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

www.competitionlawassociation.org.uk
www.ligue.org

Artificial Intelligence, Algorithms and Antitrust: The end of competition as we know it, or business as usual?

Speakers: Professor Suzanne Rab and Matt Allison

Date: Tuesday 8 October 2019

Venue: Watson Farley & Williams, London

As the number of firms looking to Artificial Intelligence ("AI") to aide with efficiencies and cost cutting increases, as well as offering new data driven products and services, so do the risks regarding competition law. The growth and development of AI may lead, further down the line, to a set of circumstances in which new forms of anticompetitive activity can occur. As this technology develops we need to reassess our current laws and find new legal solutions to the problems we may face with AI in the future. It will become important to strengthen our legal tools around the issue of liability, particularly as machine decision-making grows further away from human input. However, to take a rushed approach to legislation is ill-advisable and a period of consultation and learning should take place before the direction of any such legislation is decided. At the same, some commentators are calling for tougher *ex ante* regulatory powers. They argue these are necessary in markets where there is a risk that *ex post* intervention under competition law may come too late to address adverse effects.

AI and its Uses

AI is designed to act and think rationally to achieve goals and optimise outcomes in the most efficient way possible. Increasing reliance on AI may herald a shift in the make-up of the labour market as a demand for computer scientists and associated goods and services increases, while manufacturing jobs are substituted by machines. AI is increasingly used in a number of business sectors including in financial services and telecoms.

The debate around AI has often focused around data and big data sets. The more – and the more particularised - data is aggregated into large data sets, the more value is added. We can begin to consider data as the new oil in terms of value, however, unlike oil, information from these data sets, once used, is not gone, the inherent value remains.

AI and Antitrust

The main problems faced by the development of AI technology in terms of antitrust are threefold:

(i) AI may widen the set of circumstances in which known anti-competitive practices will occur (e.g. tacit collusion).

(ii) It may lead to new forms of anti-competitive activity which are difficult to reconcile with traditional antitrust theories of harm such as data extraction, co-opetition.

(iii) Algorithmic markets may lead to the deception and exploitation of consumers who are influenced to enter into unfair transactions.

The use of AI may lead to the facilitation of anti-competitive conduct for companies. This anti-competitive conduct may manifest itself explicitly, for example, through AI assisted coordination between competitors and tacitly, for example, through pricing algorithms interpreting the market trends and anticipating commercial strategy. However up to now regulators have usually been able to find evidence of an agreement (to collude over pricing or other parameters of competition) independently of the use of AI even where the latter is an enabler.

We must question whether our current legal tools can deal with these issues. In consideration of this matter it is helpful to differentiate between different types of practice. It is widely thought that AI provides a 'plus factor' increasing the likelihood and stability of tacit collusion, however, it should be remembered that behind the algorithm, at least for the moment, there is a human choice. It may be doubtful whether AI of itself can materially increase the risk of tacit collusion in markets that are not already prone to such risk.

AI also has positive applications in business. In general, AI creates a wide range of efficiencies. For example, Vodafone uses AI-powered chat bots to deliver responses to customer enquiries and AI techniques to manage network capacity, detect, and resolve faults.

AI and the Regulators

It is clear that the digital sector remains atop the European Competition Commission's agenda. The incoming EU President, Ursula von der Leyen, has promised to put forward legislation for a coordinated European approach on the human and ethical implications of AI within the first 100 days of her tenure. The creation of an EU AI ethical framework grounded in fundamental human rights could be leveraged for competitive advantage vis-à-vis the US and China. The EU could become the home of trustworthy AI.

The raw material which fuels AI development is data. There are calls from EU business for regulation allowing for flows of data across national borders, subject to data protection, confidentiality requirements and intellectual property rights.

There is no consensus in the approach of regulators towards the issue of AI and antitrust. The EU has generally taken a view that businesses are responsible for the actions of automated systems, and that liability follows this approach. In 2019, the Commission published a report entitled 'Competition Policy for the digital era' in which the authors stated a belief that the current competition law framework provided a solid basis for protecting competition in the digital age. In contrast national competition authorities in Belgium, Luxembourg and the Netherlands have called for the Commission to allow remedies to be imposed on companies operating in the digital sector without a finding of a breach of competition law. A joint memorandum made public by the Benelux authorities in October 2019 states that the enforcers seek to further the debate on competition in digital markets and urge the Commission to introduce *ex ante* regulation and revise merger control rules.

In the UK, there is the suggestion that liability issues may need to be reassessed, particularly if AI systems are to progress to a stage where humans become more and more distanced from the decision-making behaviour of machines as self-learning processes become more sophisticated, it may become difficult to identify any human input in the decision-making process. Though we are not there yet, we could see situations where there is no human input into machine decision-making. At this stage can we still claim that liability lies with the company?

Concluding remarks

The development of AI technology has become a clear focus for antitrust regulators. For now, it seems as though the current protections are coping, but it is important that this area of regulation develops along with the technology. It is vital that regulators and businesses understand the processes and algorithms that underwrite the technology. In light of no clear consensus on the risks posed by AI on competition, a cautious approach must be taken, one that involves taking advice from practitioners and technical experts as well as an emphasis on scrutiny of current practices.