

QUESTIONS & ANSWERS

1. Should Ryanair be allowed to charge le higher prices based on the number of time/clicks I made? – Ana

In principle antitrust law has nothing to say if Ryanair is not dominant (which must be seen on a route by route basis). But this pricing practice, currently allowed, might be seen as exploitative and violating user privacy in the near future, especially with the GDPR, which contains non-discrimination provisions, bans discriminatory profiling and requires consent and right to access in case of use of personally identifiable info. The use of machine learning algorithms is however likely to bypass some of these provisions, and the right to access would only be effective if backed by adequate technological solutions. By the way, the opposite often occurs: the lower the number of clicks, the lower the perceived price elasticity, the higher and the (attempted) price charged by Ryanair. Same for Expedia. Also, one study found that the price of the headphones Google recommends may depend on how budget-conscious your web history shows you to be. And already in 2012 one article in the Wall Street Journal highlighted that Orbitz advertised more expensive hotels to Mac users than PC users as it found that Mac users spent ~30% more on hotel bookings than PC users. – Andrea Renda

2. Should a company be allowed to set different prices based on data which the consumer did not disclose? Ana

Again the legal landscape is uncertain. It is possible as of now, as data brokers trade data about end users anyway and algorithms can establish correlations without explaining causation. Again, this will change in the future, especially in Europe with the GDPR, as users become more privacy-aware: but it is going to be very hard to distinguish cases in which data have been disclosed, from cases in which they have not, unless end users clearly specify their privacy preferences and restrictions in advance (and even in that case, user reaction might be negligible as in the case of cookie use by websites), or regulation steps in to avoid specific practices as disproportionate and discriminatory. The Commission also recently clarified that “under EU consumer and marketing law, traders can freely determine their prices as long as they inform consumers about total costs or how they are calculated. However, in some circumstances, dynamic pricing practices



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could be unfair under Directive 2005/29/EC([4](#)). This must be assessed on a case-by-case basis by competent national authorities and courts". – Andrea Renda

3. If algorithms are set automatically, companies can be charged for antitrust behavior? PH

Yes they can, as algorithms, even when self-learning, always obey to a set of instructions prepared by a human. But the proof of evidence might be complex, and as I briefly explained in the webinar in some cases the pricing outcomes on the market might be due to an interaction of algorithms, rather than to an intended consequence of algorithm interaction. In that case, strict liability might be an option, but this is for the future debate. – Andrea Renda

4. Any thoughts in how the GDPR and 'algo consumers' may affect the plausibility of price discrimination? Should we just wait and see? John

We'll wait and see. The Commission has clarified that so far it has not gathered conclusive evidence on this issue. Under the GDPR, data subjects shall not be subject to decisions based solely on automated processing, including profiling, which produce legal effects or significantly affect them, unless with explicit consent, or "if necessary for the performance of a contract" (what does it mean?). This also applies to processing of special categories of data, if explicit consent is not given. Complaints on processing of personal data are assessed by national supervisory authorities and courts. But the provision of algorithms being always interpretable to end-users is likely to remain under-enforced in the GDPR: no one really expects algorithms to be fully transparent and understandable to the end users, as even their developers sometimes fail to fully predict their results (see [here](#) for example). – Andrea Renda

5. Could the essential facility theory apply to algorithms so as to protect smaller companies? TM

The goal of antitrust should not be to protect smaller companies but rather a sound competitive process. That said, the essential facilities doctrine will likely apply to "dominant" algorithms, as it is in line with the Commission's past and current practice. Dominance, and remedies, will be inevitably a problem in these cases. – Andrea Renda

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