Competition Laws And Digital Markets In Developing Countries

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Abstract.

Developing countries have responded to the extremely rapid growth of the digital economy and new associated model platforms by introducing measures to regulate them. However, these measures most often appear to already be outdated. Simultaneously, competition law seems unable to control these evolutions, in part because of the tools which are inapplicable to this new economy. Competition law has demonstrated a flexibility allowing it to adapt to different sectors. Far from pushing for disguised or authoritarian interventionism, it supports changing the culture, tools and procedures used and moving towards regional cooperation to better understand the digital economy. There is no doubt that speed of execution is a key element in determining its effectiveness. Hence, this contribution also examines using provisional measures as procedural tools. Developing countries must pursue developments that will profoundly change their societies and foundational legal standards. The increasing emergence of connected objects on the market will create or modify many interdependent markets, which may in turn highlight new issues. Thus, it will be necessary for these countries to know how to address the problems that will arise, including the question of the local economy and small-to-medium enterprises (SMEs). Competition law and the competition authorities that practice it must evolve to accompany changes and ensure the proper function of the economies of developing countries.

Keywords*: Competition, Digital economy, Developing countries, Cooperation and Interim measures.*

I. INTRODUCTION

Les pays en développement ont réagi à la croissance extrêmement rapide de l'économie numérique et des nouvelles plateformes numériques en introduisant des mesures pour les réglementer. Cependant, ces mesures apparaissent le plus souvent dépassées. Simultanément, le droit de la concurrence semble incapable de maîtriser ces évolutions, en partie à cause d'outils inapplicables à cette nouvelle économie.Le droit de la concurrence a fait preuve d'une flexibilité lui permettant de s'adapter aux différents secteurs. Loin de pousser à un interventionnisme déguisé ou autoritaire, il soutient le changement de culture, d'outils et de procédures utilisés et s'oriente vers une coopération régionale pour mieux appréhender l'économie numérique. Il ne fait aucun doute que la rapidité d'exécution est un élément clé pour déterminer son efficacité. C'est pourquoi cette contribution examine également l'utilisation des mesures provisoires comme outils procéduraux.Les pays en développement doivent poursuivre des évolutions qui vont profondément modifier leurs sociétés et les normes juridiques fondamentales. L'émergence croissante d'objets connectés sur le marché créera ou modifiera de nombreux marchés interdépendants, qui pourront à leur tour mettre en lumière de nouvelles problématiques. Ainsi, il sera nécessaire pour ces pays de savoir comment aborder les problèmes qui se poseront, notamment la question de l'économie locale et des petites et moyennes entreprises (PME). Le droit de la concurrence et les autorités de la concurrence qui le pratiquent doivent évoluer pour accompagner les changements et assurer le bon fonctionnement des économies des pays en développement.

Mots-clés : Concurrence, Économie numérique, Pays en développement, Coopération, Mesures provisoires, Droit, Autorités.

1. Introduction

Digital issues are irrigating all the economies of developing countries. They are transforming all sectors. They are the condition for growth and innovation, but they also entail new risks of restricting competition. The major challenge remains that of the digital transformation of the economy. The Covid-19 crisis illustrated both the dependence on digital tools and services [imagine a company having to work without video-conferencing tools, without an online sales site, without a good network connection, etc.], and also its formidable potential.The global digital economy accounted for 15.5% of the global gross domestic

product (GDP) in 2016. This figure is expected to reach 25% in less than a decade.[1] Many countries have already embarked on this path, including developing countries.Thanks to new economic models based on network effects linked to the gratuitous and sophisticated use of massively collected user data, economic giants have seized and radically transformed the organisation of economic activities and behaviour of consumers. Google, Apple, Facebook, Amazon and Microsoft (GAFAM) represent a market value of three trillion dollars, hold 556 billion in cash and invest 70 billion annually in research and development.[2] In addition to these are other super platforms, such as Netflix, Airbnb, Tesla, Uber, Twitter, Baidu, Alibaba, Tencent and Xiaomi.Faced with the seemingly relentless takeover of companies in the digital economy and the monopolistic aspect which induces concentration of the markets, the first legal power remains competition law.

