

## Disclosure of Personalized Pricing: a Discussion of the New Deal for Consumers

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### Introduction

1. Personalized pricing is finding its way into the positive law of the European Union. The European Parliament recently adopted its position on the European Commission's proposal for a Directive as regards better enforcement and modernisation of EU consumer protection rules as part of the New Deal for Consumers (the 'New Deal Directive' or **NDD**)<sup>2</sup>. The law-making body introduced an information requirement for companies to disclose to consumers that they have personalized the price presented to the consumer as part of their offer in a distance contracting context. This note analyzes the implications of this rule on the set of information obligations applicable to companies using personalized pricing on the basis of its hypothetical transposition in a Member State, *casu quo* the Grand Duchy of Luxembourg. Other legal aspects of personalized pricing are beyond the scope of this note.

### Personalized pricing

2. Personalized pricing is setting the price for a product offered to a consumer equal to that consumer's willingness-to-pay (**WTP**) using the personal characteristics or past behaviors of that consumer, a pricing approach used by companies to maximize profits<sup>3</sup>. Personalized pricing is a form of first degree price discrimination, as consumers with different WTPs are charged different prices for the same product. Companies can also use other pricing approaches. A company can charge every consumer the same price (uniform pricing), calculated on the basis of its marginal costs and a profit margin (cost-based pricing). Alternatively, the company can set the price based on aggregate market demand at time of purchase (dynamic pricing), on competitors' prices (competition-based pricing), or divide the market into segments of consumers such as students/employees/retirees and set prices based on shared characteristics (third degree price discrimination)<sup>4</sup>.

3. Personalized pricing differs from other approaches in its focus on the value of the product to the individual consumer – it is a form of value-based pricing. The WTP represents the value of the product's features to that consumer expressed in terms of the financial resources the consumer is willing to sacrifice in order to obtain the product. Companies estimate WTPs by analyzing databases with consumer information and purchases using statistics<sup>5</sup>. By clustering sets of features, a company can construct consumer profiles, infer preferences and label individual consumers with one or more profiles<sup>6</sup>. Those profiles can be based on demographic or psychographic characteristics, such as age, financial status and gambling habits, but also on context-sensitive conditions, such as the likelihood to consume beverages on any given day.<sup>7</sup> By finding correlations between profiled consumers, the products purchased and the

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monetary value of those purchases, i.e. analyzing consumer behavior, companies can link consumer profiles to WTPs and predict purchases for each consumer profile. Alternatively, companies can purchase consumer profiles and WTP data from other companies<sup>8</sup>. This information is fed into a pricing algorithm, with which a company determines the offer price given the consumer's profile. In principle, the higher the estimated WTP, the higher the price the company will propose to the consumer<sup>9</sup>.

4. Each time a consumer interacts with an internet-connected device, data can be generated and collected, as the following example illustrates<sup>10</sup>. *The consumer wakes up and uses his smartphone to check (device data). The consumer turns on Spotify (app data, music preferences) or asks Alexa to play a song (voice interface data). The consumer drives to work (data on driving behavior, GPS data). Before starting work, the consumer may scroll through social media feeds (likes, personal connections) or read a few articles on newspaper websites (browser data, website history, cookies). Later in the day, the consumer consults his favorite product discount app, checks his Gmail account (email data) and perhaps even looks on aggregator sites for tickets to a holiday destination (leisure preferences, cookies). In the evening, after picking up a box of paracetamol (purchase of medical products), the consumer may watch some videos on a video platform (personal interests). The consumer feels an itch under his arm and tries to look up the symptoms online (medical interests). Just before going to bed, the consumer checks his account balance and buys some shoes on the website of a popular shoe manufacturer, after browsing around the catalogue (transaction and website interaction data).* The entirety of data generated and collected by those interactions is commonly known as the digital footprint of the consumer<sup>11</sup>, which consists of active and passive footprints. If the data are generated by deliberate actions of the consumer, such as accepting cookies or 'liking' a social media post, they are active digital footprints. If they are collected without the consumer's knowledge, such as the collecting of a consumer's IP address by a company during the visit of a website, the data are passive digital footprints<sup>12</sup>.

