

Response to ICO Call for views on “consent or pay” business models

<https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/call-for-views-on-consent-or-pay-business-models/>

I do not agree that 'consent or pay' is a lawful option under the UK GDPR and PECR. While it is not expressly prohibited (like many unlawful processing practices), it's clear that being forced to go through a payment mechanism is not as easy as clicking an accept all button (and would breach Article 7(3) UK GDPR). Any consent given by clicking accept all would also not be freely given in such a case, particularly considering the context where the ICO rightly states that merely having to navigate to a second layer to click reject is also non-compliant. Article 21(2) UK GDPR also provides an absolute right to object to direct marketing processing, including profiling through tracking for such purposes, for which no fee may be charged in principle (see Article 12(5) UK GDPR).

Power balance: Allowing 'consent or pay' will likely lead to many organisations implementing this due to the significant commercial benefits this offers them and the adtech industry. A data subject will therefore be forced to fork out significant sums of money for many services they access, just to be afforded their legal right not to have unnecessary cookies placed on their device. The power imbalance in such a situation is so significant that 'consent or pay' cannot be what parliament intended by enacting PECR and the UK GDPR. Furthermore, organisations are free to choose what payment methods to accept. Data subjects who do not have access to mainstream credit/debit cards or online banking, or would find using these more difficult, are likely to be discriminated against by any 'consent or pay' mechanism. This is particularly likely to be the case for elderly people, who are more likely to use cash or traditional banking services. Additionally, children under the age of 13 are not legally capable of giving consent under the UK GDPR, yet they are likely to click 'accept all' when the alternative is that they have to make a payment using a card they are unlikely to have.

Equivalence: In respect of tracking through cookies specifically, PECR is clear that they cannot be placed unless the user consents. The user therefore has the right to access a web service without having unnecessary cookies placed on their device. Being forced to pay for this legal right flies in the face of Parliament's intention in enacting PECR and subsequently strengthening it through multiple amendments. Of course, a web service can choose to make the content itself accessible only to users who pay a fee (but this cannot be related to placing unnecessary cookies).

Appropriate fee is entirely inapplicable. Data subjects have very strong rights under R.6 PECR (mandating freely given consent that can be rejected/withdrawn as easily as accepting), and Article 21(2) UK GDPR (allowing data subjects to object to any processing for direct marketing purposes). There is no proper basis for forcing data subjects to pay for being afforded these rights. I believe any payment of a fee would likely be recoverable as

material damages under Article 82 UK GDPR - the ICO would thereby expose organisations to civil litigation by expressing a view in favour of consent or pay.

Privacy by design: A payment system, by design, requires data subjects to give the organisation significant additional information (e.g. card details, payment information etc). Data subjects who do not wish to give websites their financial information, just for their legal rights to be upheld, would therefore face significant barriers in accessing web services. Recital 32 of the UK GDPR also states that consent given by electronic means must not be “unnecessarily disruptive to the use of the service for which it is provided.” It is clear that imposing a payment barrier, by design, would be seriously disruptive to using the service beyond what is necessary.

Beyond cookies, allowing 'consent or pay' would have disastrous consequences. For example, when booking a flight, airline operators may offer a 'tracking-free' increased fare, or a reduced 'tracking' fare where they share all personal details with advertising partners for marketing purposes using the consent lawful basis. As the lawful basis of consent does not have a legitimate interest assessment requirement, controllers can act with far fewer restrictions under 'consent or pay'. 'Consent or pay' would effectively force data subjects to agree to the reduced 'tracking' fare for services in all areas of life, unless they are prepared to fork out significant sums of money. 'Consent or pay' would likely become ubiquitous across many sectors and many different interactions with users if the ICO expresses a view that it is permitted, given the vast commercial benefits for data controllers.

General consumer law also makes consent or pay completely unviable. Under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, consumers have the right to cancel a contract for a service within 14 days. If the 'non-tracking' service has been used in that time, organisations will still have to refund the fee proportionate to what is unused.

Regulation 7 of The Consumer Protection from Unfair Trading Regulations 2008 prohibits aggressive commercial practices. Threatening to track users and share their data with a plethora of adtech controllers unless they pay a fee is, in my view, likely to amount to undue influence, given parliament's intention in enacting PECR and the UK GDPR.

Additionally, unnecessary cookies are not exclusively used for behavioural advertising tracking. They are also used to measure the impact of an organisation's advertising spending and for general analytics purposes for the organisation, services for which the organisation often pays external service suppliers. It would be farcical for organisations to expect data subjects to pay for this, yet allowing 'consent or pay' would open the door to such practices.

Users of web services have had the right to browse the web without unnecessary cookies for many years. Now the ICO is finally taking steps to enforce the law. The fact that some web services are only now advocating for 'consent or pay' demonstrates the complete disregard many have (had) for the longstanding legislation. The commercial gains that web services and the adtech industry have made by flouting the law over the years are immense. 'Consent or pay' must not be allowed to become something through which such organisations can keep circumventing the law by the back door.

Compliant solutions, in my view, include running contextual ads without tracking, or only allowing users to access to full page contents upon payment (i.e. the payment being for accessing the page contents, like a newspaper subscription, and not for doing so without tracking).

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The European Data Protection Board (EDPB) is currently also considering the 'consent or pay' principle, although many supervisory authorities have expressed a view that it is not possible under the current legislation. The consequences of allowing consent or pay in the UK are likely to be severe. If the harmonised position in the EU is to prohibit 'consent or pay', allowing this in the UK would, in my view, likely impact the UK's adequacy status for the reasons previously given.

None Of Your Business ("NOYB") also has extensive resources and information available on the dangers of allowing 'consent or pay' to which end please see <https://noyb.eu/en/28-ngos-urge-eu-dpas-reject-pay-or-okay-meta>