

ZAW | [REDACTED] | [REDACTED]

Attn: Stephen Almond, Regulatory Risk

Information Commissioner's Office (ICO)

by e-mail only

17 April 2024

ZAW view on "consent or pay" business models

Dear Mr. Almond,

the German Advertising Federation (ZAW) is the national association of advertising landscape in Germany. It represents 41 associations and organizations from the advertising industry, the media, advertising agencies and professions, and research. As the industry's "round table", it formulates joint policies and balances advertising industry interests. Our stakeholders are an integral part of the free market economy and an indispensable factor in a diverse and independent media landscape. Thereby, the Federation represents the advertising industry in all fundamental issues and does so against the backdrop of the freedom to advertise as protected in the EU Charter of Fundamental Rights, and particularly in relation to freedom of expression and the freedom to conduct business. The ZAW is registered at the EU Register under the identification number 12238962750-40.

After consulting with our stakeholders, we are reaching out to you regarding your recent call for views on "consent or pay" business models. In fact, recent developments highlight the importance of this matter: With the ruling of the CJEU in the *Bundeskartellamt* decision and subsequent actions by national Data Protection Authorities, affirming the legitimacy of "pay or consent",¹ coupled with the widespread adoption of this business model by European publishers and the recent call for an opinion from the EDPB on this matter, it is clear that this topic is of significant socio-economic importance. We therefore appreciate the opportunity to provide feedback on the ICO's proposal, as it offers a constructive framework for further dialogue on "pay or consent" business models.

¹ For an overview see *BVDW*, Pay or consent – Status quo on the European market, https://www.bvdw.org/wp-content/uploads/2023/10/PUR-Modelle-bvdw_20231004-en.pdf (last accessed on 17/04/2024).

ZAW view on the emerging thinking on “consent or pay”

Particularly in German-speaking regions, “pay or consent” models have been prevalent for several years. However, these business models are now spreading to other parts of Europe. In fact, “pay or consent” models are valued above all for granting the freedom of choice within the Internet: Publishers are inherently confronted with the challenge that high-quality content can only be created at considerable financial expense – the “free-of-charge mentality” on the Internet makes financing even more burdensome.² Through “pay or consent” models, consumers now have the free choice between re-financing this content through personalised advertising or paying an “appropriate fee”³ and choosing not to have their personal data processed. This safeguards media plurality, which is a social pillar of our democracies.

Nevertheless, there is still a great degree of legal uncertainty regarding the implementation of “pay or consent” models: Although the legal lawfulness of “pay or consent” is by now acknowledged, the specific requirements for a compliant implementation are still unsettled. The ZAW therefore highly appreciates the initiation of a public consultation by the ICO – a healthy and fertile environment for data protection regulation can only be created through discourse and a synthesis of the involved social, economic and legal interests.

Given the complexity of the situation, the ZAW aligns with the ICO’s approach of evaluating “pay or consent” models on a case-by-case basis. The ICO aptly emphasises the need to balance individual privacy rights with the freedom to conduct business as the starting point of the discussion. As stated in GDPR recital 4, “The right to the protection of personal data is not an absolute right”.

In this regard, providing assessment factors and indicators is beneficial for examining the permissibility of each individual “pay or consent” model. However, the ZAW believes these should not be construed as strict conditions for admissibility. Doing so would oversimplify the legal complexity of the situation and result in conflicts arising from overlapping criteria. “Pay or consent” models should – if applicable⁴ – be assessed under the condition of “freely given” consent; while initial factors and indicators can aid in this assessment, they should not be viewed as definitive criteria for lawful “pay or consent” models.

² Inter alia *Jan Schumann* et al., Targeted Online Advertising: Using Reciprocity Appeals to Increase Acceptance among Users of Free Web Services (2014) 78 *Journal of Marketing* 59; *Jianqing Chen* and *Jan Stallaert*, An Economic Analysis of Online Advertising Using Behavioral Targeting (2014) 38 *MIS Quarterly* 429.