5. The shoe manufacturer in the example above could have plenty of information on the consumer, which it collects itself from the consumer (either actively or passively) or retrieves from third parties, including companies operating offline<sup>13</sup>. Those third parties are often separated into two groups, consumer-facing companies and companies which do not interact with end consumers. Consumer-facing companies which rely on the collection and transfer or sharing of personal data, include large platform intermediaries such as Google and Facebook, gathering data through consumers' use of their products<sup>14</sup>. In the global market for personal data, a key role is played by companies which do not face consumers and yet collect, aggregate and transfer personal data on many consumers on a large scale: data brokers<sup>15</sup>. A data broker will actively seek to (1) collect and combine all the aforementioned personal data through public records and private exchanges and (2) construct profiles of the consumer by making inferences using the collected personal data and aggregated data (data on populations instead of individuals).

6. The shoe manufacturer's data collection arrangements with third parties can range from simple ad hoc bilateral transfers to a complex network of multiple channels transferring consumer data in real-time. For example, the manufacturer may acquire the data directly from another consumer-facing company. The most common scenario is that of the manufacturer receiving data from a data broker. The manufacturer could also receive the data from a platform intermediary, which combines data from data brokers with the data on users of its search engine, navigation software or social media network. The manufacturer can

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access the data at the time of the consumer's interaction with the manufacturer, acquired via a data marketplace, or acquired the time of its generation in connection with advertising operations (e.g. through real-time bidding)<sup>16</sup>.

### Current data and consumer protection rules

7. For the purpose of the present analysis, three legal instruments are applicable to the practice of personalized pricing. The first two instruments are Regulation (EU) [2016/679 \(GDPR\)](#)<sup>17</sup> and the law of 30 May 2005, transposing Directive [2002/58/EC \(ePrivacy Law\)](#), on the processing of personal data<sup>18</sup>. Pursuant to these instruments, all of the companies in the aforementioned example collecting the consumer's personal data for profiling purposes must have the explicit consent of the consumer prior to the collection of consumer data and the profiling of the consumer on the basis of such data<sup>19</sup>. As explained above, central to personalized pricing is the processing of personal data using algorithms to evaluate personal characteristics of the consumer in order to analyze and predict the consumer's purchasing behavior, which are forms of processing covered in the GDPR's definition of 'profiling'.<sup>20</sup> Both key components of the personalized pricing process, the profiling and the computation of the price on the basis of the profile's parameters, are entirely automated<sup>21</sup>. The outcome of these processing operations evidently affects the consumer as the level of the offer price varies depending on the assigned profile(s). *De lege lata*, per article 22(1) GDPR, the consumer has the right to object to these automated decision-making processes, unless he or she has given explicit consent and has not revoked such consent<sup>22</sup>. The prospect of receiving a personalized price which could be lower than the uniform price, is a sufficiently strong economic incentive for some consumers to provide such consent. The consumer's consent must be informed under these instruments and the information provided must be transparent and accessible, taking into consideration the specificities of the online environment<sup>23</sup>. In addition, companies must also provide information about the type of data which will be collected and the use of the data for automated decision-making purposes<sup>24</sup>. If the data is transferred to or processed by other controllers wishing to rely on the original consent, they need to be mentioned in the consent request as well<sup>25</sup>.

8. The third instrument is the Luxembourg Consumer Code (*Code de la Consommation* or **LCC**). The LCC imposes information obligations on professionals such as the shoe manufacturer<sup>26</sup>. First, articles L. 221-2(1) LCC and L. 222-3(1) LCC provide a list of pre-contractual information which the shoe manufacturer should give to the consumer in a clear and comprehensible manner, prior to the latter being bound by a contract or an offer. The articles were introduced in order to transpose Directive [97/7/EC](#) on distance contracts, which has been repealed by Directive [2011/83/EU \(CRD\)](#)<sup>27</sup>. The list includes the price of the product. The obligation to indicate the price is also detailed under articles L. 112-1 to L. 112-8 LCC. Second, the LCC contains negative obligations, stemming from the transposition of Directive [2005/29/EC](#) on unfair commercial practices. More specifically, the company is prohibited from engaging in misleading actions (L.122-2 LCC) or making misleading omissions (L. 122-3 LCC). Misleading actions are those actions which may induce or are likely to induce an error in the average consumer's decision-making, such that the consumer makes or is likely to make a decision which would otherwise not be made. Communicating to the consumer that he or she has a specific price advantage as a consequence of personalized pricing, is an example of such an action (L. 122-2(2) (d) LCC). Another example of a

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misleading disclosure would be suggesting that the performance of certain behaviors impact the price negatively (i.e. lead to a lower price), if such behaviors do not have such effect. Finally, violating the obligation to obtain informed consent under data protection rules also violates article 122-1 LCC<sup>28</sup>.

