

Scoping paper – Competition law enforcement at the intersection between competition, consumer protection, and privacy

Paper for ICN Steering Group

Introduction

The relationship between competition and consumer laws and policies has been topical for a decade or more and, if anything, has become more complex.¹ The additional interaction with privacy regulation has added a further dimension to this.

Drivers of this increased complexity and increased focus on this area include:

- Changes in information technology and the growth of large technology platforms that have revolutionized how personal and non-personal data is collected, stored, transmitted, and used for commercial purposes.
- The growth and proliferation of strategies for collecting and using such data which have enabled large technology platform ecosystems as well as other businesses such as data brokers, ad serving companies, developers of Internet of Things devices and app developers etc. to establish new models and systems for advertising, distribution, and automation, including:
 - The value of user data (e.g. to target advertising, but also to improve products / services and to train AI).
 - The use of data and computing power to enable more complex strategies (e.g. dynamic or individual pricing and yield management; services including advanced ranking and/or matching technologies).
 - The use and effect of choice architecture and the use of algorithmic decision-making, including the framing of consumer choice.
 - The potential contribution of data and access to data to entrench market power and/or barriers to entry.
 - The development of behavioural economics and greater academic understanding of interactions between consumer behaviour and competition concerns.
 - The expansion and updating of privacy laws and consumer laws.²

¹ See for example OECD work such as the Joint Meeting of the Competition Committee and the Committee on Consumer Policy on 28 November 2018 inter alia on i) Personalized Pricing ii) Quality in Zero Price Economy; ABA 68th Antitrust Spring Meeting, April 21-24, 2020 “Where Competition and Consumer Protection Meet”; Bundeskartellamt, Consumer Protection and Competition Law, Meeting of the Working Group on Competition Law, 6 October 2016.

² E.g. the EU Consumer Protection Cooperation Regulation was recently updated in order to better enforce EU consumer law, in particular in the digital environment; and the EU General Data Protection Regulation (GDPR) set up a one-stop shop enforcement system under which national data protection authorities (DPAs) can adopt infringement decisions and impose fines.

National competition agencies have already reacted through enforcement actions, inquiries, and reports.³

Context and Competition Concerns

The changes in data practices and the business models of a range of data related businesses which have been facilitated by information technology raise or at least emphasize a host of interconnected legal and policy issues that involve the relationship between the competition, consumer and privacy regimes.

In simple terms, competitive markets generally help achieve the goals of consumer and privacy policy, and enforcing consumer / privacy laws may help make markets more competitive in particular by enabling consumers to make well-informed decisions about their choices.

But this may not always be the case. It has been argued that in some instances intense competition could encourage a ‘race to the bottom’ on consumer protection or privacy standards, or that consumer / privacy enforcement will not be pro-competitive, e.g. enforcement of consumer protection laws may limit innovative entry, or data protection standards in complex ecosystems may be implemented in ways that favour large incumbents.

Given these complexities, there appear to be a number of issues which may arise:

- The application of one regime may relate to the goals of the other.
- The application of different regulatory regimes may produce tension.
- Issues that present as a competition problem may on investigation turn out to also present a consumer (or privacy) issue, or vice versa.
- Two (or more) regimes may apply, with an equivalent, or perhaps a different, result.
- A finding from one regime may be relevant in another, or to the analysis required by another.

The development in data collection changed the dynamic in many markets and also raises additional specific competition law enforcement issues:⁴

- The contribution of data (and in particular the data collection and use practices of firms) to assessments of market power in digital markets and, in particular, to network effects,

³ Examples include: The Bundeskartellamt’s recent Facebook decision; the joint paper on data and its implications for competition law published by the Autorité de la concurrence and the Bundeskartellamt, the Italian AGCM’s recent WhatsApp and Facebook decisions (on consumer protection grounds) and the enquiry on big data jointly carried out with the privacy and telecoms regulators; the JFTC in Japan issuing draft guidelines on digital platforms abusing their superior bargaining position through transactions involving customer data; the UK CMA competition inquiries in banking and energy sectors that resulted in consumer-facing remedies (open banking, price cap); the Hungarian GVH’s Airbnb commitment decision, Google commitment decision (personalisation of advertisement, data processing practice of chat services), PayPal commitment decision and market analysis on digital comparison tools; the CMA’s digital platforms market study, the digital platforms inquiry of the ACCC in Australia.

Also see the ‘Competition policy for the digital era’ report, prepared by Vestager-appointed expert ‘Special Advisers’, and the Furman review commissioned by the UK Government.

