Algorithmic Antitrust

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Amazon Faces £900M UK Antitrust Class Action For Algorithm Abuse

Anusuya Lahiri
October 20, 2022 · 1 min read

In this article:

AMZN -4.82% | Watchlist | Performance Outlook 2W-6W 6W-9M 9M+



Algorithms Become a Point of Emphasis in China's Antitrust Efforts

As antitrust efforts intensify in China, regulators are scrutinizing tools used by companies to evade competition. Accordingly, algorithms have become a target in the challenge to contain the influence of China's tech giants.

Blog Post by *Seaton Huang, Guest Contributor*

February 7, 2022 1:38 pm (EST)



A sign for the Cyberspace Administration of China (CAC) stands above the entrance to a building in Beijing. Reuters/Thomas Peter

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JUSTICE NEWS

Antitrust Division Policy Director David Lawrence Delivers Keynote at Brigham Young University Law Conference "Tech Platforms in a New Age of Competition Law"

Washington, DC ~ Friday, October 21, 2022

Reemerging Areas of Common Ground

Remarks as Prepared for Delivery

I believe that power in the digital economy has captivated the world's attention precisely because of the unique threats it poses to our liberty. The digital economy has enabled monopoly power of a nature and degree not seen in a century. Without competition to deliver ready access to the connections we seek, we are forced to pay with our time in endless scrolls. Algorithms manipulate our psychology to shape our minds and our behavior, without competition for them to do so responsibly.

THE RENT IS TOO DAMN HIGH —

US senator seeks antitrust review of apartment price-setting software

Senate committee chair wants FTC to examine software sold by Texas-based RealPage.

HEATHER VOGELL, PROPUBLICA - 11/2/2022, 9:33 AM



How do algorithms relate to antitrust policy?

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The Background: Price-Centric Antitrust

- Price analysis dominates antitrust:
  - SSNIP test
  - Price discrimination
  - Price-fixing
  - Price gouging / Predatory pricing…
- Humans decide prices; therefore antitrust liability is individual liability



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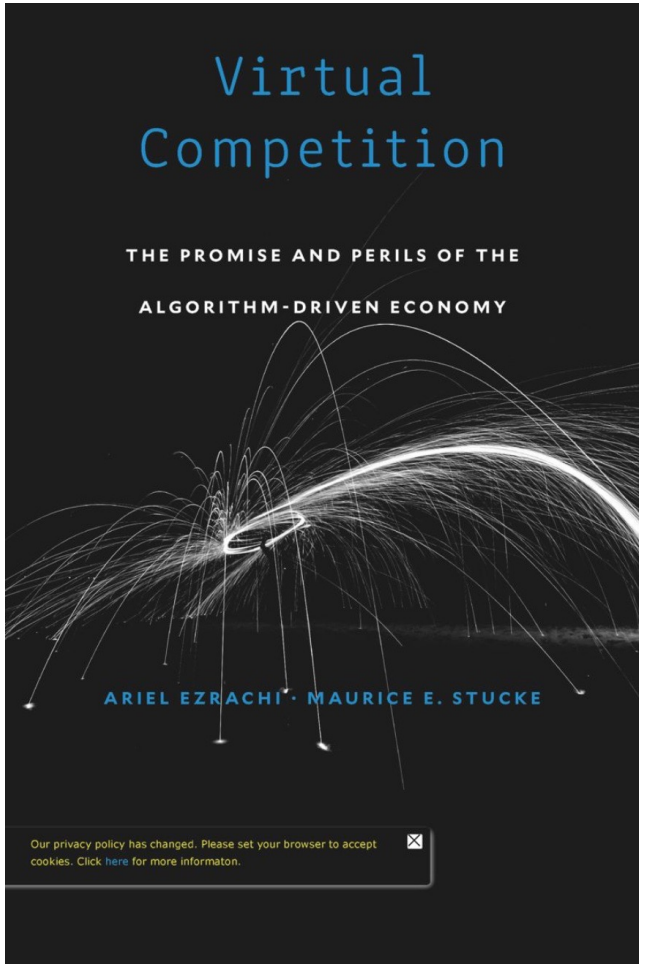
The Hypothesis: The Digital Hand



