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Resolution on Competition, Privacy and Consumer Welfare

Introduction

TACD welcomes the opportunity to contribute to the European Commission's and the US Federal Trade Commission's consultations that have been running in parallel regarding the future of competition law and policy. This contribution focuses on the interplay between competition, privacy and consumer welfare in digital markets.

Consumers benefit from the existence of competitive markets, in which they can freely choose among a wide range of products and services. Competition policy plays an important role in this regard by ensuring that competition is not disrupted in a way that can harm consumers directly (e.g. leading to price increases or less choice) or indirectly (e.g. weakening competition as a process by hampering the ability of firms to compete on the merits).

With the eruption of digital technologies and fast-developing digital markets, new opportunities and challenges emerge for consumers, the economy and society as a whole. The incorporation of technological solutions is, on the one hand, bringing benefits to markets and consumers, reducing production and distribution costs, and creating the conditions for new consumer markets offering innovative products and services. From both company and consumer perspectives, these are welcome developments as they make markets more competitive and efficient to the benefit of consumers.

On the other hand, however, both in the EU and the US, new challenges have emerged about how to apply competition laws in digital markets, notably in markets where consumers access products and services not in exchange of a monetary price but as a result of the collection and processing of personal data that is used for targeted advertising, screening, eligibility and other purposes. Further to this, the increasing exploitation of this vast amount of data collected, combined with micro-targeting by corporations, have resulted in practices (e.g. online disinformation) with significant negative implications for the working of democratic institutions.

In this regard, TACD is particularly concerned about:

- The increasing level of concentration of the online advertising market and how this impacts the rights of consumers to the protection of their personal data. Privacy harms are directly caused by the business models of companies in dominant positions which can impose excessive collection of data on people who have become "captive users."

- The inability of the existing legal framework to tackle new forms of exploitative practices (e.g. imposition of unfair contractual conditions in take-or-leave contracts) and exclusionary abuses (e.g. manipulation of ranking results) that lead to consumer harm.

- The difficulties for the US and the EU to develop a common and effective approach to deal with these new challenges. TACD understands that the EU and US systems present differences on the legal foundations of competition law, but closer alignment on essential issues (e.g. how to treat data in competition assessments) is urgently needed to offer a common response to the same practices happening on both sides of the Atlantic.

- The hesitancy of competition law enforcers, especially in the US, to take into account non-price harms resulting from abusive conduct. In many digital markets, consumers might not suffer harm in the form of a measurable price increase, but they can suffer from a degradation of the quality of the services (e.g. in the field of search when the results are being manipulated, or in the posting and promotion of fake reviews). This narrow approach misses the increasingly important competition implications of the collection of personal data, particularly when done at scale. It also fails to take into consideration the multiple effects that gaining vast amounts of personal data has in certain types of digital services.

- The long-term effects of abuses. With the fast development of digital markets, and the likelihood for firms to acquire significant market power very fast, timing acquires a new dimension. The longer the abusive practice perpetuates, the harder it gets to reverse its anti-competitive harms. The same applies to consumers being directly harmed by misuse of their data when they find themselves locked into a service where strong network effects gives them little or no ability to switch to competing services.

- The practice of profiling carried out through the application of machine-learning technologies. As a result of this profiling, an individual or a segment of the population can receive, or be excluded from receiving, information or opportunities, or can be targeted with advertising or personal offers (including personalized prices). This discriminatory targeting can reinforce existing social inequalities among the most vulnerable sectors of the society.

- The encroachment of corporate powers on the functioning of democracy, with potentially profound societal impacts as, e.g. profiling is increasingly used by political parties to identify and target potential supporters.

- Reduced incentives to innovate on privacy-enhancing technologies, as companies exploiting personal data view data protection legislation as a threat to their business model. This problem can be exacerbated by large firms absorbing start-ups that could become future competitors and offer alternative approaches that might better protect consumer privacy.

- The need for more interdisciplinary resources to be devoted to competition law enforcement related to the collection and use of data. As technology becomes more complex and abuses more sophisticated, there is a need for competition agencies to apply in their assessment insights from other disciplines, such as consumer and privacy protection, computer science and behavioural sciences. This would promote a better and more complete understanding of the effects of the technology and how to design the appropriate enforcement response.

- The lack of privacy protection in the US has contributed to the decline in competition among technology firms. This had also a spill-over effect in Europe where American firms tend to apply the same business models and data practices, even when they are illegal under EU laws.

- Prior merger approvals like Facebook/ WhatsApp have diminished competition and innovation. The EU and US decisions disregarded the privacy preferences of WhatsApp users, and reduced competition and innovation in the market for Internet message services. TACD takes note however that enforcement authorities, especially in Europe, started to give more weight to privacy as a competition parameter and a driver of consumer choice. This is a welcomed development that US enforcers should follow.

- The dominant platforms deploy secretive algorithms and invasive profiling techniques to quash competition and stifle innovation. For example, pricing algorithms could pose a threat to competition due to their potential to undermine price competition by enabling and sustaining (tacit) collusion.

- The growing concentration among the digital platforms and their gate-keeping role threaten the free exchange of ideas on the web.

Recommendations

Therefore, TACD recommends to the European and US competition authorities to:

1. Carry out sector examinations to better understand the impact of practices and agreements that shape digital markets. In particular, the authorities should, as a matter of priority, initiate an examination of the online advertising marketplace to gather information about how undertakings and firms are shaping this important market for the provision of zero-price services by consumers. They should also carry out inquiries into the potential harm of pricing algorithms in online transactions, due to the risks of (tacit) collusion.
2. Assess the market power of firms using online data, using as a proxy the control of data necessary for the creation and provision of services in view of widening competition assessments.
3. Develop theories of harm in competition assessments that can take into account the degradation of product quality and the potential loss of privacy and consumer agency. As a general proposition, a violation of a pre-existing data protection obligation should be understood as privacy harm.
4. Adopt a multi-disciplinary approach to digital markets. An anti-competitive practice is likely to often also amount to a breach of other areas of law, such as data protection and consumer laws. In Europe, competition, data protection, and consumer authorities must implement co-operation mechanisms to provide a coherent and efficient response to infringements. In the US, competition authorities should likewise coordinate with other regulators and law enforcers.
5. Systematically consider data protection and privacy standards when assessing mergers and acquisitions, and prohibit such mergers or impose conditions when they would negatively affect the protection of personal data, the privacy of individuals, and more generally democracy and pluralism.
6. Identify the right elements for future co-operation between EU and US agencies about the role of competition laws to promote effective competition in digital markets.
7. Ensure that consumers can obtain compensation for harm suffered by anti-competitive conduct, including through collective proceedings.

Background resources

Further information can be found in the individual contributions of TACD members:

- The European Consumer Organisation (BEUC) submission to the European Commission
- Privacy International's submission to the FTC
- Privacy International's submission to the European Commission
- Comments from the Electronic Privacy Information Center, Center for Digital Democracy, Consumer Federation of America, and U.S. Public Interest Research Group on "The intersection between privacy, big data, and competition." (Aug. 20, 2018)