How can competition authorities react to the antitrust threats of pricing algorithms?

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Introduction


It is becoming increasingly common for companies to set prices for their products automatically using algorithms. A recent study found evidence of more than 95% of e-tailers using algorithmic pricing and Amazon is just one of them. The Commission’s Preliminary Report on the E-commerce Sector Inquiry also recognised the potential threat that algorithms pose to competition law; it states: “There are two broad areas in which pricing algorithms could have the potential to cause anti-competitive effects. The fact is ‘personal’ algorithmic discrimination policy, where e.g., a company quotes different prices to different people based on an algorithm’s analysis of their personal data. The second is anti-competitive collusion, where companies are able to collude via their use of pricing algorithms.”

Both examples have recently been flagged as areas of concern for competition authorities. Speaking at the 14th Bundeswettbewerbsforum in Vienna, Ms. Justice Karth (Chief of the EC’s Competition Against Tied Sales) stated that the methods used by competition authorities will have to evolve to deal with the issues raised. 她强调: "Companies can’t escape responsibility for collusion by hiding behind a computer program."

Introduction

There are several factors that might mean that pricing algorithms don’t pose a threat to competition law. First, it’s worth noting that the competition authorities are alert to the challenges posed by the digital economy more generally. It’s clear from the latest Ofcom and HMRC announcements, Competition Law and Data, that the competition authorities have been carefully following developments in the digital sector. For example, Professor Dr. Peter Hirsch, Chair of the German Federal Cartel Office, has commented recently that it is clear that the European Commission is also more specifically aware of the potential threat of pricing algorithms, observing that they "tend to be built in a way that doesn’t allow them to collude." However, the extent to which actions by companies using pricing algorithms that fall outside the current competition law framework c.f. if a company implementing discriminatory pricing isn’t dominant, or companies using pricing algorithms have not entered into any agreements or concerted practices to do so, arguably the competition authorities should not try and stretch the existing law to cover these kinds of changes.

Instead, the problem here is the challenge for legislators, it’s a question of policy, does the competition law framework need to be re-worked to cover these sorts of issues?

To some extent this is already happening. Germany has already introduced significant changes to its anti-trust laws to stop the growth of the e-commerce sector, see Article 185a, which offers a defence for the use of algorithms used in an online marketplace where competition is missing. This is particularly because online markets are far more likely to promote vertical integration and create a natural monopoly.

However, there is little consensus evidence of any action against the main issue identified in this article - namely, the potential and anti-competitive effects arising from the use of pricing algorithms. Any change to the competition law framework designed to cover this would need to be significant (quite possibly unpalatable to many change) in the way competition law currently works around the world.

Does the competition law framework need to be changed?

Perhaps companies are so at, or should be, the solution. In their book, Competition Law (2nd edn) Professor Bhattacharyya, Professor Lewis and Dr. Lewis highlight the benefits of competition law and consumer gain. However, as companies with different economic incentives, for example, consumer versus co-operative that utilises prediction algorithms could provide incentives to computer using algorithms that actually work for the consumer, what the authors call "narrow" firms that offer disruptive technologies or that are even likely to reduce prices.

On the contrary, the use of disruptive technologies is always likely to push the pace of legislative change. It will be very interesting to see how these issues play out in the future.