⁴ On algorithmic pricing decisions and collusion see: ongoing ICN Cartel Working Group project on “Big Data and Cartels”; OECD Roundtable on Algorithms and Collusion; CMA’s Economic working paper on the use of algorithms to facilitate collusion and personalized pricing; Issues paper by Portuguese ADC on Digital ecosystems, Big Data and Algorithms; Report by BRICS Working Group on Digital Economy; Study by French ADLC and German BKartA on Algorithms and Competition.

barriers to entry and economies of scale and scope.

- Whether data collection and use practices, and/or privacy standards can be a measure of service quality and hence a potential measure of competition in both merger and conduct enforcement cases.
- What existing legal regimes say about what rights attach to user data and whether and under which circumstances failures to transfer or allow access to important data to other companies can be considered anti-competitive.
- Policy questions about the appropriateness of competition remedies related to data and the potential effects on dynamic competition and incentives to innovate.
- The relationship between competition remedies and other regimes.
- Policy and wider debates about the fitness of competition policy for the digital age, and the potential need for ex ante regulation.
- The potential for privacy laws and new regulatory regimes to either lessen or increase barriers to market entry and competition.

As regards the agencies that need to grapple with the above issues, there is significant variation in the way that competition, consumer and privacy functions are distributed and discharged in the jurisdictions of ICN members.⁵

Purpose of Project

Recognising both the global nature of these issues, the global operations of some of the largest firms reliant on extensive data collection and use, and the value gained to the ICN through the sharing of experience and expertise of the Members, the project seeks to achieve the following objectives:

- Increase the understanding of ICN members of how their fellow agencies consider the issues identified above which lie at the intersection of competition, consumer and privacy law enforcement
- Share knowledge and expertise developed by ICN members in dealing with the issues identified above.

Despite the commonality and global nature of the business models being considered, there seems to be significant variation in the way competition authorities understand and approach the issues which arise at the intersection of competition, consumer and privacy enforcement. This means that there is room for ICN members to increase their understanding.

Exclusions:

- The project will focus on the perspectives of ICN members as competition agencies. It will not require the involvement of non-competition agencies, but competition agencies may be able to share experiences and knowledge from consumer protection and privacy enforcement in their jurisdictions.
- While multifunction agencies will be able to share their experiences, the project will not address issues related to the institutional design of competition agencies or make any recommendations regarding institutional design.

⁵ The OECD held two roundtables on "Changes in institutional design of competition authorities" in December 2014 and June 2015 and will hold a roundtable on consumer data rights and impact of competition in June 2020.

Project Output

Task 1: Research and background; issue identification

A project drafting team of interested Steering Group members and other ICN members will review existing work to identify issues for competition agencies that may arise when:

- Prospective cases simultaneously raise competition concerns and potential consumer or privacy concerns including issues raised or emphasized by changes in data practices.
- Existing or proposed laws impose data protection obligations on businesses and/or require businesses to share or restrict data where those rights or obligations have a potential effect on competition law enforcement.

We anticipate that it will be possible to collect the requisite information through a combination of desk-research (including drawing from existing work and work produced in preparation of the OECD roundtable on consumer data rights and impact of competition to be held in June 2020 and informal / qualitative discussion amongst ICN members. This task will flesh out the issues that arise, and the preparation of a bibliography of useful existing work.

Timeline: draft paper by May 2020.

Task 2: Member Input

The team will gather the perspectives of ICN members, including any examples of real-world cases of the issues arising from this intersection in competition law enforcement cases, to provide a practical focus for the project. The format will include optional written responses or discussion input.

Timeline: Request to members in March 2020. Draft results for discussion at 2020 annual conference in May. Member input results to be finalized in fall 2020.

Task 3: Discussion

In addition to written input, the project can usefully include events dedicated for discussion of the issues alongside Tasks 1 and 2.

- Network-wide teleseminars: series of seminars in March & July 2020
- Conference sessions: discussion session at the 2020 conference (and possibly 2021)
- Workshop: discussion event in late 2020/early 2021

Task 4: Final project output

Using member input, draft an agency considerations document on how competition agencies address issues that may arise when cases simultaneously raise competition, consumer, and privacy issues including issues raised or emphasized by changes in data collection and use practices, possibly building on case studies and common scenarios.

Timeline: informed by Tasks 1-3, the final written work product and associated discussion event would conclude the project in 2021.