EU Consumer Protection 2.0

*Personalised pricing and individualized marketing under EU consumer law: fairness and discrimination*

A study for BEUC, The European Consumer Organisation

Terms of Reference

**Background**

The study is intended to conduct a consumer law analysis of phenomena which arise in direct consequence of digital platforms holding personalized information on every user: personalized pricing and individualized marketing. Although little evidence exists of the actual degree of use of such practices, the wealth of services offering behavioral profiling and the capabilities of algorithms sourcing and processing personal information in real time render such practices into low-hanging fruit, particularly attractive given the economic incentives involved. On the other hand, such practices deprive consumers of means of evaluating the market and assessing the price/quality ratio of products and services. By restricting access to objectively accessible product parameters, they also limit the opportunities for consumer organizations to provide help and support to consumers via their traditional testing and comparison services, such as “best buy” recommendations. Algorithmic intervention at the stages of searching and presentation of search results means the consumer is faced with an arbitrary preselection of offers, while being excluded from seeing others which the trader does not want them to see. Individualizing both price information and marketing message puts traders in control in what each individual consumer is allowed to know; thus placing them in the factual position of ownership of the information economy.

Despite existing arguments of increasing economic efficiency, the near unanimous rejection of such practices by consumers, also those who could potentially stand to profit from them, adds fuel to the debate on fairness, trust and the societal and individual justice implications of traders being in control of the product and price information delivered individually to each user – and on the appropriate response that should be expected from data protection and consumer laws.

**Focus**

Starting out from an evaluation of the aspects of fairness and social justice, the study should look at the societal dimension and the trust ingredient of the business-to-consumer relationship being forced to erode in the context of forced introduction of individualized lens through which the consumer sees the market. In particular, it should consider that an extreme form of individualization entails an exclusion from seeing certain offers where the consumer does not meet the profile, as well as unlimited opportunities for discouraging individuals from making certain economic and life choices by portraying them as unattractive. The analysis should also take into account the implications of increased use of personal assistants, which can further increase the opportunities for monitoring and personalization. Lastly, the report should offer solutions on how such challenges should be addressed in the framework of EU consumer law, particularly the Unfair Commercial Practices Directive.
Reference questions

• How is personalization of markets affecting the power balance between consumers and traders in the digital society? How can basic principles like fairness, justice, transparency, choice, information be applied to protect the position of consumers under these circumstances?
• How does this challenge the information-based paradigm of consumer protection, in particular that enshrined in the Consumer Rights Directive (‘CRD’) and the Unfair Commercial Practices Directive (‘UCPD’), or other consumer legislation?
• Both in terms of personalized pricing and individualized marketing as a whole, is there a way to identify economic discrimination under the classical discrimination paradigm?
• Does the current EU consumer law framework, in particular the UCPD or the upcoming European AI/ADM legislation, allow qualifying this as a discriminatory unfair practice? And if not, how could it be amended to address such discrimination effectively?
• How should consumer law respond to market personalization in the context of interfaceless consumption and *de facto* situational monopoly taking place when shopping via digital assistants?
• If price personalization is mandatorily disclosed by the trader, does this preclude an unfairness test under the UCPD and the UCTD?
• Under what circumstances should a personalized marketing practice be always banned, and should such prohibitions be included in the Annex to the UCPD?

Project planning and timeline

The closing date for submitting tender proposals is May 5, 2020. BEUC reserves the right to disregard any proposals received after this date.

The study commissioned under this call is expected to be finalized by September 30th, 2020 which is the deadline for the submission of the final report.

An interim report should be presented one month before due date. A meeting or videoconference should take place to discuss out comments on the draft report.

The final report must be approved by BEUC.

Contractor requirements

The successful contractor must have an appropriate track record in this type of research in the specific area of consumer law, data protection and the digital society. The contractor should provide information on the experience of the personnel who will manage and undertake the project.

Costs

A full outline of the costs shall be submitted with the proposal giving details of how the costs are to be attributed. The contractor will be asked to break down the overall costs of a maximum of 11,000 € (VAT excluded) based on work-days needed, including the time required for the different personnel who will be involved in the project.
Publication and dissemination of the report

The contractor is expected to send the report electronically in pdf and in word version. Unless agreed otherwise between BEUC and the authors, the copyright of the report is granted to BEUC under a non-exclusive license. The authors are free to use the data and information collected in the context of the study for publication in peer reviewed journals provided two conditions:

- Inform BEUC before any publication and seek prior approval.
- Indicate clearly that the article is a study carried out for BEUC but does not reflect the position of BEUC or their members.

Contact information

Finalized proposals to conduct the proposed research should be sent to consumer-rights@beuc.eu.