



## Discussion Points

### Presented by the Business at OECD Competition Committee to the Joint Meeting of the OECD Competition Committee and the OECD Committee on Consumer Policy

### *Personalised Pricing in the Digital Era*

November 28, 2018

*Business at OECD* appreciates the opportunity to submit these comments to the Joint Meeting of the OECD Competition Committee and the OECD Committee on Consumer Policy regarding personalised pricing in the digital era.

#### I. Introduction

1. The digital era has created the possibility for sellers to obtain, track and analyse ever-larger quantities of data regarding their customers and potential customers and concerns have been expressed that this data could be used to tailor the customer's shopping experience by presenting targeted advertising messages and product selections and by offering different prices or discounts to different customers—ultimately offering the possibility for perfect “personalised pricing.”
2. *Business at OECD* understands the term personalised pricing for the purposes of this Joint Meeting to be limited to pricing by businesses to consumers and to mean the practice of setting prices to individual consumers based on their personal characteristics, digital footprints and algorithmically-assessed willingness to pay. This is in contrast to dynamic pricing, where prices are differentiated based on characteristics of the market, the purchase and the product, including supply and demand evolution in respect of perishable, time-sensitive or scarce products as varied as travel or event tickets, fresh foods and fashion. Personalised pricing is distinct from second degree pricing differentiation covering menu pricing or the offering of various product versions, in both cases giving the customer the ability to select from alternative, differently priced options. It is also distinct from third degree differential pricing, where special prices are made available to consumers who identify as members of a specific group,<sup>1</sup> although this distinction can become little more than theoretical in situations where extremely narrow groups are defined. However, *Business at*

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<sup>1</sup> Such groups being of infinitely variable composition, frequent examples being pensioners, students or loyalty club members.

OECD would note that there are as yet no clearly set definitions in the area<sup>2</sup> and the term personalised pricing is also, for example, regularly applied to pricing to business customers. The term is also sometimes used to refer to pricing arrangements which are more akin to dynamic pricing and to differential pricing to narrow groups of consumers<sup>3</sup> and in practice the lines may be blurred between the various elements which may make up a pricing strategy.

3. This paper, in section II will provide examples of personalised pricing surveyed in practice; section III will discuss the economic effects of such differential pricing, building on *Business at OECD's* submissions on Price Discrimination for the OECD Competition Committee roundtable in November 2016 (“Price Discrimination”);<sup>4</sup> section IV will offer a suggested analysis under competition law; section V will briefly summarise other potentially relevant consumer policy and legal concerns; and section VI will draw conclusions.

## II. Personalised Pricing in Practice

4. Based on anecdotal reports in magazines from marketing consultants and some articles by concerned authors,<sup>5</sup> it could be tempting to fear that personalised pricing is rife and that, as a result well-off and unengaged consumers have to pay widely-oscillating, unfairly high prices. Yet the evidence does not support such fears. In fact, personalised pricing has been addressed in a number of recent surveys and studies by competition and consumer protection authorities around the globe, including in the UK,<sup>6</sup> the U.S.,<sup>7</sup> France and Germany,<sup>8</sup> the EU,<sup>9</sup>

<sup>2</sup> See, e.g., Ariel Ezrachi & Maurice Stucke, *The Rise of Behavioural Discrimination*, 37 EUR. COMPETITION L. REV. 485 (2016) (where the authors use the term “behavioural discrimination”); see also Christopher Townley, Eric Morrison & Karen Yeung, *Big Data and Personalised Price Discrimination in EU Competition Law*, 36 YEARBOOK EUR. L. 683 (2017) (where the authors use the term “algorithmic consumer price discrimination” or “ACPD”).

<sup>3</sup> See OECD, *Personalised Pricing in the Digital Era—Background Note by the Secretariat* (Oct. 12, 2018), available at [https://one.oecd.org/document/DAF/COMP\(2018\)13/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf). The paper suggests that not only “perfect” or first-degree price discrimination should be included in the scope of personalised pricing, but also more realistic pricing schemes based on more limited data.

