



December 13, 2023

The Honorable Amy Klobuchar  
Chair  
Subcommittee on Competition Policy,  
Antitrust, and Consumer Rights  
Committee on the Judiciary  
United States Senate

The Honorable Mike Lee  
Ranking Member  
Subcommittee on Competition Policy,  
Antitrust, and Consumer Rights  
Committee on the Judiciary  
United States Senate

RE: Hearing on “The New Invisible Hand? The Impact of Algorithms on Competition and Consumer Rights”

Dear Chair Klobuchar and Ranking Member Lee:

The Subcommittee’s hearing today is important and timely. As the Center for Democracy & Technology (CDT) has observed, along with many others, many online technology marketplaces are more concentrated than is healthy for our economy.

The growing presence of artificial intelligence (AI) in online commerce and communications presents new promising new opportunities, but also presents significant new hazards. Policymakers and others are focusing intently on how to come to grips with understanding AI and its potential to foster innovation, enrichment, and efficiency, as well as the risks it can present to privacy, safety, security, liberty, and democracy. The potential harm to competition has thus far received relatively less attention. But if the online marketplace is to evolve through robust innovation that best promotes consumer benefits and economic prosperity, it is essential that the marketplace be open to competition.

Left to its own devices, AI has the potential to create and exacerbate competitive dysfunction in a number of ways. One focus of your hearing is the potential for companies to engage in collusion – price-fixing – using algorithms in an attempt to obscure the unlawful coordination or to distance themselves from it, while magnifying its reach. CDT has recently written about the potential for this practice to occur, and how antitrust enforcers might detect and deter it, in a paper entitled “Is Artificial Intelligence a New Gateway to Anticompetitive Collusion?”<sup>1</sup>

As we noted in that paper, absent an express or de facto agreement among competing companies, there is an inherent difficulty in distinguishing between when conscious coordination is tacit collusion and when it is healthy competitive reactions. This difficulty is made greater

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<sup>1</sup> <https://cdt.org/insights/is-artificial-intelligence-a-new-gateway-to-anticompetitive-collusion/>.

when algorithms enable the companies to monitor and react to – and discipline – each other’s pricing not once a week, nor even once a day, but potentially multiple times per millisecond, at lightning speed.

We also posited that, just as pricing algorithms could supercharge the potential for price collusion, examining their programming could also provide a window into the intentions of the programmers, and the companies that elected to use the algorithms, which could be used by enforcers with enough technical expertise to know what to look for. We are encouraged that the need for such expertise is increasingly recognized both among law enforcers and in the legal academic community.

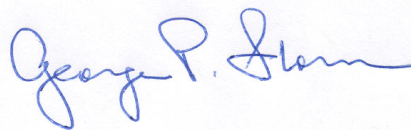
As we noted, there is a further challenge with generative AI, where the initial programming is not so explicitly traceable to collusive purpose, and the algorithms may “figure out” how to collude in the course of their operation. In that situation, we suggested holding programmers and companies accountable for failing to monitor the operation of the algorithms to make sure that they were not “learning” these bad habits.

While we are not opposed to appropriate clarifications to the antitrust laws if that proves necessary to address these concerns presented by algorithmic pricing, we suggested that, with the additional evidence made available by examining the algorithms, enforcers and courts could adapt their understanding of current antitrust law to address these concerns.

Specifically, we suggested that if two or more companies selling similar products or services are using algorithms that are programmed to enable anticompetitive pricing, that can be evidence of, at minimum, a deliberate facilitating practice that foreseeably leads to inflated prices. That might be a rule-of-reason violation; or it might even give rise to a presumption of a per se price-fixing agreement. Enforcers and courts could make a similar presumption if programmers and companies opt to turn a blind eye and allow their pricing algorithms to “learn” how to collude – if they opt to “set and forget.”

CDT stands ready to assist the Subcommittee as it continues to explore the potential for algorithms to facilitate and obscure collusive pricing, and to explore ways to ensure that the antitrust laws can play an effective role in preventing this new threat to a competitive online marketplace.

Respectfully,



George P. Slover  
Senior Counsel for Competition Policy  
Center for Democracy & Technology

cc: Members, Subcommittee on Competition Policy, Antitrust, and Consumer Rights