

# THEMIS Seminar 2019, NOVA School of Law

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“Competition Law and the Digital economy”

Closing Speech

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*(Check against delivery)*

Good afternoon, ladies and gentlemen.

It is a real pleasure to be here and I want to congratulate the organization and the speakers for what is a truly relevant program in the competition field.

Before I continue, I would also like to congratulate all of the seminar participants and in particular the winners of the Moot Court competition. Looking at the seminar program, I thought it would be appropriate for these closing remarks to provide the enforcer’s perspective.

## **1. Digital economy: benefits and challenges**

### **Platforms**

Let me start with the platforms.

Nowadays consumers have access to a great number of products and services through digital platforms.

These platforms, usually available through mobile apps, offer new ways of selling products and services which bring advantages to the consumers. For example, the apps we have today allow us (i) to buy products online, (ii) buy and sell second-hand products online, (iii) transfer money, (iv) hire a transport service, and (v) rent holiday homes.

These apps are interesting for us, consumers, because we can do all of this in a more efficient and transparent way, with more information and probably paying less than what we did a decade or two ago. Therefore, in the digital economy, innovation plays a crucial role.

### **Globalization**

Another interesting aspect of the digital economy is that digitalization has developed itself hand-in-hand with globalization.

Nowadays, in many sectors, companies do not create a product or service for a local, regional or national market. Why settle for that when they can have the world as their client?

Conversely, customers expect to be able to buy some products or services from anywhere in the world with just a number of clics on the internet. The expectation is that, by doing so, they are able to buy the best products at the cheapest prices.

### **Network effects**

However, as we know, and you have probably discussed this in the past two days, the benefits that digitalization brings to the consumer are not guaranteed, nor do they come without negative effects.

Think of the following: digital markets are prone to so-called network effects. In digital platform markets, these effects mean that the value of a platform for its users increases with the number of platform users. Our interest in becoming part of a social network increases with the number of contacts that are already part of that network.

In markets and platforms with strong networks effects there is a high likelihood of “*winner-takes-all*” effects. This means it will be very difficult to compete with the first company that conquers such a market.

It is therefore important that competition authorities try to anticipate any potential competition issues related to this type of effects.

In this respect, the AdC has developed, in recent years, some work regarding digital markets, for example with respect to ride-hailing services and the FinTech sector, which I will discuss in more detail in a couple of minutes.

### **Big data - introduction**

Another aspect related to the digital economy that you covered in this seminar was big data.

Indeed, technological innovation in telecoms, processing power and data storage have spurred a “data explosion”.

Why is big data so special? With data collection this widespread, *what does it mean for enforcers?*

We must first recognize the significant benefits of big datasets. Big datasets make it easier for both consumers and firms to compare prices and products, help them find the products that best satisfy their needs and help firms make products better customized to their customers.

But big datasets also carry significant risks to competition. There are many issues and different angles to look at. I would like to focus on the challenges brought by the use of algorithms and the issues raised by big data as an input.

### **Big data and algorithms**

Starting with algorithms:

Big data allows companies to develop algorithms that help companies take decisions regarding prices. These pricing algorithms are mainly used in e-commerce or multi-sided platforms. For example, they may take into account sales volume, customer information and other market data to help companies take strategic decisions.

Companies also use pricing algorithms together with monitoring algorithms, which follow pricing behavior of competitors. They allow for example for a real-time detection of price changes.

Pricing algorithms, when used together with so-called monitoring algorithms, make it easier for firms to collude, both explicitly and tacitly:

- Explicitly, because pricing algorithms can work as a commitment device monitored by monitoring algorithms;
- Tacitly, because there is increased transparency if firms buy the same pricing algorithms from a third party or use the same open-source software.

This said, monitoring prices from competitors and other strategic decisions according to competitors' strategies are not new market features.

However, big data and algorithms have amplified these strategic interactions and their potential effects.

In addition, we also have self-learning algorithms, where competition analysis is still rather speculative. Concerns include their black box nature, as well as the capacity for continuous optimization. Perhaps most worrisome, we can envisage a collusive outcome where the developer did not anticipate the algorithm to behave that way, raising liability concerns.

