

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Personalised Pricing in the Digital Era- Summaries of Contributions

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This document reproduces summaries of contributions submitted for Item 1 of the joint meeting between the Competition Committee and the Committee on Consumer Policy on 28 November 2018.

More documentation related to this discussion can be found at:

www.oecd.org/daf/competition/personalised-pricing-in-the-digital-era.htm

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Table of contents

Personalised Pricing in the Digital Era - Summaries of Contributions..... 3
BEUC..... 4
BIAC..... 5
EU..... 6
Hungary..... 8
Netherlands..... 9
Portugal*..... 10
Russian Federation..... 12
Spain*..... 13
United Kingdom..... 14
United States*..... 15

Personalised Pricing in the Digital Era - Summaries of Contributions

This document contains summaries of the various written contributions received for the discussion on Personalised Pricing in the Digital Era (Joint meeting between the Competition Committee and the Committee on Consumer Policy on 28 November 2018). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

BEUC

BEUC welcomes the discussion on personalised pricing in business-to-consumer relationships in the digital era from the perspectives of competition and consumer law.

Personalised pricing and price discrimination are not new phenomenon in off-line markets. However, technological developments and the ability of firms to track consumers and collect huge amounts of data would enable them to apply personalised pricing and therefore be able to discriminate consumers in a massive scale.

Consumer organisations have carried out different studies that looked at how price discrimination could impact consumers. The main conclusions can be summarised as follows:

- Personalised pricing seems to be already happening at sectors like online booking, where the consumer demand can be manipulated by the influence of unfair commercial practices.
- Personalised pricing is particularly worrisome in essential markets because consumers risk paying a higher ‘loyalty penalty’ since they would be less likely to change providers in case of a price increase.
- Vulnerable consumers are likely to be impacted negatively by personalised pricing. This is because they are the ones with less skills to identify the existence of personalised pricing and take appropriate measures to avoid it.
- The distributional impact of personalised pricing is far from being clear. The assumption that those who are willing to pay more will absorb the costs for those that can pay less is far from reality. Most sophisticated consumers are the ones who are more able to avoid the negative consequences of personalised pricing.

BEUC is of the view that the assumption that personalised pricing may entail pro-competitive effects and enhance consumer welfare does not necessarily correspond to the consumer markets’ reality. While according to traditional economics personalised pricing can improve market efficiency, it ignores that the consumer’s willingness to pay can be manipulated through the use of deceptive and unfair commercial practices therefore reducing the consumer surplus significantly.

The current legal framework in Europe is not sufficient to address the consumer concerns related to personalised pricing. Even if data protection and consumer laws are fully applicable, there is currently no obligation on traders to inform when a final price presented to consumers is the result of personalised pricing or even to oppose to this form of pricing. Furthermore, if a firm applies personalised pricing, consumers are powerless to avoid that situation, especially in markets with limited competition or high switching barriers.

BIAC

Business at OECD's submission underlines the fact that personalised pricing needs to be distinguished from dynamic pricing, second degree or menu pricing, and from third degree pricing addressed to self-identified group members, even if many pricing strategies may combine different elements.

A striking fact is the extent to which online price differentiation reflects similar tailoring of offers to consumers in the brick and mortar environment. The paper gives examples involving location generally and in-store, loyalty cards and targeted promotions. Some retailers allow loyalty cardholders to tailor their own selection of discounts online and then apply those discounts to in-store purchases. Consumers do not expect to be getting all possible discounts and realise they may not be paying the same prices as others. The submission emphasises the need to take account of pricing practices in the brick and mortar environment not only in assessing consumer expectations but also as the background to consideration of any agency or rule-making interventions to avoid unanticipated repercussions on traditional retailers or a situation where online traders would be more strictly regulated than traditional ones engaged in the same practices. A multichannel approach is important to avoid the risk of stifling innovation in the brick and mortar as well as online spheres.

Consumers are not and need not be passive and can act strategically by blocking or distorting information about their behaviour, delaying purchases, deleting cookies or using alternative email addresses. In other instances consumers may positively welcome personalisation, as when it leads to benefits for them. Suppliers offer incentives to consumers to persuade them to allow their data to be tracked under often free membership and loyalty schemes.

