

Definitely! *Maybe?*

 Navigating the curious case of dynamic pricing



Dynamic pricing: what exactly are we talking about?

The concept of dynamic pricing is not new. This well-established tactic is often used in the ticketing or hospitality sectors. It most recently made headlines across the world for **its role in the pricing surge for concert tickets over the summer**. Encouraged by the growth of AI, more and more businesses are adopting this strategy, or at least they have the tools for it, meaning **dynamic pricing is likely to become part of the ‘new normal’ consumers face in the digital age**.

Dynamic pricing, also known as real-time pricing, “means changing the price for a product in a highly flexible and quick manner in response to market demands”.¹ Businesses are able to change their prices automatically, with the help of algorithms.

There are various types of dynamic pricing so it is challenging to assess how each algorithm works, however, broadly speaking **dynamic pricing models often consider several parameters including:**

- ✔ Demand for a product/service and its availability.
- ✔ Market Trends (seasonality, specific events etc.)
- ✔ Competitors’ Prices
- ✔ Market expectations

In some cases, it can also include consumer’s personal data and behaviour, but in this case, it could then be considered personalised pricing.



¹European Commission (2021), “Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market”, Section 4.2.8 : <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52021XC1229%2805%29>



Minor issue? Major impact!

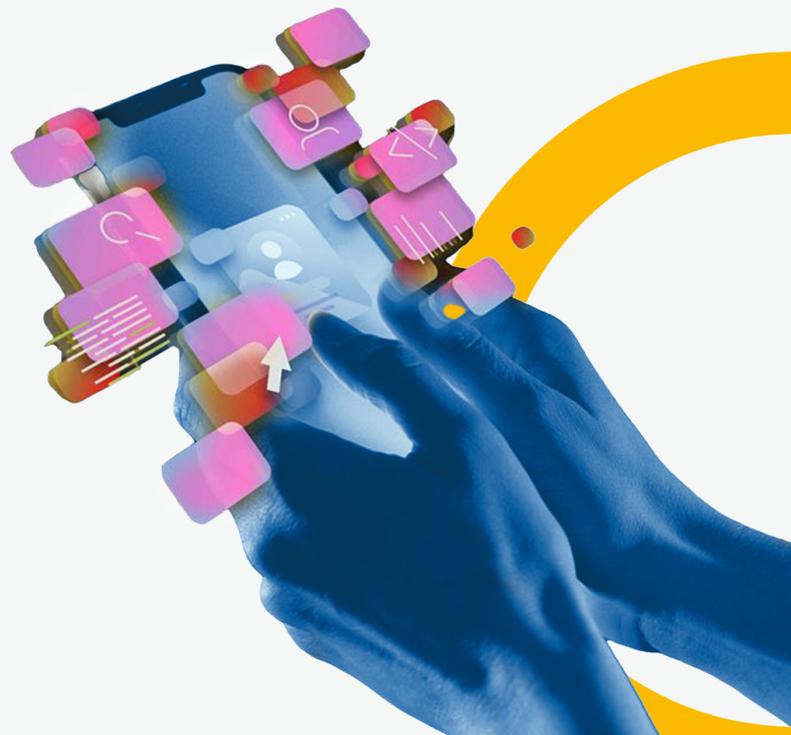
Dynamic pricing is a creature with many faces. On the positive side, **the algorithms could for example allow for price decreases when purchasing ‘out of season’**. Along with the development of electronic shelf labels (ESLs), dynamic pricing could also help tackle food waste by allowing traders to quickly reduce the price of soon-to-be expired goods.²

Similarly, **in the energy sector, dynamic pricing could help to facilitate demand-side flexibility and manage capacity issues**. A BEUC-commissioned study found that some consumers could benefit from dynamic pricing tariffs, underscoring the positive capabilities of this strategy, provided that some conditions are met.³

However, there is no ignoring that dynamic pricing also challenges the traditional consumer-seller relationship, where consumers are bound to buy products for a certain price. Consumer protection legislation mandates that relationships between consumers and companies must be guided by principles of fairness and transparency. Those who market a particular good or service cannot provide unclear or inaccurate information about the final price.

The lack of transparency of the algorithms used makes it difficult to detect if companies are employing unfair practices, abuses, or even collusive practices. It often leaves consumers in the dark about the exact price of a product, making it more difficult for them to navigate market dynamics and act as empowered consumers.

