

Markgrafenstraße 66
10969 Berlin

Besuchereingang
Rudi-Dutschke-Straße 17

Tel. (030) 258 00-0
Fax (030) 258 00-218
info@vzbv.de
www.vzbv.de

Berlin, 30. December 2015

Case Id: 9da758f0-1589-439a-9ee2-a6aa21fed3bd

Additional Information provided by the vzbv on the public consultation by the Commission on

Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy

Dynamic and Individual Pricing on Online Platforms

Definition of dynamic pricing:

Dynamic pricing means that prices change continuously, but all consumers are offered the same price for a specific product or service at a time.

Examples for dynamic pricing:

With dynamic pricing prices are continuously determined by a software solution (e.g. <http://feedvisor.com/about-2/about-feedvisor>) depending on factors such as current supply and demand, but also weather and weekdays. It is a well-established practice employed by online trading platforms. Amazon provides a prime example for dynamic pricing. A recent market check in Germany shows that Amazon's prices for a camera changed 275 times within 3 days. Prices for a smartphone on a different platform were found to vary by 100€ within one hour.

<http://www.swr.de/marktcheck/dynamic-pricing/-/id=100834/did=16117742/nid=100834/1y8yazo/index.html>. Airlines traditionally use highly dynamic pricing schemes to price airline tickets in their websites. As consumers often purchase flight tickets via online booking platforms (who in turn base their offers on the airline's prices), also prices on these booking platforms are consequently highly dynamic.

Definition of individual pricing or price differentiation:

Individual pricing or price differentiation means that different consumers are charged different prices for the same good or service by the same provider at the same time, depending on the consumers

presumed or estimated willingness to pay. Indicators to estimate the individual consumers' willingness to pay might be the websites visited before (e.g. identified and tracked by cookies), the device used by the consumer to access the offer (e.g. smartphone vs. desktop computer), the brand of the device (e.g. Apple vs. other manufacturers) or the location of the user (approximated by the post code or IP address).

Examples for individual pricing or price differentiation:

1. Examples for individual pricing/individual price differentiation are much harder to find, although the technical solutions are available on the market. The reason might be that companies are careful about individual pricing, probably fearing the negative reactions by consumers, perceiving individual pricing as unfair as the Amazon pricing experiment in 200 showed:

<http://www.bizjournals.com/seattle/stories/2000/09/25/daily21.html>

2. With individual pricing or price differentiation prices are based on the consumers presumed willingness to pay. To estimate individual consumers' willingness to pay the browsing history of consumers (e.g. observed by cookies) can be employed. E.g. a consumer that uses price comparison tools might be more price sensitive than users visiting a vendors' site directly: A 2012 Study found signs of price differentiation with respect to the origin URL of the user coming to a vendors website: If users came to the vendors site via a price comparison tool prices could be 23% lower as compared to Users visiting the vendor's site directly.

<http://conferences.sigcomm.org/hotnets/2012/papers/hotnets12-final94.pdf>. A market test in Germany found similar evidence: In one case, users visiting a vendor's site for contact lenses via a price comparison tool were charged half the price (12,66 Euro) as compared to users visiting the vendor's site directly (25,99 Euro). (http://etailment.de/thema/marketing/Dynamic-Pricing-im-Graubereich-Wenn-der-Stammkunde-der-Dumme-ist-3569?utm_content=buffer1e162&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer)

3. The Wall Street Journal found evidence of price differentiation based on the user's location.

(<http://www.wsj.com/articles/SB10001424127887323777204578189391813881534>)

Dynamic pricing and individual pricing is not illegal per se. Nonetheless, it is important to make sure that the way the price is calculated is indicated. This is also a requirement emerging from the Consumer Rights Directive and the UCPD.

Platforms should make it transparent when prices are individually calculated based on information related to the individual consumer:

1. It should be made transparent to consumers IF individual and dynamic pricing is undertaken by the platform.
2. The platform should clearly indicate which criteria are included in the calculation of the price (e.g. location/IP address, device used, surfing history, shopping history).

3. Any personalized pricing activities must be carried out in full respect of the data protection rules. That entails, that consumers must give an informed consent to the collection, transmission and processing of their data for the purpose of individual pricing.

Price differentiation can raise serious concerns, when it is based on sensitive information such as financial situation or health conditions. For example: A consumer with back pain uses the internet to research on painkillers for back pain, therapy for back pain etc. and finds out that specific mattresses might help to ease the pain. When the consumer visits the website of a trading platform offering such mattresses, it is morally highly questionable when the platform charges this consumer an higher price for specific back pain mattresses because it can conclude from his tracked previous online behaviour, that he has a high willingness to pay for the mattress.

Definition of Online Platforms

The proposed definition takes the traditional economics' concept of two-sided markets (or *economic platforms*) and adds "which uses the Internet" to make it an "online platform". This simple and encompassing approach is suitable in the realm of competition analysis and competition policy.

For policy making and the design of policy instruments in other specific realms it is not guaranteed that this definition provides a workable definition, as it is very broad.

