

**EUROPEAN COMPETITION LAWYERS FORUM**

**Response to the CMA's public consultation on  
Algorithms: How they can reduce competition and harm consumers**

**16 March 2021**

## **Part 1: Introduction**

- 1.1 The European Competition Lawyers Forum (the “ECLF”)<sup>1</sup> is grateful for the opportunity to respond to the CMA’s consultation on Algorithms, which aims at developing CMA’s knowledge and understanding to better identify and address harms.<sup>2</sup> This response has been compiled by the ECLF Working Group and does not purport to reflect the views of all ECLF members or of their law firms (or their clients). Also, while the response has been circulated within the Working Group for comments, its contents do not necessarily reflect the views of all individual members of the Working Group.
- 1.2 ECLF commends the CMA’s Data, Technology and Analytics (DaTA) Unit in its attempt to contribute to the ongoing international debate regarding the regulation of digital markets.
- 1.3 Competition and consumer protection issues potentially arising from the use of algorithms have practical implications on how practitioners should advise clients developing or applying algorithms and how to ensure clarity on regulatory standards and enforcement priorities that would likely be applied. This contribution will focus on such practical implications.
- 1.4 The ECLF would welcome a continued dialogue with the CMA, in light of other responses received by the CMA, to discuss in more detail the development of the CMA’s new programme of work on analysing algorithms.

## **Part 2: Potential Harms**

- 2.1 The Algorithms Paper identifies a wide range of potential harms to competition and consumers arising from the use of algorithms. In some instances the potential harms identified in the Algorithms Paper fall outside the CMA’s jurisdiction. In other instances, it is unclear which powers within the CMA’s jurisdiction would be engaged: whether it is consumer protection or competition law. It would be useful to clarify this point. Not all the harms identified in the

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<sup>1</sup> The European Competition Lawyers Forum is a group of leading practitioners in competition law from firms across the European Union. This response has been compiled by a working group of ECLF members. A list of working group members is set out at Annex 1.

<sup>2</sup> These aims are set out in the *Algorithms: how they can reduce competition and harm consumers*, hereafter “Algorithms Paper” published by the Competition Markets Authority (the “CMA”) on 19 January 2021.

Algorithms Paper need to be addressed by competition rules, as consumer protection, data protection and new proposed regulation across both sides of The Channel addressing market failures generated by digital platforms can address many of the concerns identified.

- 2.2 Indeed, many of the competition concerns about algorithms are linked to the exploitation of market power by digital platforms, rather than generating competition concerns in their own right.
- 2.3 Distinguishing competition concerns from consumer protection or other issues – rather than bundling them together as “harms to competition and consumers” – may also help identify the right tool to address the perceived problem. Similarly the analysis would be assisted by distinguishing more clearly between situations the CMA views as socially undesirable and those that result from an exercise of market power, collusion or for which some other clear and plausible theory of harm under competition law exist. Such clearer structuring of the analysis would also enable clearer debate on if any regulatory gaps truly exist or if it just a question of using the existing tools.

### **Part 3: Competition law**

- 3.1 As regards competition law, there is a wide spectrum of potential issues arising from the use of algorithms. Some of them are straightforward, others less so. For example, algorithms can facilitate collusion. This happens where an algorithm allows businesses to exchange information that is competitively sensitive, forward-looking, disaggregated and company-specific. At one end of the spectrum, there is little doubt that the use of algorithms to implement resale price maintenance (RPM) or a price fixing cartel is illegal (e.g. Case 50223, CMA Decision, *Online sales of posters and frames*). At the other end of the spectrum, the application of competition rules on self-learning pricing algorithms is more complex.
- 3.2 It is settled case law that competitors can intelligently adapt to the market without infringing antitrust law, as long as there is no “concurrence of wills” between them, replacing independent decision making with collusion (*Wood Pulp II*). However, it is an open question whether self-learning algorithms that signal prices to each other and learn to follow the price leader would fall within this safe harbor. There is no precedent to date on this latter scenario, but the case law on price

signaling may provide a useful analytical framework (e.g. Case 39850, EU Commission Decision, *Liner Shipping*). In *Liner Shipping*, 14 container liner shipping companies regularly announced their intended future increases of freight prices on their websites, via the press, or in other public ways. These announcements were in absolute price percentage increases, did not provide full information on new prices to customers, but merely allowed the carriers to be aware of each others' pricing intentions and made it possible for them to coordinate their behavior.

