took a conscious decision not to apply to Google searching its search algorithm, which shows the most relevant results at the top of the first page. In fact, rivals were demoted, as they only appeared, on average, on page 4.

In that case, the Commission looked at 5.2 terabytes of Google real search data (around 1.7 billion search queries) to find out how people behave online – which shows the extreme technical complexity of such cases!

An appeal against the Commission's decisions is now pending before the General Court (Case T-612/17, *Google and Alphabet/Commission*).

Still this summer (2018), in the *consumer electronics manufacturers' cases*[5], the Commission fined manufacturers Asus, Denon & Marantz, Philips and Pioneer for over € 111 million for restricting the ability of online retailers to set their own retail prices for a variety of widely-used consumer electronics products.

Those decisions followed the Commission's e-commerce sector inquiry, published in May 2017, as part of its Digital Single Market strategy, which showed that resale-price related restrictions were by far the most widespread restrictions of competition in e-commerce markets in the EU.

4 http://europa.eu/rapid/press-release_IP-17-1784_en.htm

5 http://europa.eu/rapid/press-release_IP-18-4601_en.htm.

A prominent feature in these cases was the use of pricing algorithms. Many online retailers use pricing software that automatically adjusts their own retail prices to those of competitors by way of an algorithm. Algorithms are thus taking over decisions from people, including decisions on the prices that companies charge.

II.

The General report on Topic 1 at the XXVIII FIDE Congress, that took place this year in Estoril, assessed how new anti-competitive practices are emerging in the context of *collaborative digital economy* businesses, as a combination of the platform and user actions or as a result of machine learning technologies, for which, at first sight, neither individual users, nor the platform provider might be liable.[6]

As digital markets continue to evolve and grow, and our societies are transformed as a result thereof, other values remain or become of paramount importance. To strike the right balance between, *on the one hand*, realizing the full potential of the digital economy, in terms of innovation and economic growth, and, *on the other hand*, protecting other values of our society has become a pressing issue for both political and judicial actors in the EU.

Take, for instance, the intersection between *competition*, *data* and *privacy*.[7]

Companies have always collected data for a variety of purposes. That data can raise antitrust concerns is not a novel issue. In the past, in the *IMS Health case* (2004),[8] for example, databases have been considered as essential facilities to which access should be given in certain circumstances.

However, today's technology is taking data collection up to a new level. It has become possible to accumulate a significant volume of different types of data, produced at high speed from multiple sources – commonly referred to as "*big data*".

Big data is an indispensable tool for online businesses, such as Google and Facebook, and for other industries as well. Data is therefore increasingly instrumental to compete.

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6 FIDE General Report on the internal market and the digital economy, p. 107.

7 On January 2019, the Commission will host a 1-day conference on "Shaping competition policy in the era of digitalisation". The panels discussions will focus on three topics: (i) competition, data, privacy and artificial intelligence; (ii) digital platforms´ market power, and (iii) preserving digital innovation through competition policy.

8 Judgment of 29 April 2004, IMS Health, C-418/01, EU:C:2004:257.

One of the issues that the Commission assessed before approving Microsoft's acquisition of Linkedin, in 2016,[9] was whether bringing those companies' data together would make it too hard for anyone else to compete.

Indisputably, the contours of the issue of whether the accumulation of large amounts of data, which is otherwise freely available, creates a barrier to entry to potential competitors remain relatively blurred.

Data-driven markets, particularly those dominated by digital platforms, inevitably raise privacy concerns. At the heart of the platform business model is the collection and use of large amounts of personal information.

Much of the debate has been focused on whether competition law should incorporate data protection and privacy concerns.

Some commentators regard competition law and privacy as occupying *separate terrains*. This view is based on the assumption that markets are able to self-correct in the pursuit of economic efficiencies that serve consumer welfare.

Others accept a *broad conception* of competition rules and see synergies between competition and privacy goals. This is commonly associated with some doctrine in the EU and with the so-called "Neo-Brandeis" school that has emerged in the US.

The latter approach is underpinned by a commitment to State intervention for the promotion of pluralist aims of competition law, including those of a political and social nature, not just an economic aim.[10]

Last year (2017), the *German Competition Authority*[11] sent Facebook a preliminary legal assessment holding the view that the company is abusing its dominant position on the German market for social networks by making the use of Facebook conditional on the possibility for Facebook to collect users' data generated by using third-party websites and to merge it with the user's Facebook account.

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9 http://europa.eu/rapid/press-release_IP-16-4284_en.htm.

