

ICO call for views – ‘consent or pay’ models Response from IAB UK

About IAB UK

The Internet Advertising Bureau (IAB UK) is the industry body for digital advertising. Our purpose is to build a better future for digital advertising, for the benefit of everyone. We do this by bringing together members from all parts of the commercial, paid-for digital advertising supply chain including publishers, ad tech providers and agencies to share knowledge and insights that can support policymaking.

Questions:

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

- Strongly agree
- Agree
- **Neither agree nor disagree**
- Disagree
- Strongly disagree
- Don't know / Unsure

Please explain your response

General comments and context for our response to the ICO’s emerging thinking

- Our comments are based on the views of our members who provide commercial services that are not public (or publicly funded) services. These companies are entitled to the freedom to lawfully conduct business and to choose the terms on which they offer their services to their customers. That includes adapting their business models in response to rising costs and falling revenue or other commercial pressures or changes to market structure and competition. The ICO’s guidance should more clearly reflect this in accordance with its ICO25 strategic plan, and in particular the objective of empowering responsible innovation and sustainable economic growth.
- We support an approach that:
 - Reflects the value exchange that consumers benefit from by having free ad-supported access to commercial online content/services.¹ The actual cost saving for UK households of not having to pay for ad-funded digital services stands at £580 a year and in the cost-of-living crisis, 70% of UK adults say that it’s important to them that online services are free
 - Reflects the cost of producing and providing the content/services

¹ ‘The Digital Dividend’, IAB UK: <https://www.iabuk.com/news-article/ad-supported-digital-services-are-worth-ps14600-year-uk-households>

- Supports the offer of a fair choice to consumers, which appropriately balances privacy/data considerations with other rights. The complexities of ‘consent or pay’ require balancing consumer choice, revenue protection, and compliance.
- While the ICO’s position acknowledges that data protection law balances ‘the right to privacy with other rights, like the freedom to conduct a business’ it is not clear how this balance has been considered in developing the proposed principles and how it will be reflected in any future guidance.
- Individuals’ privacy/data protection rights apply whether or not they pay to access a service. A choice to consent or pay is not a trade-off of those rights and great care needs to be taken in the presentation and language of the ICO in future commentary and guidance to avoid mischaracterising the law and/or the rights of the parties involved.
- If the DPD Bill as currently drafted becomes law, the ICO will be required to have regard to the desirability of promoting innovation and competition and to consult other regulators/bodies as appropriate about how its work may affect economic growth, innovation and competition. The ICO’s position and guidance on consent or pay options must take particular account of all these factors in relation to the digital advertising market.
- At the same time, the ICO’s guidance should address data protection and privacy matters and not stray into or intervene in matters beyond the ICO’s remit, such as commercial decisions, pricing or competition. The ICO should ensure that other regulators – in particular, the CMA – are providing relevant guidance, as necessary, according to their remit (see our comments on the CMA’s role and involvement under questions 2 and 3).

Our views on the ICO’s emerging thinking

- Based on the information published by the ICO about its emerging thinking **we agree** that:
 - In principle, data protection law does not prohibit business models that involve ‘consent or pay’ and consent can be valid when it is obtained within a framework of choices that include ad-supported or paid-for options.
 - It is appropriate to consider the risk of invalid consent on a case-by-case basis to the extent that different types of service provision/markets/sectors will have different conditions that may affect the validity of consent.
- However, **we do not agree** with the framing of the ICO’s guidance. It implies that where paid-for options are offered alongside ad-supported options dependent on consent, there will always be a risk to obtaining valid consent, and that all the factors identified by the ICO are universally relevant and equally applicable. We expand on this under points on scope and individual factors below.
- Nor do we agree with all the ICO’s positions on the factors it has identified.

- Therefore, we are not in full ‘agreement’ as explained in our further comments on the specifics.

