Proskauer

Legislating Around AI-Driven Algorithm Concerns

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Pricing algorithms are nothing new. They are, generally speaking, computer programs intended to help sellers optimize prices in real time, or close to it. These programs can use data on demand, costs, or even competitors' prices to "learn" to set the prices of products. What is new is the proliferation of these programs across industries and the emergence of artificial intelligence-driven pricing algorithms.

With more sophisticated programs, some are concerned that these algorithms will allow competitors to collude without any discussions, let alone any agreements. Of course, it is not inherently anticompetitive to use algorithms to set prices. But it is possible that AI-driven algorithms may begin to functionally collude on price, without any human input from their companies.

Because traditional antitrust frameworks hinge on humans agreeing to fix prices, there is limited precedent guiding how algorithmic pricing challenges could be handled. But the Department of Justice and the Federal Trade Commission have expressed their confidence that existing legal frameworks would capture these potential antitrust problems.

FTC Chair Lina Khan assured the public in a May 2023 opinion article that "[t]he F.T.C. is well equipped with legal jurisdiction to handle the issues brought to the fore by the rapidly developing A.I. sector, including collusion, monopolization, mergers, price discrimination and unfair methods of competition." And the DOJ is similarly of the belief that current laws are sufficient to address technological collusion. A few months ago, the DOJ filed a statement of interest in an ongoing lawsuit involving allegations that rent-setting software inflated prices, asserting that, "[l]ongstanding legal principles apply with equal force to this new machinery" and insisting that Section 1"applies where, as here, the common pricing agent is a common software algorithm."

Notwithstanding the agencies' confidence, two recently introduced Senate bills attempt to address potential competition problems. In the Senate Judiciary Committee's December 13, 2023 hearing entitled "The New Invisible Hand? The Impact of Algorithms on Competition and Consumer Rights," Senator Amy Klobuchar expressed doubt that current antitrust laws were sufficient to regulate potential anticompetitive conduct: "Whether the conspiracy takes place in a server room, or a boardroom shouldn't matter under the antitrust laws. But it isn't clear whether our current antitrust laws are sufficient to stop that practice."

Senator Klobuchar's Preventing Algorithmic Collusion Act (S-3686) would meaningfully alter antitrust law in a number of ways. It would create an enforcement audit tool and require Attorney General or FTC approval of pricing algorithms. It would allow a "presumption" of a price-fixing "agreement" when direct competitors share competitively sensitive information through a pricing algorithm to raise prices. It would also forbid companies from using non-public/competitively sensitive information from their direct competitors to inform or train a pricing algorithm, and would create a presumption of illegal collusion if competitors violate that ban.

Senator Ron Wyden also introduced a bill (S-3692) intended to target the impact of AI-driven algorithmic pricing in the housing market. (The text of his bill is not posted, but its official title is "A bill to prohibit the use of algorithmic systems to artificially inflate the price or reduce the supply of leased or rented residential dwelling units in the United States.")

While passage may be but a distant, minute possibility, these bills and other statements from the DOJ and FTC are worth keeping in mind as the ever-dynamic landscape of AI-driven technologies continues to evolve.

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