

TopITalk: Digital individual pricing

[Tiago Bessa, Managing Associate at Vieira & Almeida, Law Firm](#), in charge of Communication & Technology as well as IP Transactions, talks with us about pros & cons of individual pricing in the digital era.

APAJO: *Tiago, in October last year, EU directives in regard to the consumer law were amended and need to be transposed into national legislation till this fall. In these amendments, also individual pricing was tackled. But let's start with the definition of it. What is individual pricing exactly?*

Tiago Bessa: Personalised or individual pricing is a marketing mechanism which allows the seller to either charge the consumer for a specific price based on certain features of such consumer or to segment customers into groups, arranged in accordance with certain characteristics, and charge differentiated prices for each group.

The goal is to determine patterns and to use those patterns to sell the products at the maximum price which the consumer is willing to pay.

Individual pricing is leveraged by data collection and analysis, resulting in predictive modelling and profiling. The most common data which are collected are data related with how the consumer accessed a service (mobile, desktop, tablet, etc...), consumer's location (where is the consumer accessing from), track record (which products has the consumer previously bought) and behaviours (time and date of previous shopping, time spent on a certain product's page, etc...). The goal is to determine patterns and to use those patterns to sell the products at the maximum price which the consumer is willing to pay.

Regarding the amendments to EU Directives on Consumer law, the Recital 45 of the Directive 2019/2161 is pretty clear regarding the goal of addressing individual pricing. Individual pricing is not forbidden, but consumers shall be clearly informed when the price is personalised using automated decision-making. This allows consumers to take into account all the risks related with their decision.

This kind of measures may provide more efficient sales and contribute to economic surplus in the sectors/market where it is applied.



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I believe that the European lawmaker followed a correct approach. Instead of “forbidding by design” (a paternalistic approach), it stated a principle of “informing by design”, allowing the consumer to have the last say on whether it accepts the personalised price or not. In my view, this kind of measures may provide more efficient sales and contribute to economic surplus in the sectors/market where it is applied.

Therefore, this is a new mechanism that traders have at their disposal, but this also attracts more obligations, notably regarding pre-contractual information.

And: The new EU Directives on Consumer Law have not yet been transposed to Portuguese law.

The seller, acting as data controller, shall guarantee that this data processing is based on a lawful ground, be it the data subject's consent or other.

APAJO: *So, individual pricing is in fact based on lots of data. What about data protection in this regard?*

Tiago Bessa: Yes, certainly! The more data are available, the more accurate the profiling will be and, therefore, the closer the individual pricing will be from the maximum price a consumer is willing to pay for a given service/good. Thus, data protection is a top concern both for authorities and for consumers, although since these technologies are not always transparent, consumers might not yet be aware of them, at this stage. That lack of consumer awareness certainly poses some risks for the seller – not only reputational risks, but also the risk of the consumer wanting to withdraw from the agreement within the 14-days' time frame (applicable in respect of distance contracts).

But focusing on data protection, I must note that the European data protection framework already provides a comprehensive regime. Data subjects, which, in this case, will be the consumers, are entitled to learn beforehand all relevant aspects of their data collection and data processing. Therefore, the data controller (which might be the seller/trader) must make perfectly clear for consumers that their personal data is being collected and processed on what grounds, for which purposes and under which terms and conditions. This is the requirement of a fair and transparent data processing, which the GDPR clearly

imposes and that the individual pricing mechanism does not hinder.

Also, since within this kind of mechanism there will likely be automated decisions and profiling, the GDPR sets an additional set of stricter rules which data controllers must comply with. Particularly, the GDPR establishes that the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, if such decision produces legal effects concerning him or her or significantly affects the data subject. It will be interesting to see how to frame the new individual pricing mechanism allowed by the EU Directives and the stricter rules stemming from the GDPR.

Last but not the least, the seller, acting as data controller, shall guarantee that this data processing is based on a lawful ground, be it the data subject's consent or other.

