Cross-Regulation Enforcement – *Suggested Doctrine for Application & How it Can Improve Competition Law Enforcement in the Digital Age*

RESEARCH PROPOSAL

Competition authorities worldwide are limited in their ability to enforce against conduct harming competition or consumer welfare; for example, collusion enforcement is restricted only to conducts which give rise to *appreciable* competitive concerns,[i] and the prerequisites for abuse of dominance enforcement include market definition, market share and a theory of harm.[ii] In these times of digital economy, these traditional-markets-oriented limitations, and their price-focused methodologies, have become almost insurmountable hurdles for competition authorities.[iii]

These limitations is not without good cause – they originated in the liberal state principle of *nulla poena sine lege*, which limits the power of the state and its organs to guarantee the rights and freedom of individuals.[iv] When it comes to competition authorities, there is an additional economic reason for these limitations – the fear of over intervention and impediment of free market process for an insignificant benefit from competition perspective (type 1 errors).[v] This also contributes to competition authorities' tendency to steer clear of exploitative practices.

However, there are cases were said type 1 errors are without social costs. Such are the cases where we would like to prevent the undertaking's behaviour regardless of its competitive concerns; Specifically, when the same act is also an infringement of another regulation, such as banking, environmental, or privacy regulations. This type of infringements will be further referred to as *cross-regulation infringements,* or *cross-infringements.*

To demonstrate the cross-regulation infringements concept, consider the following examples:

a. A prominent digital multi-sided platform collects users' DATA in a way that constitutes a GDPR infringement. Subsequently, it gains a significant competitive advantage in the personalized ads market and monopolizing it.

b. Factory A is using highly polluting technology, in a way that infringes EU environmental regulation. This reduces its production costs significantly, giving it a competitive advantage over its law-abiding competitors.

Competition regulation regimes around the world, including the current European Union competition regulation, rarely consider such behaviours under the purview of the competition regulation enforcement mandate. Yet, both have clear negative competitive effects such as lower diversity, higher prices, and chilling of potential competition due to higher entry barriers. These effects are heightened in the digital economy markets, where network effects and data play a significant role, and extracting practices which extract data and not price, are harder to recognize.

However, in cross-regulation infringements, society has already decided the social costs of these behaviours outweigh their benefits, even prior to adding any additional costs of harm to competition. These cases raise a question from a public interest point of view: is there still a justification to prevent competition authorities from pursuing *even the smallest* competitive benefit by enforcing cross-infringements?

Furthermore, cross-enforcement can be used by competition authorities to effectively, promptly and with low-cost deal with some digital economy infringements, a major concern in recent years, which too often fall in-between-the-cracks of classic competition law enforcement as it has been developing thus far.

My research question is: should there be a change in competition law enforcement to allow enforcement of cross-infringements? This, while exploring possible frameworks for its application, its advantages and shortcomings, and its potential to tackle digital-economy related enforcement challenges.

THE PROBLEM OF CROSS-REGULATION INFRINGEMENTS

The main problem with cross-regulation infringements is under deterrence.

Infringing the law might become lucrative for the subject of the regulation once the *secondary* competition harm is not taken into consideration when determining the sanction. In these cases, enforcement is focused solely on the *primary* harm, and the expected sanction for infringement is set according to the latter *alone*.

However, the social cost is the sum of *all* costs, both primary and secondary, and even in cases of perfect enforcement level of the main regulation – the full social costs of the behaviour are not internalized by the infringer, who enjoys the sum benefit of the behaviour – including the secondary competitive advantage.

Example – GDPR/Competition Infringement
Social cost from *primary* privacy harm: 100
Social costs from *secondary* competition harm: 20
Expected GDPR fine according to Becker's Theory = 100
Expected competition fine: 0 [no enforcement mandate]
Result: Under-deterrence - Infringement will occur [120<100]
Assumptions: social benefit of behaviour < 100; benefit for infringer ≥ social cost

Furthermore, enforcement level can often be sub-optimal, especially when new regulations and regulators are introduced, as it seems to be the case with the digital economy. Regulators might be very young and unexperienced, or they might not be deterring enough due to weak enforcement tools at the early days of the new regulation and its implementation. And, especially when dealing with a specialized regulator, possible capture is another issue to consider.

