

SLAUGHTER AND MAY

Slaughter and May Podcast

Regulating AI - Algorithms and competition law

Intro	As AI adoption increases, and governments and regulators across the globe grapple with how best to regulate AI, we look at some of the legal issues organisations should consider when implementing AI solutions. This podcast is the first in a new series that will be exploring the legal impacts of regulating AI across a number of different practices. Look out for this campaign and further insights on the topic over the coming months.
Annalisa Tosdevin	Hello and welcome to our podcast on algorithms and competition law. My name's Annalisa Tosdevin and I'm talking to Jordan Ellison, a Competition Partner in the Brussels office. We're going to talk today about the growing societal angst around algorithms and the extent to which this is a competition law issue. We'll also discuss what some of the competition regulators are, or perhaps should be, doing, and we'll finish with some practical takeaways for those who use AI and algorithms in their business. So Jordan, I think we'd all recognise that algorithms bring us considerable benefits as consumers but there is also a growing concern around the use of algorithms and various harms are being spoken about, including in competition law circles. So one thing that I wanted to ask you today was to what extent do you think these harms are a competition law issue?
Jordan Ellison	Yes, it's a great question because I think Annalisa, a lot of multifaceted concerns have been put into the competition law bucket almost for the want of anywhere to put them, in the last couple of years. I guess we're having this discussion now because we're at the stage where the UK government is about to publish an AI white paper which I think is intended to take a more holistic look at legal and regulatory societal impacts of use of AI and that might be quite a good way of filtering out what's genuinely a competition law issue versus a different kind of issue, that people have up until now, almost tried to pigeonhole into competition law because you know the competition regulators were one of the few people who had oversight or power in this area. I guess if we think about trying to do that, work out what's competition law and what's not, on the kind of concerns we've heard about, I think what's clearly competition law are questions like; 'do algorithms make it easier for competitors to collude' you know we all know competition law sops competitors from price fixing for example, and so the question of whether the ability to really closely monitor your competitors pricing, adapt intelligently and in real time, will that result in more price competition or less price

	<p>competition or collusion. I think that's a classic competition issue and really the algorithm thing is just like a twist on an old theme.</p> <p>I think there's also questions that are a bit more farfetched but where they are still competition law questions. There have been questions about whether if a dominant firm skews its algorithms in a particular way to preference its own products over its rival's products, in rankings or something like that, can that exclude competitors? I'm not sure there are lots of concrete cases there yet, but it is a competition law question. And then ditto, there's been a lot of talk about personalised pricing and the idea that firm's get more and more clever about giving you, Annalisa, an individualised price based on a bunch of very specific information about you or your characteristics, and whether that can result in higher pricing than might otherwise occur, or that kind of issue. Again, fairly speculative but definitely something in the realm of competition law.</p> <p>I think there are things that have popped up in competition law policy circles which are not really competition law though. You know some quite legitimate societal questions, say for example on discrimination on protected characteristics like gender, race, and this sort of theme and whether for example algorithms that are say doing individualised pricing might indirectly discriminate against a particular protected group. There could be a competition law economic angle there if the discriminatory pricing is an economic problem but the problem about discriminating on the basis of protected characteristics is an equality law issue and is probably most profitably thought about in that prism.</p> <p>Similarly, there have been legitimate questions about whether your skewed algorithms that say manipulate rankings on online services, maybe mislead consumers. So maybe a consumer ticks a particular option because they think it's the best one on some objective basis but actually it's at the top of the ranking because it's been paid for but isn't clear. They're the issues, not so much competition law, but just misleading consumers, just general consumer law obligations not to mislead.</p> <p>As I say, I think there has been a lot of stuff pulled into the competition law orbit, just because of competition regulators powers, but as the UK government looks at this in a more holistic way, I think it would be good to suss out with each issue what's the underlying harm, or potential harm that's been talked about and what's the legal tool, if any, that's best suited to fixing that.</p>
<p>Annalisa Tosdevin</p>	<p>That's really interesting. I think you know, one way or another it's clear that algorithms are on the minds of many anti-trust regulators, whether they have got quite the right parameters about what they should be looking at yet is another question, but they are clearly thinking about this. Are the regulators in the UK and EU saying much</p>

