ADVERTISING ASSOCIATION

Advertising Association's Response to the ICO's Call for views on "consent or pay" business models

About the Advertising Association

1. The Advertising Association promotes the role and rights of responsible advertising and its value to people, society, businesses, and the economy. We bring together companies that advertise, their agencies, the media and relevant trade associations to seek consensus on the issues that affect them. We develop and communicate industry positions for politicians and opinion-formers, and publish industry research through advertising's think-tank, Credos, including the Advertising Pays series which has quantified the advertising industry's contribution to the economy, culture, jobs, and society.

2. The membership of the Advertising Association is very broad and includes the associations representing industry sectors, such as the advertisers (through the Incorporated Society of British Advertisers), the agencies and advertising production houses (through the Institute of Practitioners in Advertising and the Advertiser Producers Association), all the media (from broadcasters and publishers, cinema, radio, outdoor and digital), advertising intermediaries and technology providers (which include platforms and the IAB UK), market research (through the Market Research Society) and marketing services such as direct marketing (through the Data & Marketing Association).

Context

3. Advertising and marketing are important. They play a crucial role in brand competition, drive product innovation and fuel economic growth. Many industries such as the arts, sport and culture depend on it for their revenues and it also funds a diverse and pluralistic media, including a free and open internet, enjoyed by consumers of all ages, including children and young people.

4. Advertising is also a driver of economic growth and competition. We have previously estimated that every pound spent on advertising returns up to £6 to GDP through direct, indirect, induced, and catalytic economic effects. The Advertising Association/WARC Expenditure Report UK's ad market will grow by a further 5.9% in 2024, to reach a total of £39.2bn – a new high and equivalent to a 2.5% rise in real terms. This would mean a contribution of approximately £235bn to the economy supporting over 1 million jobs across the UK.

5. According to Deloitte research carried out on behalf of the Advertising Association, the one million jobs supported by advertising can be broken down as follows:
   a) 350,000 jobs in advertising and the in-house (brands) production of advertising.
   b) 76,000 jobs in the media sectors supported by revenue from advertising.
   c) 560,000 jobs supported by the advertising industry across the wider economy.

6. Commercial broadcasters, publishers, platforms and businesses from across the advertising ecosystem rely on advertising revenues to finance their content or service which allow them to offer it for "free" to users.

7. The issue of user consent for personalisation and the introduction of paid services is also being considered EU regulators specifically in the context of the DMA and by European data protection authorities with respect to VLOPs. However, the market and regulatory landscape is very different in the UK, so we welcome the ICO's decision to consult on its proposed approach. Fundamentally, we believe that any new ICO guidance should be grounded in the UK context, including the ICO's new duties under the DPDI Bill, and be

mindful of its impact to media financing which is required to sustain and deliver a free media.

8. The issue of user consent for personalisation and the introduction of paid services is common in European digital services. For example, in Germany around 80% of news brands – which include publishers like Spiegel, Zeit and Bild, now require consent to advertising or a paid subscription. Additionally, major British news publishers are also considering moving towards a "consent or pay" model for accessing content.

9. For further information on any points contained in this response please email [redacted]

Q1. Do you agree with our emerging thinking on "consent or pay"?

- Disagree

Please explain your response.

While we welcome explicit recognition that data protection law does not preclude "consent or pay", the binary framing of the issue is unhelpful and requires further reflection and nuance. It is overly narrow and ignores the wider context which is important for the ICO to both understand and consider as it develops guidance. There are a range of factors bearing on commercial decisions to evolve business models including market structure, the regulatory and competitive landscape, advertising yields and consumer behaviour. These factors will vary between companies. Online businesses are reliant on evolving their respective business models for the provision of the service to be financially viable. Hence it is important to avoid over-generalisations and recognise that case-by-case assessments remain important. We expand on this in other parts of our response.

At the core of the issue is the need to achieve an appropriate balance between the right to privacy and the freedom to conduct a business, neither of which are an absolute right. This is articulated in Recital 4 of the GDPR which states:

> *[…] The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, […], freedom of expression and information, freedom to conduct a business, […].*

It is a well understood principle in UK and EU jurisprudence that the rights of privacy and data protection are not paramount and are to be balanced with other rights and freedoms offered to individuals and corporations. It is our view that the freedom to choose the features offered as part of a service should not be fettered by the ICO to the extent that the provision of such features themselves do not breach GDPR.

While the ICO's proposed approach explicitly establishes that the rights of businesses are to be considered when looking at data protection, the ICO has not clarified how it has given weight to such rights or how it will ensure that such rights are considered in the future guidance.