Business at OECD observes that the evidence suggests personalised pricing is currently used only in extremely limited cases. It has not been demonstrated that it is causing any harm to the competitive process. Studies establish that it can promote consumer welfare with lower prices for some consumers and the availability of goods otherwise beyond their reach. Such positive effects generally predominate and consumer harm might only arise in very specific circumstances involving a dominant firm. In the presence of real benefits of innovation in the digital economy offering consumers access to new markets, increased choice of goods and services and lower search costs, the risk of over-enforcement should be weighed particularly carefully by authorities tempted to intervene. Efficiencies and total consumer welfare should always be considered in assessing alleged harm.

As regards consumer protection and other policy considerations, existing rules appear likely to be effective and additional transparency does not seem to be necessary or helpful. Any policy initiative should strike a balance between proportionate tools to address risk for consumers while preserving an innovation-friendly framework for the digital economy, avoiding unintended consequences in online markets and ensuring there is no adverse spill over into brick and mortar trading practices.

Business at OECD welcomes engagement by competition and consumer policy authorities, on a coordinated basis where appropriate, to keep under review these areas of developing market practices and the possible need for consumer education.

EU

In recent years, several articles and reports have raised potential concerns in relation to online personalised pricing. These concerns seem driven by the rise of e-commerce combined with the rise of online personal data collection.

To shape a public policy response to these concerns, it is useful to consider (a) whether online personalised pricing is positive or harmful for consumers overall, from an economic point of view; (b) whether it is happening in practice or may happen in the future; and (c) if online personalised pricing is harmful and it is happening, which area(s) of EU law is (are) best placed to address it now.

To achieve personalised pricing, three conditions must be present: (a) the ability to accurately sort consumers into ever smaller groups based on their maximum willingness to pay; (b) market power; and (c) consumers must not be reselling items on a significant scale.

The economic effect of personalised pricing is multifaceted, but it is more likely to be negative for consumers overall. Essentially, there is an output-expansion effect (a pro-competitive effect) combined with a wealth transfer effect (an anti-competitive effect), but the anti-competitive effect is likely to be more pronounced.

Several studies carried out between 2013 and 2018, including the most recent and largest study of personalised pricing in Europe – a study carried out by Ipsos, London Economics and Deloitte for the European Commission's Directorate-General for Justice and Consumers – indicate that personalised pricing does not seem to be present in the EU on any significant scale, at least for the moment. That could change if the conditions for personalised pricing materialise.

If personalised pricing were to take place in the EU, and depending on the circumstances and subject to further reflection, personalised pricing might in theory be caught by competition law in potentially two ways: a discrimination abuse or an exploitative abuse. This is not to suggest that such cases would be necessarily frequent or appropriate. Moreover, other areas of EU law – such as EU consumer protection law and/or EU data protection law – may be better suited to address personalised pricing concerns.

Indeed, personalised pricing may fall within the scope of EU consumer protection law. Marketing techniques such as personalised pricing, price discrimination or dynamic pricing fall under the Unfair Commercial Practices Directive (UCPD) and are addressed in the Commission's 2016 guidance on the UCPD. The guidance refers to personalised pricing combined with unfair practices that breach the UCPD. Furthermore, under Articles 8 and 9 of the UCPD, marketing based on tracking and profiling must not involve aggressive commercial practices.

Finally, personalised pricing may fall within the scope of EU data protection law. Personalised pricing is based on the processing of personal data in the form of profiling. Article 22(1) of the General Data Protection Regulation (GDPR) provides that the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her. Personalised pricing does not lead to a decision producing legal effects concerning the data subject, but it might significantly affect him or her. In that respect, guidelines point out that "Automated decision-making that results in differential pricing based on personal data or personal characteristics could also have a

significant effect if, for example, prohibitively high prices effectively bar someone from certain goods or services." In such circumstances, personalised pricing would only be lawful if covered by one of the exceptions provided by Article 22(2) GDPR, namely where necessary for entering into, or performance of a contract between the data subject and a controller; or authorised by Union or Member State law; or based on the data subject's explicit consent, and subject to the conditions laid down in Article 22(2), (3) and (4) GDPR.