The control it exercises over concentrations and activities restrictive of competition must make it possible to maintain a healthy and competitive market for the benefit of consumers.However, competition law is not currently widely applied to the digital sector and thus far has been unable to reverse the hegemony of groups like Google or Apple. Although the contributions of digital companies are undeniable and the domination they exert is notably the result of intense innovation and large research investments, few actions have been executed against them compared to the space these firms have taken in our daily lives.In fact, the speed of implementation in the digital economy raises the question of competition law's ability to adapt and evolve.The question of whether the implementation and enforcement of competition law is a relevant concern for developing countries is legitimate.[3] In this context, the implementation of competition law and policy plays an essential role, since they set the rules of the economic game.[4] In Africa, for example, several countries have experienced considerable growth in digital technologies over the past decade. Staggering and hesitant at first, but still unequalled, the progression of their users exceeded all expectations and at times arouses both disbelief and hope for development.In most developing countries, competition authorities have been established relatively recently. They are frequently small and have limited resources to address competition in an increasingly concentrated global economy.[5] However, 'they are free to address their own needs and need not be seduced to transplant law tailored to markets very different from their own'.[6]

Although many laws are drafted after the model of developed countries (mostly the US and EU competition law enforcement systems), the actual enforcement level in developing countries remains weak.[7]These countries must adopt regulations which guarantee the right of small-to-medium enterprises (SMEs) to benefit more from the digital economy and, therefore, have a chance for growth, especially since direct foreign investment cannot substitute the domestic strive for competition.[8]In the era of globalisation, the regulation and control of certain activities should be assigned to independent authorities, because the decision-making mechanisms of political authorities are not appropriate for economic decisions. In addition, certain socio-economic sectors remain particularly sensitive to political changes. Thus, it is necessary to ensure the proper functioning of markets beyond the vagaries of political life.[9]As the digital economy is cross-border in nature, the National Competition Authorities has been developed to respond in a concerted manner to similar cases in several states.The potential of competition law can be exploited in the digital economy by opting for a procedural instrument, which seems, a priori, particularly suitable for framing the rapid movements of the digital economy: measures emergency. Instead of studying a case thoroughly for years and arriving at a late sanction, the authorities can, after a short procedure, issue interim injunctions which must be respected until a final conclusion is reached later. Decisions rendered in a few weeks seem

more suited to the ever-faster pace of digital transformation than procedures lasting years. The price is obviously the risk of error in the assessment and qualification of the facts .

2. Competition law undermined by digital technologies

Competition law should expand its spectrum to address and achieve objectives other than the mere functioning of the market. It should be polycentric[10]. Far from the image, often widespread, of a conquering and all-powerful law that never ceases to extend its influence, competition law today appears destabilised by the emergence of digital technologies. It is facing two main types of difficulties: those related to its scope and those related to its tools.What is striking at first glance regarding the destabilisation of competition law in terms of its scope is the inadequacy of the national framework used by the digital giants. The debate on the taxation of GAFA is the most perfect illustration of this. Proof that this inability to act on the right scale is a concern at the highest level is the fact that digital issues, taken from the perspective of competition law, have been one of the priorities of the major summits over the last two years.Digital issues are also often at the intersection of competition law, intellectual property law and data protection. Hence the hegemony of other laws, particularly digital law, and the question of sectoral regulation. Moreover, debates are taking place on the adaptation of competition rules to the digital environment.Lastly, we note that the competition authorities must cohabit with other sectoral regulators such as the audiovisual regulator, the electronic communications regulator and the IT regulator, which are not failing to make their point of view known and to consider that this issue also falls within their remit.As regards the destabilisation of competition law in terms of its tools, this is a lack of expertise that the competition authorities themselves recognise, hence the use of external experts and sectoral surveys to be able to apprehend and understand these new phenomena.