9. In summary, the data protection rules impose the obligation on companies to provide the consumer with information on the processing of personal data for personalized pricing in order to obtain the consumer's consent, prior to the processing of the data. The consumer protection rules require companies to provide consumers with information prior to the conclusion of the contract. Concomitantly with the processing, the company must provide the consumer with additional information, both in case where the data is directly collected from the consumer or from other companies<sup>29</sup>. This information includes explanations about the logic and the consequences of personalized pricing, but such disclosure does not require the divulging of the company's trade secrets or infringement on the intellectual property of the company's processors.<sup>30</sup> Instead, it means that the consumer must be informed through real, tangible examples of the type of possible effects, in order to make the consequences meaningful and understandable<sup>31</sup>. The company is not obliged to disclose detailed information on the pricing algorithm or how specific data are evaluated to profile the consumer and personalize the price. Where it acquires the consumer's data from a data aggregator who constructed a profile combining personal data, inferring traits and predicting behavior, it is also not required by law to mention the content of that profile<sup>32</sup>. Finally, the information provided by the company may not mislead the consumer.

#### **The NDD's *ex post* information requirement and its implications**

10. If the NDD is adopted and transposed in the form proposed by the European Parliament, the Luxembourg Consumer Code will be amended to include a new *ex post* information requirement on companies. Article 2(4)(a)(ii) NDD provides that article 6(1) CRD, which enumerates the information to be provided before the consumer is bound by a distance contract, is amended by inserting the following point: "(ea) where applicable, that the price was personalised on the basis of automated decision making;". Recital (45) of the NDD clarifies that traders may personalize the price of their offers for specific consumers or categories of consumers based on automated decision-making or profiling of consumer behavior, allowing traders to assess the purchasing power of those consumers. Consumers should be clearly informed, so that they can consider the potential risks in their decision-making. The rule furthermore clarifies that the requirement is without prejudice to the data protection rules, as applicable in Luxembourg and outlined in section 7 above. If the Luxembourg legislator foresees the transposition of article 2(4)(a)(ii) NDD with minimum changes, it is likely that article L. 222-3 LCC will be amended by inserting a new item (t) containing this new obligation in the list of pre-contractual information elements.

11. The effect of the amendment will be, simply said, that the company must inform the consumer that the price was personalized on the basis of his or her personal data. Companies will have to provide the consumer with information on the personalization of the price at two different phases of the purchasing process: (1) before and during the processing of personal data, per the data protection rules, and (2) prior to the conclusion of the contract after the presentation of the personalized price, per the new rule. The information requirement under the consumer protection rules is of a declaratory nature; the company must simply state that it has personalized the price, without mentioning *how* personalization has affected the price relative to the uniform reference price.

12. The simplicity of the new rule and the absence of further explanations are likely to create uncertainty for companies. For example, the rule does not specify the temporal dimension of the obligation. E-

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commerce transactions typically involve a ‘check-out process’ where the details of the transaction are confirmed in multiple stages of the purchasing process. Should the notification that the price has been personalized remain displayed until the conclusion of the contract, or should it only be displayed in the stage in which it is presented? Another issue is the presentation of the information. As the rule is a form of minimum harmonization, Member States may choose to gold-plate the obligation. In Luxembourg, article L. 222-4(1) LCC provides that the information should be in plain and intelligible language. There is no specification of minimum font size or positioning of the information in the user interface, but some information elements mentioned in L. 222-3 LCC must be provided in a clear and prominent manner (*manière claire et apparente*), right before the placement of the order<sup>33</sup>. It remains to be seen if the clear-and-prominent padding will be applied to the proposed rule. Finally, and more importantly, the broader question is the application of the rule to ‘personalized discounts’, which are electronic coupons that consumers can apply to their purchases<sup>34</sup>. The proposed rule tacitly assumes that companies implement personalized pricing by varying the price displayed with the offer. However, companies can also vary prices by offering a personalized discount to the consumer prior or during the consumer’s visit to the company’s website. As the price *stricto sensu* has not been personalized, a literal interpretation of the new rule implies that personalized discounts are not within its scope. How these open issues will be resolved, will ultimately impact the effectiveness of the new rule.

## Conclusion

13. Despite the lack of clear ancillary rules on the application and implementation of the NDD’s *ex post* information requirement, the proposed rule complements a set of information obligations under data protection rules which draw the consumer’s attention to the use of personal data for personalized pricing purposes. The resulting combination of *ex ante* and *ex post* information should be sufficient to put the average consumer in an e-commerce transaction on notice that the price is personalized using the consumer’s personal data. Aware of the personalization, the consumer is able to compare the personalized price of the company against uniform or personalized prices of its competitors, such that the consumer can make utility-maximizing privacy and purchasing decisions.

