02
APRIL 2023

CRUZ VILAÇA ADVOGADOS

IN THIS EDITION

FOREWORD

The Metadata Controversy and European Law

The digital transition is a major objective of the European Union (EU), a central pillar, together with the climate transition, of the EU Strategic Agenda for the period 2019-2024.

There are several legislative acts already in force, as well as case law adopted, concerning the digital reality, with special focus on the issue of access to data generated in this context. This is the case of the new Data Regulation ("Data Act"), currently being negotiated between the Council and the European Parliament and which aims to complement the so-called "Data Governance Act", a European regulation in force since 23 June 2022, which will be applicable throughout the EU from September 2023.

The "Data Governance Act" promotes data sharing within the EU and facilitates its exchange in a secure manner; it is addressed to intermediaries and public sector bodies and addresses the issue of data altruism, allowing the creation of common European data spaces in sectors such as industry, health or administration; the new "Data" Regulation will allow increased control over the data that concerns each person, through the principle of enhanced portability, permitting everyone to decide on the use of the data generated by their connected products.

Other legislation, such as the Digital Services Act (DSA) or, previously, the GDPR, regulate digital platforms and the use of data. The DSA, which entered into force on 16 November 2022, provides in particular for mechanisms for the public supervision of these platforms throughout the EU.

At the heart of these and other rules are therefore the use, access and disposal of data generated by electronic communications. At stake are values such as data privacy and the protection of fundamental rights, which sometimes conflict with other legal needs such as public security or national interest.

In Portugal, the matter gained relevance when the Constitutional Court decided, by its ruling of 19 April 2022, to declare unconstitutional, with general binding force, the rules of the so-called "metadata" law (Law No. 32/2008 of 17 July 2008, on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks). This law determined the retention of metadata by the providers of electronic communication services and for periods of one year, and also that the judicial authorities could request access to previous metadata, in case of suspicion of criminal offence. At stake was also Article 9 of Law No. 32/2008, which did not require notification to the person concerned of access to his/her data in the framework of the criminal investigation.

Av. Duque de Ávila, 141-4Dto
Edifício OMNI
1050-081 Lisboa-Portugal

info@cruzvilaca.eu
+351 211 609 524

It should be recalled that metadata are those relating to the dates, origin, destination, location and contact period of communications by means of, for example, SMS, telephone calls and other messages made electronically. They do not imply access to the contents.

Law No. 32/2008, updated by law 79/2021 of 24 November 2021, resulted from the transposition of Directive 2006/24/EC, of 15 March 2006, stemming from the 2004 and 2005 terrorist attacks in Madrid and London, which provided for the creation of a common European arrangement for the retention of electronic data in the context of investigation linked to organised crime and terrorism.

Directive 2006/24/EC – as explained in detail by José Luís da Cruz Vilaça (in Cruz Vilaça, J. L., L'application de la Charte dans l'ère du numérique. Revista de Derecho Comunitario Europeo, 66, 447-469, 2020, available at : https://doi.org/10.18042/cepc/rdce.66.06) – has been declared invalid, in its entirety and with retroactive effect, by the 2014 judgment of the Court of Justice of the EU (CJEU), Digital Rights Ireland and Sitlinger (of 8/04/2014, C-293/12 and C -594/12, EU:C: 2014:238). In that judgment, the CJEU held that, since fundamental rights relating to privacy and personal data were at stake (even without implicating the content of communications), european rules should contain minimum safeguards against the risks of abuse and against any unlawful access and use of that data. That was not the case, the Court decided, of the 2006 Directive, which exceeded the limits imposed by compliance with the principle of proportionality regarding fundamental rights.

From that moment - eight years ago - Portugal should have amended Law 32/2008, as other European countries have done in the case of their legislation. Portugal has not done so.

In 2017, the Ombudsperson suggested to the Portuguese government that it should amend Law 32/2008, a suggestion that was not attended. For that reason, the Constitutional Court was asked to give its opinion in 2019, finally deciding in 2022 that the Law disproportionately violated citizens' rights.

As expected, questions immediately arose about the consequences of the retroactive repeal of the law, especially in what concerns criminal investigation, a debate that is far from being exclusively national, and which gives us the motto to understand the importance of metadata. In February 2023, for example, the Évora Court of Appeal annulled the judgment of the Tancos case, precisely because of the declaration of nullity of the evidence obtained through the use of metadata. Two months later, the Supreme Court of Justice decided that the declaration of unconstitutionality of the Metadata Law does not apply to cases with a final and unappealable decision, considering that for such revision it would be necessary that the Constitutional Court had expressly ruled against the res judicata exception.

How the matter will be resolved is naturally something that is now up to the legislative power to decide - and the process is under discussion in the Parliament. But it would have been enough if the various Portuguese governments after 2015 had taken into account European law, in particular the referred jurisprudence, to have avoided the present situation.

Cruz Vilaça Advogados will continue to follow this matter. We expect to present a more detailed article (newsletter) on it soon. Until then, we recommend the reading of the clear text quoted from our managing partner José Luís da Cruz Vilaça.

Paulo de Almeida Sande
Sócio

Av. Duque de Ávila, 141-4Dto
Edifício OMNI
1050-081 Lisboa-Portugal

info@cruzvilaca.eu
+351 211 609 524

Source: website of the Court of Justice

JUDGMENT *TRÁFICOS MANUEL FERRER*

On March 16, the Court of Justice of the EU delivered its judgment in *Tráficos Manuel Ferrer* (C-312/21), regarding the private enforcement of competition law, which concerns the requirement of full compensation for the damage suffered as a result of anticompetitive conduct under Article 101 TFEU, in particular by clarifying the possibility of national courts to estimate the damage in situations where that damage has been established and it is, in practice, impossible or excessively difficult to quantify it precisely.