But the impact of dynamic pricing goes beyond an issue of transparency or mere consumers’ confusion. While this might seem like a narrow issue, it can have major ramifications for consumer protection and the functioning of the EU’s Internal Market. **The algorithms behind the pricing fluctuations are not public, making it hard to determine exactly what is causing the changes for each product. If, for example, algorithms are set to respond to changes in competitors’ pricing, it risks distorting competition**. If algorithms are also focused on consumer demand or market supply, the cost of everyday goods risk increasing exponentially. At a time when between **60-75% of consumers are struggling to save money, this development is extremely worrisome**.⁴



² Computer Weekly (2024), “The pros, cons and misconceptions of dynamic pricing for retailers” <https://www.computerweekly.com/feature/The-pros-cons-and-misconceptions-of-dynamic-pricing-for-retailers> Euroconsumers (2020), “#AI4Consumers : White Paper on Artificial Intelligence” https://www.euroconsumers.org/wp-content/uploads/2023/06/AbT_AI-10092020-1.pdf

³ Households with a heat pump were found to have the biggest savings. BEUC (2024), “THE MISSING LINK: Why Dynamic Pricing is Essential in the Switch to Clean Heating” : https://www.beuc.eu/sites/default/files/publications/BEUC-X-2024-043_Why_Dynamic_Pricing_is_Essential_in_the_Switch_to_Clean_Heating.pdf

⁴ Euroconsumers (2024), “Affordability Barometer”: <https://www.euroconsumers.org/wp-content/uploads/2024/06/Barometer-report-1.pdf>

Dynamic pricing versus Consumer Law

Articles 101 and 102 TFEU

Although not specifically mentioned in the Treaty on the Functioning of the European Union, dynamic pricing could in theory result in prohibited conduct under Articles 101 and 102.

Technically speaking, algorithmic price fixing can lead the way for collusive practices. While explicit collusion is prohibited under Article 101 TFEU, the use of artificial intelligence to adapt to competitors' behaviour is not prohibited as such, that is as long as doesn't lead to collusive practices. This leads up to a major challenge: in certain cases, where the computer systems are very complex, how can this ever be detected?

In the Eturas case (C-74/14), the CJEU clarified the conditions under which actors can be considered to have participated in concerted practices, thus infringing Article 101. In this case, the administrator of an information system of several travel agencies made a technical change limiting the percentage of discounts.



The CJEU considered that it could be presumed that the agencies participated in the prohibited practice when they received the message from the administrator communicating such limitation and did not denounce or oppose it.⁵

Similarly, when the Commission fined ASUS, Philips, Denon & Marantz and Pioneer for price fixing, it referenced the manufacturers' use of "sophisticated monitoring tools" to track prices and react to price decreases.⁶

Article 102 TFEU prohibits companies in a dominant market position from abusing that dominance through practices that distort competition, such as unfair pricing. Therefore, if a dominant player used algorithmic data to adjust prices in a way which distorts competition, it would be prohibited under this article.

In 2020 the European Commission issued a Statement of Objections to Amazon in its investigation into Amazon's potential infringement of Article 102, through its use of sensitive data from independent sellers on its platform.⁷

Here, the use of seller data to inform retail decisions was considered an abuse of dominance under Article 102 TFEU. **In other words, it was considered illegal for Amazon to adjust its prices dynamically to reduce competition, by way of its dominant position and its data sets.**

5 CJEU Case C-74/14 (2016): <https://curia.europa.eu/juris/document/document.jsf?jsessionid=01E3D26F0F3547DD492E0A60AA83E51C?text=&docid=173680&pageIndex=0&doclang=es&mode=lst&dir=&occ=first&part=1&cid=1605516>.

6 European Commission (2018), "Antitrust: Commission fines four consumer electronics manufacturers for fixing online resale prices" : https://ec.europa.eu/commission/presscorner/detail/en/ip_18_4601

7 European Commission (2020), "Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices" : https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077



Unfair Commercial Practices Directive (2005/29/EC)⁸

Dynamic pricing must avoid misleading or aggressive commercial practices, as prohibited under the **Unfair Commercial Practices Directive**.

- ✔ **Article 5** bans unfair commercial practices that distort the economic behaviour of consumers. Dynamic pricing, if used to mislead consumers (e.g. artificially inflating prices for certain users), could be considered unfair.
- ✔ **Article 6** specifically prohibits misleading actions, which include providing false information about the availability, prices or price calculation methods or creating confusion about how prices are determined.
- ✔ **Article 8** covers aggressive practices, where dynamic pricing could be problematic if it creates psychological pressure on consumers to act quickly due to rapid price changes or the exploitation by the trader of any specific circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware.
- ✔ **Annex 1, Point 5:** prohibits traders from offering a product at a specific price without indicating any reason for which they will not be able to provide a product at that price for a reasonable period by considering it a misleading commercial practice.

