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I. INTRODUCTION

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The focus of this piece is recent enforcement activity of the European Commission under Article 101 and 102 of the Treaty on the Functioning of the European Union, where the competitive impact of the use of algorithmic market actors has been considered and, in some instances, sanctioned. Three distinct categories of cases are examined: where the use of algorithms creates the opportunity for strategic behaviour designed to take advantage of their otherwise non-problematic operation of an algorithmic effect; where the market-wide use of algorithms exacerbates the harm caused by anti-competitive conduct; and where the condemned behaviour comprises a decision to depart from the ordinary operation of an algorithm in certain circumstances. For each, we consider how the use or operation of the algorithm fits into the theory of harm, and the extent to which the innovative digital context requires concomitant innovation in the application of the relevant legal rule. The piece concludes with some observations on the common themes that arise from this emerging enforcement practice.

II. ONLINE ADVERTISING: ALGORITHMS AS AN ARTEFACT OF THE MARKET

We begin with the most straightforward illustration, namely where the algorithm is merely an artefact of the

III. RESALE PRICE MAINTENANCE: ALGORITHMS AS AGGRAVATORS OF HARM

But contrary, a second category of recent enforcement practice in the industry here the use of algorithm render the anticompetitive impact of resale price maintenance more serious and more durable in specific market circumstances. Oursample here again arise from the use of algorithmic resale price maintenance in the e-commerce sector, resale price maintenance (RPM) practice has aim to enhance the competitive price competition. It has been facilitated by the emergence of online retailing.

The growth of e-commerce has resulted in a well-documented change in the type and frequency of the use of algorithmic resale price maintenance. In their distribution policies, which has prompted a renewed interest in their resale price maintenance ban in the European Commission.⁴ In 2018, the Commission took a infringement decision prohibiting RPM practice in the online sphere.⁵ In each instance, it relied upon the well-established, but also somewhat maligned, but objective characteristics of a minimum RPM under Article 101(1), relying on their earlier precedent to support a formal condemnation of the use of the practice in context of a business model and market structure. It did not do so three decades ago.⁶

What is arguably more remarkable is the manner in which the Commission anchored its decidedly old-school skepticism of algorithmic resale price maintenance in modern market context, resale price maintenance reference to the recent use of algorithmic economic actors in the e-commerce sphere. On the one hand, the reference to objective prohibition of RPM is hardly a more economic approach to EU competition enforcement. There is no hint, in the decision, of the developments in *Leegin* a decade prior to it, hereby an admittedly cited U.S. Supreme Court shifted the treatment of RPM from the *per se* illegal to the rule of reason a mere category under 1 of the Sherman Act.⁷ But nor is there any hint of the Court of Justice judgment in *Maxima Latvija* from 2015, where the Court drew a clear distinction between the treatment of horizontal and vertical resale price maintenance under Article 101(1).⁸ This a distinct decision notably moving from the original *Binon* jurisprudence on RPM, which is a literal, undifferentiated reading of the Article 101(1)(a) prohibition.⁹ The Commission's approach become even more questionable when viewed in light of recent case law that has given central importance to the legal and economic context of an resale price maintenance, and in particular, the proposition that resale price maintenance has a plausible efficiency rationale are not suitable for a objective condemnation,¹⁰ even if the market would have the effect of reducing competition in practice.¹¹

Yes, despite the reference, there is one dimension to this recent enforcement activity that may justify the application of this older, arguably somewhat dated precedent in the digital context. Namely, as the Commission recognized in each of its RPM decision, the recent use of algorithmic and monitoring price in the e-commerce sphere may significantly increase the detrimental market-wide impact of individual RPM policies, which by reducing the competition that such practices are harmful to competition by their very nature. There are also in which the use of algorithmic feed into the anticompetitive behavior in this context.

First, as the Commission explicitly noted in its *Asus* decision,¹² manufacturers may use of monitoring tools to criticize the pricing practice of online retailer, which enabling the decision of lower-than-permitted resale price both more rapidly and more systematically. Accordingly, RPM practices are potentially more problematic in the e-commerce sphere because, through the use of algorithm, they can be enforced more effectively, and thus consider, more detrimental effect.

⁴ European Commission, *Final Report on the E-Commerce Sector Inquiry*, COM(2017) 229 final, March 10, 2017.

⁵ Case AT.40465 *Asus*, AT.40469 *Denon & Marantz*, AT.40181 *Philips*, AT.40182 *Pioneer*, Decision of July 24, 2018, and Case AT.40428 *Guess*, Decision of 17 December 2018.

⁶ Special Case C-243/83 *Binon v. AMP* EU:C:1985:284, C-311/8 *VVR v. Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* EU:C:1987:418, and C-27/87 *SPRL Louis Erauw-Jacquery v. La Hesbignonne* SC EU:C:1988:183.

⁷ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

⁸ Case C-345/14 *SIA „Maxima Latvija“ v. Konkurences padome* EU:C:2015:784.

⁹ Case C-243/83 *Binon v. AMP* EU:C:1985:284, resale price paragraph 44.

¹⁰ In particular, Case C-67/13 P *CB v. Commission* EU:C:2014:2204, C-307/18 *Generics (UK) and Others* EU:C:2020:52, and C-228/18 *Budapest Bank and Others* EU:C:2020:265.

¹¹ Article 1.1. In the case in Case T-491/07 RENV *CB v. Commission* EU:T:2016:379.

¹² Case AT.40465 *Asus*, paragraph 27.

Second, the widespread use of price- setting algorithms by online retailers potentially reinforces the anticompetitive effects of individual RPM

V. CONCLUDING REMARKS

The purpose of this piece is to illustrate some of the administrative, more mundane, actions in high competition enforcement, particularly the European Commission, that have already been undertaken and dealt with the operation of algorithms in their data-driven enforcement activities. From this incomplete sample, we can nonetheless discern a number of recurring themes, that suggest to better inform our understanding of the antitrust treatment of algorithms going forward.

As noted in the introduction, algorithms have become part of the furniture in many markets, meaning that an proper grasp of how competition works in those sectors is a laudable accomplishment for their use and operation. This could conceivably be a complicated task here, for instance, the algorithms are like a black box, which renders it difficult even for computer scientists to comprehend, let alone competition law or economists. Yet, from an antitrust perspective, it is not the precise operation of the technology that is of interest, but rather its actual or anticipated impact on competition within the relevant marketplace. This, of course, is a rather more straightforward question, at least in principle, and is addressed below.

Following on from the observation that the use of algorithms is not standard practice in many markets, the starting point for antitrust analysis in this context is, typically, that understanding how to do no deliberate interference with the free functioning of each program in a manner that is likely to have anticompetitive effects. Accordingly, a simple restriction or manipulation of the information that an algorithm receives, as in *Guess*, or to modify the operation of the algorithm in individual instances, particularly to the detriment of competitors, as in *Shopping*, may well be conceived of as a subtle or other anticompetitive behavior. In both cases, the implication is that the ordinary, non-restricted operation of the algorithm represents the parameter of normal competition within the relevant marketplace; deliberate efforts to avoid or diverge from the routine algorithmic process have no delimiting competitive plane are thus generally peculiar.

The principal exception here is if the algorithm itself has caused the competition problem: an antitrust enforcer, of course, would not defer to inherent anticompetitive technology. The anticipated problem of algorithmic collusion is a noted example, and is rather particularly



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