

Kluwer Competition Law Blog

Tools for Better Enforcement of EU Law in the Digital Space – Conference Report

Barbara Justen (University of Vienna) · Sunday, November 17th, 2024

While core competition law enforcement has been going on for a while, the enforcement of the adjacent digital regulation is just beginning. The conference “Tools for Better Enforcement of EU Law in the Digital Space” dealt with such problems and took place on November 7 and 8, 2024 at the European Legal Studies Institute (ELSI) in Osnabrück, focusing on the challenges of legal enforcement in the digital realm. The event attracted numerous experts and scholars who explored various aspects of enforcing EU law in an increasingly digitized society. The discussions centered on current regulations and enforcement gaps in the digital economy, as well as the compatibility of private and public law enforcement. Each of the five engaging panels sparked in-depth discussions, allowing us to explore the topics from multiple perspectives. The event was both insightful and thought-provoking, providing a valuable exchange of ideas on key issues in digital rights enforcement.

While the EU has introduced innovative approaches to data regulation and consumer protection, a comprehensive enforcement concept is often lacking. Competition and IP enforcement have been working relatively well already. For the plethora of the new digital regulations, the question arises of what one can learn from existing models. The goal of the conference was to find solutions for existing inconsistencies and to develop approaches for harmonizing enforcement, for example in data law or cybersecurity.

Panel 1: The Status Quo – Gaps and Inconsistencies

Presentation 1: “Public and Private Enforcement of EU Market Regulation in the Digital Age”

Olha Cherednychenko (University of Groningen, Netherlands) opened the panel with an overview of the tensions between public and private enforcement in EU market regulation in the digital space. She explained that private law enforcement traditionally aims to create justice between individuals, while public enforcement pursues regulatory goals such as market security and consumer protection. The EU tends to rely on state sanctions and public enforcement mechanisms in digital market regulation, which leads to gaps in private enforcement, especially in areas such as data protection and civil claims in competition law.

Presentation 2: “Enforcing the New Rules on Unfair Terms in B2B Contracts for Data Access”

Charlotte Pavillon (University of Groningen, Netherlands) introduced new provisions of the Data Act aimed at preventing unfair contract terms in B2B contracts for data access and usage. The Data Act defines a “blacklist” of clauses that are prohibited under all circumstances, as well as a “gray list” of clauses considered potentially unfair. Pavillon emphasized that these provisions are intended to protect smaller businesses from disadvantageous terms.

Presentation 3: “Data Intermediation and Digital Rights under the Data Governance Act”

Diana Sancho (Westminster Law School, UK) analyzed the role of data intermediaries under the Data Governance Act. These neutral, trusted actors facilitate transactions between data holders and data users without exploiting the data themselves. Sancho highlighted that these intermediaries are meant to improve access to data while protecting data owners’ rights.

Presentation 4: “Private Enforcement of Cybersecurity Laws in the EU”

Andreas Engel (Heidelberg University, Germany) explored cybersecurity enforcement in the EU, focusing on the state of private liability. He noted that cybersecurity regulations in the EU are primarily implemented through state sanctions and public enforcement, although private liability could be a valuable complement to encourage companies to comply with the regulations.

Summary of Panel 1 Discussion:

The discussion emphasized the need for a coherent enforcement strategy in the digital space that integrates both public and private enforcement mechanisms. Participants advocated for stronger involvement of private actors in enforcement, for instance by introducing civil damage claims in the fields of data protection and cybersecurity. Additionally, the question of whether a unified European framework for enforcing digital rights could help address gaps and inconsistencies in enforcement was raised.

Panel 2: Collective Private Enforcement and the Assignment Model

Presentation 1: “Collective Private Enforcement of EU Platform Regulations”

Tabea Bauermeister (University of Regensburg, Germany) presented the concept of collective private enforcement in platform regulation. She emphasized that class actions could be an effective way to enforce consumer rights against major platforms, particularly in cases of data protection violations or unfair contract terms. The so-called “assignment model” was proposed as a possible structure for bundling consumer rights and making enforcement more efficient.

Presentation 2: “Lessons from the DSA: Can Platform Complaint Systems Ensure Effective Enforcement?”

Miriam Buiten (University of St. Gallen, Switzerland) analyzed platform complaint systems under the Digital Services Act (DSA). She questioned whether these systems were sufficient to ensure fair handling of complaints and examined the extent to which regulatory oversight might be necessary to guarantee effective enforcement. Her analysis suggested that the internal complaint

systems of platforms are often not transparent or independent enough to protect user rights.

