SPEECH LEGAL SERVICE

"Judicial Control in Digital Markets: How to be Fair and fast ?"

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INTRODUCTION

Guest of Honour? Honoured to be a Guest! 30 years ago since I joined the Legal Service

I did not receive precise indications or instructions as to the content of my speech, but the title of the conference for this morning refers to Internet and platforms regulation under DMA and DSA.

I will therefore try focus on Internet and platform issues under EU law. This is not without difficulties for a judge at the General Court.

- First, there are many internet related cases before the Court of Justice, but significantly less before the General Court. The Court of justice took the lead in many respects, in particular as regards data questions, such as the privacy shield, the right to be forgotten or the concept of consent when dealing with cookies. I do not have any particular authority or quality to comment them. I will abstain from doing so.

- The DMA and DSA just entered into force adopted. Its substantive rules will only do so in May 202 and February 2024. So, there is no case law to comment.

What to say under these circumstances?

Upon reflection, three interrelated themes came to my mind.

- First, there are some relevant judgments delivered by the General Court in direct appeals. They include high profile cases, such as Google Shopping or Google Android. They are often analysed together with other recent cases such as Intel and Qualcomm, because these cases deal with technology that is relevant for mobile devices and hence internet access. They are all complex cases. The difficulties encountered by both the Commission and the EU Courts in dealing with such cases, both from a procedural and substantive view, illustrate the limits of classic antitrust enforcement in rapidly evolving markets, such as the market for digital services. These limits may have been one of the reasons that lead the legislator to adopt the DMA and DSA.

- Then, we may expect new cases to come to the EU Courts under the DMA and DSA. It is still early to assess the nature and the volume of this future litigation. Relying on past experience, I assume that the General Court will be confronted with a significant work load resulting from DMA and DSA enforcement. As regards this past experience, I refer in particular to the banking crisis of 2008. Bank related cases now

account for approximately 7 to 8 % of the pending cases. However, past experience can also point in another direction. When the REACH regulation was adopted in 2006, the legal community expected massive litigation before the General Court. This did not materialize.

- The third and last issue concerns the question as to whether the GC needs to anticipate the arrival of these new cases? How can it deal with them in a time frame that is compatible with the rapidly evolving nature of the digital sector ?

My speech will deal with these three questions. Before doing so, I would like to note that my speech only reflects my personal considerations about future events.

SECTION I: PAST PRACTICE

Before speculating about the future, let me first return to the past and in particular the Commission's attempts to get to grips with the power of large digital operators by applying the classic antitrust rules, in particular Article 102.

This policy goes back far back in time.

- I refer in this respect to the IBM case of the 80ties, at a time when IBM's PC standard was the standard of nearly all IT hardware. Competitors could only compete with IBM on the market for computers and terminal equipment if their machines were PC compatible. The Commission considered that IBM's refusal to disclose compatibility information resulted in the monopolization of the downstream market for terminal equipment. IBM offered commitments to disclose interoperability standards to avoid further conflicts. The Commission has published these commitments in its annual reports on Competition policy since 1984. Access to data in the IT sector is an old one.

- Control over data as a means to control downstream markets also surfaced in other sectors. I refer to the famous McGill case that set in many respect the legal standard on data related questions under Article 102. The case concerned the refusal of Irish television broadcasting operators to give access to the listings of their programmes. This allowed them to monopolize the downstream market for television guides and to prevent the creation of a new product, i.e. a comprehensive guide. The Court of justice qualified this conduct as abusive, as it also did in the IMS case, dealing with the sales of pharmaceuticals.

- In the nineties, the Commission relied on this old case law in the Microsoft investigation. The use of the Windows operating environment to monopolize the downstream markets for applications, such as Internet search tools (Explorer) or Music players, was qualified an abuse within the meaning of Article 102. Here again, access to interoperability information was the remedy, as ultimately confirmed by the General Court.

- In the late nineties, the Commission also started to investigate the practices of key suppliers to the IT sector, in particular Intel as a supplier of microchips. The Intel case concerned rebates, which the Commission and the General Court qualified as exclusivity rebates within the meaning of Article 102. On appeal, the Court of justice changed its case law. Mere legal exclusivity does no longer suffice to qualify rebates as abusive. It imposed on the regulator and the General Court an obligation to engage in economic debate on the exclusionary effects of Intel's rebate policy. The General took up the case again and annulled the decision. The case is still pending on appeal before the Court of justice and the end of the litigation is not yet in sight.