We ask that the ICO set out how it has balanced these rights in any future guidance and commit to publish a fresh assessment alongside any future consultation on draft guidance. Assuming any guidance would be published after the implementation of the DPDI Bill, we also

ask that the ICO make clear how it has had regard for the desirability of prompting innovation and competition and other relevant duties as listed under s108 Deregulation Act (2015).

Taking a singular view from the perspective of only data protection law will invariably lead to erroneous decision. For example, an "individual's right to privacy is paramount" stance does not consider properly the impact to a business, who have their costs to produce content or deliver a service. Instead, it would be better to consider the purpose of the data processing and their relationship with fundamental rights[1].

Businesses are entitled to select their commercial model to recover their costs and make a profit. We argue that this should be no different in a digital environment. Users are not entitled to the content or service in the same way they might be entitled to, for example, with a public service. Nor would it be regarded as fair or equitable to expect those businesses to provide services or content for free. Therefore, presenting the user a choice between paying for a subscription or accepting "free" content via consent for personalised advertising is reasonable.

As the ICO's proposed approach states, data protection legislation does not prevent "consent or pay". Article 6(1) sets out the relevant legal bases under GDPR. Although, consent is typically cited as necessary for personalised advertising, this is only true where consent is required under PECR to store cookies or to access browser storage[2] or under Article 9 of the GDPR to process sensitive categories of data.

In fact, Article 7 (4) also 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.*

Furthermore, Article 6(1) (b) does not impose any restrictions on the right to conclude a contract that uses data or a contract that provide services that require data[3].

Given that a UK court or tribunal may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter (s6(2) EU WA) it is worth highlighting how the "consent or pay" model has been recognised in European case law.

For example, the CJEU's ruling (4 July 2023) in the case of Meta Platforms v Bundeskartellamt (para 150) makes a specific reference to offering users, if necessary for an appropriate fee, an equivalent alternative not accompanied by such data process operations:

> *Thus, 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.*** [emphasis added]

[1] Nettesheim, M. (2023). Data Protection in Contractual Relationships (Art. 6 (1) (b) GDPR) (April 24, 2023) page 7. Available at SSRN: https://ssrn.com/abstract=4427134 or http://dx.doi.org/10.2139/ssrn.4427134

[2] https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp171_en.pdf

[3] Nettesheim, M. (2023). Data Protection in Contractual Relationships (Art. 6 (1) (b) GDPR) (April 24, 2023) page 11. Available at SSRN: https://ssrn.com/abstract=4427134 or http://dx.doi.org/10.2139/ssrn.4427134

Additionally, the Norwegian Privacy Board, in considering Grindr's appeal against the Norwegian Data Protection Authorities, stated categorically that Grindr was under no obligation to provide its services free of charge[4]. Specifically, it stated:

(machine translation)

> ***The Tribunal agrees with Grindr that it does not have a duty to provide a free dating app, and the Tribunal recognises 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.*** *Had the user before the registration process been completed been given the choice between using the free version of the app or purchasing one of the two paid versions of the app, this would have drawn in the direction that the requirement of voluntariness had been met. The user would then have had a real choice as to whether they wanted to pay money to use the application, or whether they would rather "pay" with their personal data.* [emphasis added]

Separately, data protection authorities across Europe have also recognised the lawfulness of paid alternatives to consent. At the 22 March 2023 *Datenschutzkonferenz,* German federal and state-level data protection authorities published the following conclusion[5]:

(machine translation)

1. *In principle, the tracking of user behaviour can be based on consent if a tracking-free model is offered as an alternative, even if this is subject to payment. However, the service that users receive with a payment model must first represent an equivalent alternative to the service that they receive through consent. Secondly, the consent must meet all the requirements for effectiveness standardized in the General Data Protection Regulation (GDPR), i.e. in particular the requirements listed in Article 4 No.11 and Article 7 GDPR.*
2. *Whether the payment option – e.g. B. a monthly subscription - is to be viewed as an equivalent alternative to consent to tracking depends in particular on whether users are given equivalent access to the same service for a standard market fee. As a rule, equivalent access exists if the offers at least basically cover the same service.*

Moreover, guidance[6] published by the Spanish data protection authorities AEPD on the use of cookies provides for paid alternatives to consent. The guidance states:

(machine translation)

> ***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****. As established by Guidelines 05/2020 on the consent of the CEPD, the services of both alternatives must be genuinely equivalent, and it will also not be valid for the equivalent service to be offered by an entity other than the editor.* [emphasis added]

It is also worth pointing that the EU Council's 2021 mandate[7] for the ePrivacy regulation trilogue negotiations included an explicit recognition of paid alternatives to consent in Recital 20aaaa.

