

DOES YOUR **ALGORITHM** COMPLY WITH THE COMPETITION RULES?

Companies increasingly use algorithms to achieve effective operations. Especially pricing algorithms constitute a substantial part of the algorithms used. This may give rise to problems pertaining to competition law as not all use of algorithms is lawful. Below, we will describe how you may use algorithms lawfully at your company.

WHAT IS AN ALGORITHM?

The concept “algorithm” may be used to describe almost all computer-related functions or automated processes carried out by a company. Algorithms serve as problem solvers and process automation in connection with a company’s operations.

Many attempts have been made to describe an algorithm. A description often used to give a good and clear explanation is “recipe”: An algorithm is described as a recipe with task descriptions, rules or procedures which must be performed to solve a specific task.

This may for instance be a search engine which finds relevant results in accordance with the task description. Or an app or a service used to calculate the fastest route from your company to your customers. It may also be a computer program which helps you get an overview of your products, prices and market conditions.

WHAT IS A PRICING ALGORITHM?

Both national and international investigations show that one of the most used algorithms are pricing algorithms. At the same time, this type of algorithm gives rise to most concerns in terms of competition law.

There are different types of pricing algorithms - for instance monitoring algorithms which provide an overview of the competitors’ prices, or price recommendation algorithms which recommend prices, or control algorithms which automatically change the price of specific products.

ALGORITHMS AND COMPETITION LAW: TOP 5 QUESTIONS

1. Is it okay that your algorithm monitors data, e.g. the competitors' prices?

It is lawful. You may monitor and compare your own prices with the competitors' prices. The competition rules prohibit competitors from concluding agreements with each other which restrict competition, but you are entitled to react on the market in an intelligent manner. This also implies that you may monitor the competitors' behaviour as long as you make your own business decisions independently. In contrast, it is unlawful to coordinate market behaviour.

2. Your algorithm warns you that you have to adjust your prices or that you already adjust your prices separately - is this lawful?

It is lawful to adapt your behaviour due to circumstances arising on the market if it takes place based on publicly available information. It is not lawful if it takes place based on the competitor's confidential information or according to agreement with a competitor to increase the prices.

It may be problematic in terms of competition law if competing companies' algorithms coordinate prices with each other in the same way as it is problematic if competitors do the same.

3. Am I participating in a cartel if I use a pricing algorithm together with my competitors, but we do not meet?

It is lawful to monitor the market so that you can react to changes. This means that it is lawful to use a pricing algorithm to get an overview of the market.

However, it is not lawful to participate in a price-fixing cartel. If a company exchanges information with its competitors concerning prices to control the market,

it will be considered a price-fixing cartel. This means that you are violating the competition rules if you use pricing algorithms together with your competitors or potential competitors to control prices or to obtain information on the competitors' price fixing.

4. Am I violating the competition rules if my algorithm is using the same data or codes concerning price calculations as my competitors?

You will be violating the competition rules if you make decisions concerning prices, price compositions, minimum or maximum prices together with a competitor.

This also means that an algorithm which uses the same data or is based on the same code may constitute a joint price-fixing agreement. There is a risk that it will be considered a joint price-fixing agreement if competitors make a joint algorithm based on these competitors' business information.

5. Is it lawful to use an algorithm to monitor distributors' resale prices?

It is lawful to use algorithms to monitor the market. However, it is a material violation of the competition rules if a manufacturer fixes the distributors' prices or minimum sales prices. This means that all activities which imply that a distributor cannot freely decide on its own sales prices, discounts or campaigns are unlawful.

It is for instance unlawful if your algorithm punishes or sanctions a distributor that departs from the recommended price. In addition, a monitoring system may be an aggravating circumstance in case of a sanctioning of a violation of the competition rules.

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