	<p>on this topic at the moment? For example, what is the UK's competition regulator, the Competition and Markets Authority, doing in this area?</p>
<p>Jordan Ellison</p>	<p>It's interesting, they're clearly giving it a lot of very mature, considered, informed thought which I think is what you'd expect a responsible competition authority that's keeping up to date with technology, that's exactly what you'd expect them to do.</p> <p>But there's not a lot of, there's a lot of kind of theories I guess on potential concerns, but there's not a lot of evidence of actual harms resulting in prosecution cases at the moment. There was this case in 2016 about posters, where effectively some firms in the poster market had an old fashioned price fixing arrangement and they happened to use some software to monitor whether they were each obeying the price fixing agreement. There's a little bit of a software twist there on a very old theme, so I don't really have that down as algorithms or artificial intelligence causing a competition law problem.</p> <p>It's more been in the realm of discussion papers and research. We have the Furman report and the CMA's data unit, you know, published a very kind of interesting, thoughtful, detailed report on potential harms from algorithms. But as I say, in the UK at least, it's very much in the realm of intelligent thinking about potential issues rather than lots of evidence of real cases yet.</p>
<p>Annalisa Tosdevin</p>	<p>I think it's a similar picture in the EU as well, I mean the Commission has clearly had algorithms on its radar for a while. In 2017 they featured in various speeches by Vestager and the Commission indicated it was monitoring potential competition issues thrown up by algorithms at that point.</p> <p>That was of course also the year of the Google shopping decision where the Commission fined Google for favouring its own service in its search results. In 2018 the Commission issued a decision in the Asus case, which was very much like the CMA's Posters case, really a traditional competition law infringement which was heightened by the use of algorithmic software.</p> <p>So again, I think it's more of the same, quite a lot of high level theoretical thinking in papers, perhaps fewer papers than are currently being published in the UK but nevertheless, it hasn't yet moved into more concrete action.</p> <p>We have seen the Commission try to provide some guidance on the use of algorithms in its draft horizontal guidelines but again nothing particularly concrete at this stage.</p>

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	<p>So I think it feels like competition regulators want to be seen to be saying something on this topic but are still very theoretical and high level. Is there any thinking at the moment on the role competition regulators should play in practice going forwards?</p>
Jordan Ellison	<p>There is. I think at the moment they're probably doing the right thing, you know, they're thinking through the issues but they're not leaping into make cases where harms don't exist. I think as a new technology or new market feature emerges, that's probably the right thing to do. I think getting up to speed on what the issues are and being open to complainants coming with real evidence of harm is probably the right thing for regulators to do and maybe the fact we haven't seen many cases yet is because no one has come to them with a real evidenced case of actual harm.</p>
Annalisa Tosdevin	<p>So we aren't seeing too many cases, but is there anything that the regulators should be doing to prepare? We have seen the CMA, for example, upskilling with its data unit, is there anything else that we might see them doing by way of preparation or any particular kind of case they might be on the lookout for to bring these issues to light?</p>
Jordan Ellison	<p>Yeah, I mean the upskilling's definitely happening, right. I mean, every competition authority you speak to is doing a lot of work to hire data specialists, AI specialists, other tech specialists, so that kind of upskilling is happening everywhere I think and the UK is a great example of that. You see it in the EC as well, especially with the DMA, they're really hiring in a big team of specialists so that's definitely happening.</p> <p>I don't know what the first true algorithm case will be, I suspect just the way these things develop, things develop normally quite incrementally, so it could be a fairly standard 'self-preferencing abusive dominance' case with a kind of algorithm flavour, where maybe the algorithm was part of the mechanism of discrimination against a rival, something like that. Or maybe a more consumer law case, where there's a lack of transparency to consumers about exactly what's driving the price they're paying and maybe in the grand scheme of things it's felt to be unfair or misleading to price based on a particular ranking system without being transparent about that. My personal bet is that we're not going from zero to something completely radical overnight and that this will be an incremental thing and hopefully will be based on evidence of real harm.</p>
Annalisa Tosdevin	<p>Of course there's also been a bigger question, not limited to algorithms, but nevertheless relevant for algorithms, which is are existing competition laws sufficient to deal with these digital markets types issues?</p>

