

# Associated Newspapers Ltd.

Registered Office:



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## **DMG Media's Response dated 16 April 2024 to the ICO's Call for Views on "Consent or Pay" Business Models**

### **Introduction**

DMG Media welcomes the ICO's recognition that that businesses need regulatory certainty, both to ensure compliance with the law and to guide investment decisions; it also welcomes the ICO's efforts in seeking to provide an initial view on 'consent or pay'.

To assist the ICO meet its statutory responsibility to support / enable economic growth for compliant businesses, including through understanding and minimising the negative economic impacts of its regulatory activities, DMG Media responds below to the ICO's call for views. In so doing, we also provide additional context around the economic reality of ad-funded content and the move to this alternative model, which we hope the ICO might find helpful.

Whilst DMG Media recognises the ICO's characterisation of the issues as complex, and notes that the ICO is continuing to develop its position with a view to expanding on its thinking later this year when it consults on the updated cookie guidance, we urge the ICO to publish any further thinking at its earliest convenience so that publishers considering 'Consent or Pay' can have greater certainty on the choices they are making around implementation.

### **Summary of DMG Media's response**

DMG Media's response to the ICO's call for views is summarised as follows:

- DMG Media is concerned that the ICO's approach to 'consent or pay' appears equivocal, notwithstanding that the Court of Justice of the EU ('CJEU') has already acknowledged the validity of this model.
- DMG Media agrees with the ICO's selection of the four factors set out in its emerging thinking. However, DMG Media does not consider that the competition law context of the CJEU decision, which was underpinned by the finding that Meta held a dominant position in the relevant market, is adequately reflected in the ICO's emerging thinking.
- It follows from the CJEU decision that when approaching the validity of any consent obtained through the 'consent or pay' model:
  - the balance of power should be the lens through which all of the factors relevant to an assessment need to be viewed;
  - that balance is only relevant, however, where the controller is in a position of dominance in the relevant market;
  - the assessment of dominance needs to be in accordance with national competition law concepts;
  - where it is determined, applying those concepts, that the relevant controller is not a dominant undertaking, then:

- the balance of power is not relevant; and
- regulatory expectations when it comes to 'equivalence' and 'appropriate fee' should diminish accordingly to ensure reasonableness and proportionality.
- The huge diversity and plurality of UK publishers means that balance of power is only of limited application and relevance to publishers outside of 'big tech'.
- DMG Media agrees that the rights to data protection and privacy are not absolute: they must be balanced against both the freedom to conduct a business and, in the context of news publishers in particular, freedom of expression.
- The ICO will therefore need carefully to consider the economic reality in which this call for views takes place: it is expensive for publishers to produce reliable news content; readers are accustomed to ad-funded access that is enabled by cookies that are deemed non-essential; at the same time, publishers are expected to offer readers the option to 'reject all' such cookies; where readers choose that option, the effect is that they are not paying for the content that they consume; without that revenue, news publishing will become unsustainable as a business.
- The solution, 'consent and pay', helps readers to appreciate better the cost associated with producing news content, and empowers them by giving them the choice about how they want to fund that content; i.e. either through payment of a price; or as part of a data value exchange, the concept of which is not controversial in the context of access to digital services.
- Whilst the ICO's list of indicative factors is helpful to issue-spot at a high level, they are not sufficiently comprehensive to assess whether a 'consent or pay' model complies with the ICO's interpretation of the relevant law; and, as currently stated, there is insufficient certainty about what those factors mean in practice.
- DMG Media is also keen to understand (amongst other things) how the ICO intends to align its thinking across sectors (such as competition and consumer protection) and jurisdictions (mindful that EU data protection authorities have taken a pragmatic and receptive approach to 'consent or pay').

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***Do you agree with our emerging thinking on "consent or pay"?***

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The starting assumption should be that 'consent or pay' is a valid model

1. ICO's 'call for views' page includes a warning that its emerging thinking on 'consent or pay' *"should not be interpreted as confirmation that such an approach is legally compliant"*.
2. Whilst the emerging thinking document acknowledges that *"In principle, data protection law does not prohibit business models that involve 'consent or pay'"*, DMG Media considers that the lawfulness of 'consent or pay' as a business model cannot seriously be questioned in the light of the 'Bundeskartellamt' decision of the CJEU in [Case C-252/21](#). This decision recognised the legitimacy of that business model at paragraph 150, where it held that [emphasis added]:  
  

*"... users must be free to refuse individually, in the context of the contractual process, to give their consent to particular data processing operations not necessary for the performance of the contract, without being obliged to refrain entirely from using the service offered by the online social network operator, which means that those users are to be offered, if necessary for an appropriate fee, an equivalent alternative not accompanied by such data processing operations."*
3. Whilst the UK is no longer part of the EU, this decision of its highest court is nonetheless persuasive.