- Prices no longer determined by humans
- Hypothesis: Algorithms fix prices
- Focus on price-fixing/collusive practices
- Scenarios:
  - Messenger: Humans collude through algorithms
    - Eg.: Algorithm-driven RPMs. See EC Asus et al decision in 2018
  - Hub and spoke: Common algorithm among competitors leads to horizontal alignment
    - Eg: EC LIBOR decision in 2013; Eturas 2016
  - Predictable agent: Industry-wide algorithms lead to conscious parallelism
    - Eg: predictive analytics enables dynamic pricing that stabilize prices
  - Digital Eye: Self-learning algorithms optimize profitability by conscious parallelism. No human intent
    - Eg: "God view technology" by firms that retaliate against price differences

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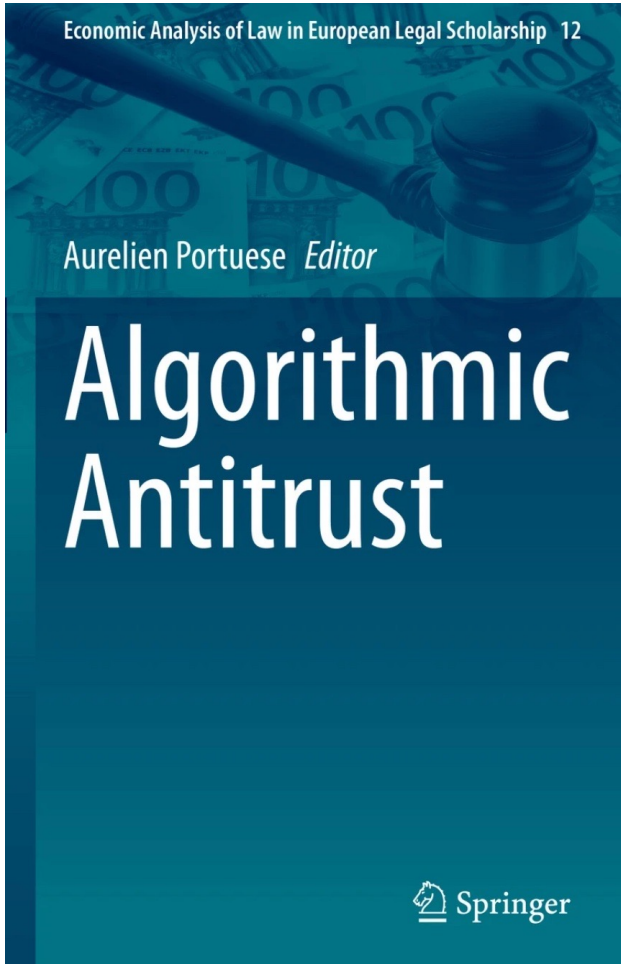
The Rebuttal: Much Ado About Nothing

- No real cases of collusion under the predictable agent scenario or the digital scenario
- In other cases: algorithms mere tools to facilitate human-designed collusion
- Focus shift from Section 1/Article 101 cases to Section 2/Article 102 cases
- Algorithmic ranking of results, algorithmic price discrimination….



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The Development: Much to do About Algorithmic Fairness

