

TO DISCRIMINATE OR NOT TO DISCRIMINATE? PERSONALISED PRICING IN ONLINE MARKETS AS EXPLOITATIVE ABUSE OF DOMINANCE

Workshop on the Law and Economics of Artificial Intelligence and Big Data

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- **MPI research project:** EU Competition Law Remedies in the Data-Driven Economy.
- **Focus of the paper:** personalised pricing by online platforms as possible exploitative abuse of dominance under Art. 102(c) TFEU.
- **Outside the scope of the paper:** relevant market and market definition.
- **Research questions:**
 - 1) Impact of personalised pricing on consumers' welfare?
 - 2) Burden of proof under Art. 102(c) TFEU?
 - 3) Possible competition law remedies?



Price discrimination v. personalised pricing



- **Definition:** a firm discriminates its customers when it sells two or more similar products at prices that are in different ratios to marginal costs.
- **Degrees of price discrimination:**
 - First degree - **perfect price discrimination** ➤ **traditionally considered impossible.**
 - Second degree - versioning.
 - Third degree – group pricing ➤ lower price to categories of vulnerable consumers.
- Price discrimination is traditionally considered **positive for consumers' welfare:**
 - 1) **Increased products affordability for 'poorer' consumers.**
 - 2) Efficient market segmentation.

- **Formation personalised pricing by online platforms:**
 - 1) Collection of large amount of personal data.
 - 2) Data analytics, including profiling
 - 3) **Personalized pricing ➤ first-degree price discrimination.**
- **Examples** of personalised pricing involving behavioural discrimination:
 - 1) Steering (i.e. search discrimination).
 - 2) Drip pricing.
 - 3) Special discounted prices (e.g. exemption from delivery costs).
 - 4) Individual coupons.



- The online platform will set the price at the consumer's **maximum reservation price** ➤ transfer of welfare from consumers to the firm.
- Behavioural discrimination favours **product misrepresentation** ➤ transfer of welfare from consumers to the firm.
- **Behavioural economics** ➤ **fairness considerations**:
 - 1) Consumers do NOT want to be discriminated ➤ fear to pay higher prices.
 - 2) Lack of transparency.
- Personalised pricing has **mixed-effects on consumers' welfare** ➤ need for a **case-by-case** assessment under EU competition law.



Personalised pricing as abuse of dominance



- **Art. 102(c):** dominant firm applies... “dissimilar conditions to equivalent transaction with other trading partners, by thus placing them at a competitive disadvantage”.
- **Traditional ECJ case law:**
 - 1) “Equivalent transactions”: characteristics of the product + different supply costs.
 - 2) “Other trading partners”: final consumers should not be excluded????
 - 3) “Competitive disadvantage”: “presumed” for the customer who pays higher price.
- **Art. 102 (c) has never been enforced *vis-à-vis* price discrimination to consumers**
 - **personalised pricing in digital markets change this enforcement pattern?**

- **Facts:** GDA (Portuguese collecting society) charged higher copyright fees to the TV station MEO in comparison its competitors.

- ECJ preliminary ruling on ‘**competitive disadvantage**’:
 - 1) NO need to quantify the ‘competitive disadvantage’, but **NO presumption**.
 - 2) National court has to assess ‘**all relevant circumstances**’:
 - a) Customer bargaining power.
 - b) Conditions for charging the tariffs.
 - c) Duration and amount of the tariffs.
 - d) Exclusionary strategy by dominant firm.
 - 3) Dominant firm can put forward ‘**objective justifications**’.
 - 4) Dominant firm is ‘**unlikely**’ to discriminate its customers.

- In *MEO*, ECJ **increased the burden of proof** that NCA/Commission would face in investigating a case of personalised pricing under Art. 102(c).
- NCAs/Commission would face a number of **enforcement challenges** in investigating a case of personalised pricing under Art. 102 (c):
 - 1) Consumers are often NOT aware to have been discriminated ➤ difficulties in collecting evidence.
 - 2) Need to analyse the functioning/logic followed by the algorithm.
- **Enforcement action by NCAs/Commission is unlikely.**



Possible competition law remedies



- Digital markets generates new challenges for the application of the traditional antitrust toolkit ➤ **infringement decision + fine is NOT an effective remedy.**
- Structural v. behavioural remedies:
 - 1) Structural remedies** (e.g. un-bundling, divestiture of a subsidiary): NOT efficient ➤ negative effect on direct network effects and product quality.
 - 2) Behavioural remedies:** the NCA 'guides' the firm in terms of competition law compliance:
 - a) Tailor-made ➤ designed in cooperation with the firm (i.e. commitments);
 - b) Possible periodic revision ➤ adaptation to the market dynamics.
 - c) Risk of market regulation ➤ overlap with data protection and consumer law.



- **Examples of behavioural remedies:**
 - 1) Limiting the amount/types of personal data collected ➤ overlap data protection
 - 2) Data sharing with competitors ➤ overlap data protection.
 - 3) Transparency requirements ➤ overlap consumer law.
 - 4) Opt-out rights for consumers from personalised pricing ➤ overlap consumer law.

- **Challenges** in the enforcement of the data sharing obligation:
 - 1) Identification of the data to be shared.
 - 2) Data has limited lifespan.
 - 3) Data value is highly subjective.



Relationship with sector-regulation

- Antitrust remedies **can clarify unclear aspects** in data/consumer law protection.
- **Cooperation** between NCA and data protection /consumer law authorities:
 - 1) Exchange of information during the investigations;
 - 2) Joint sector-inquiries;
 - 3) Consultation in designing behavioural remedies.
- **Competition v. consumer / data protection remedies:**
 - 1) Advantage: antitrust remedies ensure higher degree of deterrence.
 - 2) Disadvantage: definition relevant market and market power.

- Big data and algorithms favour the emergence of personalised pricing ➤ increasing trend, BUT difficulties in finding reliable evidence.
- Personalised pricing in digital markets = **perfect price discrimination**
- Personalised pricing has **mixed effects on consumers' welfare** ➤ need for a case-by-case assessment under EU competition law.

- After *MEO*, NCA/Commission would face **high burden of proof** to sanction a case of behavioural discrimination under Art. 102 (c).
- **Possible behavioural commitments:**
 - 1) Limitation on the number/categories of personal data to be collected.
 - 2) Data sharing obligation.
 - 3) Transparency obligations.
 - 4) Opt-out rights.
- Need of cooperation between NCAs and consumer/data protection authorities.



Thank you very much for your attention!

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