³ CJEU, C-252/21, ECLI:EU:C:2023:537, para. 150 – *Bundeskartellamt*.

⁴ It should not be forgotten that there may also be other legal bases, e.g. the conclusion of a usage contract with the users, Art. 6(1) lit. b GDPR.

Criteria upon assessing “consent or pay” models

The criteria outlined by the ICO serve as worthy reference points for fostering a differentiated discussion. Nevertheless, it is imperative to acknowledge the economic reality: There should not be a (de facto) obligation to contract and provide content without any consideration in the digital world.⁵ Claims of “surveillance capitalism”⁶ or “maximising profits”⁷ made in the context of “pay or consent” models overlook a critical aspect: High-quality content requires independent funding – along with a “genuine and free choice” between the available funding options. In fact, non-funding is neither a “genuine and free choice” for the provider nor for the recipient. This must be reflected in the possibility of a “pay or consent” alternative for the user and its legal criteria.

Power Balance

According to recital 43 GDPR, a “clear imbalance between the data subject and the controller” precludes that consent is freely given. The GDPR thereby provides the example of a public authority as the acting controller. However, a significantly more relevant scenario for “pay or consent” models arise when a private service provider with market power obtains consent from the user – can in this case consent for personalised advertising still be freely given?

Firstly, the data protection framework in a citizen-authority relationship represents a fundamentally different scenario compared to the relationships within the private sector: The governmental subordination is characterised by strong economic or social dependencies, where individuals may fear missing out essential services if they refuse to give consent. By contrast, individuals in the private sector usually have access to a wide range of equivalent offers. Consequently, there is no comparable dependency found in the private sector as it can be seen in citizen-authority relationships – even in the case of market-dominant service providers.

Secondly, even if there are no equivalent alternatives to the service provider’s offer on the market, it cannot obligatorily be assumed that consent cannot be given voluntarily⁸. One way to ensure the “freely given” nature of consent would be for the market-dominant service provider to offer an equivalent alternative itself – in the form of “pay or consent”. Under these

⁵ See Jürgen Kühling and Cornelius Sauerborn, „Cookie-Banner“, „Cookie-Walls“ und das „PUR“-Modell (2022) ZfDR 339, 358.

⁶ NOYB et al., ‘Pay or okay’ – the end of a ‘genuine and free choice’, https://noyb.eu/sites/default/files/2024-02/Pay-or-okay_edpb-letter_v2.pdf (last accessed on 17/04/2024).

⁷ Datatilsynet, Request for an EDPB opinion on “consent or pay”, <https://www.datatilsynet.no/en/news/aktuelle-nyheter-2024/request-for-an-edpb-opinion-on-consent-or-pay/> (last accessed on 17/04/2024).

⁸ Regarding the following see Jürgen Kühling and Cornelius Sauerborn, „Cookie-Banner“, „Cookie-Walls“ und das „PUR“-Modell (2022) ZfDR 339, 358 et seqq.

circumstances it is evident that offering a “pay or consent” model for providers is not only lawful, but may even be economically and legally required. Otherwise, the market-dominant provider would be forced to offer its services both free of data processing and free of remuneration, which would in fact be equivalent to an obligation to contract and perform without any consideration.

Consequently, the criterion of “Power balance” between the data protection actors is not a fundamental criterion of permissibility, but rather a condition for implementation. It becomes evident that in certain cases, offering a “pay or consent” model may not only be permissible but necessary to ensure the “freely given” nature of consent.

Equivalence / Appropriate Fee

The ZAW takes a critical view of the separation of the criteria “equivalence” and “appropriateness of the fee” – while these points are rightly listed within the matter of “pay or consent” models, they are, however, closely and inseparably related. The starting point for this is once again the premise of a balance between individuals’ rights to privacy and the freedom to conduct businesses. Offering an equivalent alternative to the processing of data is permissible and, under certain circumstances, necessary. However, the specific design of this alternative model is part of the freedom to conduct business – which includes the free choice of the business model and the price inherently associated with it.

