The Choice Delusion: Addressing Consumer Behavioral Biases Exploitation in Digital Markets

Agustín Reyna

Antitrust Enforcement Symposium
Oxford, 29-30/06/2019
If you place a frog in water and slowly bring it to a boil, it won’t notice that it’s slowly being boiled alive.

Naw man, I know. I know.

Oh...
Dark patterns

“…features of interface design crafted to trick users into doing things that they might not want to do, but which benefit the business in question.”

“Control is an illusion.”
Required: Review your data settings

Personal data laws are changing in the European Union, and we want to make it easy for you to view some of your data settings.

Please take a few minutes to review these updates and make choices about some specific data settings.

Here's what we'll ask you to review:

- How we use personal data from advertisers, app developers and publishers to show you relevant ads
- An option for turning on face recognition
- Our updated Terms, Data Policy and Cookie Policy
Legal implications of « dark patterns »

**Consumer Law**
- Misleading or aggressive commercial practices.
- Distortion of the consumers economic behaviour.

**Data Protection Law**
- Legal basis for the collection and processing of personal data.
- Principles: “data minimisation” “privacy by design”

**Competition Law**
- Users’ exploitation by imposing unfair trading conditions.
- Exclusionary effects from the use of illegally obtained data / sludging.
The Facebook cases

Belgium  Data Protection Authority (2015/2016)
• Placement of tracking ‘Datr’ cookie without user’s consent, allowing Facebook to track users in third-party websites. Legal basis: ePrivacy legislation.

Italy  Competition and Consumer Authority (2018)
• 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.

Germany  Federal Cartel Office (2019)
• 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.
**Synergies**

- **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”

Arrows indicate the relationships:
- Information asymmetries, lack of bargaining power
- Unfair T&Cs / commercial practices by a dominant undertaking
Institutional considerations (I)

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 risk of inconsistencies (e.g. incompatible or incomplete remedies).
Institutional considerations (II)

In case of concurring competences: how to ensure consistency?

- **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).

- **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.”
  - E.g. Article 9.4 EP position on EBA Regulation: “The Authority shall closely cooperate with the European Data Protection Board to avoid duplication, inconsistencies and legal uncertainty in the sphere of data protection.”

- **Model 3:** *Integrated dialogue*, joint decisions and common remedies.
  - Far reaching, but guarantees 100% consistency.
Co-ordination at EU level

• EDSP ‘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
  • CPCN: “Facebook changes its terms and clarify its use of data for consumers following discussions with the European Commission and consumer authorities” (9 April 2019)

  • EDPB: consistency mechanism for ‘Schrems’ complaint against Facebook on forced consent(?)

  • ECN/EC: Could the German Facebook case become a 102 TFEU EC investigation?
    • « generally also be possible ». See also the remarks of Thomas von Danwitz at the IKK 2019.
Preliminary conclusions

1) As the same behaviour can lead to an infringement of multiple laws, need for consistency between enforcement mechanisms.

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 agencies.

4) There is scope for intervention to streamline co-operation following the example of the CPCN Regulation.
Thank You

Agustín Reyna
Heal of Legal and Economic Affairs
BEUC, the European Consumer Organisation
agustin.reyna@beuc.eu
@arcanide