

# Personalised pricing in essential markets

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# What is personalised pricing?

- Economic terminology: Price discrimination
  - First degree: Increasing profits by charging higher prices to personalised customers or by acquiring new customers (through lower prices) that would otherwise not purchase the product or service
  - Second degree: Different prices for different qualities or quantities sold to the same buyer, e.g. loyalty schemes
  - Third degree: Selling the same goods to different groups of customers at different prices, e.g. social tariffs (disapproved of by Art. 5 Electricity Market Directive)
- Here: Personalised pricing in the sense of first degree price discrimination

# Personalised pricing and big data

- Rough personalisation, e.g.
  - According to the equipment that is used (PC, notebook, smartphone)
  - According to the type of smartphone (Apple or otherwise)
- Greater sophistication, e.g.
  - By looking at the search or purchasing history
  - By taking into consideration huge amounts of data, usually acquired from third parties and processed by algorithms
- Still not exactly „personal“ but usually group-specific prices

## Personalised pricing from a consumer perspective

- Increased search costs, e.g.
  - Price checks from different types of equipment
  - Price checks from equipment of different users
- Limited use of price comparison websites, as they would not show the personalised price
- Loss of sense for the „regular price“
- Sentiment of arbitrariness when parameters are unknown
- Chance or risk?
  - Chance for those who would pay less – but how do you know?
  - Risk of higher prices for the others
- Empirical studies: Personalised prices unpopular even with those who expect to pay less (although at a lesser degree than with the others)

# Personalised pricing and market transparency

- Price transparency as a core element of consumer protection law
  - Protection of the economic interest of individual consumers
  - Fostering of competition between suppliers
- Examples from EU law:
  - Price Indication Directive 98/7/EC
  - Consumer credit law: the annual percentage rate
  - Consumer Rights Directive 2011/83/EU

## Personalised pricing in essential markets?

- Generally hard to detect, as there may be other reasons than personalisation for different prices
  - E.g. dynamic prices that vary throughout the day
  - Changing demand or supply
- Anecdotal evidence of price personalisation in railways services (Germany)
- First degree price discrimination in energy markets?

## Personalised pricing and universal service

### Art. 27(1) Electricity Market Directive

Member States shall ensure that all household customers, and, where Member States deem it to be appropriate, small enterprises, enjoy universal service, namely the right to be supplied with electricity of a specified quality within their territory at competitive, easily and clearly comparable, transparent and **non-discriminatory prices**.

- Does non-discriminatory mean equal?
- Art. 1 Protocol (No 26) on services of general interest: "The shared values of the Union in respect of services of general economic interest (...) include in particular: (...) equal treatment (...)."

## Personalised pricing and universal service

Non-discrimination / equality means:

- Comparable situations should not be treated differently and different situations should not be treated in the same way, unless such different treatment is objectively justified.
- Article 85(2) of the European Electronic Communications Code, allows Member States to require universal service providers to apply “common tariffs”, including geographic averaging, throughout the territory.
- E.g. German energy law: Suppliers of last resort have to publish **generally applicable prices** and have to supply each household customer at these prices.
- Willingness to pay is not an objective reason for different treatment



# Personalised pricing outside universal service

- Starting point: freedom of contract
  - Freedom to decide with whom one wants to contract
  - Freedom to decide under which conditions one wants to contract
  - Freedom to use algorithms to make these decisions
  - Limitations only under discrimination laws

## Legal Protection against Personalised Pricing? – Data Protection law

- Indirect protection because the GDPR requires consent to the collection of data? – very weak, as we always consent
- The right not to be subject to a decision based solely on automated processing, including profiling, Art. 22 GDPR? – no effect until now, not least due to legal uncertainty
- The right to know what data is used and what logic is involved in automated decision-making, Art. 13 – 15 GDPR? – interpreted narrowly by the leading opinion so as to protect the trader's business secrets concerning the algorithms used

## Legal Protection against Personalised Pricing? – Contract Law

- New Art. 6(1)(ea) Consumer Rights Directive: „(...) the trader shall provide the consumer with the following information in a clear and comprehensible manner: (...) where applicable, that the price was personalised on the basis of automated decision-making.”
- Applicable to energy supply contracts and telecommunications contracts concluded as distance contracts
- Not applicable to passenger transport services, Art. 3(3)(k) CRD
- No prohibition, and probably even prohibiting a prohibition at the national level, due to the total harmonisation character of the CRD.
- But allows consumer to avoid traders that engage in personalised prices (as long as there are any)

# Legal Protection against Personalised Pricing? – Unfair Commercial Practices Law

- Misleading omission when new Art. 6(1)(ea) CRD is breached, see Art. 7(5) Unfair Commercial Practices Directive
- Misleading omission already now under Art. 7(1) UCPD if personalised pricing is not laid open?
  - „A commercial practice shall be regarded as misleading if (...) it omits **material information** that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.
  - Well arguable
- Unfair commercial practice if unlawfully acquired data is used for personalisation?

# Conclusion

- Within universal service, personalised prices is excluded.
- Otherwise, personalised prices are covered by freedom of contract but make the market intransparent and impacts on the consumer's ability to make informed decisions
- Data protection law barely protects consumers against the (automatised) (ab)use of their personal data
- (Consumer) contract law offers some protection outside financial services law
  - But only where the consumer has a choice between traders with different policies
- Unfair commercial practices law might be more useful but the situation is unclear.
- For the sake of competitive essential services markets, personalised pricing should be prohibited.