- The new century with the arrival of yet another player, of an entirely new kind, Google, which soon evolved as the dominant operator for Internet searches. Obviously, this drew the Commission's attention. It started several procedures and to judgments of the General Court. These judgments deal again with discrimination issues on downstream markets. The Google shopping case concerned the downstream market for product comparison tools. The Commission and the General Court found that Google used its position on that market to favour its own price comparison services. The Google Android case is more akin to the Microsoft case. It related to the commercial practises and contractual terms imposed on OEMs installing that Android operating software. These terms favoured, *de iure* and *de facto*, Google's Search and Play Store applications to the detriment of competing apps. Apart from some partial annulments, the General Court upheld the Commission's analysis. Both cases are under appeal and here again it might take several years before the Court of justice's final judgment.

This last comment already illustrates the limits of the policy to control dominant firms in the digital sector on the basis of classic antitrust rules. Let me dwell on these limits a bit further.

To start, I believe that classic antitrust rules offer sufficient flexibility to capture the legal problems caused by restrictive behaviour of dominant firms in the digital sector. These legal problems are not new: tying practices, access restrictions, monopolisation of downstream markets and discrimination issues are old as commercial behaviour itself. From a purely legal point of view, these practices are old wine, but served in new, digital, bottles.

However, the digital age causes a real enforcement problem. Establishing dominance is not always an easy matter. Moreover, since the nineties, academia, practitioners and regulators have favoured a more economic approach, seeking to focus antitrust enforcement on cases in which it can be established that the contested conduct has or is likely to have restrictive effects. There is no point in combatting conduct that is efficiency enhancing and within reach of a competitor that is as efficient as the dominant firm. Doing so would lead to false positives. I understand that position.

Even so, this efficiency oriented approach raises some serious questions. The more economic approach and, in general, an approach based on welfare economics, relies on a series of economic assumptions that are questionable and are actually questioned by new economic and behavioural insights. It might be that in wanting to avoid false positives, we failed to spot false negatives. In addition, the objectives of EU antitrust law go beyond the protection of consumer welfare, as recalled by the Court of justice in several cases. The quest for efficiency

requires a degree of sophistication in economic and legal analysis that is incompatible with the needs of daily antitrust enforcement.

Moreover, one may ask oneself the question as to whether antitrust regulators are not outpaced by the industry they seek to regulate for various reasons.

- First, unlike the technological behemoths of the past, the champions of the digital era are numerous. Where we had one IBM or one Microsoft in their heydays, we have many large players in the digital industry. Even for a network as the ECN, it is very difficult or hard to control all industry players at the same time.

- Second, the Commission and the other members of the ECN are competent authorities, for sure. However, they face large digital players that can rely on resources and expertise that are equal or superior in size. Engaging sophisticated legal battle with these players is not an easy game, as illustrated by the findings of the General Court on the AEC test carried out by the Commission in Intel and Google Android.

- Third, one may doubt as to whether financial sanctions are effective against the large digital operators. Of course, fines of several billions do not go unnoticed, but the revenues and other interests at stake are huge. So far, I am not aware of structural remedies being imposed at EU level in antitrust cases.

- Fourth, classic antitrust enforcement simply takes too long. Investigations before the Commission can last years. Appeals before the General Court usually follow. Even if all goes well, a procedure before the General Court takes at least three years. To that, we have to add the procedure before the Court of justice. All in all the length of the proceedings is hard to reconcile with the speed with which the industry develops. If I may take Intel as an example. The facts date back from the late nineties and the case is not yet over. In addition, one may have serious doubt about the relevance of those proceedings for the industry itself and for the development of the law. Will the legal issues discussed in Intel still be relevant, once the Court has delivered its final judgment?

Against this back drop, it is perfectly understandable that the EU legislator sought for alternative means to control the digital players, by adopting sector specific legalisation based on an ex ante and more regulatory approach. Here again, this not a new policy move. The EU legislator has already done so in other sectors, such telecoms, energy and ground handling services at airports.

SECTION II WHAT CAN THE GENERAL COURT EXPECT FROM THE DMA AND DSA?

As you will understand, it is very delicate for a judge to comment future cases. On the other hand, as a jurisdiction the General Court needs to anticipate its future workload. This holds true in particular for the work to come at the end of 2024, since that it is the date foreseen in the legislative proposal for the transfer of competence in preliminary reference cases from the

Court of justice to the General Court. It cannot be excluded that the flow of new preliminary reference work coincides with a work stream resulting from the DMA and DSA.

It is not only delicate to comment future workload, but also highly speculative. I am just a judge and not Madame Soleil. Therefore, my predictions of the future have to be taken with caution.