<sup>4</sup> See OECD, *Roundtable on “Price Discrimination”—Note by BIAC* (Nov. 17, 2016), [hereinafter *BIAC 2016 Price Discrimination*] available at [https://one.oecd.org/document/DAF/COMP/WD\(2016\)75/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2016)75/en/pdf).

<sup>5</sup> See, e.g., Ezrachi & Stucke, *supra* note 2.

<sup>6</sup> See U.K. OFFICE OF FAIR TRADING, *PERSONALISED PRICING: INCREASING TRANSPARENCY TO IMPROVE TRUST* (May 2013), [hereinafter *OFT 2013 PERSONALISED PRICING*] available at [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/shared\\_of/markets-work/personalised-pricing/of1489.pdf](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/shared_of/markets-work/personalised-pricing/of1489.pdf); and U.K. COMPETITION & MKTS. AUTH, *PRICING ALGORITHMS: ECONOMIC WORKING PAPER ON THE USE OF ALGORITHMS TO FACILITATE COLLUSION AND PERSONALISED PRICING* (Oct. 8, 2018), [hereinafter *CMA 2018 PRICING ALGORITHMS*] available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/746353/Algorithms\\_econ\\_report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf).

<sup>7</sup> EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, *BIG DATA AND DIFFERENTIAL PRICING* (Feb. 2015), [hereinafter *EOP BIG DATA REPORT*] available at [https://obamawhitehouse.archives.gov/sites/default/files/whitehouse\\_files/docs/Big\\_Data\\_Report\\_Nonembargo\\_v2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/docs/Big_Data_Report_Nonembargo_v2.pdf).

<sup>8</sup> AUTORITÉ DE LA CONCURRENCE & BUNDESKARTELLAMT *COMPETITION LAW AND DATA* (May 10, 2016), available at [www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf](http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf).

<sup>9</sup> EUR. COMM’N, *FINAL REPORT ON THE E-COMMERCE SECTOR INQUIRY* (May 2017), [hereinafter *EC E-COMMERCE REPORT*] available at [http://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_final\\_report\\_en.pdf](http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf); and EUR. COMM’N, *CONSUMER MARKET STUDY ON ONLINE MARKET SEGMENTATION THROUGH PERSONALISED PRICING/OFFERS* (June 2018), [hereinafter *EC PERSONALISED PRICING STUDY*] available at

and Canada,<sup>10</sup> and none has found evidence of more than limited use of the practice. Instead, a report by the UK's OFT in 2013 found that "prices online are often dynamic or variable, but do not appear to be set on the basis of personal information."<sup>11</sup> A more recent economic paper commissioned by the CMA (the OFT's successor) found that in the UK in 2018 there remained "limited evidence of this type of personalised pricing in practice."<sup>12</sup> In the U.S., a 2015 report, found that examples of personalised pricing "remain fairly limited"<sup>13</sup> and in the EU dynamic/ personalised pricing was found to be "rather rare" in 2017, with only 2% of retailers declaring that they use such pricing and 87% confirming they do not.<sup>14</sup> In another EU study, published in 2018 and which extended to personalisation generally, including not only pricing but other practices such as targeted advertising, the EU observed that differences in prices occurred in just 6% of cases, with median differentials being less than 1.6%.<sup>15</sup>

5. Actual examples of personalised pricing cited are correspondingly few and then often not within our definition. The most common reference by far is to an incident back in 2000, an age ago in terms of how far things have moved in online commerce, when Amazon in the U.S. briefly charged different customers different prices for the same DVD, but this pricing test was evidently random, at most referencing status as an existing customer.<sup>16</sup> Townley et al also refer to an incident of highly variable prices offered to a consumer for a set of mah-jong tiles but without any indication that the second 50% higher price (offered a few minutes after the initial one) was or could have been based on a reassessment of the consumer's likely willingness to pay.<sup>17</sup> Other examples cited include a report that Orbitz (a travel fare aggregator website) presented pricier hotel options at the top of searches made using some devices than others.<sup>18</sup> However, while in that case such search rankings might possibly have had some steering effect they did not impact product pricing.<sup>19</sup> In an example involving business customers not consumers and so not within the OECD's definition, ZipRecruiter (a job search engine) in 2015 reportedly randomly assigned different initial monthly charges to new customers, then for a second month offered tailored prices based on each company's

