

Unclassified**English - Or. English****27 April 2020****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Cancels & replaces the same document of 22 April 2020****Summary of Discussion on the Roundtable 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 document is the summary of discussion of 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>

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Summary of Discussion of the Roundtable on Personalised Pricing in the Digital Era

1. On 28 November 2018, the Competition Committee and the Committee for Consumer Policy (CCP) held a joint meeting to discuss the policy challenges of personalised pricing. The CCP Chair, Hugh Stevenson, proposed to divide the roundtable into two distinct parts addressing the following issues:

1. The benefits and risks of personalised pricing.
2. Adequate policy tools to address personalised pricing.

2. In order to set the background for the roundtable, the Chair asked the **Secretariat** to give a brief presentation on the key findings of the background note prepared by the OECD Secretariat,¹ which touched upon the definition of personalised pricing,² its economic effects, and the legal instruments that can address the potential risks of personalised pricing.

1. The benefits and risks of personalised pricing

3. The Chair thanked the Secretariat for the introduction and asked the delegation from the United Kingdom to present their recent study on pricing algorithms.

4. The **United Kingdom** described the potential benefits and risks of personalised pricing and discussed the conditions under which personalised pricing is more likely to occur and to give rise to consumer harm. In particular, taking into account the UK's Competition and Markets Authority (CMA)'s joint work with the Financial Conduct Authority on price discrimination in the financial sector, the CMA made the following observations. On the one hand, if personalised pricing is disclosed and made clear to consumers, it can help them making a more informed purchasing decision. On the other hand, in some circumstances, the nature of personalised pricing and the claims made in this context can be regarded as misleading or deceptive unfair practices. Moreover, personalised pricing can distort competition and breach Chapter II on prohibition of the Competition Act 1998 in circumstances where online traders abuse dominant positions by using algorithms to determine consumers' willingness to pay. Fourthly, authorities have to establish a theory of harm from personalised pricing practices before determining the best remedial action using competition and consumer protection tools.

5. The **Chair** thanked the United Kingdom and then asked Portugal to explain the conditions under which personalised pricing might intensify competition and affect the ability to collude.

6. **Portugal** started by listing the essential conditions for personalised pricing to occur: (i) there must be some element of market power (ii) consumers must have different

¹ DAF/COMP(2018)13

² Personalised pricing is any practice of price discriminating individual consumers based on their personal characteristics and conduct, resulting in prices being set as a function of their willingness to pay.

levels of willingness-to-pay; (iii) firms must have tools to measure consumers' willingness-to-pay; and (iv) arbitrage is not a viable option. The Portuguese delegation noted that the economic effects of personalised pricing are complicated and difficult to generalise, as these effects may vary depending on the characteristics of the markets. Portugal also pointed out that, in a digital context, personalised pricing is likely to be set by pricing algorithms, which may also raise competition concerns regarding the risk of collusion.

7. The **Chair** thanked Portugal and asked the EU to present the results of a 2018 market study³ on the online market segmentation through personalised pricing/offers in the EU.

8. The **European Union** stated that the effects of personalised pricing are in many circumstances likely to be negative for consumers for the following reasons. First, firms may be able to capture the entire gains from personalised pricing if they can set prices at consumer's maximum willingness-to-pay. Second, the output-expansion effect is limited in situations where there are capacity constraints. Third, in markets where firms practice risk-based pricing, lower-revenue consumers may be charged more than higher-revenue consumers. The EU also presented the results of the 2018 EU market study on the online market segmentation through personalised pricing/offers, which did not find evidence of personalised pricing in the EU on any significant scale, at least for the moment. It did, however, find evidence of widespread 'personalised ranking of offers' (i.e. websites changing the order of search results when different consumers search for the same products online).

9. The **Chair** thanked the EU and turned to Spain, who stated in its contribution that an increase in suppliers' surplus at the expense of consumers' surplus is not a desirable situation.

10. **Spain** described the results of its recent 2018 market study⁴ on the impact of new technologies in the financial sector (Fintech). The National Commission on Markets and Competition (CNMC) identified potential concerns of harmful price discrimination arising in situations of privileged access to big data in the financial sector. In particular, the massive collection and analysis of big data by new digital business models can help to overcome the hindrance of extensive information required to carry out personalised pricing. Moreover, privileged access to information can be a source of market power. These specificities of the financial sector increase the likelihood of successful strategies of personalised pricing, requiring competition authorities to be more vigilant.

11. The Chair then turned to **New Zealand**, who asked the Secretariat to explain the distinction between personalised pricing and price discrimination in general.

12. The **Secretariat** replied that personalised pricing is the practice of price discriminating final consumers based on their personal characteristics and conduct. The OECD Secretariat also noted that while personalised pricing can take the form of first-degree price discrimination, personalised prices are a function, but not necessarily equal, to consumers' willingness-to-pay.

³ https://ec.europa.eu/info/publications/consumer-market-study-online-market-segmentation-through-personalised-pricing-offers-european-union_en.

⁴ https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2018/181009%20Market%20Study%20on%20the%20impact%20on%20competition%20of%20technological%20innovation%20in%20the%20financial%20sector.pdf.

13. **Germany** commented that personalised pricing may raise concerns related to transparency, data protection and discrimination. Germany is planning to develop a joint study with France to examine pricing algorithms.

14. **Singapore** commented that it is initiating a market study on online travel booking, in which most favoured nation (MFN) clauses are one of the competition concerns. Singapore also asked if any delegation had experience in considering the interplay between MFN (which may lead to price parity) and personalised pricing (which may lead to different prices), but no delegation confirmed having such experience.