Presentation 3: “Enforcing B2B Data-Sharing Obligations under the Digital Markets Act”

Edoardo Alonzo (University of Palermo, Italy) examined the challenges of enforcing B2B data-sharing obligations under the Digital Markets Act (DMA). He argued that major digital platforms should be required to provide data access to other companies to foster competition. However, the issue of monitoring and enforcing these obligations is complex and requires clear guidelines and sanctions.

Presentation 4: “Decentralized Private Enforcement of the Digital Markets Act as a Challenge for a Harmonized Framework?”

Johannes Persch’s (University of Mannheim, Germany) presentation focused on the challenges posed by decentralized private enforcement of the Digital Markets Act (DMA). He examined how a lack of centralized enforcement could lead to inconsistencies across EU member states, potentially undermining the DMA’s goals of fair competition and market access. Persch highlighted that, while private enforcement empowers individual stakeholders, it also risks creating a fragmented regulatory landscape, making it harder to maintain a unified framework. He suggested that, to ensure consistent enforcement, clear guidelines and coordination mechanisms are needed to balance decentralized efforts with overarching EU objectives.

Summary of Panel 2 Discussion:

The discussion highlighted the potential of collective litigation models for enforcing rights in the digital space, especially to ensure fair competition and consumer protection. Participants discussed whether platforms could effectively provide their own complaint mechanisms or whether independent oversight is necessary.

The discussion underscored the tension between empowering private enforcement and maintaining regulatory harmony within the EU. Participants debated whether additional guidance from EU institutions could support consistent application of the DMA, and whether decentralized enforcement might benefit from a more structured oversight mechanism. Many agreed that achieving a balance would be key to ensuring both flexibility for private actors and uniformity across member states.

Panel 3: Intellectual Property and Data Law in an International Comparison

Presentation 1: “Ubiquity in Intellectual Property Law and Data Law”

Lea Tochtermann (University of Mannheim, Germany) examined the parallel challenges in intellectual property and data law arising from the ubiquity and intangible nature of both fields. She argued that harmonizing the enforcement of IP and data rights could help reduce complexity and uncertainty for companies, while facilitating more effective law enforcement.

Presentation 2: “First Steps Towards a Data Enforcement Directive” – Marko Andjic

Marko Andjic (Osnabrück University, Germany) presented initial ideas for a possible “Data Enforcement Directive.” Such a directive could provide a unified basis for enforcing data rights

and harmonizing existing regulations. He argued that such a directive is urgently needed to strengthen enforcement in the digital space and better protect the rights of citizens and companies.

Summary of Panel 3 Discussion:

Participants welcomed the idea of a unified data enforcement directive but also noted potential challenges, such as the risk of overregulation. The discussion revealed that increased harmonization in data rights enforcement could be beneficial in enhancing the effectiveness of EU regulations and promoting a consistent legal approach across member states.

Panel 4: Data Protection and Non-Material Damages

Presentation 1: “The GDPR and Immaterial Damages: Developing a European Concept”

Paul Hoyneck van Papendrecht (Erasmus University Rotterdam, Netherlands) focused on how non-material damages could be appropriately regulated under the General Data Protection Regulation (GDPR). He pointed out that the EU needs a unified concept to enable affected parties to claim compensation for non-material damages in cases of data protection violations, even if no material harm has occurred.

Presentation 2: “Non-material Damages for Data Protection Violations”

Jakob Horn (Taylor Wessing) and Lea Stegemann (Noerr, Berlin, Germany) presented an analysis of German case law on non-material damages for data protection violations. They showed that German courts have been cautious in awarding such damages and argued that clearer definitions and enforcement of non-material damages at the European level are needed.

Presentation 3: “Exploring Collective Enforcement Actions in the Digital Space”

Lena Hornkohl (University of Vienna, Austria) focused on the potential of collective enforcement actions in the digital space. She examined how collective actions could empower consumers and smaller entities to enforce their rights against large tech companies and digital platforms more effectively. Hornkohl highlighted the advantages of collective enforcement, including improved access to justice and increased deterrent effects on non-compliant businesses. She argued that collective actions are essential for bridging enforcement gaps in cases where individual claims may be insufficient or unfeasible due to high costs and complex legal procedures.

