

Guardian News & Media response to call for views on the ICO's emerging thinking on "consent or pay" business models

About Guardian News & Media

Guardian News and Media (**GNM**), the publisher of [theguardian.com](https://www.theguardian.com) and the Guardian and Observer newspapers. It is a subsidiary of Guardian Media Group, which is a British-owned, independent, commercial news media organisation. GNM has a global reputation for award-winning public-interest investigative journalism, including their exposures of the Windrush scandal and Cambridge Analytica, as well as a partner in a number of global data-led projects such as the Paradise, Panama and Pandora Papers and the Pegasus Project and, most recently, the Swiss bank leak involving Credit Suisse.

Introduction

Guardian News & Media welcomes the opportunity to respond to the ICO's emerging thinking on "consent or pay" business models. As the ICO may be aware, for as long as it has published its journalism on the web, the Guardian has pursued, and actively promoted, a philosophy of open access in support of its mission to propagate the Guardian and democratise our content. This supports and enriches the open web, enabling consumers to get unrestricted access to our open web platforms, and pro-actively supports search through the indexing of our content by search engines, such as Google and Bing.

A key goal for the Guardian, and for the Scott Trust, is to ensure the widespread availability of high quality journalism on the open web at no cost to the end user. This approach has always been subject to a value exchange. Just as the very first edition of the Manchester Guardian was a paid for publication, it also carried advertising that was addressed to the readers of that publication. From the very first publication of the Manchester Guardian there was a value exchange between the publisher and the reader of that publication.

The Guardian's approach to distribution has enabled our journalism to reach readers in every corner of the globe. The number of people who read journalism from the Guardian website on a daily basis far exceeds the numbers who would have read the Guardian or Observer in print. In October 2023 alone, internal GNM stats showed that the Guardian was visited by 146.9 million monthly unique global browsers, with 1.35 billion global monthly page views.

Today the Guardian operates a diversified revenue model, continuing to be supported by advertising - in print and online - as well as through direct payments and calls to action to ask readers to contribute to the funding of our journalism. Our journalism has never been 'free' and has always been subject to a value exchange with readers.

The current operating environment

Online advertising has played a part in underpinning an ecology of websites that enrich the open web. As a business that is funded, in part, by advertising, our preference is always to build direct relationships with advertisers to run campaigns across our website and app. While we continue to invest in our direct sales teams, and to improve our offering to clients in this space, we have to operate in the market as it is, not as we would wish it to be.

As the CMA outlined in its [2020 report on the online advertising market](#), though “some direct deals for display advertising continue to be made through traditional channels (ie involving human interaction), the use of programmatic technology has increased over time, with the result that almost all display advertising is now sold programmatically (ie ad selection, and the pricing and delivery of ads, are automated by computers using complex algorithms).”

The CMA report finds that at the heart of the present online advertising market, Google has a very strong position in advertising intermediation in the UK, “controlling a share of [90-100]% of the publisher ad server segment, [80-90]% of the advertiser ad server segment and shares of [50-60]% in supply-side platforms (SSPs) and [50-60]% in demand-side platforms (DSPs).”

Most of the money that flows in the online advertising market flows through the pipes owned by one company. The control of the online advertising market by one company has created an orthodoxy as to the types of advertising that agencies and clients should buy, including the data points and KPIs that are associated with those advertising formats. The integration of AdX with Google Ad Manager (GAM) streamlines inventory targeting and simplifies the setup of Programmatic Guaranteed (PG) campaigns, eliminating the need for extensive development work. Additionally, the compatibility between DV360 and GAM enhances targeting capabilities and provides consistent measurement metrics. This seamless integration and user-friendly interface incentivises advertisers to prioritise Google's services, creating a reliance on AdX demand for us as a Publisher seeking access to advertiser spend.

The creation of an industry orthodoxy is problematic for any business that seeks to diverge from the status quo. As GNM has outlined in meetings with ICO colleagues, GNM has invested in a secondary system of ad serving that does not rely on Google technology to auction and display advertising across our domains. The demand for that system - it being an alternative to the orthodoxy - is presently limited. Our concern is that, in the absence of the ability of the ICO to enforce a level playing field as regards the use of personal data by open premium websites, large online platforms and websites on the long tail of the web, demand for such advertising may continue to be low.

