COMPETITION LAW FACING THE EMERGENCE OF DIGITAL DATA

In recent years, digital revolution has shaken marketing by breaking down codes and frameworks of traditional trading. The development of a digital economy had brought new commercial habits and a new consuming culture that Competition Law hardly apprehended. Totally shaken, Competition Law is failing to act and more particularly three reproaches are made by Professor D. FASQUELLE « *Inability to control concentration of power in the hands of some companies , long delay of intervention, and lack of expertise* ».

In recent years tensions begin to crystallize around the digital companies and the principal targets are the Big Tech, five American technologies companies also known by the acronym GAFAM (Google, Apple, Facebook, Amazon, Microsoft). Those five American world superpowers rule the digital market with over 90 % of the search market share, Google is the most popular search engine. Facebook is the largest social network of all social networks with almost three- quarters of users every day. Together Google and Facebook capture more than 50% of on line digital advertising.

DO THE TECH GIANTS PUT IN PLACE ANTI-COMPETITIVE STARTEGIES TO OUT COMPETITORS ?

An anti- competitive phenomena and particularly concentrative is observed by Competition Authorities and jurisdictions. The Big Tech companies had developed an acquisition mindset and bought up a lot of startup on related markets. The problem with these acquisitions is that they intervene at an early stage of the startup development, a moment where their turnover do not reach the threshold set by Regulation (Reglement) N◦139/2004 for a control by the authorities. This threshold effect led to « *a sub application of merger control on digital markets* ».

In recent years, an important number of concentrations escaped European control especially when Facebook acquired Instagram and when Google acquired You Tube. The annoyance about these acquisitions is that the acquired companies are potential competitors for the acquiring companies, those who have benefited from their dominant position « *to nip in the bud a new competitor* » according to E.VILEMIN. In the long run, these practices distort competition, so we called such acquisitions « *killer acquisitions* ».

The manipulation of algorithms by the Big Tech is also a strategy to oust competitors. The use of an algorithm can be an integral part of an abuse of dominant position, behavior prohibited by Articles L420-2 of the Commercial Code (Code de Commerce français) and 102 of TFUE. The most iconic example is when the European Commission fined Google in the case Google Shopping on June 2017. In this case the algorithm defined by Google made the comparison of competitors' prices services likely to be downgraded on the result pages of Google search when the same algorithm was not applicable on Google price comparison service. The Commission's decision fined Google 2.42 Billion for abusive conduct.

IS COMPETITION LAW OBSOLETE TO FACE THE EMERGENCE DIGITAL ERA ?

There is no question that Competition law is showing a gap in front of the digital revolution but still remains efficient. A lot of tools are made available for the Competition Authority and the Jurisdictions to fight anti-competitive practices of the Big Tech.

One of the most efficient tool is the sector inquiry launched by the European Commission and the Competition Authorit. In Article 17 Regulation (Reglement) 1/2003 the Commission is empowered to conduct investigations on a specific economic sector or into any types of agreements in various sectors.

During investigations, Commission can ask companies or group of companies supporting information concerning the application of Articles 102 and 106 of the Treaty and carry out any others inspections required. The Commission can ask companies or group of companies to submit all agreements, relevant decisions and concerted practices. In France, the investigations may be on the form of « *avis* » however with the same purpose. These investigations uncovered some anti-competitive strategy that the Commission could not have identified without this tool. The commission successively fined Asus, Denon, Marantz Philips and Pionner.

Another tool can fight anti-competitive practices, Interim Measures. Codified in Articles L 464-1 of Commercial Code (Code du Commerce français) these dispositions allowed the Competition Authority to punish an alleged practices « *causing an imminent and serious violation to competition regulations , interest of consumers or complaining company* ». The interest of Interim Measures is that they can straighten out substantially anti –competitive conducts. In Directive ECN+ Authority can pronounce on his own initiative conservatory measure without any complaint filed.

At least, there is a control of concentrations done by the Commission and the Competitive Authority. This control is framed by the Regulation (Reglement) N◦ 139/2004 providing a threshold system as mentioned previously. The control of concentrations have a very important role to play to avoid seeing too much assessing market power linked to digital data and to belong to some digital companies.

TOWARDS A NEW COMPETITION LAW ?

Aware of its own deficiencies traditional Competition Law will be oblige to fit in the new digital era to reinforce regulations and to create new obligations for the digital operators. In 2019, two reports : the FURMAN and CREMER reports were submitted to the Government of Great Britain and to the European Commission to adapt Competition Law to the digital era.

The Fulman report placed more emphasis on new tools of regulation as a code of good conduct, a system of compulsory access to a certain type of data and framed development for open standard. The CREMER report preferred to adapt tests that allow Competition Authorities to prove an anti-competitive nature of some unilateral practices without the need to rewrite Articles 101 and 102 of the TFEU.

Yanis BOUHACINE

Student at University of Lyon III (France)

Master’s Degree in European Business Law