2. Adequate Policy Tools to Address Personalised Pricing

15. The Chair thanked the participants and opened the second part of the discussion about policy tools to address personalised pricing, giving the floor to the invited speaker Alexandre de Streel.

16. **Professor de Streel** began his presentation by pointing out that there are four main legal frameworks to address the potential harm of personalised pricing: consumer protection, data protection, competition law and non-discrimination law. These frameworks can help reduce the risk of consumer harm in at least three ways. The first is by improving transparency, as consumers are less likely to be harmed if they are aware that prices are personalised and if they know how prices are calculated (that is, the criteria and weighting behind personalisation). The second is by promoting consumer choice, as personalised pricing is less likely to harm consumers if they can oppose personalisation based on their personal data or if they can change provider at low switching costs. The third is by prohibiting specific forms of personalisation, particularly when based on sensitive grounds (e.g. gender, ethnicity), or eventually when engaged by a dominant firm in a way that harms consumers. While consumer and data protection rules are better suited to increasing transparency and preserving user choice, competition and non-discrimination laws may prohibit welfare detrimental forms of personalisation. To conclude, Professor de Streel mentioned that legal instruments should be clear, sufficiently certain and enforced by expert agencies cooperating with each other at national and international levels.

17. The Chair thanked Professor de Streel for the presentation and then turned to Hungary, asking the delegation to present its recent case involving price discrepancies that may be related to personalised pricing.

18. **Hungary** presented its 2016 case against Airbnb, where the GVH initiated a procedure on the presumption that the company set different prices for bookings depending on consumers' search history, computing device used and other criteria. In order to address the concerns of the authority, Airbnb committed to modify the information that it provides to consumers concerning its fares. In light of the commitments undertaken by Airbnb, the GVH did not establish an infringement and closed the procedure without imposing any fines in its final decision.

19. The Chair thanked Hungary and asked the US to present its views on the appropriate policy approach to address the potential harmful effects of personalised pricing.

20. The **US** mentioned that, in the absence of accompanying anticompetitive, unfair or deceptive conduct, personalised pricing is in itself neither a competition nor a consumer protection problem. In terms of competition law, the US would likely not condemn the use of personalised pricing, unless if this practice is part of a collusive agreement or some other

arrangement that harms the competitive process. The US delegation noted that personalised pricing may actually enhance competition, by allowing firms to poach their rivals' customers, increasing both total and consumer welfare. There are, however, scenarios in which consumer protection concerns could arise. These include situations when a firm breaks a promise or misrepresents that it would refrain from engaging in personalised pricing, when the data feeding a pricing algorithm were collected or used in a manner that violated a material promise, or when personalized prices are based on certain protected consumer characteristics covered by anti-discrimination or equal opportunity laws.

21. The Chair thanked the US and turned to the Netherlands.

22. The **Netherlands** stated that, within the context of competition law, the ACM might apply the prohibition on abuse of dominance in order to address potential harmful forms of personalised pricing. Additionally, the ACM could also apply the duty of care: if firms obtained a dominant position through the collection of consumer data, a duty of care could involve requiring firms to use their resources and superior information position in a way that does not exploit customers.

23. The **Chair** thanked the Netherlands and asked BEUC to present the results of the market studies carried out by consumer organisations of Italy and Austria.⁵

24. **BEUC** said that, according to the findings of those studies, firms are increasingly able to use advanced technology and big data to build consumer profiles, which could eventually be used to enable personalised pricing. BEUC also discussed a report by its UK member, Citizens Advice, concerning the impact of personalised pricing on essential services such as energy and telecom. The report highlights several concerns, including the risk that in markets with little switching consumers pay a 'loyalty penalty', due to their inability to compare prices. This is particularly concerning for vulnerable consumers, who despite having a low willingness-to-pay, are often the ones who pay the most.

25. The Chair thanked BEUC and turned to BIAC.

26. **BIAC** noted that, in the absence of evidence that personalised pricing results in competitive harm and in the presence of benefits (such as introducing innovation and undermining tacit collusion), the risk of over enforcement should be weighed carefully. When assessing alleged harm of personalised pricing, competition authorities should always consider efficiencies and consumer welfare.

27. The Chair then turned to **Colombia**, who asked Professor de Streel if there is a risk of misleading consumers when the information about price personalisation is fully disclosed.

28. **Professor de Streel** replied that companies should provide two types of information to consumers: the first is the fact that the price is personalised and the second is the criteria used for personalization. Such information would have the effect of empowering consumers, not of misleading them.

Argentina argued that personalised pricing could be an exploitative abuse of dominance and asked the delegations if there are specific cases with fines or sanctions in competition law involving excessive pricing or price discrimination.

⁵ DAF/COMP/WD(2018)129

29. **Consumers International** said that the main risk of personalised pricing is that it could ultimately affect consumer trust in the digital economy. The impact of price personalisation on vulnerable consumers is also worth noting.

30. The **European Union** replied to Argentina that competition policy is not necessarily the best way to deal with personalised pricing and that consumer and data protection policies are potentially more appropriate frameworks. The European Union asked Professor de Streel whether he assumed a total welfare standard when he argued in his paper that over-enforcement is more harmful than under-enforcement.

31. **Alexandre de Streel** replied that the mainstream antitrust standard is consumer welfare, not total welfare, but that he had also mentioned total welfare in order to cover the two possible standards in his paper. Professor de Streel also stated that he did not make any assumption about the relationship between over enforcement and under enforcement.

32. **The Chair** thanked the participants and closed the session.