I will limit myself to four major comments, focussing on the DMA.

My first comment concerns the interplay between the DMA and normal competition rules. As mentioned in recital 11, the DMA rules complement Articles 101 and 102. From a substantive point of view, both sets of rules rely on different concepts. In particular, the DMA does not rely on dominance and, hence, on market definitions. Moreover, the DMA focuses on fairness and contestability and does not seek to promote efficiency. Given this different nature, it is hard to say whether DMA enforcement will substitute classic antitrust enforcement. If the DMA is seen as complementary in nature, the Commission may continue to enforce the classic antitrust rules in the digital sector. This implies in its turn that the appeals against Commission decisions under the DMA may well represent a net increase in the workload of the General Court.

Second, as regards nature of the future decisions, I see three large categories: the designation of gatekeepers, decisions relating to the specification of the obligations and enforcement decisions.

The designation decisions rely primarily on purely quantitative thresholds. Seen like this, they should not give rise to intense litigation. However, it follows that the thresholds create presumptions that the companies concerned may seek to rebut pursuant to Article 3(5). Moreover, the Commission has the possibility under Article 3(8) to designate gatekeepers that do not meet all the quantitative criteria listed in Article 3(2). Given the interests at stake and the fact that the designation as gatekeeper triggers the DMA obligations, especially those listed in Articles 5 and 6, one may reasonably expect future litigation before the General Court.

By contrast, I am less certain in my prediction as regards the decisions, which the Commission as regards the obligations listed in Articles 5 and 6 DMA. This is because the obligations are directly applicable and can applied as such before national courts. This may of course lead to interpretation issues and hence to preliminary references within the meaning of Article 267, but not necessarily to direct actions under Article 263. By contrast, some litigation could arise as regards the specification of the obligations, their suspension, their update or the granting of exemptions.

This can also be expected for the enforcement decisions, which follow to a large extent the model of Regulation 1/2003. It is too early to make any sensible forecast on this enforcement practice, in particular in the absence of implementing provisions. However, I would like to make two comments on future sources of litigation that are not directly visible at first glance. The first one concerns the position of complainants. Will they enjoy similar rights as complainants under Regulation 1/2003? The second one, concerns merger control under the thresholds set by Regulation 139/2004. I refer in this respect to Article 14 of the DMA. If the Court of justice confirms the judgment of the General Court in Illumina, more concentrations will be reviewed by the Commission than is the case today.

My third observation on the DMA concerns the time line. When can the General Court expect the cases to come? During a first wave, those dates will be a function of the implementation calendar laid down in the DMA itself. Bearing in mind that the designation decisions are due in September this year, the first cases are likely to arrive in December 2023. Since the obligations only enter into one year from now, I do not expect litigation regarding these obligations and their possible enforcement before the end of 2024. From that date onwards, it becomes too hazardous to speculate on future litigation. I note nevertheless that the DMA will be a living organism that will be implemented by further acts. Both the designation of gatekeepers and the specification of their obligations will be a matter of constant review, and, hence a potential source of litigation.

Finally, as mentioned above, I focussed my three comments on the DMA. Even so, we should not lose the DSA out of sight. The DSA will enter into force in February 2024 and empowers the Commission with the enforcement of the obligations resting on very large online platform and very large online search engines are concerned. I do not take too many risks by saying that this future enforcement practice is likely to give rise to disputes and hence to litigation as well.

SECTION III HOW COULD THE GENERAL COURT DEAL WITH THE DMA AND DSA WORK

I am aware of the fact that my speculations on future events have taken you already deep into a crystal bowl. I am afraid that I will make matters even worse by additional speculation on the specific challenges that DMA related cases could pose to the General Court. Even so, these future events may occur already in 2024, *i.e.* in less than a year from now. At that very same time, the General Court is expected to receive additional competences in preliminary reference cases.

We are confident that we will be able deal with both workflows at the time. However, preliminary reference cases require special treatment, which are new for the General Court. In light of the encouraging signals from the Member States and the Commission, we have already started to adapt our rules of procedure and our internal rules to be ready in September 2024, at the date of the planned transfer of competence.

Of course, the work load that the implementation of the DMA may entail will not impact our mode of operation in the same way as the transfer of preliminary reference powers. Appeals against Commission decisions will be direct actions brought under Article 263. This administrative review is our daily bread and butter. Even so, the DMA may raise new issues, which the General Court should seek to anticipate. In my view, these issues mostly relate to time.