Under the UCPD, traders can freely determine the prices they charge for their products as long as they adequately inform consumers about total costs and how they are calculated if the nature of the product means that the price cannot reasonably be calculated in advance (Articles 6(1)(d) and 7(4)(c) UCPD).

However, in some cases, dynamic pricing practices could meet the definition of 'unfair' under the UCPD. Inflating prices in an uncontrolled, unpredictable and incalculable manner should be prohibited under Article 5 (prohibition of practices contrary to professional diligence) and Article 2(h) (defining professional diligence as 'the observance of honest market practices and the general principle of good faith'). **Similarly, the use of dynamic pricing, particularly in certain sectors such as the concert industry, creates an additional psychological pressure for the consumer. Be it due to the lack of alternative sellers, as is the case for concerts, or because they are 'too far along' in the purchase process when the price changes, these factors negatively affect consumers. All of which should fall contrary to Article 5 as it constitutes commercial practices which can distort the economic behaviour of consumers.**

⁸ See also: BEUC (2023) "EACH CONSUMER A SEPARATE MARKET? BEUC position paper on personalised pricing": https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-097_Price_personalisation.pdf



In its **2021 Guidance on the UCPD**, the Commission emphasises that the practice of raising prices as demand increases is not illegal, it acknowledges that there are situations that raise concerns, i.e. the case if the price increase occurs when the purchase process has already begun, or if consumers are not provided with sufficient information. **The guidance warns that dynamic pricing can easily become misleading if it is not properly communicated to consumers.** The UCPD and its guidance require businesses to disclose dynamic pricing mechanisms, but there is ambiguity regarding how detailed this disclosure needs to be.

Additionally, the UCPD doesn't explicitly address dynamic pricing based on consumer behaviour (e.g. adjusting prices based on browsing history or purchasing patterns). If the practice doesn't involve overt deception or manipulation, companies can legally adjust prices based on consumer data, allowing for price discrimination that is not immediately evident. **The guidance suggests that dynamic pricing should not increase the price during the booking process but does not clarify when the booking process starts.**

Consumer Rights Directive (2011/83/EU)

The Consumer Rights Directive also sets conditions to the practice of dynamic pricing. It is considered legal, provided that the pricing is transparent, and consumers are fully informed about the final price, including taxes and additional charges, before completing a purchase.

✔ **Article 6** mandates that businesses disclose the total price, or, if not possible, how the price is calculated. If a business uses dynamic pricing, it must communicate price variations and the parameters they use clearly before a transaction is finalised.

✔ **Article 19** prohibits hidden charges and costs that were not explicitly agreed upon by the consumer. Therefore, dynamic pricing must not mislead consumers with last-minute price changes that weren't communicated upfront.



Price Indication Directive (98/6/EC) (PID)

The **PID** requires traders to clearly indicate the selling price, and the unit price of products to consumers to enable fair price comparison. It was later amended by Directive (EU) 2019/2161 to include new rules on communication and calculation of price reductions.

✔ **Article 3(4)** mandates that any advertisement which includes the selling price of a product should also include the unit price.

In case C-476/14 of the Court of Justice of the European Union, the court was asked to determine if, under the PID, it was prohibited to advertise a price for a product while excluding the costs associated with accessing the product; in this case, the costs associated with transferring the product from the manufacturer to the purchaser.

The Court found that an advertisement, including the characteristics of the product, the price and a date until which the offer is valid, should be regarded as the trader's offer to sell and must fulfil the requirements of PID. Specifically, the "price must be the selling price of the relevant product, namely, its final price, within the meaning of Article 2(a) of Directive 98/6." ⁹ In other words, the final price as advertised, should not be unilaterally changed by the trader within the time frame of its offer to sell.

⁹ CJEU C-476/14 (2016) :<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62014CJ0476>



The ‘Oasis’ Case

In August 2024, British-band Oasis announced a reunion tour following a 15-year hiatus, much to the delight of fans. Tickets for the 17 UK and Ireland shows, which were to be followed by an extended international tour, were scheduled to go on sale on Ticketmaster on Saturday 31st August. And then it all went wrong.

