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The new Horizontal Guidelines – When do algorithmic pricing tools present particular competition law risks?

On 1 June 2023, the European Commission ("Commission") adopted the final version of its new horizontals package, including revised Guidelines on horizontal cooperation agreements ("Guidelines") which became effective as of 1 July 2023.

The latest in our series of alerts on different aspects of the Commission's package looks at the new guidance on how to assess the competition law risks of the use of algorithmic pricing tools, set out in the Guidelines' revised chapter on information exchange. The Guidelines suggest that, in addition to clearly problematic scenarios characterized as "collusion by code," there could be material competition risks when competitors subscribe to the same third party tool.

Competition law authorities in Europe and elsewhere in the world have regularly expressed concerns about potential harm to competition arising from the use of algorithmic pricing tools. Although reliable data are hard to come by, these tools are understood to be increasingly used, both in the B2C and the B2B context. And there is the expectation that advances in AI could make pricing algorithms more performant. The lively debate on the subject and the associated competition risks has, to date, yielded very few specific results and enforcement experience remains limited to a few, relatively clear-cut cases.

In this context, it is helpful that the Guidelines explain how the general principles governing information exchanges among competitors can be applied when firms use algorithmic pricing tools. They recognize the pro-competitive benefits – reduction of costs , lower entry barriers and enabling faster and more accurate price adjustments matching fluctuations in demand and supply – but identify three distinct scenarios where there could be competition concerns:

- ***"Collusion by code":*** When competitors agree on the use of a common pricing algorithm, this would be treated as any other price fixing agreement and considered a 'by object' restriction of competition;

- ***Hub-and-spoke scenarios:*** When competitors subscribe to the same third party pricing tool that uses commercially sensitive information from competitors, this may, under certain conditions, result in an unlawful information exchange, like any other hub-and-spoke-type horizontal information sharing arrangement; and

- ***Independent use of an algorithmic pricing tool:*** Independent use of an algorithmic pricing tool that uses publicly available data as a basis for its price setting decision would in principle be lawful. There remains considerable uncertainty, however, whether future pricing tools may be powerful enough to develop coordination strategies that could be considered to result in an unlawful agreement among competitors.

Collusion by code: The Guidelines' collusion by code scenario captures situations where competitors agree on the use of the same algorithmic pricing tool or pricing rule, either to reinforce an existing cartel agreement or to initiate a collusive arrangement. This scenario does not raise particularly novel competition law issues. In *Eturas*, the EU Court of Justice has already confirmed that a competition authority can establish an Article 101 infringement if it produces evidence that competitors using the same third party platform services have consented to the use of the same discounting rule. The Online Poster cases in the UK and US, and the Spanish case against real estate agents, are additional examples of enforcement actions against agreements among competitors to use the same pricing tool. The Guidelines confirm that these agreements would be considered 'by object' infringements of Article 101 TFEU.

Hub-and spoke scenarios: The Guidelines take the position that using a shared algorithmic pricing tool - i.e., competitors subscribing to the same tool of a third party service provider - could amount to horizontal collusion (and would then be considered an Article 101 infringement 'by object') in certain circumstances. The Guidelines do not provide more detail, but considering the Guidelines' general principles on information exchanges, the finding of a hub-and-spoke type infringement would require that the party sharing information with the pricing tool provider at least "could reasonably have foreseen that the third party would share the information with the undertaking's competitors." And the recipient of information in this arrangement would be liable only if it was aware of the anti-competitive objectives, "and intended to contribute to those objectives by its own conduct."

This awareness of customers, as required under the Guidelines, will not necessarily exist when competitors subscribe to the services of the same third party pricing tool provider. Even if a third party pricing tool provider is known for specializing in a particular industry (which is not uncommon), its customers might not be aware to the requisite extent that their competitors use the same pricing tool and that information they provide would be used to inform pricing decisions of its competitors, and/or may not intend to contribute to a collusive arrangement.

The same general principles on information exchanges also suggest that if there is a finding of a hub-and-spoke type infringement, the third party pricing tool provider whose tool contributed to the infringement may also be liable if it could at least have reasonably foreseen that its tool and practices would result in an unlawful information exchange.

Independent use of an algorithmic pricing tool: The Guidelines also clarify that the independent use of a (third party or proprietary) algorithmic pricing tool to monitor the prices of competitors and inform unilateral price setting would be lawful. This should, in principle, also apply if a more widespread use of these tools enables competitors to increase their margins.

At the same time, however, the Guidelines caution that firms could be liable for competition law infringements if their pricing tools would be able to engage in unlawful communication strategies with other pricing tools. The Guidelines refrain, however, from providing more specific guidance on this point. This is not surprising: algorithmic pricing tools might be faster and more effective in reaching collusive outcomes than humans. The result would be worse market outcomes, but this in itself would not be sufficient to establish a competition law infringement. Some additional, specific (plus factor-type) behaviour would be required.

But it is currently unclear in what type of interaction more advanced algorithmic pricing tools may be able to engage in the future and what standards competition authorities would use to distinguish lawful, parallel algorithmic behaviour from unlawful algorithmic collusion. In this respect, the Guidelines' 'explanation' that pricing practices that would be illegal when implemented by humans would (with a high probability) also be considered unlawful when implemented by a machine, offer little concrete guidance. Even in the human world, there remains considerable uncertainty about when interaction, even if it facilitates collusive outcomes, can be considered (unilateral and lawful) intelligent adaptation to the pricing of competitors and when it amounts to a competition law violation.

Take-aways

Despite the Guidelines' – welcome – attempt to develop first guiding principles on the use of algorithmic pricing tools, considerable uncertainty remains about their implementation in practice. This applies in the first place to the potential scope of liability when competitors subscribe to the same third party pricing tool. Currently, this may well be the most relevant scenario from a risk assessment perspective, as third party pricing tools that may be particularly attractive for particular industries already exist. This increases the likelihood that competitors will rely on, and provide information to, the same third party pricing tool.

Knowing less about the inner workings of the third party pricing tool and the third party's other customers might remain the best strategy to reduce competition law risks. In practice, however, these features likely would be key selling points as well as important information for a customer that considers subscribing to a service. Considering the principles set forth in the Guidelines, firms therefore may have to carefully assess any risks related to the use of third party algorithmic pricing tools.

Going forward, the risks associated with the independent use of a proprietary algorithmic pricing tool may increase further, once more advanced tools can be trained (or learn) to engage in specific conduct that would help them to coordinate their pricing decisions with pricing tools used by competitors.

Thus, the Guidelines' discussion of algorithmic pricing tools in the context of information sharing among competitors is a useful first step, but not the last word on competition law risks related to the use of these tools. This area will require continuing attention from a compliance perspective.

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