

From: [REDACTED]
To: [Consentorpay](#)
Subject: Pay or consent consultation
Date: 06 March 2024 20:57:26

External: This email originated outside the ICO.
Dear ICO,

As a data protection professional with 30+ years of experience under his belt in various roles and having been on various sides of the privacy debate (legislator, regulator, CPO, consultant), I would like to take the opportunity to respond to your call for input on the pay-or-consent business model.

First of all, I would like to stress that data protection law is never about the legitimacy of the primary business process (i.e. laying down the conditions for providing a service). That role is reserved for consumer protection law (fair business practices). As you state in your consultation, the pay or consent model itself is not prohibited under consumer protection law.

However, data protection law deals with the legitimacy of the processing of personal data in the context of operating the primary business process. So, your consultation focuses on the conditions for free and informed consent in a pay or consent model. However, that is the **wrong question**. Let me explain with an example.

To avoid the pitfall of having to discuss this issue in the context of Meta Platform's pay or consent model as the specifics of Meta easily distort the discussion, let's assume that a music streaming service offers a pay or consent model to its users: one either pays a monthly fee allowing the streaming service to pay royalties to the artists and the costs of operations, or one consents to profiling (tracking) and personalized advertisements shown on the platform of the streaming service, which also allows the streaming service to pay the artists and the costs of operations. Whether or not one is financially able to pay such monthly fee, is not a matter of data protection law, as not being able to pay the fee and a refusal to consent to profiling/tracking is in and by itself not putting that user in a disadvantaged position. After all, a music streaming service is not an essential service. There is no right to free music.

On-platform profiling is generally non-problematic. It typically happens in both business cases to offers users recommendations for music relevant to their taste, such as alerts about new releases, and recommendations for concerts and merchandise of their favourite artists.

The problem lies with (certain types of) **off-platform profiling/tracking**, especially when such profiling/tracking is about behavior that has little or nothing to do with music. This is what privacy professionals call "reasonable expectation of privacy". Profiling/tracking of user behaviour re music-related products of services, such as visits to ticket sites for concerts or to the websites of retail stores that sell music products, would be very much within the context of the streaming service and thus less problematic under the reasonable expectation of privacy doctrine.

But profiling/tracking of user behaviour on non-music related sites would be out-of-context and thus more problematic. It is problematic, as such out-of-context off-platform profiling/tracking would be **disproportionate to the purpose of the profiling**.

It should be stressed that the reasonable expectation of privacy doctrine is not the correct mechanism to counter such profiling/ tracking as consent would make the such profiling

fall within the reasonable expectation of privacy of the user.

The correct conclusion would be that consent is not a carte blanche for data processing. Even data processing with consent should meet the basic principles of data protection, especially the requirements of legitimacy, fairness and transparency, the requirement of needing a legitimate purpose and the conditions of necessity and proportionality. Out-of-context off-platform profiling/tracking is very likely to be disproportionate to the purpose of tracking of non-paying users. And as one cannot give consent for prohibited, unfair or disproportionate data processing, such profiling/tracking should be ruled a violation of data protection rules by regulators and courts.

Hence my earlier remark that the focus on the conditions of consent is the wrong question. The main problem is the disproportionate profiling/tracking of out-of-context user behaviour, not whether the conditions of consent are met. The latter question is of secondary importance here.

This example shows that it is not the pay or consent model that is problematic. It is the disproportionate collection of (out-of-context) irrelevant data points that are used for profiling to show personalized ads on online platforms.

I would encourage the ICO to take these views into consideration in this matter. I would be happy to discuss this further in person, such as at the IAPP Summit in Washington in April, or at the GPA conference in Jersey later this year.

Met vriendelijke groet / Kind regards

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