Compare Google Shopping decision in US v EU

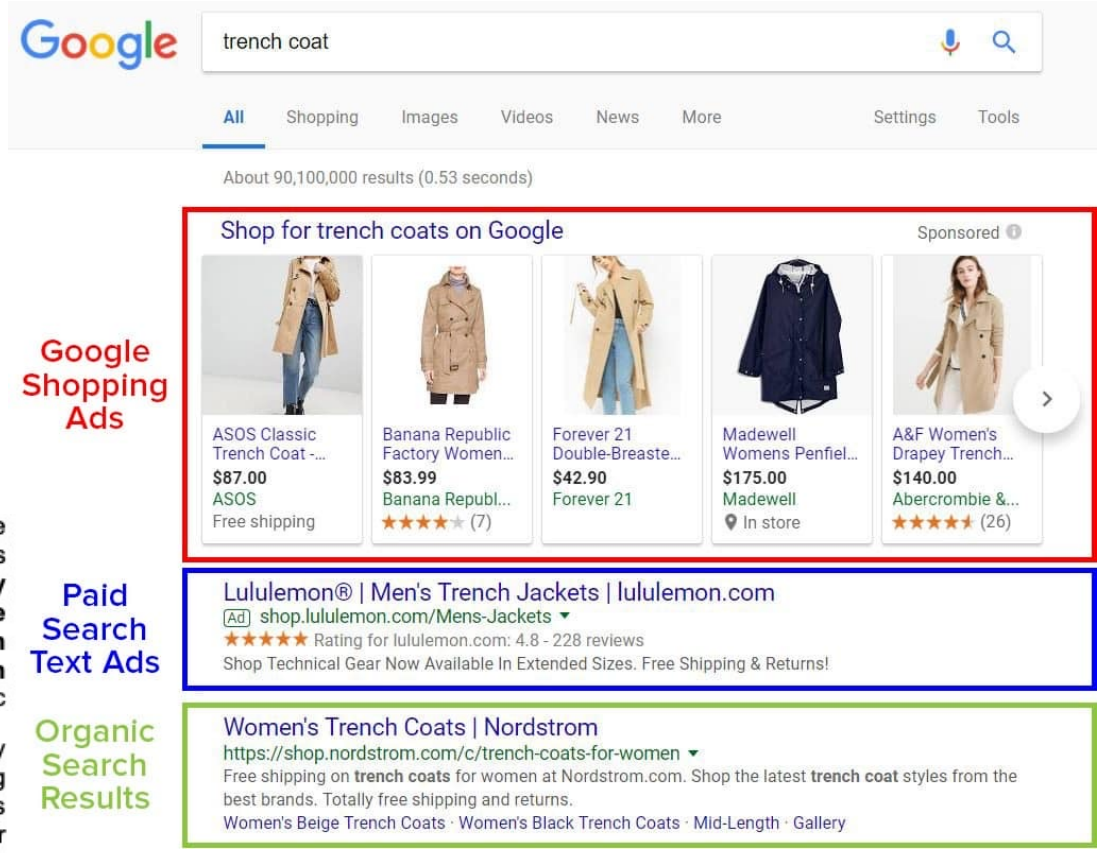
- FTC decision in 2013

In sum, we find that the evidence presented at this time does not support the allegation that Google's display of its own vertical content at or near the top of its search results page was a product design change undertaken without a legitimate business justification. Rather, we conclude that Google's display of its own content could plausibly be viewed as an improvement in the overall quality of Google's search product. Similarly, we have not found sufficient evidence that Google manipulates its search algorithms to unfairly disadvantage vertical websites that compete with Google-owned vertical properties. Although at points in time various vertical

- EC decision in 2017, GC 2021

First of all, the General Court considers that an undertaking's dominant position alone, even one on the scale of Google's, is not a ground of criticism of the undertaking concerned, even if it is planning to expand into a neighbouring market. However, the General Court finds that, **by favouring its own comparison shopping service on its general results pages through more favourable display and positioning, while relegating the results from competing comparison services in those pages by means of ranking algorithms, Google departed from competition on the merits.** On account of three specific circumstances, namely (i) the importance of the traffic

Next, the General Court considers that the present case relates to the conditions of supply by Google of its general search service by means of access to general results pages for competing comparison shopping services. It states, in that respect, that the general results page has characteristics akin to those of an essential facility inasmuch as there is currently no actual or potential substitute available that would enable it to be replaced in an economically viable manner on the market. However, the General Court confirms that not every practice relating to access to



