

The race to regulate AI-powered algorithmic pricing and decision-making tools

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In a significant civil antitrust lawsuit, the U.S. Department of Justice (DOJ) and the Attorneys General in eight states in August 2024 sued RealPage Inc., the maker of commercial revenue management software that landlords use to price apartments.¹ The complaint alleges that RealPage and its artificial intelligence (AI)-powered algorithmic pricing model were part of an “unlawful scheme to decrease competition among landlords in apartment pricing.”

The lawsuit is just one of many recent attempts by governments and regulators to grapple with the implications of AI-driven pricing and decision-making tools. As these tools have become more commonplace across all sectors of the economy, governmental entities in the U.S. and around the world are seeking to use their authority to regulate the fast-evolving industry.

AI pricing and decision-making tools

The use of algorithms by sellers and retailers to set pricing is nothing new, and indeed algorithmic pricing is used across the economy every day. Examples include airline tickets, hotel pricing, and ride-sharing apps such as Uber and Lyft.² Even before the recent AI wave, the use of algorithmic pricing tools had prompted scrutiny and lawsuits alleging antitrust violations.

With the recent explosion in interest and use of AI technologies, more businesses are relying on AI-powered algorithmic pricing, and they can access and use increasingly sophisticated tools. It is now impossible to deny that “the accelerating development of AI” is set to “change the competitive landscape and the nature of competition restraints, which enforcement agencies will need to tackle.”³

In 2023, the Federal Trade Commission (FTC) brought a lawsuit against Amazon alleging that it used a complex algorithm to set prices based on predicted behavior and actions of competitors.⁴ In a March 2024 blog post, the FTC stated the following about the use of AI and algorithmic pricing tools:

Technology is a promise. Used correctly, it can make our lives healthier, safer, and more efficient. But its efficiency can also be used by bad actors to crush competition or bilk consumers in novel ways. No matter the tool law violators use, the FTC and the Department of Justice stand vigilant on the side of consumers and competition.⁵

AI has increased the potential uses, as well as the scrutiny, of algorithmic pricing and decision-making tools, a trend that is likely to continue as these tools become more sophisticated, accessible, and ubiquitous.

Details regarding the recent DOJ antitrust suit against RealPage

The August 2024 DOJ lawsuit against RealPage came after a 2022 ProPublica investigation first thrust the company widely into the public eye,⁶ and following multiple private-party lawsuits against the company for its commercial rental management software.

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In one of the private-party lawsuits, *In re RealPage Rental Software Antitrust Litig.*,⁷ the DOJ filed an Agency Statement of Interest supporting the plaintiffs’ claims and arguments. The August 2024 lawsuit escalated the involvement of the DOJ and multiple states by bringing their own litigation against RealPage.

The DOJ complaint cites RealPage’s materials promoting its use of AI. Those materials state that: “RealPage is already the de facto market leader in certain key areas at leveraging AI.” The DOJ alleges two primary reasons why RealPage’s AI-powered algorithms allegedly violate antitrust law.

First, the DOJ alleges that RealPage contracts with competing landlords to share nonpublic, competitively sensitive information about rental rates and lease terms, which RealPage then uses to train and run RealPage’s algorithmic pricing software.

Landlords are then able to use RealPage’s software to set prices and avoid competing in a free market. For example, the DOJ alleges that if apartment demand is weak, “rather than lowering the price to stimulate demand, the algorithm reduces the target number of leases.”

Second, the DOJ alleges that RealPage uses “this scheme and its substantial data trove to maintain a monopoly in the market for commercial revenue management software.”

Efforts to regulate AI-powered decision-making outside the courtroom

Lawsuits only tell part of the story. Lawmakers are also looking to legislative and regulatory remedies to limit and regulate the use of AI-powered algorithmic pricing tools. In September 2024, the City of San Francisco was the first city in the U.S. to pass an ordinance prohibiting the “sale or use of algorithmic devices to send rents or manage occupancy levels for residential dwelling units located in San Francisco.”⁸

At the federal level, Minnesota Senator Amy Klobuchar introduced the Preventing Algorithmic Collusion Act, which would explicitly bar companies from using algorithms to collude to set higher prices. This proposal would apply to algorithmic collusion across all sectors of the economy and is not limited to apartment rental prices.