This broad definition which, combined with the examples of different 'online platforms' provided, in practice covers almost any service or application delivered over the internet to consumers. However, different types of online services and applications create different consumer problems. These problems can be related to competition because they create economic bottlenecks or there is abuse of dominance, or to consumers' privacy and protection of personal data, or there can be misleading and unfair practices. There is also a general lack of interoperability or compatibility between what could be considered equivalent online services and applications, and the lock-in policies of operating systems and application marketplaces also have detrimental effects. All these consumer issues should definitely be addressed, but the best method to do so is not to adopt an all-inclusive, one-size-fits-all definition and accompanying policy measures. Different problems will require different, better tailored solutions. This should at least be clearly stated.

The proposed sub-categories are not selective. Many platforms can fall into more than one of the proposed categories. E.g. booking.com or Amazon qualify as an online-market place and a specialised search tool. Although a taxonomy of the existing online platforms might seem desirable as a base for developing specific policies for the different kinds of platform services, it is – at least - questionable if a taxonomy is feasible: Due to the high degree of innovation and dynamics in these markets, a valid definition of today might be obsolete soon.

It is useful to include in the definition a reference to the fact that "Online platforms" depend on some form of information and telecommunication technology (with respect to their usage and implementation). Defining these economic platforms by "which uses the Internet" is insufficient and too narrow, in the sense that important consumer-facing digital services and applications are not provided over the Internet, but over so-called specialised services. For example IPTV, where many abusive and/or unfair practices can exist. From the lack of interoperability of related equipment, to

lock-in practices that deter consumers from switching, or the impossibility to freely choose the content that consumers want to watch, IPTV services are increasingly a worrisome service for consumers across the EU.

On the limitation of benefits of Online Platforms

In theory online platforms have the potential to create more transparent prices and the possibility to compare offers, lower prices for products and services, but in practise they often fail to do so properly. The reasons are manifold and often related to the business models based and deceptive business practises.

E.g. comparison tools, suggesting that they provide “neutral” and “objective” information, often provide biased information and rankings instead, as their business models are based on commissions or other payments/contractual relations between the comparison platform and the producers, trades or suppliers whose products are compared on the platform. Providing consumers (deceptively) with biased information, posing as “neutral” and “objective”, can lead to “misinformed” (instead of “informed”) consumer choices, that are not in the best interest of the consumer. When the effects of these decisions trickle through the economy they ultimately lead to an inefficient and ineffective allocation of resources in the whole economy, to the detriment of the individual consumers and society at large.

Transparency and Information requirements of Online Platforms

Data protection laws oblige online platforms to provide information to consumers (e.g. information on which (meta) data is processed and transmitted, who processes and transfers the (meta) data and to whom the (meta)data is transferred to.

This information should be stated in a language that is clear and easy to understand for consumers and in the form of layered notices, provided that they are implemented in a way that prevents ‘notification’ fatigue. To this end platforms should make use of clear and unambiguous icons.

Easy-to-understand information should be provided in the realm of data used to build consumer profiles: Which profiles are build and in which way profiles are build. This entails information on which (meta)data is collected, how the individual information/data components included into the profiles are collected, weighted and how they are analysed and evaluated. Also, consumers should be informed on how the data is transferred, and to whom it is transferred. To depict this information in a layered format is useful and appropriate, given the complex nature of the information.

Sponsored links, content search results, ranking positions etc. should be clearly perceptibly labelled as marketing/advertising. Consumers are often unable to differentiate between ‘ads’ and ‘sponsored content’ that is employed by some platforms, moreover the difference between these kinds of ‘paid’ content and ‘normal’ content is often blurry as well. For example, a recent study (<http://www.theverge.com/2015/11/20/9768350/google-ads-search-results-ofcom>) shows that when it comes to Google, teens cannot tell the difference between ads and normal search results.

Consumers should also have easy access to information regarding the business model of the platform. This is particularly important in situations where platforms are providing services to

consumers 'free' of charge on the basis of a business model which relies on the monetization of users' personal data. In this case, it should be stated explicitly for users that this exchange is taking place and that they are indeed "paying" for the service with their personal data and their attention to personalized advertisement.

There is a need for more transparency with regard to how information and offers are ranked and displayed in certain platforms. For example, in online booking platforms, consumers might think the offers they are seeing are based on value/relevance, assessed on the basis of consumer ratings, while the reality might be that a certain seller/provider has paid for its content to be promoted, or that the offers promoted are the ones paying the platform a higher commission, and all this might be not properly disclosed.

For example: Among the largest online hotel booking platforms in Germany only one (booking.com: <http://www.booking.com/content/terms.de.html?label=gen173nr-15CAEoggJCAIhYSDNiBW5vcmVmaDuIAQGYYAQe4AQTIYAQTYAQPoAQE;sid=ef62aa0ba81aef16774c31867d8ac0e1;dcid=4>) mentions in its terms and conditions, that their default ranking is influenced by the commission that the hotels pay to the platform. This information is "hidden" in the Terms and conditions. All search engines and comparison tools whose ranking and display of search results could be altered due to commercial interests/relationships with the providers should properly disclose this fact.