1 Attorney-at-law, associate at Arendt & Medernach SA. This note is written on personal title and based on legal research completed on 3 September 2019. The author thanks Astrid Wagner for her helpful comments on an earlier version of this note.

2 European Parliament, Position of the European Parliament adopted at first reading on 17 April 2019 with a view to the adoption of Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, P8\_TC1-COD(2018)0090, 17 April 2019, < [http://www.europarl.europa.eu/doceo/document/TA-8-2019-0399\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0399_EN.html) ><sup>3</sup> September 2019 date last accessed. See also European Commission, New Deal for Consumers: European Commission welcomes provisional agreement on strengthening EU consumer protection rules, IP/19/1755, 2 April 2019,.

3 Organisation for Economic Co-operation and Development, Personalised Pricing in the Digital Era – Background Note by the Secretariat, DAF/COMP(2018)13, 20 November 2018.

4 Ibid; Philip Kotler and Gary Armstrong, Principles of Marketing, 15th edition, Pearson Education Limited 2017, 309 et seq.

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5 Those statistical algorithms may vary from basic statistical population tests to complex machine learning algorithms.

See for examples of inferences, Sandra Wachter and Brent Mittelstadt, 'A Right to Reasonable  
6 Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI', Columbia Business Law Review, (2019)1.

See for examples, United States Federal Trade Commission, Data Brokers: A Call for Transparency and Accountability, 2014. < <https://www.ftc.gov/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014>> 13 August 2018 date last accessed; Privacy International, Submission to the Information Commissioner – Request for an Assessment Notice of Data Brokers Axiom and Oracle, 8 November 2011, 13 August 2018 date last accessed; Emily Steel, 'Data brokers change labels describing poor', Financial Times, 23 March 2014; Aliya Ram and Madhumita Murgia,  
7 'Data brokers: regulators try to rein in the 'privacy deathstars' Financial Times, 8 January 2019. Examples of data points and profiles can be found at Oracle Data Cloud 2019 Data Directory, < <http://www.oracle.com/us/solutions/cloud/data-directory-2810741.pdf>> 3 September 2019 date last accessed; Experian, 'Mosaic Scotland', < <https://www.experian.co.uk/assets/marketing-services/brochures/mosaic-brochure-scotland.pdf>> 13 August 2018 date last accessed; Acxiom, 'Personicx', < <http://www.personicx.co.uk/personicx.html>> 3 September 2019 date last accessed; Facebook Inc., 'Facebook Audience Insights', < <https://www.facebook.com/business/news/audience-insights>> 3 September 2019 date last accessed.

8 See paragraph 6 below.

Ultimately, the price does not only depend on the consumer's WTP, but also the company's pricing  
9 strategy. For example, the company may seek to attract loyal consumers with high WTPs to establish a long commercial relationship, in order to maximize the aggregate value of those customers' purchases during the course of that relationship.

Indications of the scope of data collection by companies can be found in privacy policies and manuals  
10 for developers, such as Facebook Pixel 3 September 2019 date last accessed. Companies may also broadcast personal data to multiple parties at the same time for advertising purposes, see footnote 15.

See for example, European Commission, Digital Competence Framework, 22 October 2019 date last accessed; Electronic Privacy Information Center, Amicus Curiae Brief Urging Affirmance, in re:  
11 Applications of the United States of America for Historical Cell-Site Data, #00511791806, 16 March 2012, page 6 (Argument); Mary Madden, Susannah Fox, Aaron Smith et al, Digital Footprints - Online identity management and search in the age of transparency, Pew Research Center, 16 December 2007.

12 See the sources cited in footnote 11.

For example, in the Netherlands, details of athletes have been sold for commercial purposes. See Arjan Dijkma en Guido van Gorp, 'Hoe de gegevens van tennissers en voetballers doorverkocht worden', NOS Nieuwsuur, 17 December 2018, < <https://nos.nl/nieuwsuur/artikel/2264001-hoe-de-gegevens-van-tennissers-en-voetballers-doorverkocht-worden.html>> 3 September 2019 date last accessed. Data transfers may be bulk transfers of stored personal data, but can also be shared between apps running on  
13 the device. See Joel Readon, Amit Elazari Bar On, Álvaro Feal et al, '50 Ways to Leak Your Data: An Exploration of Apps' Circumvention of the Android Permissions System', Proceedings of the 24th USENIX Security Symposium, forthcoming. Also interesting is the partnership program of Facebook. See 'Facebook Gave Device Makers Deep Access to Data on Users and Friends', New York Times, 3 June 2018; 'As Facebook Raised a Privacy Wall, It Carved an Opening for Tech Giants', New York Times, 3 June 2018.