Scope of the ICO’s guidance:

- The factors the ICO has set out do not apply equally, or independently of one another. As the ICO notes, power balance affects consumers' choice about whether to use a service or not. This is also addressed in [existing ICO guidance](#) on consent.
- Whether or not there is a power imbalance in any particular case should be the primary criterion that determines whether the existence of ‘pay or consent’ options (in whatever form or variation) may affect the validity of consent (see more detailed comments under question 2). As the ICO also notes, the primary concerns are whether the service is a public service, or where the provider has a position of market power – the latter being for competition authorities to determine. However, the existence of paid-for access options does not itself pose a risk of non-compliance or harm to data subjects.
- If there is a power imbalance, then ‘equivalence’ and ‘appropriate fee’ are potentially relevant considerations in relation to the validity of consent. Where there is not, matters such as business models and pricing have no bearing on data protection and privacy compliance and are therefore not for the ICO to determine. Providers have the right to choose what services they offer their customers, including the level of access, content, service or functionality and the corresponding price. But the existence of paid-for options alongside consent-based options does not create a risk so long as consent adheres to the requirements of the UK GDPR and PECR, including that it is freely given, that there is no detriment from not consenting, and that the services themselves accord with relevant data protection requirements including transparency about the use of cookies/data processing and the ‘privacy by design’ principle.
- The scope of the ICO’s principles and future guidance therefore needs to be drawn more clearly to clarify when individual, secondary factors are relevant, following a prior assessment of power balance.
- Related to that, the guidance needs to distinguish between choice in the context of data and privacy and choice about whether or not to use a service. Where there is no ‘power imbalance’, consumers have a choice whether to use a service or not. They also have a right to choose whether cookies/personal data are used to determine the ads that are shown to them, or for other ad-related purposes. They do not, however, have an entitlement to use commercially provided services or to use them for free. Nor do they have a right to object to or opt out of advertising in general, or particular advertising models. The ICO’s guidance should take care not to suggest that all commercial providers of ad-supported services must offer the same service on a paid-for basis, or that they must offer a ‘free’ service.

- **We disagree** that the ‘consent’ element of a ‘consent or ‘pay’ model should or can encompass only the use of cookies/personal data for the personalisation of ads, as implied by the ICO’s current drafting and [public statements](#). There are a variety of mechanisms by which online services are made available to consumers including on a paid-for basis (e.g. subscriptions, registrations, pay-per-article/view, etc). The guidance needs to be wide enough for providers with different business models to harness payment solutions (provided that they are executed lawfully). The guidance would benefit from being principles-led, aligned to data protection rights and other rights to avoid preferencing or precluding any particular access/business models, which would stifle commercial freedoms, competition and innovation.
 - The current position is over-simplified to the extent that it risks being misleading, and it assumes a binary choice which doesn’t take into account the practical and commercial considerations involved in decisions about viable business models for online content and services, or how cookies and data are used in practice.
 - The scenario many providers are faced with is increased volumes of users choosing to ‘reject all’ i.e. not permitting any use of cookies for which consent is needed to deliver an ad-supported service and sustain their business model. Analysis conducted by the CMA for its ‘Online platforms and digital advertising’ market study found that UK publishers earned around 70% less revenue when they were unable to sell personalised advertising.² This requires providers to then have access to other ways to fund their business.
 - Offering consumers the choice to pay instead of consenting cannot be limited to only the function of ad personalisation. Consent may also be required for the other functional purposes that are intrinsically linked to the delivery of ads (personalised or not), without which they are not financially viable. They include measurement and reporting on ad delivery and performance, brand safety, etc. This is the case regardless of the means used to select/target an ad (it would be relevant even if identical ads were shown to all users). It is important the ICO’s guidance on ‘consent or pay’ recognises this and remains open to alternative approaches to cookie compliance which allow more granular choices.
 - This latter issue could be simplified and even resolved in large part by the ICO revising its guidance to recognise ‘the interplay between consent for targeted advertising and functionality that can be considered “intrinsically linked” on a technical level to that purpose’ (as per the ICO’s [letter](#) of 5 March to IAB UK and the AOP).