Platforms whose core function is to put in contact sellers/providers with consumers should clearly disclose the nature of the information they are providing. They should disclose the rationale and criteria they apply to rank, display and filter the information and offers they show to the end-users. This can happen, in general terms, without being forced to disclose any business secrets or algorithms.

On Neutrality of Information and Advertisement on Online Platforms

In order to ensure healthy competition and consumer choice platforms should follow the concept of platform "neutrality". "Neutrality" is a benchmark principle that applies both in B2B and B2C relationships. In B2B it means that platforms should provide access in a non-discriminatory manner to those businesses that want to use the platform to ensure healthy competition. In B2C it means that, as a principle any contractual or other commercial relationship should not affect the impartiality or the service that the platform is providing to consumers and that any 'bias' resulting from economic interests should be properly disclosed, giving consumers an alternative to access the information presented in an "unbiased" manner (e.g. other ranking criteria, such as price or user ratings).

Many platforms do not comply with the principle of providing "neutral" information to consumers. The reason is that their business models are based on commissions, fees and premium services that they charge sellers or providers in return for promoting their offers, for presenting them on a higher ranking position or more prominently.

In these cases, if platforms deviate from the principle of "neutrality" - there should be a reference to "advertising" or "promoted link" whenever the default ranking or the display of information is affected by the (contractual) relationship between the platform and the seller/provider of the goods and

services in question (e.g. when the platform is paid a premium fee by the seller/provider in return for the platform presenting an offer more prominently or on a higher ranking position). The reference to “advertising” or “promoted link” should be made directly next to the offer in question. Platforms should indicate clearly and in an easy to understand language on which criteria their rankings and recommendations are based, in particular if the ranking influenced by the (contractual) relationship between the platform and the seller/provider of the goods and services. This information should be provided directly on the page on which the (search) results or recommendations are displayed.

As there are different types of platforms, we acknowledge that neutrality in practice should be looked at on a case by case basis, taking into account the specificities of the platforms concerned and the sectors in which they operate.

A serious problem for consumers occurs when advertising/commercial content is disguised as consumer reviews. Platforms that host user reviews, be it written reviews or video reviews, must make sure that they apply effective mechanisms to verify the legitimacy and authenticity of the reviews (e.g. by investing in smart algorithms that detect fake-reviews), taking down fake reviews or ensuring that they are properly identified as advertising content. Information with regard to the mechanisms that are applied to ensure the authenticity of the reviews should also be provided to consumers.

The Commission did well in setting up a multi-stakeholder group that developed a set of principles applicable to comparison tools. Although they have been developed for comparison platforms many of them can be extrapolated to other types of platforms. Valuable work has been put into this initiative which should not be discarded. The principles developed there are a good start, although they need amendment in some points. They spell out in detail the requirements that comparison websites have to meet as a general rule in order to adequately respond to legitimate consumer expectations. They concern different aspects, such as transparency of business model, coverage, up-to-datedness, verifiability and reliability, accuracy, independence of the information provider, clarity and user-friendliness, accessibility, reporting and supervision.

Overall, full compliance by online platforms with the obligations comprised in the consumer protection legislation, including the Unfair Commercial Practices Directive (UCPD), needs to be ensured.

Additional Information Platforms should provide (Terms and Conditions)

Online Platforms’ terms and conditions often fail in explaining to users what the conditions are, as they are often drafted with the sole purpose of being a liability waiver for the company. Unfortunately consumers (blindly) agree in order to be able to use the service. One reason for that might be, that consumers often do not have a choice but accepting the terms and conditions if they want to use the service at all (for example Facebook). With regards to privacy policies alone, a recent study found that it would take an average person about 250 working hours every year - about 30 full working days - to actually read the privacy policies of the websites he/she visits in a year.

Consumers can only give an informed consent if platforms provide them with concise and easy to understand information that properly reflects what are the policies, terms and conditions applying to

the use of the platform. This information should be easily accessible from platform's homepage and consumers should be encouraged to read it before agreeing to the terms of use of the service.

In terms of the format, layered notices should be considered as an option. They should be implemented in a way that prevents 'notification' fatigue. It is also important to present the information in a manner which provides the essential elements in the quickest and most visually attractive way possible, so it is easier for consumers to understand and digest all the information. For instance, companies could seek to present their terms and conditions via short videos or animations, as well as using icons and pictures together with short explanatory texts.

The European Consumer Association BEUC is actively identifying information needs of consumers, this includes how to present pre-contractual information in the most efficient way. In this regard, BEUC has commissioned a study to Professor Natali Helberger in 2013 on behavioural insights in consumer information. Together with the University of Leuven (ICRI) BEUC organised a workshop in 2014 on how to improve the presentation and visualisation of pre-contractual information.