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[https://ec.europa.eu/info/sites/info/files/aid\\_development\\_cooperation\\_fundamental\\_rights/aid\\_and\\_development\\_by\\_topic/documents/synthesis\\_report\\_online\\_personalisation\\_study\\_final\\_0.pdf](https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/aid_and_development_by_topic/documents/synthesis_report_online_personalisation_study_final_0.pdf).

<sup>10</sup> COMPETITION BUREAU CANADA, BIG DATA AND INNOVATION: KEY THEMES FOR COMPETITION POLICY IN CANADA (Feb. 19, 2018), available at [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-Report-BigData-Eng.pdf/\\$file/CB-Report-BigData-Eng.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-Report-BigData-Eng.pdf/$file/CB-Report-BigData-Eng.pdf).

<sup>11</sup> See OFT 2013 PERSONALISED PRICING, *supra* note 6, at 13 (where the OFT notes that in its own research it found no evidence of prices being set on the basis of individual customer profiles, as opposed to broader groups or types of customer).

<sup>12</sup> See CMA 2018 PRICING ALGORITHMS, *supra* note 6, at 3.

<sup>13</sup> See EOP BIG DATA REPORT, *supra* note 7, at 2.

<sup>14</sup> See EC E-COMMERCE REPORT, *supra* note 9, at 152-153.

<sup>15</sup> See EC PERSONALISED PRICING STUDY, *supra* note 9.

<sup>16</sup> See OFT 2013 PERSONALISED PRICING, *supra* note 6, at 13; and EOP BIG DATA REPORT, *supra* note 7, at 10.

<sup>17</sup> See Townley, Morrison & Yeung, *supra* note 2, at 1.

<sup>18</sup> See OFT 2013 PERSONALISED PRICING, *supra* note 6, at 11.

<sup>19</sup> See Rafi Mohammed, *How Retailers Use Personalised Prices to Test What You're Willing to Pay*, HARVARD BUS. REV. (Oct. 20, 2017), available at <https://hbr.org/2017/10/how-retailers-use-personalized-prices-to-test-what-youre-willing-to-pay> (where the author refers to an alleged incident involving different prices from Orbitz across laptop and app searches but Orbitz denied this and in any event it is not personalised pricing within the OECD's definition, rather an alleged rudimentary group-based differential).

location, type and benefits policy in an experiment described as being as close as any company has likely come to charging personalised prices<sup>20</sup> before eventually substituting a range of differentiated products aimed at customers with different needs.