POSSIBLE SOLUTION: CROSS REGULATION ENFORCEMENT BY COMPETITION AUTHORITIES

How can we remedy the cross-infringement problem? Several solutions can be implemented, from systemic solution dealing with regulatory capture to private enforcement mechanisms accounting for the full costs of the behaviour. However, this solutions take time to develop and adapt, while

the digital economy keeps evolving in mesmerizing speed, or might prove insufficient when dealing with powerful and deep-pocketed big tech companies.

This research explores another supplementary solution, more immediate and flexible; I suggest entrusting the enforcement of the secondary harm to competition in the hands of the established and expert regulator already exist – the competition authority. By doing so, competition authorities will also be able to surpass some digital-economy enforcement hurdles, such as defining the market in a zero-price market, and data-related extracting practices.

This research would like to explore the best framework for cross-infringements enforcement, considering the complexities it entails.

WHY COMPETITION AUTHORITIES?

First, there are advantages of entrusting the enforcement of cross-infringements in the hands of another regulator; a shared regulatory space can enhance productive inter-agency competition between regulators,[vi] reduce public expanse on monitoring costs, and might mitigate risk (or consequences) of agency capture.[vii] It also serves as an *insurance* against regulatory failure.

Second, of all agencies, competition authorities specifically are uniquely suitable for enforcing cross-infringements.

By their nature, competition authorities often regulate all markets and industries, which translates into lower costs of enforcing cross-infringements, both thanks to existing knowledge and expertise on different industries as well as existing, on-going communication with the specialized agencies.

This cross-industries nature of competition authorities also reduces their likelihood for capture.[viii] unlike specialized regulators, competition authorities' officials are often not limited to one industry or market in their post-regulatory employment, and so the fear of industry-bias due to revolving door is lower.

Furthermore, applying Olson's criteria for lobbying on competition authorities points towards low probability of success.[ix] Since precedents in the field of competition law are often relevant to all undertakings across industries, transaction costs are very high due to the need of the interest group to follow and influence every competition authority's procedure. For the same reason, the benefit of successful lobbying leading to more lenient competition enforcement will often be widely enjoyed by all undertakings, leading to collective action problem, reducing the incentives of the lobby group to direct its efforts and resources to the competition authority's domain.

SHORTCOMINGS AND COSTS OF CROSS-ENFORCEMENT

Cross-enforcement by competition authorities is not a perfect solution, and it entails costs and risks that should be addressed when designing the framework for its application. The research is likely to unravel the full extent of complexities surrounding this suggestion, but here are several main shortcomings which are already apparent.

First, cross-enforcement might lead to *over-deterrence and uncertainty* concerning the enforcement procedure and the expected sanction. For example, could both regulators enforce against the same act, twice? And which regulation will determine the maximal fine or sanction?

This raise the issue of expected higher *error costs* of application of the specialized regulation by the non-specialized competition authority, which contributes to the uncertainty of the undertakings, which in turn might chill desired market activity.

Second, there are additional costs stemming from the interdependent aspect of the cross-enforcement – *costly coordination* between regulators in their shared regulatory space is necessary, and while redundancy in regulatory responsibility creates competition between agencies, it might also lead to a game of "hot-potato" between agencies and *lower accountability* of each agency, especially when complicated, un-popular or politically-charged cases are in point.

Thirdly, the implication of cross-enforcement on the stand-alone behaviour of each agency should also be considered. On the one hand, the specialized agency will operate under the shadow of the competition authority, possibly reducing its much-needed reputation and trust in the public eyes. This might *weaken the specialized agency* and lower its enforcement efficiency, which will also have lower claim for stronger and more deterring enforcement tools. On the other hand, *competition authority might become too powerful* in a way that might undermine the principal of *nulla poena sine lege* and make the authority more attractive for capture.

To address these risks and minimize their associated costs, a framework for cross-infringement enforcement should be carefully crafted, accounting for these challenges.

