

Without Any Prejudice? The Antitrust Implication of the AI Act

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I. Introduction



- ▶ The AI Act
 - › April 2021
 - › Archetypal risk regulation distinguishing unacceptable (art. 5), high (art. 6), limited (art. 52) and non-high-risk (art. 69)
- ▶ No ambition to dive deeper in this risk ladder
- ▶ RQ: Does (and if so, to what extent) the AI Act allow for algorithmic regulation to take shape in competition law?

I. Introduction



- ▶ Algorithmic regulation is “*an idea whose time has come*” (O’Reilly 2013)
- ▶ Algorithmic regulation is algorithmic decision-making systems, *i.e.*, “*algorithmically generated knowledge systems*” executing of informing decisions (Yeung 2018)
 - › Executing: Automated law enforcement systems
 - › Informing: Recommender systems
- ▶ Governments enthusiastically incorporate these technologies in public administrations (Restrepo Amariles 2020)
- ▶ What about competition law enforcement?

II. Algorithmic Screening Tools



- ▶ Cartel takes place “*behind a veil of dishonesty*” and wear a “*cloak of secrecy*” (OECD 2001)
- ▶ Upshot? Few cartels discovered (Bryant and Eckard 1991, Combe 2007, Ormosi 2020, Combe 2020)
- ▶ Solution: Leniency programmes
 - › Break the omerta code among cartel member by offering amnesty to the first-in-the-door (Zingales 2008)
 - › Provides first-hand evidence (Stephan 2009)

II. Algorithmic Screening Tools



► However:

› Controversial effectiveness:

- » *“Success is to be measured by a small number of cartels, not a large number of leniency applications”* (Harrington and Chang 2015)
- » *“What consumers and industry ultimately need is an economy that doesn’t have cartels in the first place”* (Vestager 2021)

› Deterrence gap

- » The majority of investigations starts after a leniency application (Archimbaud 2020)
 - » Low probability of detection through ex officio investigation (EU Court of Auditor 2021)
 - » Expected value of penalty \leq or \geq profit driven from cartelisation?
- › *“While there is a recognition that a leniency program is an immensely valuable tool (...) concerns arise when it is the only tool”* (Harrington and Chang 2015)

II. Algorithmic Screening Tools



- ▶ There is “*conventional wisdom on collusion*” that permits the identification of “*factors that are supposed to hinder or facilitate*” collusive behaviours (Tirole 1988)
 - › Structural screens: analysis of market structure (e.g.: market concentration)
 - › Behavioural screens: analysis of the collusive methods or outcome of collusion
- ▶ The probability of cartel detection is not exogenous and depends on competition authorities’ choices (Combe 2020)
 - › Finite resources lead to different priority degrees (CJEU, *Automec srl v Commission* 1992)
 - › The Commission is free to focus “*its enforcement resources on cases where it appears likely that an infringement may be found*” (Commission Notice 2011)

II. Algorithmic Screening Tools



- ▶ In light of priority and resources allocation, AI systems help the competition law authorities initiate the “*right investigation*” (van Bonin and Malhi 2020)
- ▶ “*Algorithmic shift in the fight against cartels*” (de Marcellis-Warin, Marty and Warin 2022)
 - › Process data quicker and more efficiently
 - Sooner identification of market deficiencies
 - Shift from reactive claim to proactive investigations
 - Increases the probability of detection that increases the efficiency of leniency programmes

II. Algorithmic Screening Tools



- ▶ AI systems draw the sketch of suspicious businesses by identifying cartelists' recurring characteristics or patterns (Sanchez-Graells 2019)
- ▶ Update of screening tools → Algorithmic screening tools
- ▶ Algorithmic screening tools are recommender systems, *i.e.*, algorithmic regulation that “*direct or guide an individual’s decision-making processes in ways identified by the underlying software algorithm as optimal (...) with the human user retaining the formal decision-making authority*” (Yeung 2018)

II. Algorithmic Screening Tools



- ▶ Algorithmic or not, structural and behavioural screens work (Abrantes-Metz 2012)
- ▶ AI systems improve decision-making (de Marcellis-Warin and Warin 2017) as they are free of bounded rationality and human cognitive biases (Lim 2021)
- ▶ But: screening requires large datasets (Danks 2014) that are not always publicly available (OECD 2013)
 - › Solution: data quality requirement (art. 10 AI Act)
- ▶ But: The automation bias might reinforce human cognitive bias (Goddard et al. 2012)
 - › Solution: human agency and oversight (art. 14 AI Act)

III. Algorithmic Decision-Making under the AI Act



- ▶ Do algorithmic screening tools fall within the scope of application of the AI Act?
 - › “Without any prejudice to the application of Union competition law” (Explanatory Memorandum)
 - › This is not a dead-end
 - › AI system is a software that generates either content, predictions or recommendations given a set of human-defined objectives (art. 3(1) AI Act)
 - › High-risk AI system is
 - » Either covered by sectorial product legislation listed in Annex II and used as a product or a safety component (art. 6(1)(a) AI Act) for which a third-party conformity assessment is required (art. 6(1)(b) AI Act)
 - » Or not covered by sectorial product legislation but still considered as high-risk and as such listed in Annex III (arts. 6(2) and 7 AI Act).