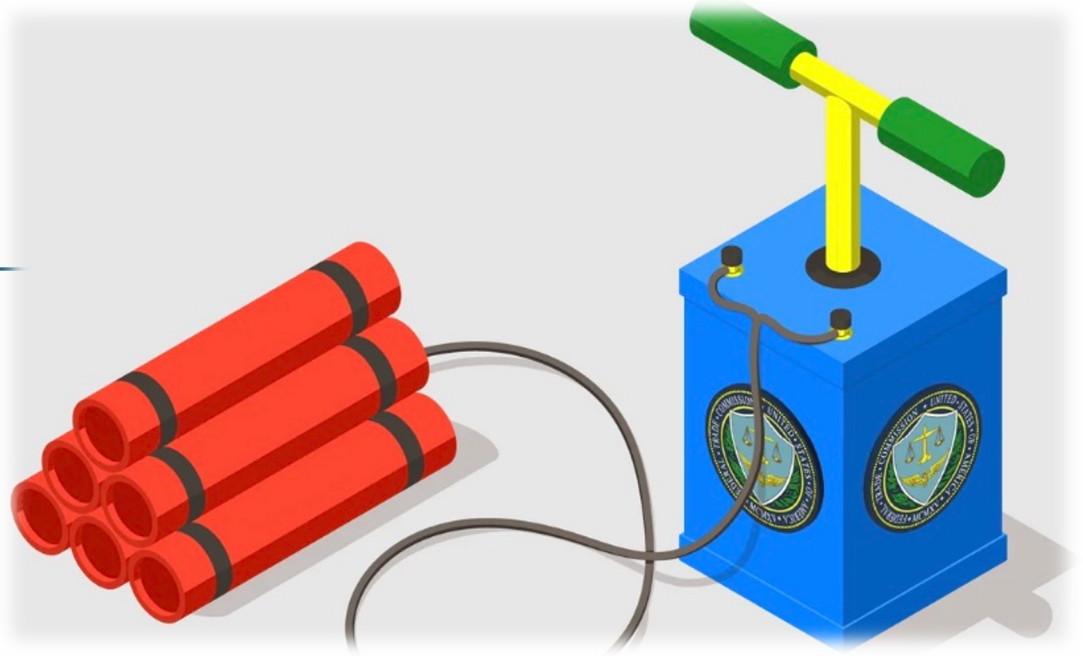
The Development ‘ed

Algorithmic fairness and algorithmic governance



- If ranking is price, artificial promotion via algorithmic akin to duty to help rivals?
- How do you monitor/ govern weekly algorithm changes?
- When is algorithmic price discrimination positive and negative?

The Development ‘ed



- Number of positions/ articles by the FTC and DOJ
- FTC now destroys algorithms under Section 5 FTC Act
  - WW 2022 settlement
  - Everalbum 2021 decision
  - Cambridge Analytica 2020 decision
- Chinese algorithmic antitrust
  - Regulations on “provisions on the Management of Algorithmic Recommendations” in effect in March 2022
  - SAMR involved together with the Cyberspace Admin of China (CAC)
  - Article 13: prohibition of algorithmic fake news, licensing requirements for recommendation service providers
  - Article 15 on algorithmic monopoly behavior (ie using algorithms to “unreasonably restrict other providers or engage in monopolistic acts”)
- European algorithmic antitrust
  - Digital Markets Act: “Fair and transparent” algorithmic ranking. See Article 6.5: “the gatekeeper shall not treat more favourably, in ranking, and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party.”
  - Algorithmic fairness or neutrality?
  - AI Act to be adopted in 2023

