Trans Atlantic Consumer Dialogue

MEMBERS WORKSHOP
DSA future gold standard for online regulation?

26 October 2020

28 participants / Organisations represented by participants: BEUC (EU), Sveriges Konsumenter (SE), vzbv (DE), Forbrukerrådet (NO), Consumer reports (US), Center for digital democracy (US), Center for Economic Justice (US), Forbrugerrådet Tænk (DK), Consumentenbond (NL), Consumer action (US), EPIC (US), EFF (US), Public Citizen (US), Consumer advocates (US), Consumer federation of America (US), Public Knowledge (US), EDRi (EU).

Introductory words given by Finn ***Lützow-Holm Myrstad,*** *Director of Digital Policy, Norwegian Consumer Council and EU co-chair of TACD Digital committee.*

We organised this member workshop to provide an overview of the Digital Services Act (DSA) and Digital Markets Act (DMA) and the key issues affecting digital rights as well as competition. This was the opportunity for members from the US and from the EU to learn about the ongoing policy developments, as well as exchanging and discuss their positions.

The aim of this event is to think together of what we can achieve as a network around the DSA and the DMA. It is going to be highly lobbied both from the EU and the US, somehow like what we experienced with the General Data Protection Regulation (GDPR). Having the support of US colleagues, and common transatlantic narrative and argumentation points is essential to counterbalance the actions of the industry.

PART 1: THE DIGITAL SERVICES ACT

What several BEUC members have proven is that online marketplaces are easing the selling of illegal products (Amazon, Facebook, Wish…). But there is also evidence of intrusive advertising, illegitimate traders, fraudulent and scam ads: see for example Which? Neena Bhati's presentation "Fairer, safer online marketplaces" at BEUC's online event[1]. Which? research shows that it is extremely easy to create fake companies online and to pass the "scrutiny" of the platforms, even with scam ads. There are many challenges and loopholes in current laws on how to ensure consumer protection and safety.

Introductory briefing by Maryant Fernández, Senior digital policy officer at BEUC:

In the EU there is an appetite to deal with these and digital rights issues (notably freedom of expression), but also issues of gatekeepers that exert anti-competitive and unfair practices. The DSA is going to review the current 20-year-old EU e-commerce Directive, while the DMA will deal with unfair and anti-competitive practices in addition to a new competition tool. The main challenge is to change the status quo.

[1] https://vimeo.com/470572418/91ea7dc911, presentation starts at 2:05

The DSA should be part of the solution to these many issues, but there are principles from the e-commerce Directive that should be preserved, such as the limited liability for user-generated content or the prohibition to conduct general monitoring for online platforms. These are essential for privacy and freedom of expression.

However, the e-commerce directive has several flaws. It has failed to hold online marketplaces liable or even accountable for their intermediary function. Also, there is not enough cooperation between Member States and not clear notice-and-action procedures. There has been some clarification by the Court of Justice of the European Union in some respects, but there is a clear need for updating the legislation. In addition, enforcement and cooperation framework in the e-commerce directive are extremely poor.

BEUC is asking for:

- A high level of consumer and safety protection.
- A distinction between providers' functions and between consumer and business user activities.
- Clear and strong legal obligations for platforms, including a 'know your business user' obligation while preserving consumer anonymity. Self-regulation is not efficient/sufficient.
- Liability for online marketplaces
    - for failure to inform about the supplier of the goods or services.
    - for providing misleading information, guarantees, or statements.
    - where the platform has a predominant influence over suppliers.
    - if upon credible evidence, they don't take appropriate measures to remedy the illegal activities at hand.
- Effective oversight and enforcement. The key is not just about being able to complain, but also for consumers' cases to be dealt with not where the company is based in the EU, but where there are consumers affected. This is one of the weaknesses of the GDPR with cases against major infringers being stuck in Ireland.

The publication of this initiative by the European Commission is expected as early as December 2nd, 2020 (but can be delayed). There is already huge lobbying going on. It's going to be a long ride.

Following words by Jan Penfrat, Senior policy advisor at EDRi:

One of the reasons there are problems in Europe now is because the e-commerce directive is so old and most of the platforms we have now did not exist at the time.
As EDRi (European Digital Rights), they look at it as "content-hosting" perspective; sometimes it is important to make a difference between content-hosting and marketplaces. It can also be complicated to make a clear distinction between the two (e.g. Facebook).

The European Parliament has adopted last week its report to give its (non-binding) position. The EP demands a phase-out and possibly a ban of micro-targeted advertising. This could be a big step towards solving some of the major issues we currently see.