Examples include the joint study by the French and German competition authorities on big data in competition law and the sector enquiries into online advertising in France and Germany.More worryingly, the concepts used by competition law can sometimes appear outdated. This is the case with the key notion of market. In traditional markets, prices are the best indicator of which goods belong to which market. In digital markets, many goods are free, so the possibility of price analysis disappears. The fact that the use of a platform may be free for some groups and paid for by others can make it very difficult to assess the market position of a company. The concept of the relevant market does not always allow for a proper understanding of the new contours of the digital economy. The elements of analysis may also appear outdated. To ensure that a dominant company is not guilty of predatory pricing, for example, one checks that the company at least covers its variable costs. In the case of a digital platform, the case is more difficult because of the free access to the service on one side of the market. New predation tests should therefore be adapted to these two-sided markets to take account of their complexity. What about liability issues when decisions are made by algorithms due to the rise of artificial intelligence? The seven years it took for Google and its price comparison service to be fined €2.4 billion for abuse of a dominant position have left many observers sceptical about the ability of competition law to respond in a timely manner. The same applies to the nature of the response: legislative or judicial? The European Commission has therefore asked three special advisers - an economic expert, a competition law specialist and a new technology specialist - to produce a report to inform the Commission of the new tools it may need to ensure that digital companies comply with competition law[11].

3. Cooperation of the competition authorities: an institutional response

In a globalised market, it is important that all national decisions are relevant when they handle digital economy cases of a cross-border nature.The effort of homogenisation is necessary for decisions and practices. In fact, the regulation of anti-competitive practices is primarily in the hands of state competition authorities.If these decisions depend in part on the national law specific to each state and the powers respectively vested in the authorities at the regional level, the international free trade areas will provide a framework for forming regulatory standards of competition to address the digital hegemony.Otherwise, it is essential to rely on the competition authorities and their means of rapid intervention in terms of the referral

and processing of cases. These bodies face a lack of resources (human, material or financial) for effectively applying competition law.To do this, these authorities must have sufficient human, legal and financial resources. First, regarding human resources, a competition authority needs experts in the digital field. Any lack of skills can result in a loss of efficiency in analysis and, therefore, in speed of intervention. There must also be legal resources; the texts and standards in place must contribute to the proper implementation of competition law. Financial resources are also integral; conducting the necessary, complex investigations requires funds. Finally, they must have technical resources.

This will contribute to the establishment of cooperation plans, making it possible to detect market failures.However, what is possible in competition law is difficult for national standards, which can overlap and sometimes even be contradictory. While there is an effort to standardise competition law decisions in any regional market, the rules of each country remain diverse. It is, consequently, impossible for digital giants to respect standards contradicting those of a neighbouring state. This complexity is, of course, not likely to provide legal certainty capable of enabling the development of digital innovation, as the competition authorities have called for.The challenge of legal security and transparency requires that the rules applicable to platforms be clearly defined by regulations. Thus, some risks could be defused, allowing the competition authorities to avoid certain interventions. Given their limited means, particularly in developing countries, this route should be studied. An example of this, given the boom in electronic commerce, would be if these countries acquire appropriate policies and regulations to ensure that local SMEs benefit from free access to platforms under fair conditions, as India has done by adopting new rules.[12]Supporting local businesses in a digital world where small businesses are generally taken over by large ones is another challenge in developing countries. Small-to-medium enterprises are generally unable to compete with large international companies and are easily usurped by them. Thus, local economies undergoing liberalisation need a competition law framework that prevents a 'government owned inefficient monstrosity [from] becoming a privately-owned inefficient monstrosity resulting in even more abuses of the company's monopolistic powers'.

[13]Developing countries are grouped together in regional trade and economic frameworks, which reflects how many countries see regional markets as an important route for developing their trade and expanding markets for the benefit of local businesses. Establishing policies and rules relating to the digital economy, competition and consumer protection at the regional level could be more effective in combating the abusive practices of global digital platforms and concentration of digital businesses. Indeed, governments should strive to develop industrial policy strategies to help the digital sector develop and face competition from global digital platforms, including making data available for local and regional development.In Africa, there is a dynamic in favour of a harmonised African continental digital strategy in the context of the African Continental Free Trade Area (AFCFTA).[14]In Asia, the Association of Southeast Asian Nations (ASEAN) plans to create a single market by 2020, which could be the forum and framework for the development of regional competition rules.The Caribbean Community (CARICOM), for its part, has a Regional Competition Commission, which is responsible for implementing regional competition rules.Significant progress is being made in the modernisation of telecommunications networks, regulatory adjustments are being made to account for the immateriality of new activities and a political will to support and encourage the digitisation of economies is clearly displayed. Even if the local conditions of access to and use of information and communication technologies (ICTs) remain strongly under constraint, the stakes in terms of economic and human development which cover the promotion of these technologies, like their social appropriation, opens a field of original research in different legal disciplines.In conclusion, to regulate digital giants, we must not succumb to the illusion of their omnipotence. No serious action can be taken on a small scale. This is why the solution requires regional cooperation from competition regulators.

