

techUK response to ICO call for views:

"Consent or Pay" business models

April 2024

About techUK

techUK is a membership organisation launched in 2013 to champion the technology sector and prepare and empower the UK for what comes next, delivering a better future for people, society, the economy and the planet.

It is the UK's leading technology membership organisation, with around 1,000 members spread across the UK. We are a network that enables our members to learn from each other and grow in a way which contributes to the country both socially and economically.

By working collaboratively with government and others, we provide expert guidance and insight for our members and stakeholders about how to prepare for the future, anticipate change and realise the positive potential of technology in a fast-moving world.

Section 1: Your views on our approach

1. Do you agree with our emerging thinking on “consent or pay”?

techUK welcomes the ICO’s call for views on “consent or pay” business models – an important and rapidly evolving policy area. We recognise, as the ICO acknowledges in its consultation, that data protection law “*balances fundamental rights like the right to privacy with other rights, like the freedom to conduct a business.*” Therefore, we believe that the ICO approach could be strengthened by explicitly setting out how it has balanced data protection rights against other rights, including the right to conduct business, and taken into account its statutory duties under the existing Act, the DPDI Bill and s108 Deregulation Act 2015.

It is crucial to ensure that the fundamental rights of data subjects are respected. However, it is also important to consider the wider commercial and economic consequences. Therefore, the ICO should take a balanced approach, and we ask the ICO to expand the guidance to acknowledge this. We also ask that the ICO set out how its proposed approach and future guidance will be adapted to the new duties set out in the DPDI Bill, supporting innovation and sustainability in the digital marketplace. We are of the view that this balance can be achieved with a principles-based approach that provides practical safeguards for compliance and innovation.

While the fundamental rights of data subjects are paramount, it's equally important to consider how these rights interact with other individual and group rights and freedoms including the freedom to conduct business. Therefore, the ICO should ensure a balanced approach. We request clarification on how this balance will be achieved in this consultation and future guidance. Additionally, we urge the ICO to explain how its approach and future guidance will adapt to the new duties outlined in the DPDI Bill, fostering innovation and a sustainable digital marketplace. We believe a principles-based approach with practical safeguards can achieve this balance and support both compliance and innovation.

The landscape of online advertising and funding models is inherently complex, shaped by a multitude of factors that intersect and influence one another. This complexity stems from the diverse array of online services operating on various business models, from subscription-based platforms to ad-supported services and many other types of services. Each provider brings its own considerations, underscoring the need for a nuanced and case-by-case approach that acknowledges and accommodates this diversity and avoids over-generalisation. It is also important that the ICO’s approach and future guidance is firmly grounded in the UK context and is not inappropriately influenced by developments in other markets with a very different context. For example, the EDPB has recently published an opinion on ‘consent or pay’ with respect to ‘large online platforms’ and the European Commission has opened an investigation on this issue under the DMA. These developments are very specific to the EU context and should not influence the development of an approach for the UK market.

Amidst this, understanding and respecting consumer behaviour and preferences is paramount. Users exhibit diverse attitudes towards personalised advertising, with many valuing its relevance and convenience and the services that the ad revenue supports. In contrast, offering a paid tier provides features like an ad-free environment, access to premium functionalities, or service quality. This varied ecology preserves the option for

users who are comfortable with advertisements to continue utilising the free, ad-supported tier. This increased choice empowers users by granting them greater autonomy over their data and the overall user experience and service level they receive.

Indeed, personalised advertising or paying for services could also be viewed as helping to maintain the free and open nature of the internet by offering alternatives to paid for models. Users are still able to exercise choice and access valuable online services. In many cases, this includes offering users a new choice of an ad free service (for a fee), which may not have been offered to them before. In this instance, the user can continue to get the same service in the same way as they did previously (supported by personalised advertising) or can now choose an ad free service. In turn, this could be considered to preserve the accessibility of the internet without compromising privacy rights.

techUK agrees with the ICO's goal that *"any organisation considering such a model must be careful to ensure that consent to processing of personal information for personalised advertising has been freely given and is fully informed, as well as capable of being withdrawn without detriment."* Obtaining consent, where required, for cookie use is necessary and organisations will need to ensure it is achieved in a transparent way and through clear and transparent communication including a detailed explanation of any "consent or pay" options and choices which are user-friendly and accessible.

This is achieved through a number of safeguards in the existing legal framework, which ensure that data subjects' rights are protected, including the GDPR's data protection principles, the requirement for processing to be within the scope of consent, as well as a set of other legislation that governs how organisations handle data, including cookie consent, or consumer protection laws.

2. How helpful are the indicative factors in comprehensively assessing whether "consent or pay" models comply with relevant law?

The ICO's indicative factors are a valuable starting point but are overly generalised and need further detail and nuance. The ICO must acknowledge pre-existing challenges in the market arising from falling ad yields and significant upcoming changes in internet architecture, and the potential impact of new decisions on how data protection law should apply.