4. Having recognised the principle of ‘consent or pay’, in its ‘Bundeskartellamt’ decision the CJEU therefore determined the key factors to be as follows:
  - (a) the ‘appropriateness’ of the fee; and
  - (b) the ‘equivalence’ of the paid for service.
5. Both of these factors therefore rightly feature in the ICO’s emerging thinking. However, as explained below, DMG Media considers that those two factors need to be applied mindful of the specific context of the CJEU ‘Bundeskartellamt’ decision, where the controller, Meta, held a dominant position on the market for online social networks.

The right to privacy is not absolute, and other freedoms are at stake

6. Although the [Charter of Fundamental Rights of the EU](#) (**‘Charter’**) no longer has effect in the UK, DMG Media welcomes the Information Commissioner’s acknowledgement that it is necessary to balance the right to privacy (at Article 8 of the Charter) with other fundamental rights such as the freedom to conduct a business (at Article 16 of the Charter). That freedom extends to selecting their business models; and it should be remembered that in the UK promoting the success of a company is a legal duty (see s.172 of the Companies Act 2006) that is reflected in (amongst other things) its ability to create value for its shareholders and society.
7. In the particular context of news publishers, the ICO will also need to consider the right to freedom of expression and information, which is guaranteed by Article 11 of the Charter as well as Article 10 of the [European Convention on Human Rights](#) (that continues to be implemented in the UK via the Human Rights Act 1998). It is worth recalling that the right to freedom of expression includes the freedom *“to receive and impart information and ideas without interference by public authority and regardless of frontiers.”* Domestic case law is clear that neither privacy nor freedom of expression has precedence over the other.
8. Whilst it is, of course, right that people’s personal data and privacy should be protected, it is equally important that the public should have access to reliable, independent news. This requires teams of reporters, photographers, editors and lawyers, all of whom have to be paid. The difficulties in sustaining and monetising a reliable news service are huge, and advertising has always been an efficient way of funding it.
9. In an online context, that advertising typically relies on the use of what are deemed to be non-essential cookies. There are different types of online advertising, but it is behavioural advertising that enables publishers to maximise revenue from the limited estate available to display advertising. Behavioural advertising relies on such cookies not just for targeting advertisements to users but also for what are understood to be less intrusive activities such as delivering and/or measuring the effectiveness of those advertisements.
10. Although contextual advertising does not involve the same level of data collection, and is therefore promoted by many as a less intrusive alternative to behavioural advertising, it still relies on cookies for (amongst other things) delivery and/or measurement purposes. These are deemed to be non-essential purposes, and will therefore require a change in the relevant law even for their use to be compliant.

The economic reality

11. Put simply, the problem for news publishers is as follows:
  - (a) readers have become accustomed to an advertising-funded business model, and their expectations are largely that they should not have to pay to access reliable news content online;

- (b) cookies that are deemed to be non-essential are required in order to enable the online advertising that funds reader access to content;
  - (c) publishers are expected to offer their readers the ability to reject those non-essential cookies;
  - (d) where readers choose to reject those non-essential cookies, the real-world consequence of that choice is that they will not be paying for the news content that they consume;
  - (e) without that revenue, publishers will not be able to fund the business infrastructure required in order to produce and disseminate reliable news content (including the journalists who report on and fact-check it), and news publishing will become unsustainable as a business.
12. DMG Media is not aware of any other business that is expected to give consumers the choice to enjoy its products completely free of charge.
13. This is an existential problem for many news publishers. The anticipated solution, which has been tried and tested in the EU, is the implementation of an alternative business model: 'consent or pay'.

The data value exchange

14. DMG Media considers that 'consent or pay' will:
- (a) help readers better to appreciate that there is a cost associated with the production of the reliable content they enjoy, which cannot be taken for granted;
  - (b) empower readers by giving them the choice about how they want to fund that content, the options being either:
    - (i) through payment of a price; or
    - (ii) as part of a value exchange, where their personal data are monetised responsibly through behavioural advertising in order to pay that price.
15. The concept of a data value exchange in the context of access to digital services is not controversial, and is already recognised in EU legislation – see, for example, Directive (EU) 2019/770, which acknowledges that: *"Digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader."*
16. Providing readers with the option of deciding which services they want to pay for, and which they do not want to pay for (because they want to fund it through a data value exchange), democratises access to reliable news content, and guarantees that those who cannot afford a subscription are not excluded.