6. Some authors have referred to location-based pricing such as Staples Inc's alleged quoting of lower prices to on-line consumers located close to rival brick and mortar stores<sup>21</sup> as personalised. Location is a personal factor but taking it into account may not be a reflection of the consumer's assessed willingness to pay but rather be related to delivery cost considerations, to an assessment of the customer's risk profile, as in the insurance industry, or to its role as a variable when combatting payment fraud. So, examples based on location are not necessarily personalised pricing.
7. It is clear that consumers are not and need not be entirely passive in the face of personalised pricing. In Europe, consumers are not only aware of on-line personalisation but assume it to be much more prevalent than it actually is.<sup>22</sup> The U.S. report describes the proliferation of consumer-empowering technologies, from the simplest ones, like search engines, price comparison and price-tracking sites and apps, to more complex ones, like tools enabling consumers to arbitrage to undermine differential pricing.<sup>23</sup> Consumers 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 such as lower insurance premiums for safer drivers. Suppliers offer incentives to consumers to persuade them to allow their data to be tracked under often free membership and loyalty schemes.
8. A striking fact evident to even an occasional shopper is the extent to which on-line examples of price differentiation in many cases reflect similar tailoring of offers to consumers in the brick and mortar environment. The location-based examples are clearest as retailers regularly take account of nearby competing stores in setting prices. Consumers who choose to save time by shopping in a conveniently located city centre mini-market branch of a popular grocery brand expect to find and are presented with higher prices than they could pay at the brand's out-of-town superstore. Large stores study shoppers' in-store travel patterns to optimise placement of products and promotions as avidly as digital players monitor online browsing. Having moved light years beyond reliance on broadly-distributed coupons to be clipped from newspapers and magazines, by analysing the data available from store loyalty cards, retailers are now able to offer consumers targeted promotions and discounts in-store at the check-out. By combining loyalty card data with a consumer's store brand credit card retailers may have very detailed personal information to assess a shopper's individual characteristics and spending levels. In a further cross-over move between the on-line and

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<sup>20</sup> See Brian Wallheimer, *Are you Ready for Personalised Pricing?*, CHICAGO BOOTH REV. (Feb. 26, 2018), available at <http://review.chicagobooth.edu/marketing/2018/article/are-you-ready-personalized-pricing>.

<sup>21</sup> See Townley, Morrison & Yeung, *supra* note 2, at 1.

<sup>22</sup> See EC PERSONALISED PRICING STUDY, *supra* note 9 (where consumers surveyed reported that nearly all or most websites use personalised pricing, well above the level of personalised pricing observed).

<sup>23</sup> See OFT 2013 PERSONALISED PRICING, *supra* note 6, at 13-15.

bricks and mortar realms, some retailers allow loyalty card holders to tailor their own selection of discounts online and then automatically apply those discounts to in-store purchases. Even when pushing their own trolley to the check-out, consumers do not expect to be getting the same discounts and realise they may not be paying the same prices as those ahead in the queue. *Business at OECD* of course recognises that more data may be more available to a broader range of sellers on-line, apparently justifying the current focus on online pricing. *Business at OECD* would however emphasise 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 to assessing pricing practices is important to avoid the risk that innovation in the brick and mortar as well as on-line spheres might be stifled.

9. The limited observed use of true personalised pricing is perhaps not surprising given the limited circumstances in which it is likely to be feasible and the concerns to which it may give rise. As *Business at OECD* noted in its paper on Price Discrimination<sup>24</sup>, there is consensus among economists that any firm wishing to engage in price discrimination must (1) have some significant degree of market power; (2) have the ability to estimate buyers' willingness to pay; and (3) arbitrage between customers who pay lower and higher prices respectively must be impossible or difficult. In addition, especially where price discrimination between consumers is concerned, firms must be careful not to alienate customers who may view this tactic as unfair<sup>25</sup> and must still observe a wide range of consumer protection, privacy, equality and other rules.<sup>26</sup>
10. Even if personalised pricing may well, as a consequence, remain a limited practice, it may, alternatively, become more prevalent as data availability, the sophistication and availability of algorithmic analysis and consumer acceptance evolve.<sup>27</sup> *Business at OECD* supports the continuing efforts by authorities to monitor developments in their markets to ensure an appropriate response to any competition issues or other concerns, such as those explored in Section V below. *Business at OECD* would also suggest that authorities might usefully seek to educate consumers to recognise dynamic pricing and not take price variations which result from it as a personal affront, to avoid consumer trust in online markets being undeservedly undermined.

### III. The Economic Effects of Personalised Pricing

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<sup>24</sup> See *BIAC 2016 Price Discrimination*, *supra* note 4, ¶ 2.

<sup>25</sup> See *EOP BIG DATA REPORT*, *supra* note 7, at 4 and 13. The Amazon example discussed in para 8 of the text above led to coverage and an element of outcry suggesting this factor will be taken seriously and it is cited in each of the studies.