Another important aspect of the DSA that is important is the interoperability[2], which would give the possibility for consumers to communicate on one platform to communication on another platform without having to sign-up on every platform. It is not an issue of feasibility, but it is a business choice

[2] If you would like to dive deeper into the question of interoperability of gatekeeper platforms, EDRi is co-organising an online expert panel about it on November 4, at 4pm CET. See speakers and sign up here: https://www.openforumeurope.org/event/virtual-debate-interoperability-and-the-digital-services-act/

from platforms. Interoperability is about empowering people to choose the platform that meets their needs. It is possible. If there is no legislative push, platforms will not do it on their own.
This will have an additional impact on competition by decentralising content moderation.

--- Questions
How would this proposal mesh with existing laws or directives concerning ecommerce and cookies?

- DSA is supposed to be an update of existing e-commerce legislation
- Cookies is supposed to be covered by e-privacy directive
- DSA should not impact/influence e-privacy, but there are some interlinks. The European Parliament is asking for stricter legislation for advertising, going as far as asking the European Commission to consider a phase-out of targeted ads followed by a prohibition.
- If there would be a provision for micro-targeting advertising in DSA, then there could be a possibility of it to affect e-privacy. But EDRi not lobbying for DSA to regulate cookie policy as it is already covered in e-privacy.

--- What are the industry arguments against DSA?

- Industry is divided: there are the big platforms on 1 side, then brand and IP associations on the other. SMEs are also divided, with some SME organisations taking platforms' side. Brands see there are a lot of illegitimate traders. Main challenge is to change the status-quo and not only have window-dressing exercise.
- Platforms are open to the idea of having a responsibility (whatever that may mean) but then they say that all players need to have responsibility as well. However, they do not want to talk about liability: they want the current e-Commerce Directive provisions to be protected. They also want “good Samaritan” provisions so if they take voluntary measures, they are not liability if something goes wrong.
- In general companies are not against the DSA, they are open to making changes, but interoperability and advertising remain very touchy subjects.
- There is also some form of pushback from media and publishing platforms linked to their business model.

Comment from US perspective by Justin Brookman, Director of Consumer Privacy and Technology Policy at Consumer Reports

Just like for the e-commerce directive in the EU, there are provisions in the US in the section 230 of the Common Decency Act. In the US, liability law is strong in most jurisdictions already and it holds the seller liable. There are some exceptions in the case of auctions, and some other places where it is attenuated.
There have been a few cases where courts are interpreting the provisions by using section 230, especially in the case of Amazon where the platform has used it as defence to be considered as only a hosting platform and not liable. But in most cases Amazon has lost and been held liable.

There has been a lot of discussions about reforming section 230 at federal level[3], but most of it has not been focused on product liability but more about allegations of bias from Big Tech companies

[3]Comment in the chat by Susan Grant: The privacy bill by Senator Brown in the US, not formally submitted yet but in "discussion draft" form, would force the change in advertising that we've been talking about by limiting use of personal data to certain permissible purposes, and allowing only contextual advertising see https://www.banking.senate.gov/imo/media/doc/Brown%20-%20DATA%202020%20Discussion%20Draft.pdf

against conservatives. Trump administration has tried to revise section 230 to make it harder for platforms to exercise curation responsibilities, and disincentivise platforms from taking products down.

Discussion going forwards: where is the line when platforms become sufficiently integrated in commerce to justify them bearing responsibility?

Regarding fake reviews, the FTC has a document called the "Endorsement Guide" meant to clarify when a review is being paid for. FTC has also mandated research on interoperability, and bill proposal by Senators. However, these discussions are not as advanced as the ones around reform of Section 230. But it is a topic that is of high interest for consumer advocates.
Both Trump and Biden have been critical of Section 230, in diverse ways. Trump wants less curation; Biden wants more responsibility for the platforms.

--- Question
Do speakers see any synchronicity between the two sides regarding liability?

- There is a convergence for more clarity about marketplace liability and less clarity at the same time.
    - We want to get marketplaces more accountable and liable as a last resort when things go wrong. The difference is that in the US there is case law pushing for this. In Europe we do have a lot of evidence of wrongdoings, but not as many case laws as in the US. This may be because we also do not have the same legal avenues and litigation culture is not the same.
    - Another convergence is that in the US you have the Good Samaritan approach, and big platforms want the same in the EU. The Commission seems to be willing to have something in between, expanding the liability protections for voluntary actions, but we are very sceptical about this approach.
- The general themes are similar with broad recognition that in early 2000s there was a strong deregulatory approach. Now we want to act and should make platforms liable. Desire to rain-in the holy unregulated internet to consider some values like consumer protection.

--- Question: not about only liability but also about business model and about media

- Alternatives we can propose emphasise we are not against advertising, and we do not want to ban them. But you can still show people ads without using their personal data by rather targeting the content of the page.

