

Algorithms and discrimination

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Focus on two types of discrimination

Price
discrimination of
final consumers

Discrimination of
competitors by
favouring own
downstream
activities

Consumer price discrimination and EU law

Data protection

- Right to object to processing of personal data for direct marketing
- Right not to be subject to a decision based solely on automated processing which produces legal effects concerning you or significantly affects you

Consumer protection

- Unfair Commercial Practices Directive leaves traders free to set prices as long as consumers are informed on how they are calculated
- But traders cannot apply misleading or aggressive commercial practices

Anti-discrimination

- National antidiscrimination law prohibits differentiation based on gender, racial or ethnic origin, religion and age
- Services Directive prohibits differentiation based on nationality or residence
- Proposal for a Regulation on geo-blocking

Price discrimination and EU competition law

- Article 102(c) TFEU:

‘applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage’

- So no scope to address price discrimination by a dominant firm vis-à-vis final consumers?
- Issue not yet occurred before the EU Courts

Way forward?


Data and consumer protection as first line of defence to make consumers aware of price discrimination



National antidiscrimination law and EU internal market law ban discriminatory conduct but their scope is limited



Policy issue whether competition enforcement should be used to protect final consumers against discrimination



Need for case-by-case approach to ensure competition law only prohibits discrimination that is harmful to welfare

Discrimination of competitors

- Communication on Online Platforms and the Digital Single Market: additional measures considered to address lack of **transparency of rankings in B2B context**
- Link with net neutrality and **'platform fairness'**
- Ongoing strive for **algorithmic accountability**
- Is a requirement of transparency enough?

Scope for competition enforcement?

- *Google Shopping case*
- **Exclusionary discrimination** as a stand-alone form of abuse under Article 102 TFEU?
- More general **concept of non-discrimination**
- Google is ordered '*to comply with the **simple principle of giving equal treatment to rival comparison shopping services and its own service***'

Conclusion

Advent of algorithms requires clarification of liability for discrimination under existing legal regimes

There is a need for consistent application of the different regimes

Main challenge is to devise adequate remedies and monitoring

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