Ticketmaster, the only designated ticket seller for the event, had employed dynamic pricing. Fans watched in horror as the demand for tickets, for an event that many believed would never happen, caused prices to surge. Standing tickets were initially advertised for £135 (€160) and rose to £355 (€421) at its peak¹⁰. To make matters worse, many only discovered the £200 increase at the point of purchase, after spending hours in an online queue¹¹.

In the UK, the Competition and Markets Authority (CMA) launched an investigation into how dynamic pricing may have been used by Ticketmaster during the sale¹². Our colleagues at the UK based consumer organisation Which?, released a statement saying they believe “the pricing practices used for the first round of Oasis ticket sales could have breached consumer law as its research found some fans weren’t properly warned about the use of ‘in demand’ pricing” and highlighted that “if the CMA investigation finds customers have been misled, there could be grounds for court claims”.¹³

While there was not yet an official response from the European Commission to the discussion raised by the Oasis ticket sales, the Commission has stated that it is monitoring the phenomenon and does not rule out the possibility of intervening to safeguard consumer rights.

The recently published Digital Fairness Fitness Check highlighted however the impact of the rapid pace of technological developments on consumer protection. Developments in AI are powering the dynamic pricing trend which is becoming more and more common across the various sectors. Which makes it really doubtful whether merely “monitoring” dynamic pricing is still enough.

¹⁰ Euronews (2024), “Oasis ticket controversy: Would dynamic pricing be legal at EU concerts?”; <https://www.euronews.com/culture/2024/09/03/oasis-ticket-controversy-would-dynamic-pricing-be-legal-at-eu-concerts>

¹¹ The Guardian (2024), “European Commission to examine Ticketmaster’s ‘dynamic pricing’”; <https://www.theguardian.com/money/article/2024/sep/03/european-commission-to-investigate-ticketmasters-dynamic-pricing>

¹² UK Competition and Markets Authority (2024); <https://www.gov.uk/government/news/cma-launches-investigation-into-ticketmaster-over-oasis-concert-sales>

¹³ Which? (2024), “Which? responds to Oasis not applying dynamic pricing to concerts outside of the UK”; <https://www.which.co.uk/policy-and-insight/article/which-responds-to-oasis-not-applying-dynamic-pricing-to-concerts-outside-of-the-uk-aTTDP2y6pvRw>



What's next?

In light of the recent consumer experiences and the agile development of the technology powering this trend, **the current situation needs our immediate attention, to ensure a fair market where empowered consumers can challenge market players to deliver the innovation, products and services that meet their needs.** To that regard, at least the following elements require further reflection, full economic analysis, and consequently relevant action.

Regarding the transaction process

- ✓ Clearly define the **purchase process**: this could be seen as the period when a customer **places an item in the shopping basket to the completion of the transaction within a set time frame.**
- ✓ **No price changes once the purchase process** has already begun, as the conditions under which the consumer decided to proceed with the transaction are altered during the process.
- ✓ Fixed **time during which the set price** is valid during the web session.

Regarding the Terms and Conditions

- ✓ **Explicit obligation to inform when the price is dynamic**: just as there is a legal obligation to inform consumers when personalised pricing is determined based on an algorithm, it makes sense to also include **an explicit obligation to inform them when the price is dynamic and may fluctuate** based on demand. This fluctuation should not happen during the purchase process. Even more, it should be considered to prohibit price fluctuation linked to a high level of demand immediately before a product is made available for purchase.
- ✓ **Conduct an assessment** of what the full impact would be of **introducing limits on how much the price can fluctuate** as a result of dynamic pricing.

Regarding the need for fair market dynamics

- ✓ **Having sufficient enforcement mechanisms** to address potential harms caused by dynamic pricing, including penalties in situations where **consumers are not provided with sufficient information about the pricing method.**
- ✓ **Investigate the effect of dynamic pricing in different sectors** and, where appropriate, **define which market sectors should not apply dynamic pricing** and under which conditions this should happen when dynamic pricing is **permissible**. This assessment should take into account the level of competition in a given market and the different pricing models used.

Together with BEUC, Euroconsumers and its national organisations will continue to closely monitor developments in dynamic pricing and delve into concrete solutions to protect and empower consumers and ensure a fair market.

About Euroconsumers

Gathering five national consumer organizations and giving voice to a total of more than 1.5 million people in Italy, Belgium, Spain, Portugal, and Brazil, Euroconsumers is the world's leading consumer cluster in innovative information, personalized services, and defense of consumer rights. Our European member organizations are part of the umbrella network of BEUC, the European Consumer Organization. Together, we advocate for EU policies that benefit consumers in their daily lives.