Hungary

According to the Mid-term Digital Consumer Protection Strategy¹ of the Hungarian Competition Authority (hereinafter GVH) published in 2018, digitalisation is especially attractive to consumers as it enables them to have a custom-made, private shopping-experience. According to the GVH, it is necessary to ensure that undertakings do not use algorithms or other forms of artificial intelligence at consumers' expense. In other words, steps must be taken to ensure that consumers who lack digital knowledge will not suffer disadvantages as a result of the existence of informational differences. Nevertheless, it is also important that undertakings are able to innovate whilst complying with the law. On the other hand, executive bodies should be aware that as regards to digital markets, the economic environment, business models and consumer preferences differ from those of traditional markets.

Even though the GVH has both competition law and consumer protection enforcement tools, as a first step, the GVH believes that consumer protection enforcement can ensure a faster, more active intervention and enforcement in a timely manner. Consequently, the GVH has taken steps in the area of consumer protection enforcement, and it is for this reason that the present contribution deals with the topic of personalised pricing from a consumer protection perspective.

As we can see from the cases of the GVH and of other competition/consumer protection authorities as well, there have been no enforcement cases so far in which authorities have established infringements; nevertheless, investigations are still initiated in this area if personalised pricing is suspected. In a number of these cases, alternative reasons have been established other than personalised pricing for the differences existing between offers, thereby highlighting that we need to be open to these possible explanations as well. Even in such cases, investigations can result in solutions for the identified problems. Furthermore, even if consumers are informed about the personalised nature of offers, the information that is provided to consumers about the pricing practices employed needs to be accurate. The GVH has launched further investigations using this experience, which are currently still ongoing.

¹ Available in English:
http://www.gvh.hu/en//data/cms1039453/GVH_Statgia_Digitalis_fogyved_startegia_2018_09_27_a.pdf

Netherlands

This paper looks at online personalisation from the broader perspective of not only competition, but also consumer protection in the digital economy. Online personalisation is defined as the differentiation between consumers of prices and offerings, based on personal characteristics and behaviours that undertakings have inferred from data on the consumer that they have collected, processed, and combined. It includes personalised pricing, targeted advertisement and personalised search results. Online personalisation strategies bear both risks and benefits for the competitive process between businesses and for the final consumer. At its best, personalisation strategies are applied to tailor offerings to consumers' preferences and consumers' search costs. At its worst personalisation strategies may steer consumers towards the highest prices they are willing to pay for and to deter searching for the best buy. Vulnerable consumers are more prone to the risks of personalisation.

It is argued that effective competition, balanced bargaining positions between consumers and firms and guarantees for the protection of public interests are three important preconditions for beneficial results of personalisation strategies. The paper discusses the instruments the Netherlands Authority for Consumers and Markets has at its disposal to contribute to these preconditions. The ACM has a wide range of powers, but their application to potentially harmful personalisation strategies may require a broad interpretation of those powers. This goes particularly for the application of the prohibition of abuse of dominance to business-to-consumer price discrimination. In addition, the Authority should closely study the effectiveness of its instruments. For example, the Authority may require transparency about the personalisation of search results on the basis of existing consumer protection rules, but these requirements are not effective if they don't help the consumer to make better choices. Governments and Authorities should collaborate both with research institutes and with international bodies like OECD to strengthen detection of potentially harmful personalisation strategies and to develop best practices in remedying those harms.

*Portugal**

Digitalization has resulted in the creation of online markets where the interaction between firms and consumers is markedly different relative to offline markets. Firstly, there are little to no menu costs or time delays in price adjustments. Secondly, there tends to be a higher degree of privacy of information in online prices in comparison to offline prices. Thirdly, goods and services sold in online markets are often tied to a single individual or group of individuals.

Personalised pricing is a form of direct price discrimination in which firms segment customers into small groups and charge each group a value close to an estimated willingness to pay (WTP). For this reason, there is a sliding scale in the strength of price discrimination, in which firms can move from third to first-degree price discrimination, according to their ability to segment the market. As with any form of price discrimination, personalised pricing requires (1) firms to have some degree of market power; (2) that there is heterogeneity among consumers that firms can identify; (3) that firms can fine tune prices according to this heterogeneity; and (4) that there is no arbitrage among buyers.

The effects of personalised pricing on market outcomes are highly dependent on the type of market structure, the degree of uncertainty about consumer types and the use of pricing algorithms. As a result, a per se negative position towards personalised pricing is not adequate, as it would entail potential losses in terms of consumer welfare – a rule of reason approach should thus be preferred.

