

EU antitrust enforcement 2.0 - European Commission raises concerns about algorithms and encourages individual whistleblowers

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The European Competition Commissioner Margrethe Vestager has emphasised two important developments for EU antitrust enforcement, which have emerged from technological advancements:

- The Commission is taking proactive steps to consider whether the increasing reliance on computers to handle business processes and decisions raises competition law issues. One area of current concern is the use of algorithms, in particular whether algorithms may be being used illegally to establish cartels or make them more effective.
- The Commission wants to improve its methods for cartel detection. In addition to companies' cooperation through leniency applications, it wants to encourage individual whistleblowers to come forward anonymously. On 16 March 2017, the Commission launched a new messaging system that will improve the opportunities for individuals to provide information to the Commission about anti-competitive behaviour and safeguard their anonymity.

Algorithms

In a speech given on 16 March 2017, Commissioner Vestager set out in some detail how the use of algorithms could, in her view, infringe EU competition law. She commented:

- The Commission's e-commerce sector inquiry has discovered that the use of algorithms is widespread. The inquiry **"has shown that two thirds of retailers who track their competitors' prices use automatic systems to do that. Some of them also use that software to adjust prices automatically."** Last year, the German and French competition authorities published a joint paper on data and competition, which considered the potential competition law concerns raised by algorithms.
- There is a risk that automated systems can lead to more effective cartels, for example through their ability to monitor prices.
- Algorithms can be intentionally used to engage in price-fixing or retail price maintenance.
- Businesses may be deemed to be acting in collusion as a result of the way their algorithms operate. She commented: **"Illegal collusion isn't always put together in back rooms. There are many ways that collusion can happen, and some of them are well within the capacity of automated systems".**
- **"Pricing algorithms need to be built in a way that doesn't allow them to collude."**
- Whilst the Commission's cases to date have dealt with agreements that were established by humans (but implemented by computers), this does not mean that the Commission will not investigate automated systems that collude. **"As competition enforcers, I think we need to make it very clear that companies can't escape responsibility for collusion by hiding behind a computer program"**.

Commissioner Vestager's concerns echo those raised already by influential academic lawyers and national enforcers. The UK Competition and Markets Authority has focussed on such software. Semi-autonomous automated repricing software played a key role in its August 2016 infringement decision on online selling of posters and frames. It has subsequently made clear that it is considering the possibility to bring cases where there may be fully-autonomous software "colluding" with no need for any human intervention.

New anonymous whistleblower tool

Commissioner Vestager also took the opportunity to highlight the launch of a new anonymous whistleblower tool for cartels and other anti-competitive practices.

The tool provides the opportunity for individuals to supply information regarding anti-competitive behaviour through an independent agency to the Commission. In the past, individuals have been able to tip off the Commission by contacting it directly, but the Commission has not been able to follow up with the individual if he/she wants to remain anonymous.

The new tool consists of a specially-designed encrypted messaging system that allows two-way communications. The system is run by a specialised external service provider, which acts as an intermediary relaying only the content of received messages without forwarding any metadata that could be used to identify the individual providing the information. In particular, the tool provides individuals with the option of asking the Commission to reply to its messages, and allows the Commission to seek clarifications and details.

The Commission is hoping that this initiative will increase the likelihood of detection of anti-competitive practices, by increasing the number of tip-offs as well as the quality of the information being provided.

The Commission initiative follows efforts by other competition authorities to encourage whistleblowing by individuals. The Commission's system is similar to an anonymous whistleblower system that was set up in Germany in 2013, and which the Commission has regarded as having worked well. For instance, the FCO fined parts manufacturers EUR 75 million in 2015 after an anonymous tip received through its online whistleblower system. The UK also has a system in place where individuals can be paid financial rewards of up to £100,000, if they provide accurate, verifiable and useful information which helps the CMA in the detection and investigation of cartels, and which leads to the imposition of fines or criminal prosecution.

The new tool increases the chances of cartel detection in the EU. This is particularly important for the Commission in a climate where the increasing threat of follow-on damages actions is regarded as discouraging companies from coming forward to disclose cartels. For companies, this new trend raises a couple of problematic issues, e.g. whether employees will still feel encouraged to use established internal whistleblowing systems that many companies have set up, and how a cartel which has been revealed by a tip-off from a member of staff affects the company's ability to apply for leniency.

The Commission's new system is expressly not limited to cartels, but also covers other anti-competitive practices, including vertical restrictions in distribution chains.

New frontiers of detection and enforcement

Technological advances have both increased the risks of detection for competition law infringement as well as opened up new areas of competitor interaction for the regulator to investigate. Business needs to adjust to the new reality, namely that competition authorities are increasingly prepared to look beyond the traditional forms of cartel conduct, such as agreements made in smoke-filled rooms, and to use technology to expand their powers of detection. Competition authorities are actively examining whether they have the appropriate IT and analytical tools to detect technology-based collusion.