> *(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***

[4] https://www.personvernnemnda.no/pvn-2022-22

[5] https://www.datenschutzkonferenz-online.de/media/pm/DSK_Beschluss_Bewertung_von_Pur-Abo-Modellen_auf_Websites.pdf

[6] https://www.aepd.es/guias/guia-cookies.pdf page 29

[7] https://data.consilium.europa.eu/doc/document/ST-6087-2021-INIT/en/pdf page 25

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. *Conversely, in some cases, making access to website content dependent on consent to the use of such cookies may be considered, in the presence of a clear imbalance between the end-user and the service provider as depriving the end-user of a genuine choice. This would normally be the case for websites providing certain services, such as those provided by public authorities. Similarly, such imbalance could exist where the end-user has only few or no alternatives to the service, and thus has no real choice as to the usage of cookies for instance in case of service providers in a dominant position.* [emphasis added]

To the extent that use is made of processing and storage capabilities of terminal equipment and information from end-users' terminal equipment is collected for other purposes than for what is necessary for the purpose of providing an electronic communication service or for the provision of the service requested, consent should be required. In such a scenario, consent should normally be given by the end-user who requests the service from the provider of the service.

Q2. 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.

Power Balance

When examining the issue of power balance, the ICO's proposed approach notes two considerations: accessing a public service or that the service provider has a position of market power.

For the first consideration it is helpful to refer to Recital 43 of the GDPR which states

In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller, in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation.

In addition, the EDPB Guidelines 05/2020 on consent under Regulation 2016/679[8] refers to the imbalance of power applying to public authorities and in the context of employment. In the case of a public services provider, there is no realistic alternative other than to accept the terms of the data controller. In the employer/employee relationship "*it is unlikely that the data*

[8] https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf

subject can deny his/her employer consent to data processing without experiencing the fear or real risk of detrimental effects".

The ICO's proposed approach considers whether this logic should be applied to a service provider that is asking for consent to personalised advertising or a fee in the absence of consent that has neither market power nor offers a public service. The balance between data protection rights and freedom to do business are relevant here. As noted above, online businesses will be reliant on adjusting their sources of revenue to ensure that the provision of the service remains financially viable. This is where we believe that the ICO's proposed approach over-simplifies the complexity of such commercial decisions and the complex factors which must be considered.

Unfortunately, the EDPB Guidelines on consent do not provide any additional clarity here. Para 46 states:

> *The controller needs to demonstrate that it is possible to refuse or withdraw consent without detriment (recital 42). For example, 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.*

But then it goes on to say (para 48)

> *If a controller is able to show that a service includes the possibility to withdraw consent without any negative consequences e.g. without the performance of the service being downgraded to the detriment of the user, this may serve to show that the consent was given freely.* ***The GDPR does not preclude all incentives but the onus would be on the controller to demonstrate that consent was still freely given in all the circumstances****.* [emphasis added]

These statements appear to be contradictory as it states on one hand that withdrawing consent does not lead to "any costs for the data subject" but then on the other hand it says "the GDPR does not preclude all incentives". There is also some contradiction between saying "any costs" vs "significant negative consequences". The former says no cost is acceptable, whereas the latter suggests some costs might be acceptable.

However, the only relevant consideration here is whether the user experiences *detriment* as a result of withdrawing consent and how those effects weigh against other rights. In the case of consenting to personalised ads or paying a fee, the answer appears to be none, so long as the paid for service is equivalent to the one that provides personal ads and that is stated clearly up front. This position is consistent with the EU Council's mandate Recital 20aaaa quoted above.

The second part of this question refers to market power and likely stems from the CJEU's ruling (4 July 2023) in the case of Meta Platforms v Bundeskartellamt (para 154):

> *[…] the operator of an online social network holds a dominant position on the market for online social networks does not, as such, preclude the users of such a network from being able validly to consent, within the meaning of Article 4(11) of that regulation, to the processing of their personal data by that operator. This is nevertheless an important factor in determining whether the consent was in fact validly and, in particular, freely given, which it is for that operator to prove.*

Although, this CJEU judgement is case specific and is an interpretation of European law, the analysis of "dominant position" is well anchored in UK competition law (Chapter II, Competition Act 1998). In the UK context, the assessment of market power requires detailed economic analysis taking into account the relevant market within which the online business in question

operates which is not within the ICO's area of direct expertise. Therefore, any assessment should only be based on a prior determination of market power by the CMA.