The uneven playing field

Even in the face of changes to privacy laws - such as the UK Data Protection Act 2018 - UK regulators have identified key differences in the way in which permission is sought for the use of cookies and other tracking technologies to underpin programmatic advertising auctions.

As an open website that competes with hundreds of other news websites that serve a UK audience - including the licence fee funded and advertising free BBC news website - the Guardian provides its readers with granular options to decide how their data is used through a consent management platform. We provide these options **before** any non essential cookies are fired to ensure that new users can choose whether their data for advertising purposes.

We do this because the law requires this approach, and because we want to be open and transparent with readers about how their data is used.. We do this because we know and believe that we exist on the basis of the trust that readers place in our brand and the journalism that is published in our name. Many other platforms and websites do not trade on trust to the same degree, knowing that, in a programmatic world, advertising spend follows the path of least resistance to websites and platforms that are able to access the personal data of their users.

The 2020 CMA report on the online advertising market highlighted how some online platforms obtain consent through so-called clickwrap agreements at point of sign-up, that enable those platforms to gather data which is then used to attract programmatic advertising spend to those platforms.

Such platforms do not trade on trust as the basis for retaining users, knowing that consumers are locked in to using those platforms due to various factors including that they, “*may be unable to communicate with a comparable network by accessing a different platform... may not have access to a similarly extensive or high-quality body of ‘user-generated-content’ by accessing a different platform.*” As a result of this lock-in, “*many consumers are likely to be sharing more data than they would otherwise have decided to and not receiving a fair return for the data they provide.*”

At the other end of the spectrum, so-called [Made For Advertising \(MFA\) sites](#), utilise channels such as Facebook, Twitter and Pinterest ([77% of traffic in 2023](#)) to bring users to their sites, gather data without user permission, explicitly for the purpose of serving personalised advertising on those sites. MFA do not provide users with granular choices as to how their data is used – many do not have privacy or cookie policies - and are built solely for the purpose of capturing user data, designed solely to deliver high viewability of advertising impressions, in order to capture programmatic advertising from the online advertising ecosystem. Such sites have no incentive to be open and transparent with readers as to how they use their personal data, or have any concerns about the damage that may be caused to their brand of the ICO naming and shaming them as part of an enforcement process. They exist to capture user data, to connect to the programmatic ecosystem, in order to generate money.

In the context of an interconnected programmatic advertising ecosystem that flows to sites that have the most data on their users, both of the above examples demonstrate how open, premium publishers are not operating on a level playing field on the open web. In the absence of concerted, deliberate and consistent action by the ICO to enforce the law in relation to all websites and platforms that are made available to UK consumers, and no action to deter the demand side from targeting advertising spend at websites and platforms that have not gathered user consent in an open and transparent way, open websites that comply with the law, and do the right thing, will lose out to those who do not.

Funding journalism in the future

In such an environment, the question for premium publishers that wish to continue publishing journalism online without a hard paywall is how to fund investment in high quality journalism and information in the future? In a highly competitive English speaking

news, how can publishers innovate around options for data use and variable payments to access great journalism in the future?

These are important questions for the ICO to consider in the context of an area of media production - high quality independent news - that is subject to multiple deliberate legal and policy interventions to enable the wide availability of news and information to the public. It is in this context that this consultation takes place, and in which we respond to these vitally important questions posed by the ICO.

Responses to ICO questions

Do you agree with our emerging thinking on “consent or pay”?

- *Strongly agree*
- **Agree**
- *Neither agree nor disagree*
- *Disagree*
- *Strongly disagree*
- *Don't know / Unsure*

Please explain your response.

GNM welcomes the ICO's intention to provide further guidance on so-called “consent or pay” models. In particular we welcome the principle based acknowledgement that “*data protection law does not prohibit business models that involve ‘consent or pay’.*”

We agree with this assessment and support the need for further detailed guidance on how to comply with the obligations of data protection law in implementing a “consent or pay” model. The factors that the ICO have identified are important in complying with data protection law, however their relevance will always depend on the sector and services provided. As we outline in our introduction to this response, the Guardian operates in a market in which there is a high degree of competition and the ability of citizens to access news from multiple sources. While this may change over time - for example, if news sources are unable to continue investing in high quality content due to a decline in advertising revenue, or the continued theft of publisher IP by large LLM developers - it is presently the case that consumers are not “locked-in” to the use of any single news source.