POSSIBLE FRAMEWORK FOR APPLICATION OF EFFICIENT ENFORCEMENT

The final aim for my research is a proposal for an efficient model for cross-enforcement, based on the cost and benefits analysis conducted in the doctrinal part of the research. At this stage, I will suggest three possible frameworks for cross-enforcement application, mentioning that my research will focus on determining and modelling the efficiency of each framework and identifying which one will be able to optimize and aid in reaching the optimal level of enforcement.

One option, which I find to be the narrowest of the three, is to consider cross-infringements as *competition not on the merits.* This will allow competition authorities to consider cross-infringements as abuse of dominance under article 102 TFEU, without the need to evaluate potential harm to competition, and impose a fine as well as force the undertaking to stop the infringing behaviour. The main shortcoming is the perquisite of the relevant market definition and market share, which will significantly reduce the impact of the suggestion on elusive digital economy cross-infringements, especially GDPR.

The second option will be to add a *prohibition on monopolization, when it is the result of a cross-infringement*. This might especially deter GDPR infringers, where it is lucrative to pay the GDPR fine – but win the competition for the market. In my opinion, this prohibition should be accompanied with a unique power to give orders that will remedy the market structure, for example forcing the monopoly to allow competitors to access the legally accumulated DATA by the monopoly for a certain period after the infringement.

The most radical solution will be to legislate *a new per-se prohibition* in competition law, outlawing cross-infringement with *any minimal* harm to competition or competitor, regardless of dominancy or collusion.

Either framework should be complimented with limitations and guidelines concerning its practical application aimed at minimizing its costs. For example, these limitations could include inhibition mechanisms such as mandatory consulting with the specialized regulator or granting the latter with standing/appeal rights. Additionally, they should account for the type of sanctions that can be imposed, the maximum over-all fines that can be set, and the implication of cross-enforcement on private enforcement.

METHODOLOGY

The research has two parts, doctrinal and critical, and is mostly done from the interdisciplinary prism of economic analysis of law.

The doctrinal part consists mainly of surveying existing literature on shared regulatory space and competition enforcement in the digital age and in general, inter-alia performing some comparative analysis of competition authorities' different powers given their different enforcement portfolios and recent cases which raise similar questions.

The second part is more of a critical nature, suggesting a novel tool for enforcement of cross-infringements and digital cross-infringements, and a framework for its application, based on insights derived from the doctrinal and comparative research. I intend to compliment the critical part by conducting a test-case analysis, applying the different possible framework on the decision of the German Bundeskartellamt (BKartA) of February 6th, 2019[x] concerning GDPR infringement by Facebook, and comparing their expected outcome to that of the actual highly controversial case, which was enforced as an abuse of dominance infringement by the German competition authority.

ABOUT THE RESEARCHER

Or Elkayam, Lawyer and economist.

Educational Background: LL.B. *magna cum laude* Tel Aviv University, Israel (2018); B.A. in Economics, Tel Aviv University, Israel (2018); LL.M. Candidate, European Master's in Law and Economic, Rotterdam University (current; Erasmus Mundus scholarship holder).

Professional Background: Israel Competition Authority – Enforcement Department (Attorney 2019-2021; Legal Intern 2018-2019)

SOURCES

[i] Case 85/76 EU:C:1979:*36 Hoffmann-La Roche & Co. AG v Commission of the European Communities*, para. 123.
[ii] See R. Whish and D. Bailey, *Competition Law* 22-45 (10th ed. 2021)
[iii] OECD (2022), *OECD Handbook on Competition Policy in the Digital Age*, p. 13-16
[iv] J. Hall, *Nulla Poena Sine Lege,* The Yale Law Journal, December 1937, Vol. 47, no. 2
[v] See G.A. Manne and J.D. Wright, *Innovation and The Limits of Antitrust*, Journal of Competition Law & Economics, March 2010, Vol. 6, Issue 1, p. 153–202.
[vi] A.J. O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV.. 1655, 1677 (2006)
[vii] N.K Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2324-25 (2006)
[viii] J.R. Macey, *Organizational Design and Political Control of Administrative Agencies,* 8 J.L. Econ. & Org. 93, 99-100 (1992).
[ix] See M. Olson, *The Logic of Collective Action,* Harvard University Press (1965), mainly *p. 53-66*
[x] For an English summery of the decision, see here