PART 2: THE DIGITAL MARKETS ACT

Agustin Reyna, Director Legal and ***Economic Affairs at BEUC***

+ Comment by Sharon Treat: Internet privacy law in Maine - LD 946 "An Act To Protect the Privacy of Online Customer Information" prohibits a provider of broadband Internet access service from using, disclosing, selling or permitting access to customer personal information unless the customer expressly consents to that use, disclosure, sale or access. The legislation also prohibits a provider from refusing to serve a customer, charging a customer a penalty or offering a customer a discount if the customer does or does not consent to the use, disclosure, sale or access of their personal information. Enacted last year: http://legislature.maine.gov/legis/bills/bills_129th/chapters/PUBLIC216.asp

Both the European Commission and Member States have been quite active on enforcement of competition in digital markets in the past years. But there are limits to anti-trust laws: complex proceedings, difficult remedies, hard to get meaningful changes.

When we talk about regulating markets, it is mainly about targeting certain practices or companies (for example, the regulation that led to the liberalisation of markets that were in the hands of public companies such as telco, postal services or energy where legislators had to intervene to open up those markets). However, on digital market, we are looking also at gatekeeping companies who are dictating how companies are reaching their consumers.

The DSA will count on a set of rules - DMA - to include dos and don'ts for companies in gatekeeping positions. The idea is to have self-enforcing rules by defining the markets concerned. But we do not know yet how the European Commission will address it. BEUC suggested a benchmark on the number of consumers these platforms have in the EU. However, those 'dos and don'ts' are also difficult to define: what is the scope to cover for efficiency? Some ideas would be mandating interoperability, banning certain practices like tying or self-preferencing by gatekeeper platforms, imposing data portability, etc).

Gatekeeping rules are only one part because the Commission is about to propose a new competition tool which is even more important and will give more power to the Commission to intervene without having to find an infringement case (similar power in the UK with CMA (Competition and Markets Authority)).

In terms of timing: everything will be announced in a package. It is going to be a difficult file because even with an agreement to do something against Big Tech, the incentive is still very political. The EU will give more powers to EC and competition agencies. Politically, it might be difficult to have a competition tool that is horizontal and not only limited to digital market.

--- Questions
How do you understand the grey list?

- Rather have a 'blacklist': not sure this is the direction the European Commission will take with list of presumption.
- With the new powers for the EC, it is important to figure out the scope of when there should be an intervention? When there are structural market problems and not making a case by case target of companies. The EC will have to define when they will use this new power by benchmarking when there is a situation of structural market problem.
- This will also allow something that is not currently possible which is early action in the case of these structural market problems.

What are the criteria for market intervention: in the UK case there are criterion to be met (usually looking by market outcomes)?
One would need to define the standard of proof in the legal instrument and differentiate it from the standard under abuse of dominance.

Comment from a US perspective by Alex Harman, Competition policy advocate at Public Citizen:

There have been seven hearings of antitrust committee of the US House of representatives, which published three weeks ago its report[4]. There is not yet any legislative proposals but only

[4] https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf

recommendations by the committee which are very loose and subject to interpretation, a lot of them are similar to EU proposals.

For example, the report does recommend interoperability, but not how it could be implemented. Some of the concerns raised are how to regulate a potential interoperability regime, while still seeking competition enforcement actions such as structural separation to avoid locking in incumbency.

It is still unclear how he two current regulators (FTC and DoJ) are sharing competition cases and there are still potentially cases to come with Facebook, Amazon, and Apple. The current legal regime is problematic and has narrowed the scope of interpretation, making it difficult to bring those cases.
The current DoJ case against Google is actually similar to the European Commission's case in 2016 and looks specifically at search engine monopoly and harm/violation of law with Android OS and their exclusive contracts to have the browser installed to increase advertising opportunities in search.

--- Questions
Do you expect these cases to go ahead if the Democrats win the US election? I know that the Biden campaign has many ties to big tech companies, but not sure if that will have an effect on the cases?
Because of the bipartisan support for enforcement actions against Google – the Republican-led DoJ as well as the states with Democratic leadership – we expect that a Biden administration would continue the case and hopefully expand its scope.

End of discussion. Thank you to the panel and participants.

NEXT STEPS FOR TACD:

- How – as a network – can we create added value from what is produced by members?
    - Support from US colleagues in the lobbying efforts will be as essential as for the GDPR.
    - Develop a common argumentation, deliver the same message: this is one thing we can learn from the industry
- Create a common 'toolkit' with shared:
    - Statements
    - Messaging
    - Argumentation sheets
    - Principles
    - Once the legislation is out: identify the most relevant venues for our messages.