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14 European Data Protection Supervisor, EDPS Opinion on online manipulation and personal data, Opinion 3/2018, 19 March 2018 3 September 2019 date last accessed.

United States Senate – Committee on Commerce, Science and Transportation, Office of Oversight and Investigations Majority Staff, A Review of the Data Broker Industry: Collection, Use, and Sale of Consumer Data for Marketing Purposes, Staff Report for Chairman Rockefeller, December 2018; FTC  
15 Report 2014 (footnote 7); Privacy International (footnote 7). Much of this data is traded through data marketplaces. See e.g. Oracle Data Cloud 2019 Data Directory (footnote 7). Privacy International (footnote 7). Much of this data is traded through data marketplaces. See e.g. Oracle Data Cloud 2019 Data Directory (footnote 7).

UK Information Commissioner's Office, Update report into adtech and real time bidding, 20 June 2019 < <https://ico.org.uk/media/about-the-ico/documents/2615156/adtech-real-time-bidding-report-201906.pdf>> 3 September 2019 date last accessed; complaint of Johnny Ryan filed by Ravi Naik with the Data Protection Commission, 3 September 2019 date last accessed; Data Protection Commission, Data  
16 Protection Commission opens statutory inquiry into Google Ireland Limited, 22 May 2019 3 September 2019 date last accessed; complaint of Johnny Ryan filed by Ravi Naik with the Data Protection Commission, 3 September 2019 date last accessed; Data Protection Commission, Data Protection Commission opens statutory inquiry into Google Ireland Limited, 22 May 2019 3 September 2019 date last accessed.

The GDPR applies where the monitoring of the behavior of such data subjects takes place within the  
17 Union, irrespective of whether the company proceeding to such monitoring is established in the EU and to companies established in the EU and processing the data as data controller or as processor.

18 Article 6(1)(a) and 22(2)(c) GDPR ; Article 4(2), 9(3) ePrivacy Law.

A draft of the ePrivacy Regulation, which will repeal the ePrivacy Directive, was proposed by the  
19 European Commission on 10 January 2017. It is currently under review by the Council of the European Union, which has proposed amendments to the proposal.

20 Article 4(4) GDPR.

The algorithms may be audited by engineers or data analysts, but individual instances of the algorithms'  
21 application to consumer data are normally part of the robotic process automation (RPA) pipeline and thus performed without human intervention.

22 European Union, Personalised Pricing in the Digital Era – Note by the European Union, DAF/COMP /WD(2018)128, 28 November 2018.

Article 4(11) GDPR and recital (42). See for more details, Article 29 Working Party, Guidelines on  
23 transparency under Regulation 2016/679, WP260 rev.01, 11 April 2018, and Article 29 Working Party, Guidelines on consent under Regulation 2016/679, WP259 rev.01, 10 April 2018.

24 Article 29 Working Party, Guidelines on consent under Regulation 2016/679 (footnote 23), page 12 et seq.

25 Ibid.

26 L. 010-1(2) LCC.

27 See Chambre des Députés, Draft Bill (Projet de loi) 4641.

European Commission, Guidance on the implementation/application of Directive 2005/29/EC on unfair  
28 commercial practices, Commission Staff Working Document SWD(2016) 163 final, 2016), paragraph 5.2.13.

29 Articles 13 and 14 GDPR.

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<sup>30</sup> Recital 63 GDPR.

<sup>31</sup> Article 14(2)(g) GDPR; Article 29 Working Party, Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, WP251rev.01, page 26; recital 58 GDPR.

<sup>32</sup> Note that the data aggregator also needs the consumer's consent to transfer the data to a third party, as it is a form of 'processing' under the GDPR.

<sup>33</sup> Article 22-4(2) LCC, which implement articles 6 and 8 CRD. An example of a rule prescribing the presentation of information with greater specificity can be found in Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, articles 2(2)(m) and 13.

<sup>34</sup> See e.g. Stephanie Clifford, 'Shopper Alert: Price May Drop for You Alone', New York Times, 9 August 2012.

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