In this case, as in the other cases, competition enforcers need to be able to ascertain responsibility for the behavior.

### **Big data as an input**

Another issue raised by big data relates to the accumulation of market power. Data can be an advantage and a decisive competitive advantage for dominant companies.

So, besides helping firms make better decisions, data can also be an input in production, increasing the quality of final products and making such products and services possible.

It is when dealing with multi-sided markets that there are significant differences in the competition assessment, due to network effects.

In these markets, zero prices and non-monetary transactions, such as in the case of Google Search, are common. These non-monetary transactions involve user data, which is used to improve final products. In Google's case, for instance, this data improves Google Search itself and Google AdWords, generating both direct and indirect network effects.

The network effects in multi-sided markets may generate a tendency towards concentration.

For this reason, from the enforcer's perspective, focusing on reducing barriers to entry and expansion is key to ensure market discipline.

## **2. Do competition enforcers have the right tools to deal with the digital economy?**

I have now mentioned some good examples of the issues raised by the digital economy: platforms, network effects, big data and algorithms.

These issues have also been addressed in the Report prepared by a group of experts at the request of Commissioner Vestager, which was published yesterday.<sup>1</sup> It will certainly be an interesting read for the next few days and provide food for thought about the challenges of digitalization for competition enforcers.

In light of all these challenges, we, enforcers, must ask ourselves: do we need new tools for investigations involving the digital economy?

Our experience says maybe not.

In short, I believe that we are well equipped and that the current antitrust principles and tools are still adequate to address digital markets. They may just need to be adapted.

### **Investigative capacity - mergers**

Let me give you an example. In 2015, the AdC reviewed a merger between two online platforms. FixeAds proposed to acquire part of CustoJusto. Both are online platforms for classified ads and auctions<sup>2</sup>.

This was the first merger in the so-called “digital economy” to be analyzed by the AdC.

As regards the economic instruments used in the evaluation of this operation, there was no need to resort to “innovative” tools. I know I am not addressing a group of economists. So bear with me.

For example, the existence of two-sided markets is something recognized and discussed for a long time in the economic literature and by national competition authorities. However, because its existence is more frequent in the “digital economy” era when compared to the more traditional markets, two-sided markets have become increasingly important.

In the presence of such markets, as was the case in this merger, the SSNIP test has to be adapted since it has been designed for one-sided markets, where only the price level is relevant, and there are no indirect network effects.

The proceedings for the merger between FixeAds and Custo Justo were closed by request of the parties following the publication of the AdC’s draft decision initiating an in-depth investigation.

Overall, the analysis of the AdC in this merger case suggests that, to some extent, competition authorities may not need *new* analytical tools to deal with the digital economy; rather, the existing tools may need to be adapted.

### **Reinforcing detection capacity**

Besides looking at potential tweaks to the competition assessment, there is another angle to analyze the impact of digitalization on competition enforcers.

### **Forensic IT skills and tools**

This is about the need to strengthen detection capacity in the context of increased digitalization.

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<sup>1</sup> “*Competition policy for the digital era*”, by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, available in: <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

<sup>2</sup> Proposed acquisition of part of some assets of CustoJusto, Unipessoal, Lda. by FixeAds – Serviços de Internet, S.A. (Ccent. 26/2015 – FixeAds/ Custo Justo Assets).

Overall, dawn raids are increasingly focused on computers, e-mails, mobile phones and the cloud rather than paper and physical files.

Since each dawn raid may include sifting through thousands of digital documents, the duration of dawn raids and of the data review may vary significantly (depending on the tools and skills we have).

We have tackled this issue as part of our enforcement priorities with significant investment in forensic IT equipment to collect and assess data from dawn raids, as well as in training of staff.

#### ECN+ Directive

In addition to the investment already done in forensic IT, the AdC's detection capacity will also be reinforced by the changes brought by the recent ECN+ Directive.

One important goal of the Directive, which links with the digital economy, is to enable national competition authorities to access and gather all the necessary digital evidence.

This is crucial because right now it's more likely more likely to find evidence of a cartel over emails or chat services rather than on paper and in physical agendas.

### **3. Advocacy**

#### **AdC's advocacy role**

So far, I have talked mostly about enforcement.