The competition law context of the CJEU's 'Bundeskartellamt' decision

17. DMG Media considers it important to emphasise the specific context of the CJEU's 'Bundeskartellamt' decision, and its relevance when assessing the validity of any consent obtained through the 'consent or pay' model.
18. The decision was a reference from the German national competition authority, and the authority's finding that Meta held a dominant position on the market for online social networks underpinned that decision.
19. As a result, in DMG Media's view, this means that when approaching the validity of any consent obtained through the 'consent or pay' model:
- (a) the balance of power is the lens through which all of the factors relevant to an assessment need to be viewed;

- (b) that balance is only relevant, however, where the controller is in a position of dominance in the relevant market;
  - (c) the assessment of dominance needs to be in accordance with national competition law concepts;
  - (d) where it is determined, applying national competition law concepts, that the relevant controller is not a dominant undertaking, then:
    - (i) the balance of power is not relevant; and
    - (ii) the weight to be accorded to the two other factors identified in that decision (i.e. 'equivalence' and 'appropriate fee') diminishes accordingly.
20. So whilst 'power balance' rightly features as a factor in the ICO's emerging thinking, DMG Media considers that:
- (a) this factor is only of limited application and relevance to publishers outside of 'big tech' given that the market for news in the UK is hugely diverse and pluralistic, as evidenced (for example) by Ofcom reports on news consumption (see, for example, figures 8 and 9 of its [2023 News Consumption Survey](#)); and, as such,
  - (b) the regulatory expectations when it comes to other factors would need to be reduced accordingly to ensure that they are reasonable and proportionate.

#### Permissions, privacy and payment

21. Contrarians of 'consent or pay' often misrepresent the model as a zero-sum game, whereby you either have privacy if you pay for it, or you do not. This misrepresentation is not only overly reductive but it is also wrong: regardless of whether users choose to consent or choose to pay, data protection and privacy laws will still apply to the processing of their personal data. That is why it comes as no surprise to DMG Media that the ICO has identified 'privacy by design' as an indicative factor in its emerging thinking.

#### ***How helpful are the indicative factors in comprehensively assessing whether "consent or pay" models comply with relevant law?***

22. Whilst the ICO's list of indicative factors is helpful to issue-spot at a high level, they are not sufficiently comprehensive to assess whether a 'consent or pay' model complies with the ICO's interpretation of the relevant law; and, as currently stated, there is insufficient certainty about what those factors mean in practice. DMG Media addresses each factor in turn below.

#### "Power balance"

23. There is a lack of clarity about the circumstances in which the ICO considers there is an imbalance. The ICO says that consent is unlikely to be freely given where individuals *"have little or no choice about whether to use a service or not"* and then illustrates that this *"could be the case when they are accessing a public service or the service provider has a position of market power"*.
24. These illustrative examples are, however, plainly both monopolistic scenarios; and the ICO should be clear that consideration of this factor applies solely to dominant undertakings, with dominance being assessed using UK competition law concepts. It is also necessary for the ICO to explain how, where there is an assessment that a controller is not exercising a monopoly, such a finding reflects on its expectations regarding the other factors.



“Equivalence”

25. The ICO puts the question of equivalence in terms of whether the ad-funded and paid-for services are “*basically the same*”. This suggests an expectation of substantial similarity between the services.
26. If, however, the reasoning behind having equivalence is to prevent nudging from one service to the other, then given that the criticism levelled by contrarians is that ‘consent or pay’ is used to drive up consent rates, the ICO example is confusing, as it suggests a nudge to a ‘premium’ subscription service.
27. Also, many publishers have in recent years tried to safeguard their revenue streams by introducing subscription schemes, including for ‘premium’ content. These exist already and clearly equivalence should not prevent publishers from offering ‘premium’ subscription services alongside their ‘standard’ paid-for and ad-funded services (those two latter services being equivalent).