- 3.3 Algorithms can also facilitate exploitation of market power or foreclosure of competitors. This can happen through a merger or an exclusive cooperation agreement resulting into the combination of a large and unique set of Big Data; or it can happen where a dominant company's use of such large and unique set of Big Data to implement targeted pricing, ranking, self-preferencing, etc. does not constitute "competition on the merits". Recent examples include mergers in which the EU Commission has considered the question of the accumulation of Big Data and its impact on competition (e.g. Case COMP/M.7217, *Facebook/WhatsApp*; Case COMP/M.6314, *Telefonica UK/Vodafone UK/Everything Everywhere/JV*; Case COMP/M.4731, *DoubleClick*; Case COMP/M.8124, *Microsoft/LinkedIn*; Case COMP/M.4726, *Thomson/Reuters*). Finally, the German competition case against Facebook is another relevant example: in that case, the Bundeskartellamt issued provisional findings that Facebook is abusing its dominant position by making the use of its social network conditional on its being allowed to limitlessly amass data generated by using third-party websites and merge it with the user's Facebook account.
- 3.4 The role for competition rules to engage with pricing algorithms is therefore potentially limited to a range of specific circumstances, namely:

- a. where there are risks of actionable tacit collusion in a range of competitive relationships;
- b. where foreclosure risks are associated with firms that enjoy market power which engage in discriminatory practices (which requires a technical and economic examination of the impact of the algorithm on the market in order to determine whether the type and level of discrimination being generated produces anti-competitive effects); and
- c. where algorithmic "failures" occur because of unforeseen circumstances (requiring a policy decision as to whether the problem generated is truly one of market abuse or anti-competitive behavior or, on the other hand, an

instance of market failure which should be addressed by some form of regulation).

- 3.5 It would be useful to frame the Algorithms Paper against this body of case law and decision making to avoid the risk of diluting their precedential value and deterrence effect when it comes to future compliance efforts and counselling. In the following section, we advance some initial suggestions on how the CMA could so.

#### **Part 4: Potential scope for further guidance**

- 4.1 Combining the CMA's findings in the Algorithms Paper and the available body of case law to date,<sup>3</sup> the CMA could provide further guidance – possibly within the Digital Regulation Cooperation Forum – on how it intends to apply its prioritization principles, statutory powers and cooperation mechanisms with other UK regulators (such as the ICO and Ofcom) to tackle the potential harms arising from the use of algorithms for competition and consumers.
- 4.2 By way of suggestion, such guidance could have the following objectives, where possible:
- d. Categorizing and ranking the possible harms by their inherent gravity.
  - e. Providing positive suggestions as to which steps businesses could take to achieve a more compliant outcome.
  - f. Clearly identifying which conduct would breach which statute, similar to the CMA's warning letters.
  - g. Agreeing cooperation mechanisms with the ICO and Ofcom to identify which is the best placed authority to act in line with the principles of efficient administration and *ne bis in idem*.
  - h. Providing more examples – e.g. of unilateral behavior that in some form or other amounts to misleading consumers or discriminating against them and of collusion through the use of algorithms.

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<sup>3</sup> For a recent summary of the case law to date, see Liza Lovdahl Gormsen, *Algorithms and Competition Law*, in CPI Antitrust Chronicles July 2020; and Giulia Sonderegger, *Algorithms and Collusion*, in ECLR Volume 42, Issue 4, 2021.