To avoid unintended consequences from new digital sector policies or regulations, close consultation with all stakeholders is crucial. Such consultation contributes to achieving protection for consumers while promoting competition and innovation. Given the imperative of business investment to create jobs and economic growth and to stimulate innovation and competition, competition authorities are encouraged to meaningfully engage with different actors throughout the process of planning policies and legal frameworks.Everyone knows that the digital revolution has profoundly shaken up societies in developing countries. These upheavals have tested the capacity for action of public decision-makers, who are in a hurry to provide immediate and radical responses. And when it came to regulating the economic power of the new digital companies, all eyes turned to competition law. It is far from certain, however, that the economic problems posed by the irruption of platforms from developed countries into the digital economy of developing countries originate, strictly speaking, in competition problems. Rather, they point to the shortcomings of these countries' industrial strategies, with the fragmentation of national markets making it impossible for competitors from developing countries to emerge from the dominant platforms. They also refer to the shortcomings of fiscal integration, which prevents a fair redistribution of the value captured by foreign operators. Recourse to competition policy is therefore a default choice. But necessity is the law: the means to act must be there, they must be operational and powerful. From now on, it should force overly powerful companies to share the value they preempt, to integrate competitors into their ecosystems, to open up to third parties the data they have collected. This change in perspective will upset the balance of competition law, and the question of its future remains.

3. Interim measures: a procedural response

There are insufficient studies on the questions of temporality, the adequacy of the time of litigation and of digital economy.[15] It is all about speed and promptness. The advancement of knowledge and proliferation of technological products are rapid. In the digital economy, the phases of achieving and absorbing innovation take time to succeed. Today, innovation is at the crossroads of constraints and opportunities for companies, at the risk of losing market share and being immediately vulnerable to the entry of a new competitor.At the European level, the tribulations of Google are a paradigm. After seven long years of investigation, the European Commission is playing a red card against Google. The American giant is sentenced to a record fine amounting to 2.42 billion euros, as of June 27, 2017, for abuse of a dominant position.[16]Given the speed of digital progress, it will be necessary to examine the various challenges to competition law. How can anti-competitive practices not be built and consolidated? How do governments prevent the digital leader of a market from taking everything, forcing others to wait for another unpredictable innovation cycle before removing it afterwards?A reflection on the procedural tools is also essential. First, we may consider protective measures. As an illustration, to act more quickly, the Competition Authority in France has a new tool enabled by the European ECN + directive adopted in December 2018. It can now take action to impose measures in emergency situations to avoid irreversible changes, such as the disappearance of players or the final acquisition of a major position on a market,. This is useful, since injured SMEs and start-ups generally do not dare go to the Authority for fear of retaliatory manoeuvres.The concept of interim measures is of great importance in economic law in general and in competition law in particular.

Based on this observation, the legal arsenals of competition in developing countries contain this notion and can use and benefit from it when facing the hegemony of the digital giants.The various actors are rarely able to endure the slowness of the traditional procedure, because if practices suspected of being anti-competitive persist during the prosecution, they can generate significant and irreparable outcomes in the relevant markets.These measures contribute to the effectiveness of the fight against anti-competitive practices, because they allow the competition authorities to pronounce interim measures in an emergency pending a decision, that is to say ‘intervene by freezing the situation in question’. It is a manifestation of legal realism which gives the competition authorities a veritable ‘summary authority’. The recognition of this power is offset by the need to justify such provisional measures and compliance with certain formal and

substantive conditions. This is why the conservatory act is both a ‘finalized act’, in the sense that it is defined by its aim, which is to preserve heritage wealth, and a ‘conditioned act’.Interim measures, therefore, translate into the obligation to avoid a probable danger. These are not the normal tools for managing a situation, but temporary measures seeking to protect the useful effect of a decision to come. They are acts awaiting the decision on the merits, but more than that, they participate in its development.