² CMA ‘Online platforms and digital advertising Market study final report’, 1 July 2020, para. 44
https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf

- Similarly, non-personalised ad models, including those that use contextual targeting, may depend on obtaining consent for the use of cookies/personal data. The ICO acknowledges this in its [letter](#). Services using these models may choose to offer a payment option for customers who do not wish to provide that consent.
- Not all 'ad personalisation' methods depend on the use of personal data and alternative models are developing all the time. However, most models require the use of cookies or equivalent technologies. The guidance therefore needs to take this into account and to be technology-neutral and future-proof.
- In a European context, the broad re-interpretation of relevant ePrivacy rules taken by the EDPB on the technical scope of Art. 5(3) of the ePrivacy Directive suggests that even innocuous, limited and non-intrusive processing should de facto be subject to consent, such as the delivery of contextual advertising. This has the potential to diminish the financial viability of ad-supported models, whether personalised or not, and disincentivise the development or adoption of privacy-led technologies. The CMA's market study³ contains evidence and analysis of the impact on ad revenue of an inability to use third-party cookies and a comparison of the value of contextually targeted and personalised ads. The ICO has the opportunity here to take a different track that benefits economic growth, innovation and consumer choice. We welcome the indication in the ICO's recent letter that it expects the update to its cookie guidance to address 'the interplay between consent for targeted advertising and functionality that can be considered "intrinsically linked" on a technical level to that purpose'.
- For these reasons, the ICO's characterisation of a 'consent or pay' model as offering consumers a choice to 'pay not to be tracked' is not helpful or accurate and should be avoided. Consumers need to understand and the ICO explicitly acknowledge:
 - that consumers are paying for the content or service, not for data protection and privacy rights; these apply irrespective of the access model they choose
 - that there is no entitlement to access commercial content and services for free, ad-supported or not
 - the reasons and purposes for which consent is sought, and their relative impact on privacy: these are not limited to ad personalisation and could be for non-personalised ad models, for functional purposes that are intrinsically linked to ad delivery, or for service and content functionality. As noted above, this complexity could be significantly reduced by

³ CMA 'Online platforms and digital advertising Market study final report', Appendix F: the role of data in digital advertising, 1 July 2020 (particularly the section starting at para 112).
https://assets.publishing.service.gov.uk/media/5fe495438fa8f56af97b1e6c/Appendix_F_-_role_of_data_in_digital_advertising_v.4_WEB.pdf

allowing non-intrusive, low-risk uses of cookies without requiring consent so that consumers' choices and decisions are focused on uses that have a greater privacy impact.

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

	Very helpful	Helpful	Neither helpful nor unhelpful	Unhelpful	Very unhelpful	Don't know / Unsure
Power balance			x			
Equivalence			x			
Appropriate fee				x		
Privacy by design		x				

Please explain your ratings.

Power balance

- Please see our comments under 'scope' in response to question 1 for relevant context. We have marked this as 'neither helpful nor unhelpful' because we do not agree that all the factors identified by the ICO are universally relevant and equally applicable for the following reasons.
- As set out under question 1, this factor is most relevant for public services or sectors/markets where the provider has market power. The assessment will depend on the nature of the service in question.
- As we have also said earlier, whether or not there is a power imbalance in any particular case can help to determine whether there is a potential risk to the validity of consent in a 'pay or consent' context. It should be considered a primary criterion that determines whether other factors, specifically, 'equivalence' and 'appropriate fee', and consideration of existing users, are or may be relevant in any particular case.
- However, the ICO's guidance needs to clarify which power balances are relevant to the validity of consent in this context. We suggest there are two main components to power balance, as referred to in the ICO's emerging position, and each should be **applied and assessed objectively, on a case-by-case basis**, to consider if and how they affect a user's choice about whether or not to access or use a particular service.

1. The necessity of access to or use of the service. As the ICO notes, this is more likely to be relevant for public services, for example.
 2. Market power: this becomes a relevant consideration for services that are necessary and where the provider's market position means that consumers' choices about accessing or using that particular service are limited in a way that affects their ability to give consent freely.
- Individual providers should not be expected to have to carry out competition-related assessments as a matter of course. The CMA should provide guidance on this question, including setting out the criteria that determine when it is and is not a relevant consideration.
 - There should be no suggestion that there are different standards of GDPR compliance applied to services or afforded to their users based on their 'power' (size/market position), nor is market position necessarily an accurate indicator of consumer choice in this context (i.e. there may be similar and equivalent services in the market available to the individual, albeit with a smaller market share). The ICO should take care here (as is also the case in relation to pricing) not to conflate data protection and consumer law principles, which may lead to unintended and unclear application of the law.