Digital markets evolve fast. The products and services of today may no longer exist tomorrow. New products and operators enter markets, which may suddenly tilt towards the entrenched positions that the DMA seeks to avoid. By contrast, court proceedings take time. Proper judicial proceedings imply that the parties have their say in court and that judges have sufficient time to think and deliberate. Of course, there are means to speed up proceedings,

but beyond a certain point, judicial time becomes incompressible. There is therefore a balance to strike between the industry needs, on the hand, and the needs of a proper administration of justice, on the other hand.

Let me say first, that the proceedings as we have seen them in classic antitrust cases, such as Google Shopping, Google Android and Qualcomm cannot serve as a benchmark, as I already mentioned above. They are too complex and take too long for a wide variety reasons, including the procedural behaviour of the parties themselves. In the digital world, the General Court should aspire to shorter proceedings.

The DMA itself contains a few indications that could serve as a benchmark. I note for example that the Commission shall endeavour to adopt non-compliance decisions within a period of 12 months from the formal opening of proceedings within the meaning of Article 20 and that investigations may take place before that opening. Such investigations also take time. I note in this respect that market investigations that market investigations into systematic non-compliance may take 12 months.

Obviously, these are administrative benchmarks, which do not necessarily apply to judicial proceedings, but a duration between 12 to 24 months coincides with the average length of proceedings before the General Court, which corresponded in 2022 to 16 months for all cases and to 20 months for cases dealt with by judgment. I think we may try to use these averages as benchmarks that fall in line with the Commission's own deadlines.

In order to meet this target the General Court could rely on Article 151 of its rules of procedures. It provides for expedited proceedings in which there is only one round of pleadings and in which the case receives priority treatment dealt. I note, however, that expedited procedures should remain exceptional. It is simply impossible to grant priority treatment to a large group of cases at the same time.

Moreover, such proceedings presuppose that parties play the game. Extension and confidentiality requests are hard to reconcile with the objectives of Article 151. In this respect, I am pleased to note that the DMA anticipates confidentiality issues. I refer to the non-confidential summaries referred to in Article 8(6). Over and above of such explicit provisions, I strongly recommend that the Commission addresses confidentiality questions at an early stage of the proceedings in a manner that could be reused in the context of subsequent Court proceedings, if any, of course.

Also, it might well be that interim relief will play an important role in the context of DMA enforcement both at the level of the Commission and of the General Court. I refer to Article 24 of the DMA, which allows the Commission to adopt interim measures in non-compliance procedures. The question arises as to what kind of control the General Court should exercise on those measures. The General Court had to reply to that question in Broadcom, but the parties withdrew the case after have reached a settlement. The only precedent is the old Camera Care order. In addition, gatekeepers themselves could seek interim relief by requesting the president of the General Court to suspend the Commission's decision, totally or partially, or to adopt other forms of interim relief. If these were to occur systematically, it might be a reason to reinforce the interim procedures in the rules of procedure of the General Court, for example by allocating such cases to a broader panel of judges than the president alone.

Finally, the General Court is fully aware of the key role it will have to play in the system set up by the DMA and DSA. Both pieces of legislation are particularly intrusive for the companies involved. They impose far-reaching obligations that affect their business models and the fruits of their R&D. It can therefore not be excluded that some companies will contest the legitimacy and proportionality of the system itself in the context of the direct actions, which they may bring against the Commission's decisions. This is a substantive issue, on which I will not comment. Even so, I submit that proper judicial control delivered in due course will be crucial in terms of legitimacy and acceptability.

As you may have noticed, I am concerned about the challenges that the DMA could possibly pose to the General Court. We are confident that we will be able to deal with them. Even so, as a suggestion for the future, I submit that the EU legislator should include in its impact assessment the consequences of future legislation on the national and EU judiciary.

FINAL COMMENTS

Let me conclude my observations with a historical consideration. As lawyers, we are attached to legal certainty and abhor arbitrariness. This does not mean that the law cannot evolve. It must respond to societal needs. I think the DMA and the DSA give such a response.

Even so, one should not forget that they are children of their time, as was once the very formalistic stance taken by the Commission in the first decades of the competition policy pursued under Regulation 17. Then, at the end of the eighties and nineties, this formalistic rule based approach was increasingly resented as a societal straightjacket. As a result, Regulation 1/2003 replaced Regulation 17, paving the way to the more economic approach to which I referred in the first part of my speech. In its turn, this approach is called into question, as being no longer fit for purpose in the digital world. Now, the DMA and DSA provide for detailed provisions, reminiscent of the old block exemptions. One day, they will be revised as well, as the pendulum of history commands. It may be an interesting theme for the 30th Annual Conference of the Legal Service.