10 Commissioner Margrethe Vestäger does not seem to favour a large interpretation of the consumer welfare standard. She stated that "I don't think we need to look to competition enforcement to fix privacy problems" (https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-big-data-world_en). Similarly, Director-General Johannes Laitenberger has recently highlighted that "the function of competition policy and enforcement is not to duplicate or correct other regulation" and that 'the Commission uses its remit under competition law in full, but in full respect of its limits' (http://ec.europa.eu/competition/speeches/text/sp2018_08_en.pdf, p. 8).

11 https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html?nn=3591568

Whereas these practices have been investigated by national data protection authorities, it is the first time in the EU that the collection and use of personal data is investigated from the perspective of an abuse of dominant position.

This case triggers interesting questions as to what extent violations of consumer protection or data protection rules may constitute an abuse of dominance.[12]

In the EU, one should bear in mind that privacy and data protection enjoy a legal status as fundamental rights.[13] Remember also that the EU Charter of Fundamental Rights applies to the EU institutions but equally to Member States when they implement EU law.

As a result, privacy and data protection laws can impose limits on the enforcement of competition law.

Therefore, even if one excludes data protection considerations from the application of competition law, this does not preclude data protection from influencing competition law.

The case law of the Court of Justice has stressed the importance of those issues.

In the Volker und Schecke case (2010), the Court declared, for the first time, that provisions of secondary legislation that required the publication of the names of certain Common Agricultural Policy beneficiaries were invalid as they interfered with the EU Charter rights to data protection and privacy.[14]

In the Digital Rights Ireland case (2014), the Court declared the Data Retention Directive invalid as a result of its failure to comply with same rights.[15]

Both the Commission and national competition authorities must therefore respect fundamental rights when they enforce competition law.

This means, for example, that the right to data protection could prevent competition authorities from imposing upon undertakings remedies that would interfere with that right.

12 FIDE General Report on the internal market and the digital economy, p. 109.

13 Articles 7 and 8 of the EU Charter.

14 Judgment of 9 November 2010, Volker und Markus Schecke and Eifert, C-92/09 and C-93/09, EU:C:2010:662.

15 Judgment of 8 April 2014, Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238.

The GDF Suez case (2014) in France illustrates this point.[16] The French competition authority adopted an interim measure ordering the company to disclose data concerning its customers - that it acquired while it was a public service operator - to competing energy suppliers in order to enable them to compete effectively.

The French competition authority worked in conjunction with the French data protection authority (CNIL) in order to ensure that the data sharing agreement did not breach data protection law.

At the end of the day, GDF Suez was ordered to obtain prior consent from all affected data subjects.

Another potential implication for competition law enforcement in connection with the obligation to respect fundamental rights – notably in light of the increasingly severe antitrust fines – is that judicial review may need to become more intense.

It follows from the Court's case law in cases Digital Rights Ireland (2014)[17] and Schrems (2015)[18] that a strict standard of review will normally apply when the EU Charter is engaged.

Traditionally, however, the Court had taken, in general, a careful approach as to the scope and intensity of its own scrutiny of the Commission's decisions in complex technical and economic matters. An important reason for that reluctance is supposed to be that such appraisals lie beyond the ordinary capacities of a court of law.

The Court of Justice stated in the landmark case Consten and Grundig (1966) that "the exercise of the Commission's powers necessarily implies complex evaluations of economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences, which the Commission deduces therefrom".[19]

16 http://www.autoritedelaconcurrence.fr/pdf/avis/14mc02.pdf

17 Judgment of 8 April 2014, Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paras. 47-48.

18 Judgment of 6 October 2015, Schrems, C-362/14, EU:C:2015:650, para. 78. In that case, the Court held that the Commission's discretion to adopt a decision regarding the adequacy of the third country data protection measures is limited and the Court's review of the requirements of secondary legislation, read in light of the EU Charter, must be strict.

19 Judgment of 13 July 1966, Consten and Grundig v Commission, 56/64 and 58/64, EU:C:1966:41

Notwithstanding, the EU courts have progressively felt the need to strengthen their scrutiny in competition cases as a result of the incorporation of more sophisticated economic analysis.

The judgment of the Court in the *Intel case* constitutes an important – albeit limited – step made by the Court in this direction.

In such context, the great challenge for the jurist and, in particular, for the judge, is to be able to lay down clear and solid legal criteria, capable of securing the adaptability of the concepts to a fast-moving complex reality, whilst enhancing legal certainty and predictability in the application of the law.