<sup>26</sup> See section V below.

<sup>27</sup> Some commentators suggest the increase in personalised pricing may occur indirectly through personalised discounts and search optimisation. See MARC BOURREAU, ALEXANDRE DE STREEL AND INGE GRAEF, *BIG DATA AND COMPETITION POLICY: MARKET POWER, PERSONALISED PRICING AND ADVERTISING – PROJECT REPORT 41 (2017)*, available at [http://cerre.eu/sites/cerre/files/170216\\_CERRE\\_CompData\\_FinalReport.pdf](http://cerre.eu/sites/cerre/files/170216_CERRE_CompData_FinalReport.pdf).

11. The effects of differentiated pricing in general have been well documented in the economic literature and *Business at OECD's* views were summarized in its Price Discrimination submission. Consumers for whom price differentiation implies lower prices or the availability of goods otherwise beyond their reach benefit, whereas those who pay higher prices may suffer. The overall impact on consumer welfare—the fundamental concern of competition law—is thus ambiguous and will depend on which of these effects is dominant and, generally, on whether total output in the market increases, clearly benefitting consumers overall.<sup>28</sup> If differentials are not allowed or possible, the resulting uniform pricing may induce firms to abandon a market segment of customers with lower willingness to pay, reducing total output and consumer welfare.<sup>29</sup>
12. Differentiated pricing to consumers does not carry the risk, which may arise in pricing to businesses customers, of impacting competition in downstream markets. This may simplify the economic analysis, but it remains complex, depending on output effects and also on whether the effect of the particular price discrimination is to increase or reduce the intensity of price competition. Data-driven price differentiation which allows a firm to propose lower prices to customers with a strong preference for another product will result in greater price competition,<sup>30</sup> but price competition may be dampened if it deters consumers from engaging in a search for alternatives<sup>31</sup>.
13. In markets with imperfect competition, personalised pricing based on sophisticated estimates of each consumer's willingness to pay gives scope for suppliers to extract rents from consumers but may also result in more intensive price competition with the competition effect dominating and consumer surplus generally being greater where suppliers have more precise estimates of consumer preferences.<sup>32</sup>
14. Even in the case of single firm monopolists, where total welfare will likely be enhanced to the benefit of the firm, but overall consumer welfare may suffer, it is generally agreed that an examination of the actual effects of price discrimination is needed to establish the actual impact on consumers and competition.<sup>33</sup>

#### IV. An analysis of Personalised Pricing under Competition Law

15. In the absence of experience of applying competition law to personalised pricing, *Business at OECD's* analysis starts from its view that the application of competition law to differential pricing is most apt when considering the use of discriminatory pricing by a dominant firm which has exclusionary effects. *Business at OECD* favours the use of established analytical frameworks for addressing predatory pricing, bundled discounts and other cases where the

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<sup>28</sup> We note that apart from these positive allocative effects other public policy goals may be concerned with the distributional effects between winners and losers, as discussed in Section V below.

<sup>29</sup> See *BIAC 2016 Price Discrimination*, *supra* note 4, ¶¶ 11-19.

<sup>30</sup> See *Autorite de la Concurrence & Bundeskartellamt*, *supra* note 8, at 22.

<sup>31</sup> See *Townley, Morrison & Yeung*, *supra* note 2, at 10.

<sup>32</sup> *Id.*, § 2.3 (where the authors cite the supporting research).