III. Algorithmic Decision-Making Under the AI Act



- ▶ Law enforcement activity mentioned in Annex III
 - › The AI Act defines law enforcement authority as any public authority competent for law enforcement activities, *i.e.*, the prevention, investigation, detection, or prosecution of criminal offences (arts. 3(40) and 3(41) AI Act).
 - › Annex III submits to mandatory requirements AI systems used by law enforcement authorities “AI systems intended to be used by law enforcement authorities for predicting the occurrence or reoccurrence of an actual or potential criminal offence based on profiling of natural persons as referred to in Article 3(4) of Directive (EU) 2016/680 *or assessing personality traits and characteristics or past criminal behaviour of natural persons or groups*” (Annex III(6)(e) AI Act)
- ▶ This definition is quite close to the purpose of behavioural cartel screenings, and yet it is restricted to criminal offences

III. Algorithmic Decision-Making Under the AI Act



- ▶ Reference to criminal offences is problematic, as competition law is qualified as criminal in some but not all Member States
 - › Full criminalisation: Ireland, Estonia, Denmark, Greece and Slovenia
 - › Criminalisation of specific competition law infringements in Luxembourg, Germany, Poland, Hungary, Austria, Italy, Belgium, Portugal and Croatia
 - › Criminalisation of competition law infringement in specific circumstances in France, Romania, Czechia and Slovakia (*caveat* Cyprus)
 - › No criminalisation in Bulgaria, Finland, Netherlands, Sweden, Malta, Lithuania, Latvia and EU competition law
- ▶ Upshot: The AI Act will only apply to competition law proceedings in legal orders that criminalise competition law
- ▶ How does this fit the objective of harmonisation?

III. Algorithmic Decision-Making Under the AI Act



- ▶ Applying the AI Act to competition law through the backdoor? Criminal law if (ECtHR *Engel*)
 - › Classification in domestic law as a starting point (ECtHR, *Weber v. Switzerland* 1990)
 - › Nature of the offence
 - » Does the rule concern all citizens? (ECtHR, *Bendenoun v. France* 1994)
 - » Does the rule have a deterrent or punitive purpose or does it merely impose pecuniary compensation? (*Ibid*)
 - » Were the proceedings brought by a public authority under statutory powers of enforcement? (ECtHR, *Benham v. The United Kingdom* 1996)
 - » Does the rule at stake seek to protect general interests of society? (ECtHR, *Produkcija Plus Storitveni Podjetje D.O.O. v. Slovenia* 2018)
 - » Is the imposition of a penalty upon a finding of guilt? (ECtHR, *Benham v. The United Kingdom* 1996)
 - » Is the misconduct at stake classified as part of the criminal law in the vast majority of the Contracting States (ECtHR, *Öztürk v. Germany* 1984)
 - › Severity of the penalty (ECtHR, *Campbell and Fell v. The United Kingdom* 1984)
- ▶ Upshot? Competition law belongs to the criminal sphere (ECtHR, *Société Stenuit v. France* 1992; ECtHR, *Lilly France S.A. v. France* 2002; ECtHR, *A. Menarini Diagnostic S.R.L. v. Italy* 2011)

III. Algorithmic Decision-Making Under the AI Act



► Within the EU

- › Competition law offences “*shall not be of criminal nature*” (Council Regulation 1/2003)
- › ECtHR *Jussila*: hard core vs peripheral criminal law
- › EU competition law is not hard core criminal law but belongs to its periphery (Bot 2010, Sharpston 2011, Kokott 2013, Wahl 2018, Bobek 2021)
- › Confirmed by the ECJ (recently, *bpost* 2022)
- › Competition law is “*criministrative*” law (Bailleux 2014)

III. Algorithmic Decision-Making Under the AI Act



- ▶ RQ: Could the criministrative nature of competition law serve as a back-door to apply the AI Act to all competition law proceedings regardless of the domestic qualification?
- ▶ No
 - › Contextual approach: the AI Act and SWD refer to “criminal matters” in a context of hard core criminal law
 - › Coherence: “AI systems specifically intended to be used for administrative proceedings by tax and customs authorities should not be considered high-risk AI systems used by law enforcement authorities for the purposes of prevention, detection, investigation and prosecution of criminal offences” (Recital 38, *in fine*, AI Act)

IV. Conclusion: Without Any Prejudice?



- ▶ Annex III suggests AI systems intended to be used by law enforcement authorities in the course of detection, investigation and prosecution of criminal offences raise high-risk and are subject to mandatory requirements
 - › In legal orders that qualify competition law as criminal: algorithmic screening tools would have to comply with the AI Act
 - › In legal orders that do not qualify competition law as criminal: the AI Act does not apply
 - › The AI Act closes the door to an extension of its scope of application through peripheral criminal law
- ▶ As the AI Act is a harmonising regulation, keeping different standards of protection depending on national qualification makes no sense



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