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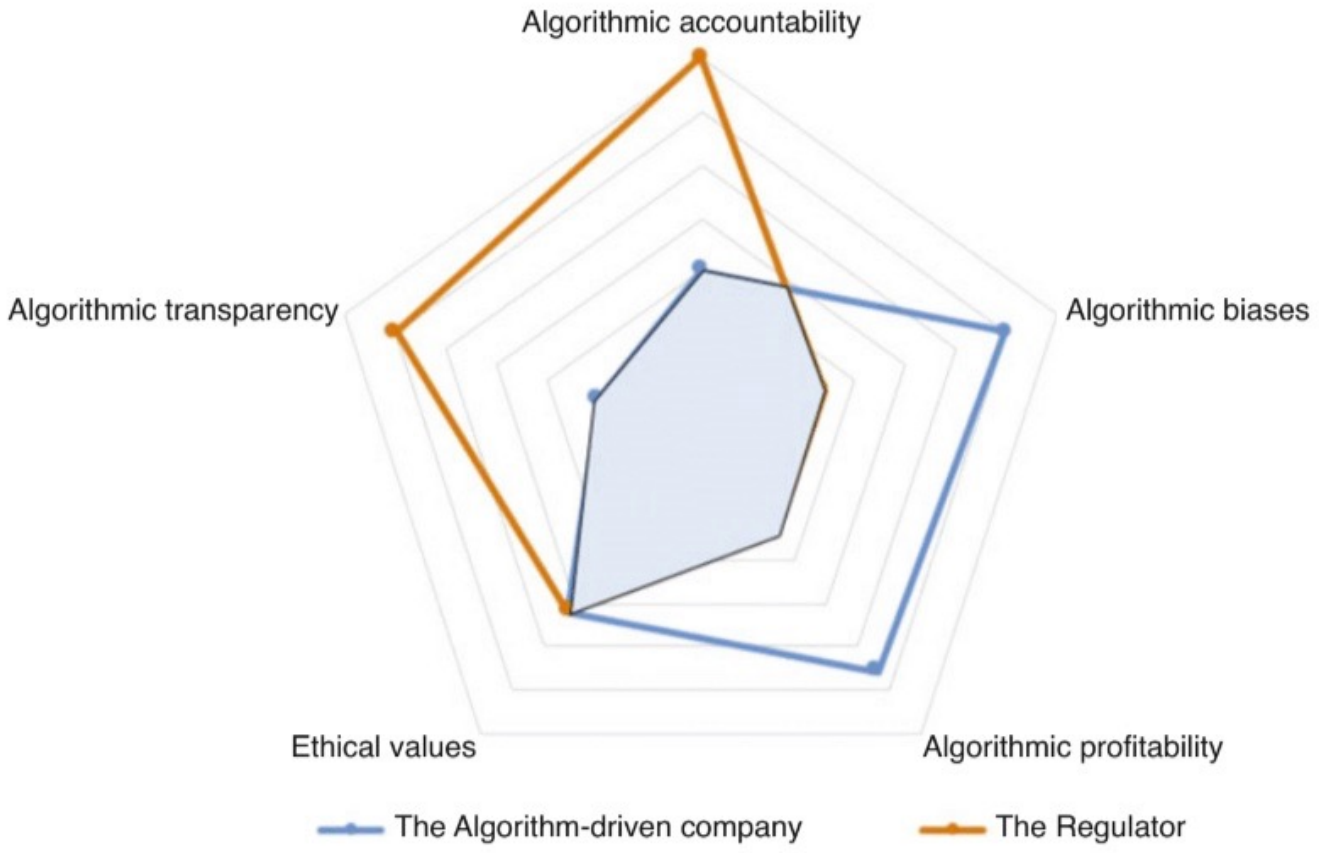
Conclusion: “Algorithmic Neutrality”?

- Regulators want to open the “black box” and micro-manage algorithms and ranking, but:
  - IP/ trade secrets issues
  - Rent-seeking
  - Ad-funded business models at risk
  - Efficiency/Innovation of dynamic pricing



Conclusion ‘ed

- Separation of platform and commerce
- Dystopia of neutrality
  - Ranking made irrespective of business models, irrespective of consumer preferences and user choices
  - Duty to help rivals
  - Overlook proprietary aspects of algorithms
  - Overlook the dynamic efficiencies: dynamic pricing, automated functions (since financial markets), innovation not only *through* algorithms but also *on* algorithms
- Narratives need evidence. Evidence needs a balanced approach

OECD Conclusions

The pro-competitive effects of algorithms listed by the OECD are numerous. On the supply side, the OECD notes that algorithms "help increasing transparency, improving existing products or developing new ones. . .[M]arket entry has been promoted by the ability of firms to develop new offerings based on algorithms. . .This triggers a virtuous mechanism whereby companies are under constant pressure to innovate, thus promoting dynamic efficiencies. . .The rise of algorithms on the supply side can also promote static efficiencies by reducing the cost of production, improving quality and resource utilization, as well as streamlining business processes".[17] Algorithms can indeed facilitate market entry.

Thank You!

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