<sup>33</sup> *Id.*, § 2.6 (where the authors point out that the shape of the demand curve will dictate whether consumers are in aggregate better off).

dominant firm's objective is to exclude rivals. It can be doubted if discriminatory prices to consumers, absent more, could ever harm competition to this standard.<sup>34</sup> EU competition law's specific treaty reference to price discrimination provides that it may be abusive if it places the customer at a "competitive disadvantage" which would seem to exclude pricing to consumers.<sup>35</sup>

16. Personalised pricing which discriminates unjustifiably based on the consumers' nationality or residence could fall within EU precedents condemning discrimination on this basis as abusive, but *Business at OECD* would caution that insisting prices should be harmonized in a given geographic region could result in higher average prices for all consumers, or markets not being served at all in lower-priced geographic areas,<sup>36</sup> and *Business at OECD* agrees that geographic price discrimination which is not otherwise anti-competitive is best reviewed, if at all, under other rules.<sup>37</sup>
17. Although some jurisdictions also prohibit exploitative abuse, these cases call upon competition authorities to apply often vague and ill-defined standards and the risk of over enforcement and false positive findings of antitrust liability is particularly high.<sup>38</sup> EU competition law references charging unfair prices as a potential abuse<sup>39</sup> which it has been suggested could apply to personalised pricing<sup>40</sup> but this should not, *Business at OECD* suggests, be taken to extend competition law to conduct which may be unfair in terms of distributive fairness or consumer protection concerns, without damaging competition. *Business at OECD* agrees with the conclusion that competition law should thus not generally anticipate abuses based on personalised prices, even if pursued by a dominant firm.<sup>41</sup>
18. Personalised pricing by suppliers who are not dominant will violate competition law only if arranged collusively between competitors. Express collusion appears rather unlikely to the extent it would involve sharing highly valuable confidential information on each firm's least price-sensitive customers. As for the risk of tacit collusion, particularly supported by the use of pricing algorithms,<sup>42</sup> the CMA concludes that extensive use of personalised pricing in a

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<sup>34</sup> The French/German report queries if they can be within the scope of EU competition law but notes that national competition law may be stricter. *Id.*, n.49 (citing German case law).

<sup>35</sup> But note that European case law under TFEU Article 102(c) is not entirely consistent. See Townley, Morrison & Yeung, *supra* note 2 (in particular the cases discussed in the text associated with footnotes 133-134).

<sup>36</sup> See *BIAC 2016 Price Discrimination*, *supra* note 4, ¶¶ 28-30.

<sup>37</sup> OECD, *Price Discrimination—Background Note by the Secretariat* ¶ 149 (Oct. 13, 2016), available at [https://one.oecd.org/document/DAF/COMP\(2016\)15/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)15/en/pdf).

<sup>38</sup> See *BIAC 2016 Price Discrimination*, *supra* note 4, ¶¶ 3 and 5.

<sup>39</sup> See Treaty on the Functioning of the European Union TFEU, 2012 O.J. (C 326) 47, art. 102 (a).

<sup>40</sup> See Townley, Morrison & Yeung, *supra* note 2, at 34.

<sup>41</sup> See Mariateresa Maggolino, *Personalized Prices in European Competition Law* 24 (Bocconi Legal Studies Res. Paper No. 2984840, 2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2984840](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2984840) ("Unless we decide that the welfare of these subjects [consumers with a greater willingness to pay] is worthy of legal protection, and unless we want to affect the efficient allocation of products, antitrust law should not pursue personalized prices, even if charged by a dominant firm.").

<sup>42</sup> Which, as CMA 2018 PRICING ALGORITHMS, *supra* note 6, at paragraph 5.18 clarifies, will only amount to a potentially anti-competitive practice if there is an intention of the competitors to acquiesce to the suppression of rivalry.

market would actually make it significantly less likely that algorithms could lead to tacit coordination. The CMA notes that the traditional conditions that facilitate tacit coordination (such as transparency) make it harder to engage in highly personalised pricing because they mean that price comparisons are easier for customers. Conversely, if pricing is truly personalised, then it is difficult for competitors to observe and detect any deviation, making collusion less stable.<sup>43</sup> Conceivably competitors could collude by agreeing to limit or not to apply personalised pricing and this may need to be taken into account in considering any voluntary industry codes of practice which may be proposed to address any consumer protection or other concerns discussed in Section V below.