It is rightly never referred to as the one “pay or consent” model, but rather of “pay or consent” models in general. This terminology is rooted in the diversity of implementations of “pay or consent” in practice.⁹ What all variants have in common is that they offer the user tracking-free and in some cases advertising-free use of content in return for payment – as an alternative to consent-based data processing. In some cases, users are also offered additional options for using the website, such as an extended offering with additional content. These variations are on the one hand driven by the independent business decisions of the entrepreneur and on the other by the different commercial practices in the various sectors. Therefore, the call for “equivalence” between ad-funded service and paid-for service would not only restrict the freedom to conduct businesses but also run contrary to customary business models.

Furthermore, each “pay or consent” model also determines the price. The “appropriateness” of the price is thus not solely measured by the expected revenues upon the user’s consent to data processing, but rather by the entirety of the services in the selected “pay or consent” model. Therefore, a variety of considerations play a role in determining the actual value of the offered option. In order to preserve the freedom to conduct business in this regard, providers of the “pay or consent” model should be granted a wide margin of discretion – as in the analog,

⁹ See an overview of the different models in use *BVDW*, Pay or consent – Status quo on the European market, https://www.bvdw.org/wp-content/uploads/2023/10/PUR-Modelle-bvdw_20231004-en.pdf (last accessed on 17/04/2024).

non-digital world. However, it is also clear that an unreasonable price selection for the respective "pay or consent" model can restrict the voluntariness of the consent to data processing in individual cases. Therefore, data protection authorities shall be able to assess whether a fee is appropriate in the sense that it is not against public policy or usurious. In doing so, general legal principles should be referred to in order to ensure legal clarity.

Privacy by Design

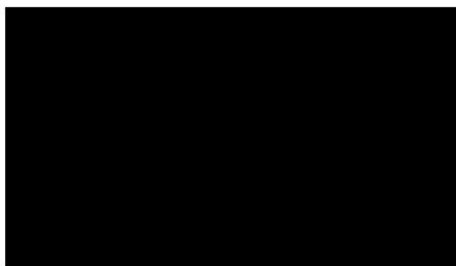
The "privacy by design" criterion considered by the ICO is viewed as very useful and target-orientated. This is also in line with the transparency principle set out in Art. 5(1) lit. a, which "requires that any information and communication relating to the processing of those personal data be easily accessible and easy to understand, and that clear and plain language be used" (recital 39). Every individual "pay or consent" model should also be measured against this standard.

Final Comment

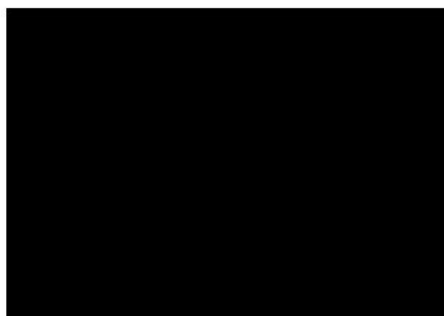
The ICO's initiation of a public consultation resonates with the current state of affairs in the digital advertising industry. The private sector faces significant legal uncertainty in this regard. This stems – among others – from the complexity of the issue: The “pay or okay” models cover a variety of the social, economic and legal components of data protection law. The foregoing considerations reveal this – although without going into detail. An uncalibrated decision could thus have far-reaching implications for both the data subject and the controller or processor.

The ZAW therefore welcomes the ICO's approach to individually assess each “pay or consent” model. In doing so, a balance must be struck between individual privacy rights and the freedom to conduct business. The proposed criteria for evaluating “pay or consent” models serve as important points of reference in this regard. However, it is also important to note some constructive criticisms: Particularly, the criteria of “equivalence” of the paid-for service to the ad-funded service and the “appropriateness of the fee” could jeopardize a proper assessment of every individual “pay or consent” models. This must be taken into account by the ICO.

Yours sincerely,



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