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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Executive Summary of the discussion on Personalised Pricing in the Digital Era-****Annex to the Summary Record of the 130th Meeting of the Competition Committee held
on 27-28 November 2018**

This Executive Summary of the OECD Secretariat contains the key findings from the Roundtable on Personalised Pricing in the Digital Era- held during the joint meeting between the Competition Committee and the Committee on Consumer Policy on 28 November 2018. More documents related to this discussion can be found at <http://www.oecd.org/daf/competition/personalised-pricing-in-the-digital-era.htm>

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

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Executive Summary

By the Secretariat*

On 28 November 2018, the OECD Competition Committee and the Committee on Consumer Policy held a joint meeting to discuss the implications of personalised pricing in the digital era for competition policy, consumer policy and other policy areas such as privacy and data protection.

Considering the background note prepared by the OECD Secretariat, the written contributions, as well as the discussion by delegates and the expert panellist, the following key points emerged:

1. Personalised pricing refers to the practice of price discriminating consumers based on their personal characteristics and conduct, resulting in prices being set as a function of consumers' willingness-to-pay.

Under personalised pricing, businesses segment customers into small groups or individuals, charging each a share of an estimated value of their willingness-to-pay. A special case of personalised pricing is “perfect” or first-degree price discrimination, which involves charging consumers their full valuation. It is important to distinguish personalised pricing from other price strategies that involve no discrimination, such as dynamic pricing, as well as other forms of online personalisation, such as A/B testing, targeted advertising and price steering.

For personalised pricing to occur, three fundamental conditions must be satisfied: (i) businesses must be able to measure consumers' willingness-to-pay; (ii) businesses must create a mechanism to prevent arbitrage; and (iii) businesses must have some element of market power. Although these conditions are satisfied in several digital markets, and there are anecdotal cases of consumers receiving personalised offers online, existing evidence of personalised pricing is still relatively limited. There are also no documented cases of the special case of perfect price discrimination, which remains a theoretical hypothesis.

2. Personalised pricing has generally positive effects on efficiency, but an ambiguous effect on the distribution of surplus between firms and consumers. Whether personalised pricing benefits or harms consumers depends on the particular characteristics of the market.

Personalised pricing can potentially improve both static and dynamic efficiency. In relation to static efficiency, personalised pricing can enable firms to serve low-end consumers who would otherwise be underserved or out of the market, as they would not afford the product under uniform pricing. This creates an output expansion effect that increases static

* This executive summary does not necessarily represent the consensus view of the Competition Committee or the Committee on Consumer Policy. It does however identify key points from the discussion at the Roundtable on Quality Considerations in the Zero-Price Economy, including the views of the expert panellist, the delegates' oral and written contributions and the background note prepared by the OECD Secretariat.

efficiency. In relation to dynamic efficiency, personalised pricing encourages firms to innovate and differentiate their offers, by allowing them to raise revenues from successful innovations without sacrificing sales. However, personalised pricing could also promote rent-seeking activities in monopolised industries.

Personalised pricing has more complex and ambiguous redistribution effects, typically leaving some individuals better off and others worse off. First, personalised pricing generally transfers surplus from consumers with a high willingness-to-pay, who are charged higher prices, to consumers with a low willingness-to-pay, who benefit from lower prices. Second, personalised pricing also affects the distribution of surplus among businesses and consumers, depending on the competitive conditions of the market. In particular, consumer welfare is likely to drop in monopolised markets, but is more likely to increase in relatively competitive markets, where personalised pricing reduces the risk of collusion and may encourage firms to compete more aggressively for each individual customer.

Lastly, personalised pricing also raises concerns about fairness and market trust. Despite the overall positive economic effects, surveys show that consumers tend to perceive personalised pricing as unfair. Consumers appear to be concerned about the possibility of deceptive conduct, undisclosed or impermissible uses of their personal data, and a lack of transparency by businesses. Some studies suggest, however, that consumers have a more positive attitude towards personalised pricing when (i) it is implemented through personalised discounts; (ii) it is combined with product versioning; or (iii) consumers participate in the price-formation process (e.g. online auctions).

3. While there is not a strong case to prohibit personalised pricing as *per se* anti-competitive, regulators can use a variety of policy tools to guarantee that these practices are transparent, consented by consumers and easy to opt out of, therefore reducing the risk of consumer harm.