19. Finally, in the absence of real-world evidence of competitive harm associated with the aggregation of personal data<sup>44</sup> or its application in personalised pricing and 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.

#### **V. Other Consumer Policy and Legal Concerns**

20. Studies of personalised pricing have suggested that other issues need to be considered when assessing particular cases, including:

- whether it directly or indirectly disadvantages vulnerable consumers;<sup>45</sup>
- whether it directly or indirectly disadvantages groups protected by equality or non-discrimination laws;<sup>46</sup>
- whether it leads to a reduction of trust in online markets;<sup>47</sup>
- whether it should be more transparent;
- whether it violates laws protecting personal data and privacy;
- whether it is based on sensitive information;<sup>48</sup>
- whether it involves misleading statements or omissions;
- whether it violates advertising rules; and

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<sup>43</sup> See CMA 2018 PRICING ALGORITHMS, *supra* note 6.

<sup>44</sup> See OECD, *Hearing on Big Data—Note by BIAC* (Nov. 17, 2016), available at [https://one.oecd.org/document/DAF/COMP/WD\(2016\)77/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2016)77/en/pdf).

<sup>45</sup> Such as those with poor digital, literacy or numeracy skills or those on low incomes.

<sup>46</sup> Such as those based on age, disability, gender, sexuality, race or religion.

<sup>47</sup> See OFT 2013 PERSONALISED PRICING, *supra* note 6, at 28 (such reduction is described as the most significant concern).

<sup>48</sup> Such as health, religion and sexuality.

- whether it violates other consumer protection laws such as those dealing with consumer contract terms.<sup>49</sup>

21. *Business at OECD* strongly supports consistent enforcement of existing consumer protection, advertising and data protection rules and would suggest that among the many different areas for consideration above, efforts should primarily be focused on assessing whether certain forms of personalised pricing may be considered to violate those rules. Establishing whether there is any enforcement deficit in relation to existing legislation is a key building block for understanding and assessing any future direction of policy in this field. This is particularly important in those jurisdictions with recently enacted rules such as the EU's General Data Protection Regulation (GDPR).
22. As regards consumer protection generally, in *Business at OECD's* view the existing general principles provide a sound and technology-proof legal protection framework to prohibit any potential unfair practices related to personalised pricing. Many OECD countries have comprehensive rules on unfair and misleading commercial practices, such as the Unfair Commercial Practices Directive (UCPD)<sup>50</sup> and recent guidelines concluded that personalised pricing or marketing could breach the UCPD if combined with unfair commercial practices.<sup>51</sup> This has also been confirmed in the recent review of EU consumer protection law, which concluded that there is no need to change the UCPD to include any specific provisions on price discrimination or personalised pricing.<sup>52</sup>
23. There are also existing rules regarding data protection in many jurisdictions. For example, the GDPR already includes high transparency requirements, and *Business at OECD* does not see any need to add an additional layer of information before assessing the impact of the current provisions in practice and whether they have improved consumer awareness. Information overload would not necessarily contribute to a better level of consumer awareness and trust. Under the GDPR,<sup>53</sup> the consumer must be informed if automated decision making (such as consumer profiling, which may occur in connection with personalised pricing) takes place and must receive meaningful information about the logic involved, as well as the significance and envisaged consequences for the consumer. The EU data protection regulators<sup>54</sup> have indicated that instead of complex mathematical explanations about how algorithms or machine-learning work, the trader should use clear and comprehensive ways to provide the

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<sup>49</sup> Note that the EU's Unfair Terms in Consumer Contracts Directive provides that the unfairness of terms does not depend on the fairness of the price. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, 1993 O.J. (L 95) 29, art. 4.

<sup>50</sup> Directive 2005/29/EC on Unfair Commercial Practices, 2005 O.J. (L 149) 22.

<sup>51</sup> See *Commission Staff Working Document: Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices* (May 25, 2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0163&from=en>.

<sup>52</sup> See *Commission Staff Working Document: Impact Assessment* (Apr. 11, 2018), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018SC0096>.

