

Further 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/>

This response is further to my response to the ICO of 6 March 2024.

Examining PECR and examples of the consequences of allowing organisations to charge for refusing consent

Regulation 2 of PECR states: “consent” by a user or subscriber corresponds to the data subject’s consent in the UK GDPR (as defined in section 3(10) of the Data Protection Act 2018).

Regulation 6 of PECR requires that a user has given their “consent” before unnecessary (tracking) cookies can be placed. However, ‘consent or pay’ would provide an option for organisations to force data subjects to pay before they can refuse to consent. This would clearly be unlawful under the UK GDPR and PECR for the reasons stated in my previous response.

However, there would be further serious consequences if ‘consent or pay’ were to be valid, because R.6 PECR uses the UK GDPR definition of consent that many other provisions also use. As such, if (hypothetically) organisations could charge users to refuse consent to tracking cookies, they can logically also do so for other processing purposes.

Regulation 19 PECR prohibits automated marketing calls without a subscriber’s consent. If ‘consent or pay’ were to be allowed, an organisation could, for example:

- During a signup process, state that they want to use a data subject’s phone number for making automated marketing calls, offering the user an accept and reject option;
- Allow the data subject to select the ‘accept’ option free of charge;
- Charge the data subject a sum of e.g. £3 per month to refuse consent.

Data subjects that consent to automated marketing calls are likely to make the organisation more money than those who reject. Similarly, users who accept tracking cookies may make an organisation more money than those who reject. Therefore, under ‘consent or pay’, the organisation would be justified in charging users to refuse consent, like they would be in the context of tracking cookies.

Regulation 21B PECR prohibits marketing calls of pension schemes without a subscriber’s consent. If ‘consent or pay’ were to be allowed, an organisation could, for example:

- When a user signs up for a personal pension scheme website, allow the user to accept or refuse marketing calls for the pension scheme;
- Allow the data subject to select the ‘accept’ option free of charge;
- Charge the data subject a sum of e.g. £5 per month to refuse consent.

Data subjects that consent to marketing calls for personal pension schemes may make the pension organisation more money than those who reject. Similarly, users who accept tracking cookies may make an organisation more money than those who reject. Therefore, under 'consent or pay', the organisation would be justified in charging users to refuse consent for pension marketing calls, like they would be in the context of tracking cookies.

Regulation 22 PECR prohibits the sending of marketing emails to individual subscribers without consent. If 'consent or pay' were to be allowed, an organisation could, for example:

- When a user signs up for a forum, allow the user to accept or refuse marketing emails from the forum's advertising partners;
- Allow the data subject to select the 'accept' option free of charge;
- Charge the data subject a sum of e.g. £10 per month to refuse consent.

Data subjects that consent to marketing emails from the forum's advertising partners are likely to make the forum more money than those who reject. Similarly, users who accept tracking cookies may make an organisation more money than those who reject. Therefore, under 'consent or pay', the organisation would be justified in charging users to refuse consent for marketing emails from the forum's advertising partners, like they would be in the context of tracking cookies.

Regulation 22 PECR, the soft opt-in and the "free of charge" requirement

Regulation 22(3) of PECR provides a favourable alternative to obtaining consent for organisations (the "soft opt-in").

Regulation 22(3)(c) states as one of the requirements of the soft opt-in: "the recipient has been given a simple means of refusing (**free of charge except for the costs of the transmission of the refusal**) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication."

It is therefore clear that a refusal by a data subject must be free of charge, even as part of the soft opt-in which is favourable to organisations. However, if 'consent or pay' were to be allowed, the soft opt-in would in fact not be favourable to organisations at all, as, under consent, they would be able to charge data subjects a fee to refuse. This clearly would render the soft opt-in effectively useless and cannot have been Parliament's intention.

Furthermore, under both the purposive and teleological legal interpretation approaches, it is clear that the 'free of charge' requirement for refusing under the soft opt-in also applies to consent generally.

Consent or pay's logic is legally flawed but made somewhat plausible by the current status quo of non-compliance in the context of consent for tracking cookies

The law requires an organisation to obtain (freely given) consent for certain processing, but the logic of 'consent or pay' is that a user should have to pay to refuse if an organisation can earn more money if a user accepts. With the adtech industry and many organisations being accustomed to their extra, unlawfully obtained income by failing to obtain consent before

using tracking, they would clearly love to maintain this status quo by charging users to refuse. However, this is a hugely distorted reality from what the law says. Legally, the status quo should be that no tracking takes place at all, unless and until a user freely accepts. This was clearly parliament's intention in enacting PECR and the UK GDPR. If parliament had wanted to make changes, it could have done so in the DPD bill (but notably has not done so, excluding behavioural advertising from the loosened requirements under R.6).

The same applies to all the above examples: no direct marketing emails/automated calls etc should be sent unless the user freely consents. The logical legal consequence of 'consent or pay' is that organisations can charge users to refuse their marketing communications. This demonstrates the complete absurdity of 'consent or pay', but would be a very real consequence of the ICO entertaining 'consent or pay' in its regulatory stance. It would be a huge mistake and would cost the ICO dearly in its effective enforcement of PECR in areas beyond cookies. The ICO should stand firm and tell the adtech industry (who appear to be pushing for consent or pay to be allowed) the obvious: consent or pay is forbidden. The ICO's purpose is to enforce the existing legislation.