Equivalence

Any assessment of equivalence requires careful assessment and be balanced against the rights of a provider to conduct business and to freely select service features and its revenue model. Equivalence should not be construed as requiring providers to offer a service for free or at a commercial loss. The ICO should consider consumers' rights to information and the consumer benefits of sustaining service choice in the UK market.

Power imbalance

The GDPR emphasizes the importance of assessing the imbalance of power in the context of the specific processing activity for which consent is sought. This must be assessed on a case-by-case basis.

The inclusion of “market power” as a relevant factor may inadvertently place the ICO in the position of having to evaluate compliance with competition laws and regulations, which is beyond its jurisdiction. The relevance of this factor to an individual case should be considered on its merits. Any such assessment would require a detailed economic and market analysis which is outside the ICO’s expertise and best conducted by the CMA to avoid the ICO developing competing rules in this area.

Therefore, we believe that the focus should remain on the quality of consent, including ensuring the options presented are clear and easy to understand, and users can readily withdraw consent. Additionally, initiatives aimed at user education could be prioritised to empower individuals to make informed choices about data consent.

Appropriate fee

Finally, while we agree with the ICO statement that the service should consider whether the fee is appropriate, we do not believe this is relevant to the ICO’s assessment of compliance with UK data protection law or in all cases. It may, for example, be relevant where there is an imbalance of power. We welcome that the ICO acknowledges that the specific pricing will depend on a number of factors and business considerations, which the service providers should be able to determine freely. An assessment to determine that a fee is appropriate goes beyond the ICO’s remit as a data protection regulator and engages both consumer and competition law as well as market analysis. The CMA would be more appropriately positioned to make such a determination.

3. Are there any other factors that should be considered? Or anything else that you feel the ICO should consider in relation to the factors?

Question 3 skipped.

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

When considering the potential impacts on the existing users, it is good business practice for providers to strive to minimise the downsides for existing users. Many online services are transitioning to new business models in response to changing market conditions and regulation and providers should be guided to communicate clearly. This could include clear and transparent communication about any planned changes to the service’s funding model, including a detailed explanation of the "consent or pay" options and an option to opt out that is user-friendly and accessible.

Within this context, we would like to note that it is equally important to consider the benefits that the introduction of “pay or consent” model could bring. As set out in the earlier section, it could be seen as presenting existing users with an opportunity to enhance their experience. It is striking that the ICO has not considered that existing users are likely to be far more informed than new users from their existing understanding of the service and its features and have a mature view of its value to them. This should be a consideration in developing future guidance, but we do not feel that existing users need any special consideration unless there is an imbalance of power, or the service is a public service.

For example, by offering a paid tier with features like an ad-free environment, access to premium functionalities, or enhanced service quality, the model caters to users who prioritise a seamless experience. Simultaneously, it preserves the option for users who are comfortable with advertisements to continue utilising the free, ad-supported tier. This increased choice empowers users by granting them greater autonomy over their data and the overall user experience they receive.

Section 2: Current practice

5. Are you acting on behalf of an organisation?

Yes.

6. Does your organisation provide any online or internet-enabled products or services?

81% to 100%.

7. Is your organisation engaged in the provision of online advertising, for example as a publisher, advertiser, intermediary or in some other capacity?

N/A

8. Do you currently operate a “consent or pay” model in the United Kingdom? See our definition of “consent or pay” in our emerging thinking.

No.

9. Do you think the indicative factors are sufficient to comprehensively assess whether your “consent or pay” model complies with relevant law?

N/A

10. What are your motivations in using a “consent or pay” model?

N/A

11. Are there elements of our thinking on “consent or pay” that might impact on your organisation, positively or negatively? Please explain.

N/A

Section 3: About your organisation

12. What is the name of your organisation? - required

techUK

13. If you would like your response to remain anonymous when reporting please tick this box.

Do not wish for our response to be anonymous.

14. Which of these best describes your organisation’s activities?

☒ Other (industry or trade association).

15. How many staff does your organisation have globally?

10 to 249 members of staff.

16. Approximately what percentage of your staff are based in the UK?

81% to 100%.

17. If you have UK based staff, where are they? Choose all that apply.

England, Scotland.

Section 4: Final comments

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

We value the ICO's acknowledgment of the importance of regulatory certainty for businesses. However, this also needs to be coherent across intersecting areas of law and regulation. This is an evolving area of work, and any new ICO guidance could have significant and wide-ranging consequences, potentially creating substantial burdens or distorting freedoms for businesses, particularly smaller entities.

Therefore, we would like to emphasise the need for the stakeholders to be given ample time for consultation on any forthcoming guidance. This will allow the ICO to develop a robust and appropriately balanced approach that provides a long-term and durable solution. It will also allow businesses to effectively plan for, and ultimately achieve, compliance.

19. We may wish to contact you for further information on your responses. If you are happy to be contacted please provide an email address below.

Yes, we are happy to be contacted. Please [REDACTED]
[REDACTED] at [REDACTED]