

DMA's Response to the ICO's call for views on "consent or pay" business models, 17 April 2024

The Data & Marketing Association (DMA) represents around 700 companies across the UK that are involved with data and marketing activities, both off-line and online, including commercial and non-commercial businesses, as well as publishers and media networks. All these rely on commercial sources of revenue, including advertising, direct marketing and subscription.

This response focuses on the questions in the ICO's call for views on "consent or pay", published on 6 March 2024.

Q1. Do you agree with the ICO's emerging thinking on "consent or pay"?

No, we disagree. The ICO's emerging thinking does not take into account that online content need to be paid for somehow, whether through personalised advertising or subscription. We accept that, if a customer chooses an advertiser-supported model and consents to use of their data, then it is important that their consent is valid and freely-given. The usual rules apply, empowering customers through purpose limitation and transparency about what data is being collected and used.

This is important in gaining and keeping the customer trust which is essential to effective marketing. It is core to the DMA's Code of Conduct, which is based on GDPR, and we work very closely with the ICO's office to ensure industry best practice is well understood throughout the sector.

GDPR does not prevent "consent or pay". Article 7 (4) makes it possible to link consent with the performance of a contract as a legal ground so long as necessity can be established.

When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.

Consent is also required under Article 9 of GDPR to process sensitive categories of data, and under PECR to store cookies or to access browser storage.

However, we have significant concerns that the ICO's tests of free consent in this context, involving what fee or subscription may be "appropriate", as well as a privacy by design test, may be too onerous for the commercial market to flourish, when it is often in competition with public services. No private sector business should be forced to provide their service free of charge and so there must be an alternative revenue source. The ICO does not appear to be factoring into the equation that the customer has the option of not taking the service at all which is important in the context of free consent.

There is a basic principle at stake. In traditional media, such as newspapers, magazines and TV, it is well understood by consumers that they must pay for content, through the cover price, licence fee, or subscription. It has also been long established that "free" TV services, such as ITV, Channel 4 and Channel 5, are only "free" to watch because they carry

advertising, and that the cover price of magazines and newspapers is significantly reduced because they take advertising.

Likewise, in the online world, content provided by commercial organisations must be paid for somehow. No business should be required to provide a service free of charge at its own expense without any revenue stream. If that were the case the business would just close removing the product or service completely from the market. Therefore, presenting the user a choice between paying for a subscription or accepting “free” content with personalised advertising is reasonable.

It is entirely different in the case of online public services, such as those provided by the Government, local councils, the NHS or the BBC, all of which have public funding. In developing its test about the power balance between the service provider and the consumer, the ICO should differentiate between these public services and commercially-funded online content.

Online publishers are under huge commercial pressure to adapt their business models in the face of competition for advertising revenue from the platforms such as Meta and Google which dominate the advertising market and have adopted - or plan to adopt - the pay or consent model. It is reasonable for British publishers also to consider moving towards a “consent or pay” model, and we note this is now common in countries like Germany, where major publishers now require consent to advertising or a paid subscription.

As set out in more detail in the Advertising Association’s response to this call for views, various European data protection authorities have already agreed that the “consent or pay” model is compliant with GDPR, including for example:

1. The European Court of Justice, in its ruling (4 July 2023) in the case of *Meta Platforms vs Bundeskartellamt*, states (para 150): *those 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.*
2. The Norwegian Privacy Board, in considering Grindr’s appeal against the Norwegian Data Protection Authorities, stated that Grindr was under no obligation to provide its services free of charge¹. *“The Tribunal agrees with Grindr that it does not have a duty to provide a free dating app, and the Tribunal recognizes that a key feature of the business model for social media and applications is that registrants “pay” for the use of social media and applications by accepting that their personal data is used commercially, for example by being disclosed to advertising partners”.*
3. At the 22 March 2023 *Datenschutzkonferenz*, German federal and state-level data protection authorities published the conclusion² that “the tracking of user behaviour can be based on consent if a tracking-free model is offered as an alternative, even if

¹ <https://www.personvernemnda.no/pvn-2022-22>

² https://www.datenschutzkonferenz-online.de/media/pm/DSK_Beschluss_Bewertung_von_Pur-Abo-Modellen_auf_Websites.pdf

this is subject to payment”.