- 4.3 In particular, where there are risks of tacit collusion through algorithms, we would query whether the scenarios identified in the literature to date<sup>4</sup> are sufficiently robust to form operational categories for the CMA: namely, the scenarios of –
- i. “Messenger” algorithms;
  - j. Hub & spoke facilitator algorithms;
  - k. Algorithms that serve the function of so-called “predictable agents”; or
  - l. The “digital eye” scenario.
- 4.4 There is a danger that collusive arguments will get a disproportionate amount of attention because although interesting, in the real world they are far less likely either to be seriously attempted or to succeed beyond automated price matching.
- 4.5 In considering discrimination by a dominant firm, perhaps this would be a good time to consider whether personalized pricing can fit coherently within the economic theories regarding the anti-competitive effects of certain forms of differentiation. As the concept of discrimination under the Competition Act 1998 is always conditioned by the idea that it is only problematic when “undue” or “unfair”, perhaps the test can embrace the competition thinking associated with excessive pricing. By the same token, specialized pricing, while tinged with elements of “unfairness” if it is excessive, could be acceptable if restricted by reference to some objective characteristics that should be satisfied (in the same way that we accept the purchase of a last minute ticket on a plane in Business Class to be compatible with competition rules even though it may be 10 times the price of the lowest Economy seat and virtually an identical price to produce).
- 4.6 In reality what may be a concern is not so much what the algorithm would try to do, but the data that companies are allowed to gather and correlate, in order to allow it to work. If users had more control over their own data and who it is shared with, many exploitative concerns would be less marked. Therefore, any further guidance from the CMA should also focus more on companies’ ability of gathering and using data.
- 4.7 More problematic admittedly is how one deals with the situation of merely transient market power generated by circumstances of local scarcity (e.g., few taxis in a particular suburb of London that is congested because of a large sporting event).

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<sup>4</sup> See e.g. *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* Illustrated by Ariel Ezrachi, Maurice E. Stucke (ISBN: 9780674545472).

- 4.6 CMA's further guidance on these points would help businesses – particularly, smaller businesses – to untangle the benefits of the use of algorithms from their potential harms, provide greater legal certainty for their compliance efforts, and reduce the need for public enforcement, while facilitating private enforcement.

### **Part 5: Liability**

- 5.1 Even assuming that an anti-competitive object or effect is established, the question arises whether liability can be established, if business decisions are made by self-learning machines rather than by the companies.
- 5.2 Liability can only arise from conduct that is committed “intentionally” or “negligently”. Defining the benchmark for illegality requires assessing whether any illegal action was anticipated or predetermined (e.g. through programming instructions) or whether could have reasonably been foreseen.
- 5.3 The EU Commission Note to the OECD on *Pricing Algorithms and Collusion* makes an interesting statement in this regard: “*An algorithm remains under a firm’s direction and control and therefore the firm is liable for the actions taken by the algorithm*”. This sounds like a presumption of direct liability, but it remains to be seen whether such a presumption would find support in the existing case law on liability. Given the complexity of algorithms and the likelihood that they are developed or partially by third parties is it really correct to attribute liability on this basis even if a rebuttable presumption.
- 5.4 The use of algorithms can also be an aggravating circumstance. For example, in the investigation into retail price agreements involving Asus (Case AT.40465), Denon & Marantz (Case AT.40465), Philips (Case AT.40181) and Pioneer (Case AT.40182), the Commission stated: “*the effect of these suspected price restrictions may be aggravated due to the use by many online retailers of pricing software that automatically adapts retail prices to those of leading competitors.*”
- 5.5 So, in identifying potential harms arising from the use of algorithms, the CMA should bear in mind the question of who is liable for such harms and under which circumstances. In particular users of algorithms that they have not themselves developed should be able to rely on statements and where appropriate warranties and indemnities provided by developers and not be held liable for consequences of which they were unaware of and against which they took all reasonable steps to avoid. This is key to ensuring that compliance efforts and counselling are targeted to the appropriate market actors, that is to ensure that appropriate

safeguards could be established by undertakings developing algorithms and by undertakings using such tools in their business.

### **Part 6: Lessons from the financial services industry**

- 6.1 Some of the proposals in the Algorithms Paper take inspiration from sector specific regulation for algorithms used in the financial services industry. However, we are concerned that the Algorithms Paper might overlook the nuances and ontological differences of such experience.
- 6.2 Financial services regulation for algorithms depends on several factors: e.g., the competition concern itself, the market dynamics, the business model, etc. Remedies are specific and adapted to those parameters.
- 6.3 Financial sector regulation starts from the premise that there is specific public interest with regard to the provision of a limited set of services and in making it subject to prudential supervision. Based on this premise, these activities would typically be available to specifically licensed entities (from banking, to payment, investment services, etc.). There is a close and regular interaction between the industry and the sector specific regulator, the FCA. This premise does not apply to algorithms in all sectors.
- 6.4 Moreover, the difficulty in applying financial services regulation to new technology is well illustrated by the FCA's cautious approach to the Fintech sector. The FCA's approach has been focused in limiting rather than extending the scope of sector specific regulation. The FCA's sandbox approach focuses on how to lessen the traditional regulatory burden, while the entities are small enough not to pose considerable risks to the wider public or wider financial system.
- 6.5 Therefore, the CMA's suggested path to extend a form of financial services-type prudential and/ or conduct regulation to the use of algorithms in all sectors is fraught with danger.