“Appropriate fee”

28. The ICO appears to consider that consent is unlikely to be ‘freely given’ where the paid-for alternative involves an “*unreasonably high fee*”. How the reasonableness of any pricing decisions will be assessed, or what the ICO considers would constitute “*objective justification of the appropriateness of the level*”, is not clear.
29. DMG Media observes that were the ICO to develop a calculation method, this would doubtless need to be in consultation with the CMA given the likely implications on the market of it essentially dictating prices. This would presumably be the case were the ICO to assess reasonableness by reference to a link between the fee charged and the revenue that would otherwise be generated by the use of personal data.
30. When it comes to determining an ‘appropriate fee’, DMG Media is mindful that the [EDPB Guidelines 05/2020 on consent](#) take the view that consent would not be valid where a data subject who does not consent faces “*significant negative consequences (e.g. substantial extra costs)*” (see paragraph 24). It is, however, important to note that simply imposing a fee to access content where none was previously payable (because it was ad-funded) cannot be considered to be ‘substantial extra cost’ given that, in fact, it is not an ‘extra cost’ at all.

“Privacy by design”

31. Whilst DMG Media acknowledges that design choices and transparency will likely play an important role when it comes to the quality of any consent obtained in the context of ‘consent or pay’, we are concerned that many of the currently unresolved cookie issues (e.g. in relation to the level of information presented to users) risk being resurfaced – something that we are keen to avoid.
32. In addition, DMG Media notes additional potential issues relating, for example, to the necessity for the consent option to:
  - (a) be in a ‘bundled’ form, where exercising any separate granular choices in a CMP is treated as a complete refusal / withdrawal of consent by the user (i.e. an ‘all or nothing’ approach); or
  - (b) involve less steps on the user journey as compared with the pay option – that friction on sign-up, whilst entirely justifiable, might be viewed as pushing users towards consent.
33. To the extent that the source of any additional potential issues are other ICO papers, including its joint paper on *Harmful design in digital markets*, the ICO needs to ensure consistency between its positioning in those papers and its emerging thinking here.

34. DMG Media also emphasises the importance of the ICO working with industry bodies such as the IAB and AOP.

***Are there any other factors that should be considered? Or anything else that you feel the ICO should consider in relation to the factors?***

Alignment of thinking across sectors

35. It seems from its emerging thinking that the ICO is alive to the importance of a cross-sectoral and cross-jurisdictional approach, and DMG Media reiterates the importance, where possible, of ensuring alignment with legal and regulatory requirements in other relevant sectors such as competition and consumer protection, as well as data protection authorities in the EU given that digital services are not restricted to geographic borders.
36. That said, DMG Media is hopeful that as a result this consultation, the ICO will better understand the challenges that publishers face, and will continue to face, as a result of overly cautious interpretations of the law, and will accordingly take into account such considerations in any guidance or thinking on 'consent or pay' issued as a result.

Clarity on 2021 expectations

37. Whilst the ICO refers to its [2021 Commissioner's Opinion on online advertising](#) for context when introducing its indicative factors, some further clarity on the high level expectations it refers to would be welcome. For example, what factors will the ICO be considering when it considers whether 'consent or pay' proposals are focused on peoples' interests, rights or freedoms? Further what type of evidence will organisations be required to provide to demonstrate that people are fully aware of what happens when they interact with online services?

Guidance on measurement cookies

38. DMG Media is aware that the ICO wishes to reserve comment on ad measurement and fraud prevention cookies until after the DPDI Bill receives Royal Assent. However, given how critical the ICO's stance on this is to publishers, DMG Media would welcome some indication of its stance in any follow-up to this consultation.

Consent withdrawal

39. DMG Media notes the ICO's reference to the right to withdraw consent – in particular, that users must be able to withdraw consent without detriment. In the specific context of 'consent or pay', it is not clear what the ICO considers to be a 'detriment' though DMG Media notes that the [EDPB Guidelines 05/2020 on consent](#) illustrate detriment by requiring that "*the controller needs to prove that withdrawing consent does not lead to any costs for the data subject and thus no clear disadvantage for those withdrawing consent.*"
40. DMG Media observes that the 'consent or pay' model is entirely premised on giving users the choice between ad-funded or self-funded access to content. As such, where a user withdraws consent (e.g. by changing a consent preference in relation to an advertising cookie) this is a clear indication that they no longer want ad-funded access to content. Simply returning that user to the position they were initially in, by resurfacing the ad-funded and paid-for options, cannot reasonably be viewed as a detriment. Any other interpretation would be irrational, and entirely undermine the model.

***Do you agree that organisations adopting “consent or pay” should give special consideration to existing users of a service?***

41. DMG Media considers that this will be a particular issue when it comes to services provided by dominant undertakings where users may find it hard to switch, though all organisations are likely to need to consider whether it may be necessary to refresh any existing consents.