



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

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Competition Law and Algorithms: Are the existing antitrust tools fit for purpose?

Speakers:

David Jevons, Partner, Oxera

Simon Constantine, Director, Policy and International, UK Competition and Markets Authority

Claire Jeffs, Partner, Slaughter and May

Date:

6 March 2018

Venue:

Slaughter and May

The debate on the impact of algorithms on competition is one of the "hot topics" of the moment in competition law. David and Simon warned the audience of the potential threat posed by algorithms on competition (whilst noting some of their benefits and grey areas). Claire, in particular, noted that the legal tools to deal with these threats already exist to a large extent.

David Jevons, '*Algorithms and Competition*'

Algorithms are often used in markets to set prices and tailor-make offers for consumers. They are also used extensively by platforms to match consumers and suppliers and play an ever increasing role in determining what we are shown on the internet. Improved efficiency, reduced costs and lowering of entry barriers brought by algorithms all point to their pro-competition nature.

However, concerns arise when the automated software may make decisions not expected by traditional models, causing uncertain implications for competition. For example:

- **Collusion.** Algorithms, through machine learning, may develop the capability to identify the profit-maximising point in a market. They may also be able to identify other algorithms in the market to achieve profit-maximisation through collusion. This is currently relatively unlikely due to the other conditions that need to be met for coordination to be successful. However, algorithmic software is being advertised on its ability to help users maintain prices or avoid price wars, which suggests some there regulators do need an ability to enforce competition law here.
- **Changes in the distribution of consumer outcomes.** When used in conjunction with consumer data, algorithms are likely to lead to some big changes in the distribution of market outcomes. In the insurance industry, for example, where insurers were not able to identify different levels of risks faced by individuals before, they can now readily assess risks and refuse to provide insurance to particularly risk-prone individuals. There is currently a lack of transparency in how consumers' data is being used, which means consumers may not be able to understand why their price or product features differ to others offered in the market. This wider distribution in outcomes means firms are having to ensure they can justify the fairness in outcomes for different types of consumer.

Simon Constantine, '*Competition law and algorithms: A competition authority perspective*'

The use of algorithms and big data can lead to competitive and consumer benefits, the CMA's Open Banking remedies being an example. However, algorithms might also lead to some potential concerns from a competition or consumer welfare perspective:

- **Collusion:** Algorithms could serve to facilitate collusion, by reinforcing an explicit collusive agreement (as in the CMA's Online Posters case), through a 'hub and spoke' mechanism, or through more tacit coordination.



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- **Reinforcing dominance.** Algorithms could in principle be used by dominant companies to reinforce that dominance, particularly when the company holds large and exclusive data sets. A dominant company's ability to immediately match a new entrant's discounted prices may deter such entry.
- **Consumers being misled.** For example, the CMA's Digital Comparison Tools market study found that some price comparison websites provided limited information to consumer on how products are positioned in search results.
- **Behavioural discrimination.** Firms may use algorithms to offer different prices to different customers: such price discrimination can be beneficial, but could in principle also be used to exploit consumer vulnerabilities or biases

In response to the challenges raised by algorithms, the CMA believes that it has the requisite capabilities. For example:

- Its **market investigation powers** and **consumer protection powers** enable the authority to review issues beyond infringements of competition law.
- It is working with **other national competition agencies** to compare challenges faced in each other's market.
- It has **digital forensic tools** to obtain and analyse relevant evidence and, will shortly be establishing a data and digital insights team to further enhance its ability to analyse data and assess its competitive and consumer implications.

Claire Jeffs

Instead of engaging in abstract discussion of potential theories of harm brought about by algorithms and changes to the law at this stage, the law should take an incremental approach to deal with these issues. The use of algorithms in the market is not as alarming as some might initially think.

- **Not prevalent in e-commerce.** According to a European Commission investigation on e-commerce, 53% of retailers track competitors' prices, and only two-thirds of them implement algorithms. This indicates that only one-third of e-commerce businesses use algorithms.
- **Tacit collusion is ambiguous.** Enforcers often find it difficult to prove tacit collusion in merger situations. Similarly, it may well in any event be difficult to establish whether tacit collusion is in fact a competitive concern in a behavioural context where algorithms are used.
- **Zero human involvement is unlikely.** Whilst some are concerned with the self-learning ability of algorithms, the businesses in question are owned by human beings with an economic interest in the conduct in question. The proposition that an algorithm-based cartel/collusion will have no human involvement at all, and so make it very hard to detect, seems unlikely in practice - there will always be a human email or other communication somewhere to evidence the conduct.
- **Lack of case law support.** Although not prevalent, existing algorithm-related case law does exist at both EU and national level. These cases are based on standard types of conduct. This is not something new to the courts or regulators.