The provisional measures reflect a ‘concern for economic realism’. Indeed, a period of several months must necessarily elapse, due to the requirements of the procedure. Between the referral and the decision on the merits, the continuation of anti-competitive practices during this period risks irreparable damage to the general economy or the sector concerned and can even eliminate certain undertakings so that the injunctions that the competition authorities order at the end of this procedure become inapplicable. While it is, therefore, important that the competition authorities can, in certain cases, intervene by freezing a situation to avoid these irreversible attacks, the use of this ability to intervene must remain strictly limited so that it cannot lead to unjustified interventionism, which is contradictory to competition law. This is why the implementation of these measures is subject to the presence of certain conditions.The Moroccan legislator, for instance, has ruled out the hypothesis that the competition council cannot decide to implement interim measures without receiving a request from a party. Competition authorities in other developing countries are called to follow these steps to handle emergency situations.Recourse to interim measures must be done with some caution, without sacrificing the quality of the law or the procedural rights of the parties. Despite the imperative of speed, the quality of the investigations, motivation, presumption of innocence, adversarial principle and legally engaged rights of the parties to judicial proceedings must be guaranteed.

4. The case of Morocco

In a transitional economy such as that of Morocco, competition law must prevent large companies from adopting abusive tactics that aim to eliminate small, effective competitors. Additionally, businesses must be prohibited from fixing prices, sharing markets and employing other tactics that harm consumers. The process of liberalization and the establishment of a new market economy require the application of competition policy and law to control and regulate the power of the markets and fortify vulnerabilities before they are irretrievably exploited to the detriment of the economy (El Bazzim, 2023).It is an ambitious step that Morocco intends to take. To regulate the activity of the digital economy and in particular that of the digital giants, otherwise known as "GAFA", which, although present and making profits on Moroccan territory, escape any control. This situation is so intriguing that the latter, through their strength and technological superiority, exert a stranglehold on the market to the point that they often find themselves in situations of dominance and unfair competition. Is the Moroccan Competition Council legally equipped to confront the digital giants? Its president points out that: "In the current law, nothing prohibits the opening of proceedings as long as there is a prejudice somewhere, as long as there is a contentious referral".Why not resort on its own initiative, as part of the remit of this council? The regulator will not go that far. "We essentially act when there is a prejudice and a complaint. As long as no one has come to protest, there is no reason to open files," emphasises the president of the Council, continuing "we ask the players in the Moroccan market to address us when they feel there is abuse”.

(Medias24, 2022) The Moroccan legal arsenal of competition does not constitute an obstacle to the opening of cases against the digital giants. In countries with similar legislation (France, United Kingdom, etc.), regulatory authorities have taken steps that oscillate between notices and financial penalties, referring to laws like those in Morocco.Enforcement action is a partial response to the problem of digital concentration. It is also an ad hoc reaction to an evolving phenomenon. It has its limits, as litigation procedures are long and can only be successful when technology has evolved so much that these solutions become obsolete, which is why it would be useful to have regulations that would allow regulatory authorities to act ex ante. Policy makers and competition policy makers therefore need to take into account the various developments in order to control the risks of digitalisation without compromising the benefits it can bring, while taking into account the rapid evolution of technology. It goes without saying that good regulation presupposes good legislation and this is where Morocco's great challenge lies. Although there is no effective

regulation and a specific law, Morocco has taken a first step regarding the OECD agreement establishing a minimum tax on multinationals, including GAFA.

This agreement, which should come into force in 2023, establishes a minimum tax on these operators in the country where they operate. But regulating is not just about focusing the activity of GAFAs, it requires a wide range of regulations and laws that frame their behaviour in relation to competition in different markets. Hence the need for harmonious legislation that would reinforce the current legal framework.In this complex and fast-growing digital environment, governments and regulators need to constantly review the adequacy of the legal and regulatory framework to ensure sound development conditions.This new field is gradually being introduced by looking at international experiences. In this context, the Competition Council, which organised in Marrakech in 2022, the international conference under the theme "Digital Transformation between Regulation and Competitiveness" (anrt, 2022) . The Moroccan Council can do many things. It would be easy for it to establish cooperation with the communication and information technology authorities to better understand the functioning of the sector and to better design competition law in the digital field. The digital market is evolving and moving so fast that the rules have to keep up.