In terms of competition law enforcement, concerns that follow from personalised pricing imposed by a firm in a dominant position could theoretically fall within the scope of an abuse of dominant position, due to excessive prices, predatory behaviour or price discrimination in an intermediate goods market.

- Under the Portuguese Competition Act, a situation in which personalised pricing is harmful to competition and consumers could theoretically be regarded as a potential abuse of dominance if undertaken by a firm in a dominant position that exploits consumers by imposing excessive prices.
- The Portuguese Competition Act also prohibits firms in a dominant position from engaging in predatory pricing, i.e., an abuse of dominance with the intent of excluding firms from the market. Personalised pricing makes it easier for firms to engage in predatory behaviour, as the incumbent may target solely the entrant's strong customer groups while keeping its own groups captive, thus minimising losses.
- In Portugal, the application of discriminatory prices by a firm in a dominant position to commercial partners in otherwise identical conditions could also be seen as an abuse of dominant position under the Portuguese Competition Act, to the extent it affects competition in relevant markets. Indeed, the application of personalised prices in intermediate markets may disrupt competition in downstream markets, as it may render some firms less competitive or even exclude them from the market.

In terms of merger control, a merger that will entail the combination of two or more datasets may give rise to competition concerns by allowing the merged firm to move along the sliding scale of price discrimination and, at the same time, better estimate the buyers' WTP. In this case, the merged entity may fully appropriate merger efficiencies or even reduce consumer surplus.

Finally, when it comes to consumer protection, fairness and trust, in terms of institutional design, the AdC powers only relate to the enforcement of competition law, and the AdC does not have enforcement powers in pure consumer protection matters other than those that follow from protecting competition in the market.

Russian Federation

At first glance, many products of the digital era are provided to users "for free" in the usual sense of the word, that is, without charging money. On the other hand, many of the free services bring their owners indirect benefits, which can take many different forms. Profit can be obtained through unobtrusive contextual advertising on the Internet or through the use of information collected about users in business planning (for example, indirect information from users' smartphones may indicate the size of pedestrian traffic in one place or another in the city, which may later play a major role in choosing places for organizing stores and retail outlets).

It is also used to "accustom" users to a particular product, taking into account the network effect, ranging from trial versions of programs to deliberate connivance with regard to piracy.

A habitual model can be considered when free goods or services play the role of an advertising insert, which increases the demand for a commercial object. The core of a business model is a free product or service that provides a stable audience, i.e. potential market. If we talk about the software market, here the model of free use of the product is often used in exchange for paid related services, primarily technical support.

At the same time, when considering certain actions of companies with the pricing of their goods (services) in the digital environment, competition and other regulatory authorities face difficulties in assessing such actions, since the pricing mechanism is often "sewn up" in software (app) and for its evaluation, it is necessary to understand how this software works and how its individual functionality affects the pricing process for the product (service) itself.

In 2017, the FAS Russia considered a claim by a taxi aggregator that it, as well as other taxi aggregators became subjects to surveillance by competitors.

According to the claim, one of the taxi aggregators, operating in the Russian Federation, was spying on other (competing) taxi aggregators using an application installed on users' smartphones, and adjusted the price of a trip on its taxis, and also gave additional discounts depending on which application of rival taxi aggregators is installed on the user's smartphone. These actions, according to one of the taxi aggregators, can be interpreted as unfair competition.

The FAS Russia did not establish that the taxi aggregator application adjusts the price of a trip or gives certain advantages (discounts, promotions for trips, etc.) depending on the presence/absence of a competing taxi aggregator application on the smartphone.

It is important to note that this example of how business entities operating in the digital environment, through access to consumer subscriber devices (smartphones, tablets, personal computers, etc.) have the ability to track the activities of not only consumers, but can also monitor the activities of competing applications (programs) installed on the same device, that is, the economic activities of their competitors.

*Spain**

The CNMC has recently had the opportunity to analyse two practical instances of personalised pricing in digital sectors. Firstly, the CNMC adopted an opinion concerning the regulatory alternatives to address some public concerns in the sale and resale of tickets for events by electronic means (e-ticketing). Secondly, the CNMC has recently conducted a market study on the impact of new technologies in the financial sector (Fintech).