As a final point here, the ICO mistakenly assumes that contextual advertising is a financial substitute for personalised advertising, and that all ad-supported services are commercially viable in their current form. Given falling ad yields and the impact of the ICO's preferred 'accept all/reject all' implementation of cookie consent this assumption is misplaced. It is therefore crucial that the ICO assesses each case on its merits and makes a fulsome assessment of relevant factors and rights of all parties. This should draw on the CMA's analysis of the UK digital advertising market. Fundamentally, guidance should not fetter a provider's freedom to choose the features offered to ensure the ongoing viability of a service and where the features themselves are compliant with the UK GDPR.

Equivalence

In considering the equivalence question, the ICO's proposed approach considers whether the ad-supported service and the paid-for service *are basically the same*.

We disagree that they are required to be same. In assuming that they are the same it could fetter commercial freedom to evolve business models to ensure future viability. Equivalence is the state or fact of being equivalent, equality in value, force, significance, etc. In the 2023 *Datenschutzkonferenz* conclusion, for example, it refers to an "equivalent alternative".

It appears that the ICO views a service provider offering a choice between personalised ads and a 'premium' ad-free service that bundles lots of other additional extras together negatively, as it makes the point that it is not the same service. However, we think that so long as the core service is equivalent, it should be up to the service provider to determine what extras, if any, are included as part of the model. We would also argue that even if bundling makes the paid alternative more attractive then it reduces the pressure to consent. If the user still opted for consent in this scenario, then there would be little doubt that the consent was freely given.

As noted above, the ICO's emerging thinking contains some misplaced assumptions about advertising yields and the viability of ad-supported services today. These are also relevant. It is important that the ICO avoids future guidance fettering necessary commercial decisions around the features offered to ensure the ongoing viability of a service and where the features themselves are compliant with the UK GDPR.

Appropriate fee

Determining what is an appropriate fee is highly subjective and a question which we think a data protection authority is ill-suited to deal with.

Any determination on the appropriateness of a fee should have to take in to account various regulatory and market considerations, likely also engaging consumer and competition law. It is worth pointing out that S.64 Consumer Rights Act (2015) states:

(1)A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—
[…]
(b) "the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it."

Judging the appropriateness of a fee is clearly not within the ICO's competency or current remit. Prices will also involve some element of business judgement, forecasting and intuition. Hence, any attempt to use some financial benchmark to gauge "appropriateness" would be arbitrary at best. Advertising revenue is dynamic, and service providers are subject to user churn; some users are less price sensitive than others. Moreover, the cost to produce content or deliver services will vary across providers.

Finally, it would be wrong to interpret the GDPR in an overly narrow manner. As stated in Recital 4, "*The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality*". The key consideration is proportionality, and it would be inappropriate for a data protection authority to intervene in price setting or arbitration on what users should pay and this type of intervention would likely face legal challenges.

Privacy by design

We believe that this factor is relevant to the "consent or pay" model. Users should be provided with clearly distinguishable and easily understandable information, using plain language to explain the choice between consenting to data collection/processing and paying a fee. The design should also allow users to easily exercise their rights under the GDPR.

For the "consent or pay" model to be viable, there must be reasonable limits on how much users can adjust their consent settings. Otherwise, if users could withhold all consent, it would undermine the purpose of offering a paid alternative with fewer data requirements.

The ICO has done considerable work in privacy by design, via its Code and also more recently with the CMA on 'Dark Patterns'. In the ICO's future guidance on "consent or pay" it would be helpful if there was acknowledgement that there should be latitude for controllers to decide what is the right approach for their audiences.

The ICO has taken a strict approach towards nudging and sludging etc, however, conveying complex legalistic principles in a way that satisfies the conditions for consent, while being simple to understand, is not easy. Therefore, for privacy by design, we think that the line ought to be drawn at design approaches that are deliberately intended to misinform or mislead end users. Fundamentally, brands should be able to present information in ways that are appropriate for its audiences, products, brand tone of voice etc.

Finally, we think that the ICO should consult with the CMA on its guidance with respect to harmful design practices in presenting online choices.

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

- Disagree

Please explain your response.

The ICO proposed approach suggests that organisations need to give special consideration to the treatment of existing users of the service, who may understand the organisation's current approach and use the service extensively in their daily lives. This may lead to a difference in power balance (for example, users may find it hard to switch) or have implications for how choices are presented.

However, we think it should be sufficient to present the user with a clear choice between consenting to personalised adverts or to pay a subscription fee and that withdrawal of consent requires payment to continue using the service.

Given that there is an existing relationship, and the user can revoke consent at any time, it does not make sense to offer special consideration to users that have previously consented to personalised adverts or content. The service provider is already in a position with limited bargaining power because consent can be revoked at any time. Instead, it is more relevant to consider a provider's freedom to evolve its business model to ensure future viability of the service and the benefits of continuity of service to its existing customers.

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

Please refer to the opening preamble.

17 April 2024