Online price discrimination and personal data: A General Data Protection Regulation perspective

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ABSTRACT

The General Data Protection Regulation (GDPR) contains various provisions with relevance to online price discrimination. This article, which analyses a number of essential elements on this junction, aims to provide a theory on whether, and, if so, how the GDPR affects price discrimination based on the processing of personal data. First, the contribution clarifies the concept of price discrimination, as well as its typology and relevance for big data settings. Subsequent to studying this topic in the context of the Commission’s Digital Single Market strategy, the article tests the applicability of the GDPR to online price personalisation practices by applying criteria as ‘personal data’ and ‘automated processing’ to several discriminatory pricing cases and examples. Secondly, the contribution evaluates the possible lawfulness of price personalisation under the GDPR on the basis of consent, the necessity for pre-contractual or contractual measures, and the data controller’s legitimate interests. The paper concludes by providing a capita selecta of rights and obligations pertinent to online discriminatory pricing, such as transparency obligations and the right to access, as well as the right to rectify the data on which price discrimination is based, and the right not to be subject to certain discriminatory pricing decisions.

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“A key step is to avoid average pricing. Pricing to specific customer groups should reflect the true competitive value of what is being provided. When this is achieved, no money is left on the table unnecessarily on the one hand, while no opportunities are opened for competitors through inadvertent overpricing on the other. Pricing is an accurate and confident action that takes full advantage of the combination of customers’ price sensitivity and alternative suppliers they have or could have.”


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1. **Price discrimination – conceptual remarks**

Price levels for consumer products diverge extensively within the European Union and beyond: firms may award quantity or loyalty rebates to their purchasers and student discounts to youth, identical drugs may cost more in Belgium than in Greece, and prices of airplane tickets rapidly change. Furthermore, Uber introduced a ‘surge pricing’ system through which cab rates increase according to local demand, manufacturers bundle goods for lower prices than the sum of the parts, electricity costs may be significantly lower during off-peak periods, and bars practice happy hours. These examples share the same phenomenon, in which the same provider sells identical products for different prices and such differences are not motivated by different cost structures (e.g. different costs of supply). This phenomenon is called price discrimination.\(^\text{1}\) Price discrimination likewise encompasses the reverse situation, with all buyers being charged the same price in spite of an existing difference in costs.\(^\text{1}\)

The commonly-used definitions of ‘discrimination’, such as “the unjustified different treatment of comparable situations”\(^\text{2}\) or “the practice of treating somebody or a particular group in society less fairly than others”\(^\text{3}\), reveal an inherently negative connotation. It does hence not surprise that price discrimination, too, is oftentimes perceived unfavourably by the public (a US survey e.g. indicated that US adults “overwhelmingly object to most forms of behavioral targeting and [consider] all forms of price discrimination as ethically wrong”).\(^\text{4}\) However, whereas the word ‘discrimination’ traditionally bears a negative connotation, the term ‘price discrimination’ should be read neutrally as it constitutes a fundamental concept in economic theory.\(^\text{5}\) Additionally, discriminatory prices may well aid in treating ‘comparable situations’ in a comparable manner (should e.g. loyal customers, both online and offline, be served in the same manner as sporadic purchasers?) and, dependent on the case, prove beneficial for both providers and society at large. The benefits of price discrimination are nonetheless contentious, with even European institutions seemingly differing in opinions on its advantages.\(^\text{6}\) Price discrimination is, however, no new technique and hence its conditions, types, profitability aspects, consumer surplus, and social welfare effects have been thoroughly studied from an economic perspective.\(^\text{7}\)

Economists traditionally distinguish three categories: (1) first-degree price discrimination, meaning each individual consumer is charged the maximum he or she is willing to pay for the product\(^\text{8}\) (i.e. ‘perfect’ price discrimination\(^\text{9}\), the...
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