### **Part 7: Compliance**

- 7.1 These complexities have an impact on how counsel should advise businesses developing and/or applying algorithms.
- 7.2 Businesses and their counsel must assess the potential risks (e.g. is it RPM, hub and spoke, or foreclosure, etc.?) and try to disentangle the pro-competitive effects from the negative effects of any business conduct.



7.3 Compliance choices in this regard could include changes to the algorithm structure, use or policies. This will depend on the circumstances of each case. For example:

- m. As regards Big Data pooling agreements, companies could send their data to a platform, and get back aggregate data with no indication of which company it comes from. That would still give companies information that would help build better cars or make existing ones run better - without undermining competition. Or companies might limit the type of information they share. So car companies might decide not to share information that would tell rivals too much about their technology. Online shops might share data without saying when products were bought, or for how much. And companies also need to be sure that pooling data doesn't become a way to shut rivals out of the market.
- n. As regards pricing algorithms: in a recent speech on Algorithms and Competition of 16 March 2017, Commissioner Vestager said: "What business can – and must – do is to ensure antitrust compliance by design. That means pricing algorithms need to be built in a way that doesn't allow them to collude. Like a more honorable version of the computer HAL in the film 2001: A Space Odyssey, they need to respond to an offer of collusion by saying "I am sorry, I'm afraid I can't do that." What this means in practice for antitrust compliance will invariably depend on the facts of each case. However, it should be possible to set some ground rules based on the existing case law. Businesses should remain free to use self-learning pricing algorithms once prices are set and signaling can benefit consumers – for example, by allowing quicker and automatic switching, like smart meters detecting signals of lower or higher prices and self-learning to switch to the supplier offering lower prices.

7.4 On the one hand, the CMA has all the tools to deal with the harms identified in the Algorithms Paper:

- o. Its forensic digital powers allow it to examine price movements which are more susceptible to algorithmic manipulation and which are concentrated, where the likely anti-competitive effects are significantly greater.
- p. In turn, its market review powers allow it to take action if the circumstances support such intervention, which includes tailored

regulatory measures. In this context, for example, the CMA may impose a “duty of care” – for example, through Codes of Conduct – on firms in particularly sensitive sectors to take certain precautionary steps in the selection and adaptation of software, and/or to document their selection and programming of algorithms.

- 7.5 On the other hand, from a practitioner’s perspective, all of the potential harms identified in the Algorithms Paper that may constitute competition law infringements may be prevented through appropriate compliance strategies and counselling.
- 7.6 Finally, algorithms are a rapidly developing technology, and the CMA should monitor the use and development of algorithms and reassess the initial risk analysis whenever there are significant changes or advances in technology.
- 7.7 Therefore, it would be helpful for the DaTA Unit to acknowledge that the CMA, businesses and their counsel already have the tools to seek to avoid the potential harms identified in the Algorithms Paper that may constitute competition law infringements. Moving the post too early or too frequently through legislative changes or additional ex ante regulatory requirements, whilst it is still early days for judging the use of algorithms, could be counter-productive and it would risk shifting the emphasis from compliance efforts and counselling to a kind of “Big Brother”-type of enforcement. We trust that this is not what the DaTA Unit has in mind.

## **Part 8: Conclusion**

- 8.1 The CMA faces a challenge: how to demonstrate that yet more work has practical relevance to the welfare of consumers. The best way to meet that challenge is not more papers, conferences and panel debates, as interesting and stimulating as they may be; it is by providing practical guidance for solving realistic situations undertakings could face, ongoing regulatory dialogue with specific undertakings using or developing algorithms, bringing cases and testing them before the courts.

## **Annex 1: Members of the ECLF working group**

- British Institute of International and Comparative Law: Dr Liza Lovdahl Gormsen
- Flint-Global: Stephen Kinsella
- Herbert Smith Freehills: Stephen Wisking
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- Slaughter and May: Philippe Chappatte
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- Uría Menéndez: Edurne Navarro Varona