While we agree with the four considerations identified by the ICO, we believe that “equivalence” and “appropriate fee” guidance are more likely to be appropriate for concentrated markets or public sector service providers. Their relative importance will depend on the nature of the market. There is a danger that this guidance is seen as a one size fits all approach to all websites across the internet, which would risk the ICO straying outside the realms of data protection law.

In addition we hope that this guidance will be principles led and not specific to “consent or pay” only. This would allow publishers to innovate with new commercial models that best suit the wants and needs of different types of readers, and the publisher's wider business strategy.

We agree that ICO guidance on the “power balance” and “privacy by design” is helpful in ensuring a “consent or pay” model is compliant with data protection law. As set out below in relation to “appropriate fee” and “equivalence”, the ICO should consider that the “power

balance” between an organisation and individual will depend on the services provided and the sector. In relation to “privacy by design”, we would welcome confirmation that existing ICO guidance already supports compliance with this requirement.

In addition to focusing on data protection law it is important that the ICO confirms that existing guidance, for example on consent or transparency, also applies in “consent or pay” solutions.

How helpful are the indicative factors in comprehensively assessing whether “consent or pay” models comply with relevant law?

	Very helpful	Helpful	Neither helpful nor unhelpful	Unhelpful	Very unhelpful	Don't know/ Unsure
Power Balance		X				
Equivalence			X			
Appropriate Fee			X			
Privacy by Design	X					

Please explain your ratings.

Imbalance of Power

Alternative models such as “consent or pay” (sign in, subscription or other new business models etc) can be offered when a reader “rejects all” on a cookie banner. The “imbalance of power” test is met through alternative services being made available to the user, particularly in the UK with major freely accessible news websites such as the BBC.

News publishers exist in markets with high degrees of competition between established UK news publishers, established international news outlets that publish in English, multiple aggregators of news publisher content in English, and many long-tail websites that create facsimiles of news content in order to attract users and advertising revenue. Established UK news publishers do not benefit from network effects or user lock-in in the same way as platforms that connect users to a network of friends and professional contacts with whom they need to communicate.

Equivalence of services

The ICO’s guidance would be most helpful in how “consent or pay” models can be compliant with data protection law such as transparency, choice and individual rights. It is

difficult to assess different “services” for comparison - for example a premium ad free subscription versus a consent personalised advertising experience. This will also depend on the sector and the services provided and how easy it is for users to get an equivalent service elsewhere.

In addition there is a risk that guidance in this area may stymie commercial innovation. If the guidance is framed around the current service provision, that may prevent experimentation with alternative commercial models. For example, allowing users to control their experience through bundling of products, or micro-payments for articles a user finds specifically relevant. The inability for news publishers to provide different options to users could deprive those users of flexible ways of accessing journalism, without the need for a full monthly subscription. We see nothing in data protection that would require publishers to provide access to high quality journalism without any sort of value exchange.

Appropriate Fee

The Guardian does not provide a regulated service, nor does it exist in a market in which there is a high degree of concentration or user lock-in. As such, we see no basis for either data protection or competition regulators to define the pricing of services where there is abundant consumer choice. The ICO’s statutory responsibility is to establish whether personal data is used in accordance with relevant laws, not to determine whether the prices for accessing high quality journalism are correct.

Unlike social media platforms, where the value exchange is abstract, news organisations do have pre-existing commercial products that set a benchmark for the value that users place on good quality journalism. A seven day subscription to the Guardian & Observer costs [£69.77 per month](#), while the Guardian’s digital edition is [£14.99 per month](#). While we would not expect to charge a user this amount for viewing an article on theguardian.com the cost of producing a piece of journalism remains the same.

The Guardian has always run its business based on a value exchange with readers, whether that is direct payment or advertising. We have never given our journalism away for free, and it would be a perverse situation if a newspaper were unable to charge a user for accessing that product online. We do not think it is the role of the ICO to regulate the cost of print products, and would not expect them to set the price of access to a digital product either.

Privacy by Design

We agree that this is appropriate for ICO guidance.

The ICO has previously issued guidance on Privacy by Design and other obligations including transparency. There has recently been a joint paper on harmful designs in digital markets by the ICO and CMA.