	<p>In respect of algorithms specifically while some algorithmic harms aren't fundamentally different from traditional forms of anti-competitive conduct, as we've already spoken about, they do also have the potential to give rise to harm in more novel and untested ways. And we've seen the introduction, as you said, of the Digital Markets and Services Acts in the EU, and the Digital Markets Unit proposals in the UK, both of which contain some provisions on, for example, algorithmic transparency, accountability and interrogation, so sort of arming the regulators with the tools to investigate algorithms.</p> <p>I think it's fair to say no regulator has really yet been clear on what would guide the assessment of those algorithms from a competition law perspective, for example how they might apply competition rules to autonomously colluding algorithms, in the absence of agreement or concerted practice between humans. There is obviously still a lot of thinking to be done on these things as well.</p> <p>So I think we've already established that many of the harms being considered aren't really necessarily true competition law harms, and it's clear there's going to be a lot of potentially overlapping regulatory interest in algorithms, for example from privacy regulators, competition regulators, financial regulators - how are we going to avoid duplication and burden for industry?</p>
<p>Jordan Ellison</p>	<p>That's a big question right and in one sense it's good if we have a more holistic approach to these things so that non-competition issues are not pigeon holed to a competition regulator. But on the other hand you always have to be careful about adding more regulators to these situations and putting undue burdens and inconsistent rules on business. I think part of this is going to be having the right intellectual architecture and which regulator is in charge of which harms. Trying to make sure competition regulators are clear on what they do, consumer law enforcers are clear on what they do and privacy regulators know what they're role is: clarity on harms and responsibility for harms.</p> <p>Also, probably just good practical dialogue between different agencies, not the algorithm context, but we've already seen in a lot of our tech based competition law cases where there's a big data angle, very close collaboration between the competition agencies and the privacy regulators. In the UK you've also got more informal things like the Digital Regulation Cooperation Forum. Across Europe I see quite a few examples of the completion and privacy regulators working quite closely together. I think it's a mix of clarity of intellectual architecture and also just practical cooperation and everyone talking to each other regularly.</p>

<p>Annalisa Tosdevin</p>	<p>That's really interesting, and I think for example, the DRCF that you mentioned, has recently published a couple of papers on algorithms so again it's obviously got this at the forefront of its mind and is planning to undertake further activity in this area in the next year or so. I think it seems we can seem to expect to see a lot more on this in the coming months and years, from the competition regulator perspective and I'm sure from various other regulators too.</p> <p>With all of this in mind, what would you say are the key practical takeaways for clients who use AI and algorithms in their business?</p>
<p>Jordan Ellison</p>	<p>I think the first thing to say is that clients ought not to feel overly burdened by a law that doesn't yet exist and there's a high degree of unpredictability about what the UK and other Governments will do to create new rules in this space. In terms of existing rules, as we've said, we're not seeing a huge bunch of harms in the real world. I don't think businesses ought to feel any use of AI or algorithms should immediately put them in a red zone, very different from using any software or technology, it's partly about maintaining perspective.</p> <p>Having said that, rather than trying to predict the exact content of future rules that don't exist, it's more about at the moment I think just having some very good, basic, rules of thumb and maybe three I would think of:</p> <ul style="list-style-type: none"> • I guess the first would be, not really even a competition specific one, just a general one that always stands you in a good stead, is have clarity on what your algorithm is trying to achieve, the sorts of factors and criteria it's using to make decisions and be willing to explain that. It's sort of the front page of the newspaper test, do you know what you're trying to do and how you're doing it and would you be willing to explain that to your shareholders, customers other stakeholders – I think that's a pretty good starting point. • Maybe more competition law related, I think I would, on algorithms that are deciding prices, I think it's good, not for the competition law to drive any of that design or anything obviously, but just for the people involved in creating those pricing decision making tools to sit down with their competition lawyer earlier in the process and just get a sense of what factors are going to go into pricing and basically it's perfectly legitimate to take into account competitors pricing as you set your own pricing, and doing that electronically or through AI is as legitimate as doing it manually. Just having that discussion process is really useful. • The third thing I would say, still related to pricing decision making, is generally avoid trying to signal anything to your

	<p>competitors when you're setting prices. If your price decision making is looking at what's happening in the market and adapting your own prices intelligently, that's generally going to be ok. Whereas if you're changing prices, not to adapt to the market, but to try and send a signal to your competitors, that's when you start to get closer to the sorts of allegations of either explicit or tacit collusion.</p> <p>I think very broad rules of thumb but I think with those very broad rules of thumb, you put yourself in a reasonable place to avoid the most obvious harms that people have talked about. And then as things go forward and the UK government and other governments publish real legislation on this, they'll be further things to think about, but you know at this stage I think it's about common sense and almost that front page of the newspaper test.</p>
<p>Annalisa Tosdevin</p>	<p>That's really helpful. So in summary, I think we're at beginning and seeing the start of seeing some very detailed thinking by competition regulators in this area, there's clearly going to be a lot more to come and take it step by step, but those rules of thumb for the moment are key things that will be helpful for companies to bear in mind.</p>
<p>Jordan Ellison</p>	<p>Exactly, exactly.</p>
<p>Annalisa Tosdevin</p>	<p>Well thanks for your time Jordan, this has been a really interesting conversation. I mean the government has recently produced an AI policy paper setting out its emerging approach, with a full white paper to follow in late 2022, so it will be interesting to see what that says.</p> <p>We will be publishing more content on the legal implications of regulating AI in the coming months as well.</p>
<p>Jordan Ellison</p>	<p>Great, looking forward to it,</p>
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