II. CONCLUSIONS

Investment in ICTs in developing economies has become a major topical issue, and in the absence of a systematic inventory of initiatives and their achievements, many young players are seizing on the digital option to drive diversification in the economy. Economic growth requires creativity, innovation and the development of new markets with high export potential. Digital choice can serve as a powerful accelerator. A digital strategy should encourage the mobilisation of actors from various origins to optimise interactions and promote inter- and multisectoral achievements. The implementation of a digital strategy should be accompanied by strategic governance and a monitoring system, which would make it possible to report, in real time, the results of the initiatives supported by the implementation plan and those developed in independent ways but contributing to the strategy.The current perspectives described above show a clear evolution towards a strengthening of vertical market governance by competition authorities in developing countries. Another, horizontal, path should be preferred. It consists in associating more closely the addressees of competition rules (consumers, enterprises) with their implementation. As far as competition law is concerned, it is a further step in the decentralisation of competition law enforcement. The competition culture must be defended and disseminated, by widening the circle of those who can implement it in their own sphere of action.Governments in developing countries are taking note of the radical novelty of activities made possible by digital technologies. They rely on these activities to solve problems, better serve consumers and create jobs.

They also observe that these activities sometimes show excesses, which public authorities must then correct by adopting new and adapted rules. In general, one expression often arises in these debates: ‘regulation of the market by competition’, a coded expression which means that when faced with digital companies perceived as upsetting the established order, things must be reframed and sometimes tough.In the economic field, digital technology favours concentrations, which themselves open the way to anti-competitive practices. These practices, in part, undermine the potential of developing countries by restricting competition and innovation. Therefore, it is no longer possible to wait; an economic regulatory framework adapted to the 21st century and to developing countries must be adopted.It will be good policy to involve digital companies in a process of co-construction of the applicable rules. Experience shows the difficulty of regulating the digital sector through binding decisions imposing structural or behavioural remedies. The Microsoft case in the mid-2000s or the Google Shopping case in the late 2010s can be taken as examples: the remedies applied were only relatively effective. Horizontal and negotiated rule-making in the digital economy avoids many of the biases of the traditional regulatory method.All the courses of action described in the sections above demonstrate that concrete, pragmatic and credible action is possible. The gigantism of GAFAM paradoxically constitutes an opportunity for developing countries, as any damage to their brand image can have a substantial effect on the branded image of these companies listed on stock exchanges that embody the maturity of the liberal economy. Regulation by notoriety is, therefore, a weapon which states

should not deprive themselves of. Likewise, these giants can reveal their weaknesses when the ethical convictions of the employees force them to modify their trading orientations.

The digital economy in these countries is awaiting an update of the competition rules governing the various sectors concerned. However, do states or competition authorities have the means to impose rules on large digital businesses? The scale at which these companies operate far exceeds the territory of many states. The nature of their activity sometimes makes them unseizable for public authorities. The power of their business models and the strength of their bond with the multitude of connected individuals prevent most states from establishing a power relationship with them. In a way, the idea that states are overwhelmed only reinforces calls for regulation and regional cooperation, but concurrently, we are no longer entirely certain that it is still possible.To step back from the passive spectator attitude has, therefore, become insistently pressing, especially in the new paradigm of the digital economy in which the shape and size of businesses have changed.Many changes are still before us and will profoundly modify the societies of developing countries and legal relations on which they are founded. Placing more connected objects on the market will create or modify many interdependent markets, which will pose new problems that will have to be addressed. Competition law and the authorities who practice it must be able to evolve to support these changes for the general interest.The upheavals induced by the irruption of digital technology in many sectors of activity have prompted to revise the conceptual tools of competition law and its modes of intervention, so that decisions remain effective and strictly proportionate to the requirements of the competition.

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