While we welcome the explanation of Privacy by Design in relation to “consent or pay”, we note there is extensive existing guidance on how choices can be presented “fairly and equally” and on providing people with “clear understandable information”. It would be useful if the ICO could confirm that this existing guidance applies rather than that there are separate specific obligations related to “consent or pay”.

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

UK GDPR does not prohibit consent or pay models.

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

- *Strongly agree*
- *Agree*
- *Disagree*
- *Strongly disagree*
- *Don't know / Unsure*

Please explain your response.

We continue to develop our thinking on consent or pay while we await the ICO's response to this consultation, but we expect that existing users will be repermissioned as they are today. At this point existing subscribers will have the option to accept/reject, which is the same as their current experience. Non-subscribers may be presented with a consent or pay option, which is no different to new users.

Are you acting on behalf of an organisation? - **required**

- **Yes**
- No

Does your organisation provide any online or internet-enabled products or services?

- **Yes**
- No
- Don't know / Unsure

Is your organisation engaged in the provision of online advertising, for example as a publisher, advertiser, intermediary or in some other capacity?

- **Yes**
- No
- Don't know / Unsure

Do you currently operate a “consent or pay” model in the United Kingdom? See our definition of “consent or pay” in our emerging thinking.

- Yes
- **No**
- Don't know / Unsure

Do you think the indicative factors are sufficient to comprehensively assess whether your “consent or pay” model complies with relevant law?

- Yes
- No
- **Don't know / Unsure**

Please explain your response.

As set out above we would welcome that the ICO confirms that existing guidance, in particular in relation to transparency, consent and harmful design in digital markets, is applicable and relevant for assessing the compliance of “consent or pay”. Without this confirmation, there is a risk that, for example, references to being upfront with users and fair in choice architecture will be understood to mean different obligations than those already explained in existing ICO guidance.

What are your motivations in using a “consent or pay” model?

The Guardian’s approach to distribution has enabled the widespread availability of high quality journalism on the open web at no cost to the end user, but with a value exchange at its heart. Our journalism has never been ‘free’ and has always been subject to a value exchange with readers.

The lack of a level playing field in enforcement of privacy laws between different actors online, a programmatic advertising ecosystem in which advertising spend follows data, regardless of how consent for use of that data was gathered, means that the amount of advertising revenue that can be generated in circumstances where a user decides to “reject all” is low to zero.

In these circumstances, we believe it is equitable and fair to provide readers with a choice as to whether they wish to access Guardian journalism, through the acceptance of personalised advertising, or by direct payment in some form.

Are there elements of our thinking on “consent or pay” that might impact on your organisation, positively or negatively? Please explain.

The ability to experiment with different forms of value exchanges to access individual pieces of journalism could be hugely beneficial for news organisations that are seeking to provide journalism to as wide a proportion of the population as possible. The danger is that without the ability to experiment with different payment models, in the context of an advertising ecosystem in which data protection law is not uniformly enforced, premium publishers face a loss of advertising revenue without any ability to encourage readers to pay to access that journalism in other ways.

What is the name of your organisation? - required

Guardian News and Media

If you would like your response to remain anonymous when reporting please tick this box.

- I wish to remain anonymous.

Which of these best describes your organisation's activities?

- Adult sites
- Advertising
- Communications service
- Consent management platform
- Content aggregation
- Gaming
- News media – **YES**
- Online marketplace
- Online search
- Retail
- Social media
- Streaming media
- Other (please specify):

How many staff does your organisation have globally?

- 0 to 9 members of staff
- 10 to 249 members of staff
- 250 to 499 members of staff
- 500 to 999 members of staff
- **1,000 to 2,499 members of staff – YES**
- More than 2,500 members of staff
- Don't know / Unsure

Approximately what percentage of your staff are based in the UK?

- 0% to 20%
- 21% to 40%
- **41% to 60%**
- 61% to 80%
- 81% to 100%
- Don't know / Unsure

If you have UK based staff, where are they? Choose all that apply.

- England – **YES**
- Northern Ireland – **YES**
- Scotland – **YES**
- Wales – **YES**
- Don't know / Unsure

Before completing this call for views, do you have any final comments you have not made elsewhere?

We may wish to contact you for further information on your responses. If you are happy to be contacted please provide an email address below.