For the report on the sale and resale of tickets for cultural events via electronic means, the CNMC considered that secondary markets for the resale of tickets may serve as a countervailing factor to price-discrimination practices arising from operators with market power, since they enable arbitration by consumers. These considerations show that how surplus is allocated between suppliers and consumers is not irrelevant for competition. In the CNMC's view, an increase in suppliers' surplus at the expense of consumers' surplus is not a desirable situation, even if overall efficiency is not affected.

In the study on the impact of new technologies in the financial sector (Fintech), the CNMC identified potential concerns in terms of price discrimination arising from situations of privileged access to big data. Although these activities might well lead to extract clients' surplus, the CNMC also noted the potentially negative reputational effects if such practices could not pass unnoticed. However, one should not magnify the self-regulatory effect arising from such reputational effects, as it may create an incentive for firms to conceal their personalised pricing practices. In the financial sector, privileged access to information can be also a source of market power. This can be a reason justifying open-banking approaches in regulation to prevent situations where the fact that only a company has access to users' data relevant for competition is detrimental to consumers' welfare.

United Kingdom

Personalised pricing can have negative or positive effects for consumers. Concerns are more likely to arise in circumstances where there is limited competition, or where consumers are unaware of, do not understand, and/or cannot avoid personalisation. Concerns will also arise where personalisation is based on particular characteristics of the individual consumer that may be associated with vulnerability - such targeting may be unfair, or illegal (if based on protected characteristics). Online markets increase the scope for personalisation and unlike markets offline, allow for traders to collect information about a consumer's search behaviour without the consumer being able to see the pricing offers made to other consumers.

Where personalisation takes place, it is less likely to be harmful where consumers know it is happening, understand how it works and can exercise effective choice. Transparency alone will not necessarily adequately address the risk of consumer harm and the quality of disclosure is vital. The disclosure of information on personalisation will serve little positive purpose if the information provided to the consumer is misleading, confusing or otherwise not comprehensible to the consumer and/or does not give the consumer a real choice (for example, the disclosure is made very late in the transactional process).

Furthermore, the nature of personalisation and the claims made as a result of the personalisation can be a misleading, deceptive or an otherwise unfair practice in some circumstances. UK consumer protection legislation² protects consumers from commercial practices that are considered unfair, misleading actions, misleading omissions and commercial practices which are aggressive.

The CMA will use its full range of powers to tackle harm in digital markets, whether individually or in combination³, focusing on using the best tool to address the potential concern. Personalised pricing can potentially distort competition and subsequently breach the Chapter II prohibition of the Competition Act 1998 in circumstances where online traders abuse dominant positions by using algorithms determining the consumer's maximum willingness to pay. Given ambiguous effects, the CMA would undertake an evidence-based assessment of the market and consider carefully the best form (if any) of intervention in a case at hand. This includes recognising the risks of both inaction and of significant interventions.

The CMA, and previously, the Office of Fair Trading (OFT), has published guidance for businesses, including recommendations from our previous studies into digital markets to help online traders comply with consumer and competition law and to support effective growth of digital markets.

2 For example, the Consumer Protection from Unfair Trading Regulations 2008 (the CPRs). See Part 2, Article 6 of the CPRs for further details of the provisions for misleading omissions available [here](#).

3 For example, following a market study into Digital Comparison Tools (DCTs) using powers under EA02, the CMA made recommendations to DCT providers to help online traders comply with the law but separately opened a competition law investigation into a specific provider.

*United States**

Personalized pricing involves the use of data analytics to provide distinct prices to consumers based on personal characteristics and behaviors. Personalized pricing has potential implications for both competition and consumer protection policy. From a competition standpoint, personalized pricing is a form of price discrimination, where each consumer receives an individual price based on the available information about the consumer. In the United States, price discrimination is often viewed as efficient.

Antitrust and consumer protection law are complementary tools conceived to assure that markets function for consumers. Antitrust enforcement polices the market for behavior that unreasonably restricts the competitive process, while consumer protection enforcement is designed to remove deception and fraud from the marketplace. In the absence of accompanying anticompetitive, unfair, or deceptive conduct, personalized pricing, in and of itself, provides no justification for intervention under either body of law, as the practice does not appear to hinder market function and, indeed, has the very real potential to increase welfare. In light of the theoretical ambiguities and with virtually no real-world experience on which to evaluate the practice, there is not a compelling case for banning personalized pricing.