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Additionally, Vice President Kamala Harris has included in her presidential campaign’s housing platform a proposal to prevent landlords from using algorithmic price-setting tools to increase rents by large margins.⁹

These actions have coincided with legislative efforts to regulate AI more broadly. According to the Brennan Center for Justice, over 100 pieces of legislation introduced in the 118th Congress as of October 1, 2024, seek to regulate some facet of AI. Further, three states, California, Utah, and Colorado, all passed legislation in 2024 regulating AI, and sixteen more states have AI legislation under consideration.

Colorado’s law, the Colorado Artificial Intelligence Act, is the first in the nation to broadly regulate AI and to impose substantive obligations on AI businesses. Notably, the Colorado AI Act imposes requirements on AI developers to protect consumers from algorithmic discrimination and seeks to build safeguards and guardrails around the use of AI for consequential decisions.

Efforts around the world

The race to regulate AI decision-making tools is not limited to the United States. The EU recently passed the AI Act, which includes provisions on AI decision-making and the risk of AI discrimination.

Article 86 of the AI Act provides individuals affected by certain AI decision-making tools the right to obtain “clear and meaningful explanations of the role of the AI system in the decision-making procedure.” The AI Act also contains multiple provisions barring discrimination using AI decision-making tools.

Canada also anticipates passing comprehensive AI legislation that will likely include restrictions against discrimination. Canada has already issued a Directive on Automated Decision-Making that imposes restrictions on the Canadian government’s use of automated decision-making systems.

Brazil published a national AI Strategy, which among other things seeks to create parameters to ensure human intervention when there is automated decision-making in high-risk situations.

Additionally, Singapore’s Personal Data Protection Commission has developed voluntary governance initiatives for ethical AI use, which include “Proposed Advisory Guidelines on Use of Personal Data in AI Recommendation and Decision Systems,” which recommend best practices where AI systems are intended to make decisions.

Takeaways for companies considering AI tools

As the use of AI tools grows, AI decision-making and pricing tools will follow. AI is already being used to assist in price setting, as well as assisting in approving loans, engaging in wealth management, and more. AI-powered algorithms are increasingly being used in the provision of medical care, and in hiring decisions.

Companies considering deploying or developing AI tools to assist in decision making need to be aware of the benefits and risks of deploying those tools and be prepared for governmental entities’ scrutiny.

Notes:

¹ Press Release, U.S. Department of Justice, Office of Public Affairs, *Justice Department Sues RealPage for Algorithmic Pricing Scheme that Harms Millions of American Renters* (Aug.23, 2024), <https://bit.ly/4eFo7hJ>; *United States et al. v. RealPage, Inc.*, No. 1:24-cv-00710-LCB-JLW (M.D.N.C.).

² Alexander J. MacKay and Samuel N. Weinstein, *Dynamic Pricing Algorithms, Consumer Harm, and Regulatory Response* (Harvard Business School, Working Paper No. 22-050, 2021).

³ Ariel Ezrachi and Maurice E. Stucke, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, 5 Univ. Ill. L. Rev. 1775-1810 (2017).

⁴ Complaint, *FTC et al. v. Amazon.com*, No 2:23-cv-01495-JHC (W.D. Wash. Sept. 26, 2023).

⁵ Hannah Garden-Monheit and Ken Merber, *Price fixing by algorithm is still price fixing*, Federal Trade Commission Business Blog, Mar. 1, 2024, <https://bit.ly/4fXeY55>.

⁶ Heather Vogel, *How a Secret Rent Algorithm Pushes Rents Higher*, ProPublica, Mar. 11, 2024, <https://bit.ly/4dEt5d3>.

⁷ No. 3:23-MD-3071(M.D. Tenn.).

⁸ San Francisco Cal., Ordinance 224-24 (2024).

⁹ Nicolas Nehamas and Jim Tankersley, *Harris to Lay Out Economic Message Focused on High Cost of Living*, N.Y. Times, Aug 16, 2024, <https://nyti.ms/3A3HmCj>.

About the author



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