But while enforcement is our clear priority, we are also conscious of the restrictions to competition that are not attributed to corporate behavior but rather to market conditions.

In addition, antitrust investigations often take several years. Can enforcers move quickly enough to make a difference in dynamic markets? I believe this question also links to how competition authorities should respond to societal expectations in the digital market.

Therefore, in some cases, there is an advocacy role to play.

With respect in particular to digitalization, our aim is to ensure that the consumers are able to fully seize the benefits of the digital economy.

I would like to mention three AdC initiatives in this respect:

- Regarding ride-hailing services;
- Regarding FinTech; and
- Regarding big data and algorithms.

#### **Paper Big data & Algorithms**

Starting with the last one, and as I mentioned earlier, the AdC is undertaking a scoping exercise concerning big data and algorithms.

In line with one of our main priorities, which is the reinforcement of cartel detection, we have a keen interest in understanding the various possible collusion scenarios between companies through such new tools. The goal is to be up-to-date with the analytical framework that may be used to assess these issues.

We hope to publish this paper in the first half of 2019.

### **Ride-hailing services**

Regarding our initiative concerning ride-hailing services: the issue of Uber and other public passenger transport services by car hire has been part of public debate worldwide. In Portugal, as you know, the debate on whether to allow Uber to operate and how to regulate its activity was widely participated.

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

As such, the AdC defended a regulatory review that seeks not to favour a given type of service provider over the others, but rather one that promotes a level-playing field capable of yielding the benefits of competitive interaction.

We also highlighted the need to undertake a regulatory review that would not entail replicating the existing regulation to new entrants but rather to make the set of rules currently applicable to taxi services in Portugal more flexible.

Our recommendations had a direct impact in legislation, which later admitted ride-hailing services. But they remain to be implemented in what concerns traditional taxis, which could benefit from more flexible rules.

### **FinTech**

The AdC has also been actively advocating for the benefits of FinTech for competition in financial services.

Ten years after the financial crisis, the financial sector is in an interesting phase of consumer-focused innovation. The term FinTech refers to new services and business models in the financial sector, based on technological innovation.

Total global investment in the FinTech sector over the past three years has been estimated at more than USD 140bn by some firms.<sup>3</sup>

FinTech promises more choice, improved convenience and higher quality to consumers of financial products and services, both individuals and firms.

New entrants are disrupting traditional business models. We can now pay with contactless cards, through e-wallets or mobile phone apps. FinTech is also offering new financing options, such as crowdfunding.

Competition authorities and other regulators must ensure that financial markets remain contestable, such that these benefits from innovation have room to materialize.

At the end of 2018, the AdC published an issues paper on Technological Innovation and Competition in the Financial Sector. The paper identified barriers to entry and expansion that FinTech companies might face in the provision of payment services and crowdfunding.

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<sup>3</sup> <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2018/07/h1-2018-pulse-of-fintech.pdf>

In relation to payment services, the AdC identified a market foreclosure risk by incumbents with respect to fundamental inputs that new entrants need: payment account data and banking infrastructure. These inputs are in the possession of incumbent banks, who have the capacity and incentive to foreclose.

In this respect, the AdC recommended, among other measures, that (i) access to information by third party providers should not be subject to charges, and (ii) any dependence that new payment service providers may have vis-à-vis banks in accessing technical infrastructures should be eliminated.

The results of the AdC initiative were visible. Financial regulators, in particular, launched a number of initiatives with the potential to make the financial services ecosystem more open to innovation and competition.

But we remain vigilant regarding barriers or collusive behavior in this area.

#### **4. Final remarks**

To conclude, it is clear that the digital economy represents both an interesting challenge for enforcers.

I would single out three takeaways from our perspective:

First, it is important to identify the different features of digital markets and adapt – but not radically change – our tools when necessary.

Second, enforcers must be equipped with the right skills and resources for tackling digital evidence. This may imply legislative change.

Third, the challenges of digitalization may be tackled both with enforcement and advocacy tools by competition agencies. Promoting competition in the digital economy will certainly bring benefits to society in the medium- and long-run.

Thank you and enjoy your free time in Lisbon.