PAPER PROPOSAL

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ABSTRACT

"The consumer right to fair algorithmic treatment"

Direct advertising mainly consists in personal commercial solicitations towards individual consumers. Nowadays, such solicitations can be largely personalized, based on each consumer's preferences and habits which are known beforehand by the trader. This is possible by means of novel technologies which enable the collection of personal data, their analysis and correlation, leading to conclusions and predictions on personal aspects of the data subject. Through this processing traders can form profiles that reflect the economic behaviour of individual consumers and then target accordingly specific advertisements to them.

The algorithms used for consumer profiling without human intervention are designed to provide consumers with only that information which is most likely to affect their economic behaviour. The pertinent algorithmic responses are based on conclusions drawn by previous choices of each consumer concerned, as well as on statistical data. Such automated decision-making processes can be misguided by social prejudices and stereotypes, as well as by wrong assessments of the information available, leading to inaccurate predictions. Upon of that, lack in sufficient algorithmic competition caused by the exclusive control over masses of data and technologies by certain companies, deprives consumers from alternative sources of information.

In view of the above, it is argued that automated profiling for promotional purposes may result in consumers being locked in "filter bubbles", i.e. an iconic commercial reality, kept uninformed or prevented from finding out about opportunities that would be significant for them. Under these circumstances, consumers' economic behaviour may be materially distorted. They can be namely mislead or coerced into transactional decisions that they would not have taken otherwise, i.e., if they had been thoroughly and precisely informed about the options offered in the market.

This paper endeavours to define fairness with reference to the outcomes of profiling for promotional purposes. It poses the question whether consumers assume a "right to fair algorithmic treatment" and how such a right can be safeguarded under the existing EU legal framework on consumer and personal data protection. In this context, the study examines the formation of inaccurate consumer profiles and the restriction of consumers within limited commercial choices as an unfair commercial practice according to Directive 2005/29/EC. It investigates the conditions under which such activities constitute, in particular, misleading commercial practices, as well as the agressive commercial practice of "undue influence". It also argues about the prerequisites under which such commercial practices are considered likely to materially distort the economic behaviour of the "average consumer". To this end, the study analyses the german case-law on the lawfulness of Ad-Blockers, as well as the case-law of the ECJ with regard to the implementation of the "average consumer test".

The study deals further with the question of any protection afforded to the consumer by the General Data Protection Regulation (GDPR) against false and discriminating findings of automated profiling for commercial purposes. In that regard it addresses the following particular issues: Does transparency regarding automated profiling activities suffice to safeguard informed transactional decisions, given that behavioural data analysis mechanisms are driven nowadays by self-learning artificial intelligence systems which gradually update their prediction methods without human intervention? What other measures can be taken by data controllers in the framework of their data protection impact assessment (DPIA) to prevent algorithmic discrimination? Has the consumer a right to opt out of profiling?