In light of the overall economic effects of personalised pricing, prohibiting these practices altogether could ultimately reduce market efficiency and have the unintended effect of harming consumers. Instead of giving *per se* treatment to personalised pricing, authorities may consider intervening only in exceptional circumstances where personalised pricing is likely to have harmful effects, taking actions to minimise that harm. A sensible policy response could entail requiring companies to disclose their personalised pricing practices, request consumers' consent and allow consumers to opt out.

There are alternative policy tools that can help address the risks of personalised pricing, including competition law, consumer protection, privacy and data protection, and anti-discrimination laws. These policies often have similar objectives, such as promoting consumer welfare and fair outcomes, but use very different tools that can potentially act as complements or substitutes in achieving the desired policy goals. Effective enforcement may thus require the close co-ordination between the authorities responsible for the enforcement of competition law enforcement, consumer protection and other policy areas.

4. In some jurisdictions, it is possible to use competition law to assess personalised pricing as a potential abuse of dominance, though this is not necessarily the most effective policy option to address the harmful effects of personalised pricing.

Harmful forms of personalised pricing could potentially infringe competition law, either as an exploitative or exclusionary abuse of dominance. On the one hand, personalised pricing could potentially qualify as an exploitative abuse under the category of excessive or unfair pricing, if there is evidence that consumers are charged a higher price for reasons not related to costs. On the other hand, personalised pricing could potentially qualify as an exclusionary abuse when firms use personalised pricing to target rivals' consumers with predatory prices, in an attempt to foreclose the market.

While qualifying personalised pricing as an abuse of dominance is theoretically possible, this option has several limitations. Firstly, abuse of dominance provisions apply to dominant companies, covering only cases where firms have a substantial share of the market. Secondly, many OECD jurisdictions do not prohibit or rarely investigate exploitative abuses in practice. Thirdly, abuse of dominance provisions usually do not apply to business-to-consumer relationships.

5. Consumer protection law is generally a more appropriate tool to prevent exploitative forms of personalised pricing – which may qualify as an unfair trade practice under certain circumstances – as well as to deter misleading practices ancillary to personalised pricing.

In most OECD jurisdictions, consumer protection law is a viable tool to tackle exploitative forms of personalised pricing, to the extent that there are protections against unfair trade practices. In particular, consumer authorities could determine that an infringement has occurred when businesses use personalised pricing techniques that are deceptive or misleading, lack transparency and are implemented without user choice or consent, posing a greater risk of consumer harm. In comparison to competition law, consumer protection law might be better suited to tackle exploitative personalised pricing, as it focuses on business-to-consumer relationships and applies to all firms irrespective of their market share.

Consumer authorities may also prohibit ancillary unfair trade practices that, when combined with personalised pricing, are likely to result in consumer harm. In particular, some misleading or deceptive practices could have the effect of substantially reducing transparency and limiting consumer choice, thereby exacerbating the risks of personalised pricing. Examples of ancillary misleading practices could potentially include:

- Stating that a personalised price is the “best price” when other consumers are offered better prices.
- Making an invitation to buy a product at a specified price and then adjusting the personalised price upwards as the consumer goes through the buying process.
- Falsely stating that the personalised offer will only be available for a very limited time to prevent consumers from making an informed choice and to prey on behavioural biases such as loss aversion.
- Offering a personalised “discounted” price that is higher than the listed price.
- Collecting private data to personalise prices without the consumer choice or consent.
- Using private data to personalise prices, when such data was collected for other stated reasons.

- Failing to disclose that the price or discount offered is personalised.

6. Some other complementary policy tools can help address the risks of personalised pricing, including privacy and data protection laws, as well as anti-discrimination laws.

Privacy and data protection laws regulate some of the means required to implement personalised pricing, namely the collection, use and sharing of personal data. In most OECD jurisdictions, these laws are consistent with the OECD Privacy Guidelines principles that require the disclosure of the purposes for which personal data is collected, as well as a consumer consent to those uses. Therefore, privacy and data protection laws can effectively prohibit firms from collecting and using data to personalise prices without consumer awareness and consent, reducing the risk of consumer harm.

Anti-discrimination laws prevent firms from discriminating against individuals on dimensions that are contrary to legal rights, whether such discrimination takes place in pricing strategies or other business decisions. In OECD jurisdictions, anti-discrimination laws typically prohibit discrimination based on protected characteristics such as gender, race, religion, age, political views, nationality, disability, sexual preferences and marital status. Anti-discrimination laws can thus, potentially prevent unfair forms of personalised pricing based on characteristics that are not relevant to determining the price of a product.