4. Guidance³ published by the Spanish data protection authorities AEPD on the use of cookies also provides for paid alternatives to consent, stating that: *There may be certain cases in which non-acceptance of the use of cookies prevents access to the website or total or partial use of the service, provided that the user is adequately informed about this and an alternative is offered, not necessarily free, access to the service without having to accept the use of cookies.*
5. The EU Council's 2021 mandate⁴ for the ePrivacy regulation trilogue negotiations included an explicit recognition of paid alternatives to consent in Recital 20aaaa: *“In contrast to access to website content provided against monetary payment, where access is provided without direct monetary payment and is made dependent on the consent of the end-user to the storage and reading of cookies for additional purposes, requiring such consent would normally not be considered as depriving the end-user of a genuine choice if the end-user is able to choose between services, on the basis of clear, precise and user-friendly information about the purposes of cookies and similar techniques, between an offer that includes consenting to the use of cookies for additional purposes on the one hand, and an equivalent offer by the same provider that does not involve consenting to data use for additional purposes, on the other hand”.*

Q2. How helpful are the indicative factors in comprehensively assessing whether “consent or pay” models comply with relevant law?

As stated in our response to Question 1, the ICO's tests are too high and risk undermining the business model for commercial services. They include:

- The power balance: is there a clear imbalance of power between the service provider and its users?
- Equivalence: are the advertising-funded service and the paid-for service basically the same?
- Appropriate fee: Is the fee appropriate? Consent for personalised ads is unlikely to be freely given when the alternative is an unreasonably high fee.
- Privacy by design: are the choices presented fairly and equally, with clear options?

The power balance:

The ICO's examples of power imbalance include accessing public services or where the service provider has a position of market power.

In relation to public services, we stated in answer to question 1 above that the ICO should differentiate between the consumer's experience in accessing public services and their

³ <https://www.aepd.es/guias/guia-cookies.pdf> page 29

⁴ https://data.consilium.europa.eu/doc/document/ST-6087-2021-INIT/en/pdf/page_25

experience accessing online commercial content. This is permitted under Recital 43 of GDPR which makes it clear that consent is unlikely to be freely given where the controller is a public authority, and in the EDPB Guidelines 05/2020 on consent under Regulation 2016/679⁵ which refers to the imbalance of power as regards public authorities and in the context of employment.

In terms of a service provider that is asking for consent to personalised advertising or a fee in the absence of consent, GDPR Recital 42 says that the controller needs to demonstrate that it is possible to refuse or withdraw consent without detriment. It is clear that there is no detriment caused as long the consumer is clearly informed that the paid for service is equivalent to the one that provides personal ads.

The ICO's other example of power imbalance relates to market power. The European Court of Justice July 2023 ruling in the case of Meta Platforms vs Bundeskartellamt determined that a social network with a dominant market position needs to provide users with the option to give valid and free consent and be able to prove it did so. However, it is for the competition authorities, and not for the ICO, to make determinations about dominant market power.

Equivalence

The ICO's test for "equivalence" seems to be that the ad-funded service and the paid-for service should be the same. The ICO states this would not be the case if a service provider offers a choice between personalised ads and a 'premium' ad-free service that bundles lots of other additional extras together. However, there are many examples in the offline as well as the online world showing that bundles are attractive to the consumer, as well as being commercially-profitable to the service operator. We do not agree that opting for personalised ads instead of such an option involves a diminution of freely-given consent.

Appropriate fee

We do not consider it is the ICO's role to determine whether the fee for a service is inappropriate or unreasonable. The fee is for the commercial operator to decide, in the context of a competitive market where the user can go elsewhere or choose not to buy the service.

Privacy by design

We agree that giving people clear, understandable information about what the choices are and what each choice involves is required by GDPR and that people need to be able to exercise their rights under GDPR. This does not mean that people should have a right to access the service for free whilst withholding consent for the collection and use of their personal data.

Q.3 Do you agree that organisations adopting "consent or pay" should give special consideration to existing users of a service?

No. The ICO suggests that services need to give special consideration to the treatment of existing users who may understand the organisation's current approach and use the service

⁵ https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf

extensively, as it may be hard for these users to switch, leading to a difference in power balance. However, we do not agree that existing users should have greater data privacy rights than new users. All users should have the same choice between consenting to personalised ads or paying a subscription fee, and be aware that if they withdraw consent, they will need to pay to continue using the service.

Q4. Before completing this call for views, do you have any final comments you have not made elsewhere?

No

For further information, please contact:

[REDACTED]