This may lead to the reduction of what in economics is called consumer surplus, i.e., the difference between the highest price a consumer is willing to pay and the actual price they do pay for the good (which is the market price of the good). But, in my view, it may also lead to more efficient sales and to better economic trade-offs.

APAJO: *Where do you see the advantages of this very personalized pricing concept in concrete terms and where do you see the risks of it?*

Tiago Bessa: Starting with the risks, I have already mentioned above the reputational risks pending on the seller once the consumer becomes aware of the individual pricing, he or she has been subject to (if the information was not provided in a clear and transparent manner).

Also, there are risks regarding discrimination, since different prices to different consumers, based on personal data collected and processed, might lead to unfair treatments and possibly to complains.

Moreover, there are regulatory risks – in Portugal, under the Distant Sales Decree-law and the Unfair Commercial Practices, the seller is bound to clearly inform the consumer about the price and how it is calculated, and there is also the limitations set out in the GDPR on profiling and automated decisions.

On the side of the advantages, throughout history, sellers have always tried to find the maximum price a consumer is willing to pay for a given service/good. Prices are commonly devised by average and sometimes you feel you are paying less than you should in order to buy something. Of course, this changes from consumer to consumer, but now you have the necessary tools to enable this. This may lead to the reduction of what in economics is called consumer surplus, i.e., the difference between the highest price a consumer is willing to pay and the actual price they do pay for the good (which is the market price of the good). But, in my view, it may also lead to more efficient sales and to better economic trade-offs.

Price comparison may lose its relevance because prices would be devised considering the specific preferences of the consumer itself and not with an average of consumers.

APAJO: *And how can transparency and comparability be secured in such a pricing environment?*

Tiago Bessa: Compliance with consumer and data protection provisions are a first

but solid step towards transparency. It is important for the consumer to be an informed part of the individual pricing process and also for the seller to comply with these important rules. Transparency and prior information will be pivotal to the correct application of individual pricing mechanism.

Comparability is another but equally important aspect. Price comparison websites and platforms are an important mean to achieve it. It can be provided by companies, as a service, by relevant consumer protection stakeholders, such as associations or NGOs or, also, can be ensured by public authorities. In an individual pricing mechanism, price comparison may lose its relevance because prices would be devised considering the specific preferences of the consumer itself and not with an average of consumers. In any case, for “standard prices” it would remain an important tool in order to decide where to find services and goods, at least a first decision before any application of individual pricing.

It would mean that an odd would be offered to a specific gambler considering the risk and price evaluation made individually. Combining this with the level of risk taken by operators when defining odds can lead to an entire new world of online sports betting.

APAJO: *Do you think this is something which could and will be applied to online gambling in general and online sports betting in particular also?*

Tiago Bessa: I believe that this new pricing mechanism may also be applicable to online gambling, notably to online sports betting. In fact, it may be a sector specifically keen to introduce this.

Defining odds considering the willingness of a gambler to risk and to place a bet below or above a certain price is certainly something challenging to operators. It would mean that an odd would be offered to a specific gambler considering the risk and price evaluation made individually. Combining this with the level of risk taken by operators when defining odds can lead to an entire new world of online sports betting.

This would not be introduced without complying with the abovementioned regulation in order to effectively tackle consumer protection and data privacy legitimate concerns. Also, since gambling always attracts discussion on addiction, it may also be the case that individual pricing (bearing in mind that the price is specifically based on the profile of a gambler) can be seen as a mechanism aggravating the risk of addiction.

Therefore, within strict limits and with an addiction prevention compliance program – which operators are already bound to implement – we believe that it will be possible for personalised pricing to occur within the online gambling market.

APAJO: *Many thanks for your insight in this matter. Really topical right now.*

Tiago Bessa: Thank you, Annie. It was truly an honour to discuss these interesting and disruptive matters with you. Developments in consumer protection move so quickly that we need to remain very vigilant. It is not easy to keep track of all regulatory amendments, but that is inevitable, since every day, new technologies and applications are launched, presenting new and demanding legal challenges!