Presentation 4: “Are State Consumer Agencies Fit for the Enforcement of Consumer Rights in Digital Environments? The Case of Poland after the DSA”

Igor B. Nestoruk’s (Adam Mickiewicz University Poznan, Poland) presentation examined the readiness of state consumer agencies to enforce consumer rights effectively in digital environments, focusing on the case of Poland in the context of the Digital Services Act (DSA). Nestoruk highlighted that while the DSA enhances consumer protection in the digital space, many state agencies face resource and expertise limitations that hinder their enforcement capabilities. He used Poland as a case study to illustrate the challenges agencies encounter, such as limited funding, staff shortages, and the need for specialized digital knowledge. Nestoruk argued that without significant improvements in resources and training, consumer agencies may struggle to keep pace with the rapidly evolving digital landscape.

Summary of Panel 4 Discussion:

The discussion recognized the value of collective enforcement actions in ensuring consumer protection and accountability in the digital realm. Participants debated practical aspects such as the challenges of implementing effective collective action mechanisms across EU member states and the need for clear procedural guidelines. Many supported the idea that collective actions could serve as a vital tool for balancing power dynamics between consumers and large digital corporations, potentially enhancing overall compliance and fairness in the digital economy.

Panel 5: The Enforcement Directive – A Critical Review**Presentation: “The Enforcement Directive: A Critical Analysis”**

Justine Pila (Oxford University, UK) critically examined the Enforcement Directive on its 20th anniversary, assessing its effectiveness in harmonizing the enforcement of IP rights. While the directive has made significant progress in this regard, she argued that it falls short of addressing the challenges posed by digital transformation.

Summary of Panel 5 Discussion:

The discussion focused on whether the directive should be revised to better meet the demands of the digital age. Participants suggested that an updated directive could support a more comprehensive approach to IP enforcement that aligns better with digital market requirements.

Workshop

The conference concluded with a workshop led by Hans Schulte-Nölke, where participants collaboratively explored potential approaches to strengthen enforcement of EU law in the digital space. The workshop encouraged an open exchange of ideas, drawing from the insights shared throughout the conference.

Key Outcomes:

1. **Harmonization of Enforcement Mechanisms:** Participants agreed on the importance of harmonizing enforcement approaches across the EU to reduce inconsistencies and ensure a level playing field in the digital market. There was a strong consensus that both private and public enforcement should be better integrated to cover gaps in current practices.
2. **Potential for a Data Enforcement Directive:** Building on discussions from earlier panels, participants saw value in developing a dedicated Data Enforcement Directive. Such a directive could establish a cohesive framework for enforcing data rights, ensuring that regulations are applied consistently across member states.
3. **Strengthening Collective Enforcement:** The workshop emphasized the potential impact of collective enforcement actions, especially in empowering individuals and smaller entities against large digital platforms. Suggestions included implementing EU-wide standards for collective actions and creating mechanisms to support consumers’ awareness of their rights in digital contexts.
4. **Guidelines for Non-Material Damages in Data Protection:** Recognizing the challenges in enforcing non-material damages, particularly under the GDPR, the group proposed developing

clear EU guidelines. These guidelines would help courts quantify non-material damages more consistently, enhancing the effectiveness of data protection rights.

5. **Enhanced Role for Data Intermediaries:** Participants recommended a clearer regulatory framework for data intermediaries to strengthen trust and facilitate data-sharing, while ensuring privacy rights. The workshop suggested that intermediaries could play a more active role in supporting individuals' control over their data.

In summary, the workshop reinforced the need for an integrated and harmonized enforcement structure across the EU and laid the groundwork for future initiatives to address the unique enforcement challenges in the digital realm.

Conclusion

The conference highlighted the need for more coherent and harmonized enforcement mechanisms in the digital space. As digital markets and data flows become increasingly integrated into EU economies, the effectiveness of legal enforcement in this area will become critical. Through a series of insightful lectures and discussions, the conference underscored the importance of integrating private and public enforcement mechanisms, advancing collective enforcement models, and exploring new frameworks like a potential Data Enforcement Directive.

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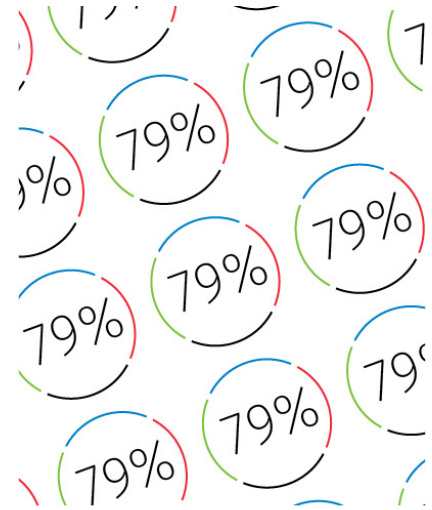
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