Optimising public enforcement through cross-institutional cooperation

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15. Breaking down enforcement silos

Digital markets require a multi-disciplinary approach. Anti-competitive conduct can also breach other areas of law such as data protection and consumer laws. The different competent authorities must therefore work together to provide a coherent and efficient response, especially when it comes to identifying the authority best placed to intervene and to designing appropriate behavioural remedies. The European Data Protecting Supervisor Clearing House initiative is a step in the right direction, but a stronger commitment is needed by the authorities concerned.
Why it matters to consumers?

- Better understanding of online consumer harms.
- More coherent enforcement to target specific harms with the right legislative tools.
- More effective remedies in consumer-facing markets to ensure meaningful changes in the market.
- “One stop shop” for complaints by consumers and consumer organisations.
## The Facebook cases

<table>
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<tr>
<th>Country</th>
<th>Authority</th>
<th>Year</th>
<th>Details</th>
<th>Legal Basis</th>
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<td>Belgium</td>
<td>Data Protection Authority</td>
<td>2015/2016</td>
<td>Placement of tracking ‘Datr’ cookie without user’s consent, allowing Facebook to track users in third-party websites. Legal basis: ePrivacy legislation.</td>
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<td>Italy</td>
<td>Competition and Consumer Authority</td>
<td>2018</td>
<td>Undue influence (aggressive practice) on users caused, who suffer, without express and prior consent, the transmission of their data from Facebook to third-party websites/apps, and vice versa. The undue influence is caused by the pre-selection by Facebook of the broadest consent to data sharing. Legal basis: UCPD.</td>
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<tr>
<td>Germany</td>
<td>Federal Cartel Office</td>
<td>2019</td>
<td>Conditionality for the use of Facebook social media services to the collection, combination and use of data from third-party websites and apps, without user consent. Legal basis: GWB.</td>
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Multidimensional approach

Data Protection Law
- Protection of human dignity (in personae right)
- "Consent"

Consumer Law
- Protection of consumer’s economic autonomy
- "Informed decision"

Competition Law
- Protection of competition as a process
- "Consumer welfare"

Information asymmetries, lack of bargaining power in B2C

Unfair commercial practices by dominant undertakings for data extraction
Areas of co-operation

1. Adjudication of competences between authorities.
2. Sharing of information and evidence during the investigative phase.
3. Remedy design:
   - Consumer-facing remedies e.g. incorporating behavioural testing.
   - Data-sharing remedies e.g. ensuring harmony with the GDPR / ePrivacy.
Institutional considerations

What criteria to follow for the adjudication of competences?

• Identification of intervention benchmarks in the substantive Law:
  • Did the behaviour lead to an infringement of a positive or negative obligation?

• Who is better placed to deal with the infringement? Two options:
  • A) identification of one authority to deal with the infringement:
    • This choice might be easier if an agency embodies both consumer and competition powers.

  • B) concurring competences
    • DPAs, Consumer authorities and competition agencies might open parallel investigations
      • Problematic? Not always, but risks incompatible or incomplete remedies.
      • Ne Bis In Idem: no issue per se if proceedings follow "complementary objectives covering (...) different aspects of the same unlawful conduct at issue" (Di Puma and Zecca, Joined Cases C-596/16 and C-597/16, para 42)
Models of co-operation

Ad-hoc dialogue       Structured dialogue       Integrated dialogue

Informal             Formal

Type of engagement
Models of co-operation

- **Model 1**: informal, *ad-hoc dialogue* between authorities
  - E.g. FR NCA interim measure on access to customers data base in GDF Suez merger (2014); DE NCA Facebook investigation (2017-2019).

- **Model 2**: *Structured dialogue*, formal channels of communication, legal obligation to co-operate.
  - E.g. Article 23 CPCN Regulation: “Where the coordinated actions concern widespread infringements or widespread infringements with a Union dimension of the legal acts of the Union referred to in Article 2(10), the coordinator shall invite the European Banking Authority to act as an observer.”
  - National initiatives in FR (Autorité de la concurrence + DGCCFR 2019 MoU)
  - PeerR (Energy)

- **Model 3**: *Integrated dialogue*, conducting common investigations but issuing separate decisions.
Models of co-operation

Ad-hoc dialogue
- FR MoU, ARCEP initiative
- UKRN
- CPCnet – EBA (Article 32 CPCN Reg)

Structured dialogue
- CPCnet – EDPB (Recital 45 CPCN Reg)
- Digital Clearing House
- PeeR (Energy)
- EBA consumer protection committee (Article 3(6)(c) EBA Reg)

Integrated dialogue
- GDPR consistency mechanism (only within DPAs)

Type of engagement
- Informal
- Formal
Co-ordination at EU level

• EDPs ‘Digital Clearing House’
  • “to bring together agencies from the areas of competition, consumer and data protection willing to share information and discuss how best to enforce rules in the interests of the individual”.

• European networks of authorities: EDPB – ECN/EC – CPCN + regulated industries
  • Start with common meetings to identify priority areas.
  • Currently, there is limited scope to discuss cases: see most recently Google/Fitbit merger.
  • The EC could consider opening formal channels of communication between the networks.
The DMA: an opportunity for a more coherent approach to public enforcement?

• Creating formal channels of co-operation e.g. following the EBA model:
  • The Supervisory Authority “shall establish, as an integral part thereof, a Committee on consumer protection and financial innovation, which brings together all relevant competent authorities and authorities responsible for consumer protection with a view to enhancing consumer protection, achieving a coordinated approach to the regulatory and supervisory treatment of new or innovative financial activities” (Article 3(6)(c) of the new EBA Regulation).

• Tailored to gatekeepers in digital markets, but to be extended in the future to other markets.

• One-stop shop for consumer organisations: structured-cooperation to submit evidence and complaints which might fall within the competence of different authorities.
  • Model: MOU between Consumentenbond and ACM
  • EU level: CPC external alert system-like for the DMA?
Preliminary conclusions

1) Convergence of laws in digital markets require a multidisciplinary approach to enforcement.

2) Opportunity for cross-fertilisation between different legal disciplines.

3) While flexibility seems important, enforcement at national and EU level would benefit from a more structured dialogue between authorities and consumer organisations.

4) There is scope to streamline co-operation following the examples of the CPCN Regulation or the EBA Regulation.
Thank you for your attention

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