<sup>53</sup> General Data Protection Regulation, 2016 O.J. (L 119) 1, art. 13.2 (f).

<sup>54</sup> See EUR. COMM'N, ARTICLE 29 DATA PROTECTION WORKING PARTY, GUIDELINES ON AUTOMATED INDIVIDUAL DECISION-MAKING AND PROFILING FOR THE PURPOSES OF REGULATION 2016/679 (Feb. 6, 2018), available at [http://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc\\_id=49826](http://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=49826).

information, in particular how the profile is used for a decision concerning the consumer. The GDPR goes beyond transparency by imposing strong safeguards, such as requirement for consumer consent for certain profiling operations which have significant consequences. This does not typically include targeted advertising based on profiling, but “[a]utomated 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.”<sup>55</sup> Given that consent is one of the strongest tools to empower consumers, *Business at OECD* would again suggest that the existing rules appear adequate and their application in practice should be assessed before any other rules need to be considered.

24. As regards transparency, *Business at OECD* respectfully submits that, again, existing evidence does not suggest that increased transparency—beyond existing requirements regarding consumer information and data privacy—is needed to improve consumers’ ability to detect and respond to personalised pricing. In Europe, a study by the Commission on online market segmentation through personalised pricing/offers, concluded that “there was very little difference in the proportion of respondents correctly [identifying] personalised pricing or targeted advertising, as transparency in the communication increased.”<sup>56</sup> Other reports have made the point that consumers’ incentives to engage may vary and increasing transparency through the provision of more information and data may not make the consumer more active.<sup>57</sup> Further emphasis on increased transparency would appear misplaced given that research indicates that there is a low prevalence of the practice of first degree personal pricing; there is no evidence of consumer harm from the practices; and in the past increased transparency has not seemed to be a particularly efficient tool.

25. *Business at OECD’s* overall view is thus that no need for additional rules has been demonstrated on the basis of consumer protection and other policy considerations, and *Business at OECD* would suggest that the following prerequisites should be the point of departure for any regulator before considering new regulations:

- Vital public interests are at risk;
- There is a market failure;
- Industry has had the opportunity to self-regulate but has failed to do so;
- Existing legislation has been used and enforced as far as possible;
- Regulations should be principles-based and technology neutral; and

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<sup>55</sup> *Id.* at 22. Criteria for assessing the significant effects would include “the intrusiveness of the profiling process, including the tracking of consumers across different websites, devices and services; the expectations and wishes of the consumers concerned; the way the advert is delivered; or using knowledge of the vulnerabilities of the [consumers] targeted.” *Id.*

<sup>56</sup> See EC PERSONALISED PRICING STUDY, *supra* note 9, at 264.

<sup>57</sup> *Consumer Vulnerability in Digital Markets: Summary of Stakeholder Roundtable*, UK COMPETITION & MKTS. AUTH. (Sept. 12, 2018), available at <https://www.gov.uk/government/publications/vulnerable-consumers/consumer-vulnerability-in-digital-markets-summary-of-stakeholder-roundtable>. *Business at OECD* understands that the direction of the CCP AG on behavioural insights will be further studying of transparency tools but considers that this may, in consequence, be premature.

- Regulations should as far as possible be compatible with legislation in other markets and internationally harmonized solutions should be pursued.

26. Alongside these concerns to which personalised pricing may give rise, it may also be noted that big data not only enables personalised pricing, it also provides new tools for monitoring it and, for example, enforcing antidiscrimination laws more effectively.<sup>58</sup>

## VI. Conclusions

27. In conclusion, the evidence suggests that 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 and even in theory such harm could only arise in very specific circumstances when applied by 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.

28. As regards consumer protection and other policy considerations, existing rules appear likely to be effective in terms of consumer protection and data privacy 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.

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

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<sup>58</sup> See EOP BIG DATA REPORT, *supra* note 7, at 17.