COMMISSION REFERS HUNGARY TO THE COURT OF JUSTICE FOR VIOLATION OF ARTICLE 2 OF THE TREATY ON EUROPEAN UNION

The European Commission has referred Hungary to the Court of Justice of the EU for alleged violation of fundamental values of the EU (Charter of Fundamental Rights, Article 2 TEU, Article 56 TFEU, Directive 2010/13/EU, Directive 2000/31/EC, Directive 2006/123/EC, Regulation (EU) 2016/679) following the adoption in 2021 of a law considered discriminatory against the LGBT+ community (case C-769/22). Portugal has decided to join the Commission and will therefore send its written observations to the Court of Justice, supporting the concerns raised by Brussels on the Hungarian law. This is the first time that a Member State is referred to the Court of Justice for suspected non-compliance with Article 2 TEU.

ADVOCATE GENERAL RANTOS' OPINION IN CASE *AUTORIDADE DA CONCORRÊNCIA AND EDP*

On 2 March 2023, Advocate General Rantos delivered his Opinion in case *Autoridade da Concorrência and EDP* (C-331/21). The national courts asks whether, and in what conditions, a non-competition clause in a partnership agreement between undertakings operating in different product markets can constitute an agreement with an anti-competitive object within the meaning of Article 101 TFEU. The Advocate General considered that the questions referred for a preliminary ruling may be divided in four groups: (i) the assessment of whether undertakings present on separate product markets are potential competitors of one another; (ii) the legal characterisation of an association agreement aimed at promoting the activities of the contracting parties; (iii) whether a non-competition clause within the framework of such an agreement is ancillary in nature; and (iv) whether such a clause can be characterised as a restriction of competition 'by object'.

2022 STATISTICS ON JUDICIAL ACTIVITY

On the 3rd of March, the Court of Justice published its judicial statistics report for 2022, which highlights that the Court of Justice and the General Court have been dealing with a high number of cases that include issues on the rule of law, the environment and digital privacy. In 2022, the two courts completed 1,666 cases. As regards the duration of proceedings in the case of references for preliminary rulings, the Court of Justice has recorded an average of 17.3 months.

Source: website of the Court of Justice

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REQUEST FOR A PRELIMINARY RULING IN *PRÉFET DU GERS E INSTITUT NATIONAL DE LA STATISTIQUE E DES ÉTUDES ÉCONOMIQUES II*

On 6 march 2023, the request for a preliminary ruling from the Tribunal judiciaire d'Auch (France) lodged on 23 November 2022 (C-716/22), concerning Brexpats' right to vote in European elections, was officially published. The case concerns a British national living in France since 1984 who was removed from the electoral roll following the conclusion of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 30 January 2020.

CONCENTRATIONS THAT DID NOT MEET MERGER CONTROL THRESHOLDS OF REGULATION 139/2004 OR NATIONAL LAW CAN BE ASSESSED EX POST UNDER ABUSE OF DOMINANCE RULES

On march 16, the Court of Justice of the EU concluded, in *Towercast* (C-449/21), that a concentration of undertakings which has no Community dimension within the meaning of Article 1 of Regulation (EC) No 139/2004 of 20 January 2004, is below the thresholds for mandatory *ex ante* control laid down in national law, and has not been referred to the European Commission under Article 22 of that regulation, can be examined *ex post* by a competition authority of a Member State in order to verify if that concentration constitutes an abuse of a dominant position prohibited under Article 102 TFEU, in the light of the structure of competition on a market which is national in scope.

COMMISSION COMMUNICATION AMENDING ITS 2008 GUIDANCE ON ENFORCEMENT PRIORITIES CONCERNING EXCLUSIONARY PRACTICES

On the 31 of march, the European Commission adopted a Communication (and Annex) amending its 2008 Guidance on enforcement priorities concerning exclusionary abuses. The package is the first major policy initiative in the area of abuse of dominance rules (article 102 TFEU) since 2008, and it seeks to ensure that abuse of dominance rules are clear, effective and applied vigorously to the benefit of European consumers and the economy at large.

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+351 211 609 524

LATEST NEWS ON OUR WEBSITE

GLOBAL DICTIONARY OF COMPETITION LAW

JJosé Luís da Cruz Vilaça, the founding partner of Cruz Vilaça Advogados, former judge of the Court of Justice, and President of the General Court of the European Union is the author of an entry in the "Global Dictionary of Competition Law" on the definition of "prejudice (Art. 267 of the TFEU)". The entry in the “Global Dictionary of Competition Law” contributes to a better understanding of the preliminary referral mechanism, which according to the lawyer, an expert on European Law, “is the true basis of the EU legal and judicial system”.

See the full Article here.

CJEU RULES ON PORTUGUESE RULES ON INCORPORATION OF BIOFUELS INTO FUELS

On 9 March 2023, the Court of Justice of the EU rendered its judgment in case Vapo Atlantic (C-604/21), ruling that the incorporation obligations of biofuels into fuel, in force in Portugal through Decree-Law no. 117/2010 (currently repealed and replaced by Decree-Law no. 84/2022), constitutes a technical regulation for the purposes of Directive 98/34. Accordingly, it can be enforced against individuals only if its draft has been notified to the European Commission, which did not occur.

Under the mentioned national legislation, companies that failed to comply with the incorporation obligations were subject to the payment of a financial compensation. The CJEU's judgment, which has erga omnes effect and accordingly is binding for all the entitites involved - determines that those compensations cannot be enforced.

Rita Leandro Vasconcelos (partner at CVA) and **Mariana Martins Pereira** (principal associate at CVA) intervened in these proceedings on behalf of Vapo Atlantic, S.A.

Source: website of the European Commission

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