

Information Commissioner's Office

Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

For the attention of:



By email only

14 March 2024

Dear Sirs,

Re: ICO Guidance on “Consent or Pay” Mechanisms

This letter is on behalf of the Movement for an Open Web (“MOW”), a not-for-profit organisation that is seeking to secure an open and decentralised web.

The Information Commissioner’s Office (ICO) has issued guidelines for consultation regarding the use of “consent or pay” or “pay or okay” mechanisms on websites to obtain valid consent for processing Personal Data for targeted advertising¹. This approach allows website visitors to choose between accessing online services for free in exchange for consenting to their personal data being used for personalised advertising, or opting to pay for the service if they refuse this consent.

The ICO has also provided that, while data protection laws do not prohibit the use of “consent or pay,” organisations employing this mechanism must ensure that consent for processing Personal Data for advertising purposes is given freely, is well-informed, and can be withdrawn without any negative consequences.

The ICO model therefore offers a mechanism whereby wealthier users can pay to access sites with reduced ads, while less affluent users can provide their Personal Data for advertising use to avoid payment to the same effect.

Crucially, MOW submits that the ICO’s model lacks an important option: where all users can gain ad-funded access using deidentified match keys.

In the ‘SRB’ case², it was established that the data in one organisation’s hands may be anonymous, while that same information in another organisation’s hands can be Personal Data. The central element dividing the two is whether the appropriate organisational measures exist to keep the data in question

¹ <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2024/03/ico-launches-consent-or-pay-call-for-views-and-updates-on-cookie-compliance-work/#:~:text=One%20proposed%20model%20is%20a,regulatory%20approach%20to%20this%20model>

² See Case T-557/20, SRB v EDPS at [EUR-Lex - 62020TJ0557 - EN - EUR-Lex \(europa.eu\)](#)

separate from the identity of specific individuals, so that they are capable of being re-identified or not. The ICO has affirmed this standard, which it refers to as the “in-whose-hands” analysis.

As such, MOW submits that a third option (in addition to the ICO’s “consent or pay framework”) that allows all users to benefit from ad-funded access through the use of low-risk, deidentified match keys is far better for society as it ensures that content is freely accessible to all. In return, small and independent companies that rely on the exchange of deidentified match keys benefit from increased access to information in a decentralised ecosystem.

Furthermore, MOW is concerned that the language used by the ICO inadvertently may adopt the positions of very large publishers’ and platforms. Larger publishers are focusing on their large end user bases and “first party” data. They claim, incorrectly, that first party data is not personal data, or if it is, that they can obtain meaningful consent to its use from end users. As noted by the Bundeskartellamt³ the imposition of “one size fits all” or “take it or leave it” terms by major businesses are likely to deprive users of a meaningful choice. Put another way, for meaningful choice to operate effectively and address concerns about anticompetitive behaviour and invasion of privacy, the terms need to be offered in circumstances where users are offered a meaningful choice. This might, for example, mean offering end users a choice of terms which where greater or lesser personal data is used.

In its issued guidelines, the ICO provides that users may “pay a fee and not be tracked”. On its own that may not be sufficient since a choice of different terms for different offerings can be envisaged. Also, with regard to how information is exchanged between systems, “tracking” is the pejorative name for the use of match keys in cookies that support the matching of the supply of an ad with a user that is interested in that product. The use of laden language such as tracking is noted by the CMA to be part of the armoury deployed by major businesses when seeking to condition end users to adopt a particular choice path (and use their products rather than products offered by smaller competitors). It is in the words of the CMA part of a dark pattern that is intended to manipulate end user choices.⁴

A more neutral use of language would be to refer to “interoperability” with competitors’ products which is enabled via the use of match keys.

Apple’s privacy policy clearly states that its collection and processing of user interactions with its content are linked to a “random identifier”⁵. It appears that Apple has implemented the appropriate organisational measures to ensure this random identifier is not personal data but is information that is **not** linked to the identity of authenticated User Accounts. This would correctly align with the SRB case and the ICO’s “in whose hands” guidance and reinforces the notion that when data is not linked to individuals, it is not tracking.

Conclusion

MOW is concerned that unless the ICO includes an option for ad-funded access to content with deidentified match keys, (“aka random identifiers”) its “consent or pay” model will fail to promote a

³ Both in relation to its cases against Facebook (now Meta) as determined by the European court, See Meta vs Bundeskartellamt Case C-252/21

(<https://curia.europa.eu/juris/document/document.jsf?text=&docid=275125&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1652408>) and See BKA settlement with Google October 2023

(https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/05_10_2023_Google_Data.html)

⁴ See Para 3.3 of the CMA’s Online Choice Architecture Discussion Paper that references “dark patterns”

(https://assets.publishing.service.gov.uk/media/624c27c68fa8f527710aaf58/Online_choice_architecture_discussion_paper.pdf); also see the joint CMA and ICO paper on Harmful Designs in Digital Markets (https://www.drcf.org.uk/_data/assets/pdf_file/0024/266226/Harmful-Design-in-Digital-Markets-ICO-CMA-joint-position-paper.pdf)

⁵ <https://support.apple.com/en-gb/102399>

decentralised ecosystem in which all users can freely access content, and smaller, independent businesses can access vital information.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Preiskel & Co', written in a cursive style.

Preiskel & Co LLP