

15th Dubrovnik Jean Monnet Seminar

“The EU and Trust in the Online Environment”

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Algorithms *versus* justice

Online discrimination through the lens of EU competition and data protection law

“Our most intense disputes about justice are about the right tests for justice, not about whether the facts satisfy some agreed test in some particular case”, claims Dworkin in his book *Law’s Empire*. Ensuring justice in the age of rapidly developing digital technology triggers the conundrum of a continuous need to reevaluate the adequacy of – and often to modify - the established legal tests. This contribution is a quest for the legal and regulatory solutions that would effectively respond to proliferating algorithmic decision-making processes in the commercial sphere.

Deploying algorithms leads to substantial improvements of business processes, particularly in terms of their efficiency, and hence is widespread amongst the market operators such as financial institutions or the Silicon Valley corporate giants. Yet, as the algorithms are projected to achieve a specific normative outcome and learn from a set of consumers’ data determined by the companies, their neutrality is contested. As framed by Pasquale, the companies’ conduct is designed “to orchestrate an online world that maximizes their own profit”. Though *accurate*, the algorithms may therefore be *unjust* in that they not infrequently produce discriminatory and unfair outcomes for the final consumers.

Holding algorithms accountable for their impact on the society and transparent about how decisions are being taken is, however, perplexing. Algorithms are proprietary and constitute a valuable trade secret for companies. Simultaneously, an argument often voiced in the debate is that the level of algorithmic complexity is so substantial that even their designers are unable to interpret them. Is this a sound line of justification of the market conduct that may result in discrimination and diminished control of consumers over how they are being profiled online?

The article explores the implications of algorithmic unaccountability and intransparency for the enforcement of EU competition and data protection law. The analysis is conducted at the intersection of these two areas of law as they both aim to scrutinize market conduct that interferes with consumer welfare, their individual rights or interests. The data used by algorithms may be personal, or even sensitive, which entails that their processing must be in compliance with the data protection requirements. Such personal data could simultaneously give rise to anticompetitive exploitation of consumers by companies in position of economic strength. Having identified the instances in which algorithmic accountability is prerequisite, the article provides solutions to effectively reconcile the interests of the market operators with the rights and interests of individuals.