Equivalence

- We have marked this as 'neither helpful nor unhelpful' because we do not agree that all the factors identified by the ICO are universally relevant and equally applicable for the following reasons.
- The ICO's guidance needs to be clearer about its scope and the circumstances where risks to the validity of consent may arise (see comments on scope under question 1). Equivalence may be a relevant consideration where there is a power imbalance that should be considered in any assessment of the validity of consent. We have addressed this point in more detail under our comments on scope under question 1. Otherwise, we do not agree that is helpful in all cases because it may not be a relevant factor in terms of valid consent.
- The guidance also needs to take care to avoid scope creep into areas outside the ICO's statutory remit that are not related to data protection and privacy and seek to distort business freedoms. Currently, there is too much ambiguity and potential overreach in what the ICO has set out in terms of the scope of its guidance generally and 'equivalence' in particular which is leading to concern. Equivalence could be a helpful factor, where determined to be relevant and if carefully defined and framed in data protection terms, to help providers ensure that the consent they obtain is valid. Relevant examples of language or approaches that are not likely to be compliant might be helpful. However, as set out above, there are concerns about this factor being applied as currently drafted and the implications it has beyond data protection, and the existing example given by the ICO is not helpful (we expand on this below).
- The ICO's description of equivalence implies that paid-for options that offer more than ad-supported options necessarily constrain a person's choice about

whether to consent or pay, or unduly encourage them to consent instead of paying. That is not the case. Added features or incentives attached to paid-for options do not make the choices on offer less fair, or consent less valid. They make paid-for options better value and allow for a clear comparison of the value exchange available based on ad-supported or paid-for access, supporting consumers to make informed choices.

- Where paid options are offered alongside options available with consent for ads, consent can be freely given since there is no detriment to consenting, not consenting, or withdrawing consent. If a user does not wish to proceed with either option, access can be withheld. Whichever choice the user makes, they benefit from identical data protection and privacy rights.
- The ICO's guidance should not extend beyond this point when it comes to service offers, which are for providers to choose, assuming that the delivery and execution of those services is compliant with data protection and privacy law. As drafted the ICO's interpretation of equivalence risks implying that providers cannot offer other options beyond a single paid-for equivalent to a consent-based personalised ad-supported option. In practice, there are many ways in which providers can make access available, such as tiered options, subscriptions, micropayments, pay per article/view, and/or premium services (with or without ads). The ICO's proposed approach also does not account for providers choosing to incentivise paid-for options to generate business, such as via discounts or bespoke offers.
- The proposed approach could also be read to apply to scenarios where access (whether full or limited) is permitted without being dependent on consent for ads and paid-for options are available alongside that free access. Without a more clearly defined scope, there is also a risk that the guidance is presumed to apply to any and all paid-for access options. This ambiguity is concerning and needs to be addressed.

Practical considerations:

- It may not be possible or fair to provide exactly equivalent services depending on the products that an organisation offers. For example, particular service features may not be sustainable given the revenue of a particular option.
- There may be differences in the functions that can be provided depending on the purposes that individuals consent to. For example, consent for content personalisation is separate from consent for ad personalisation.

Appropriate fee

- We can agree that 'fees should be set so as to provide consumers with a realistic choice between the options'. However, beyond that, the terms used by the ICO such as 'appropriate' and 'unreasonable' are highly subjective and will vary on a case-by-case basis within and between different markets and sectors, based on a range of different potential factors. As drafted, the ICO's proposed approach creates uncertainty and ambiguity.

- Calculating fees is a complex process that will be based on many different factors. Businesses are entitled to the freedom to develop sustainable business models for their services, which supports their participation in competitive markets, and to determine pricing accordingly.
- Existing consumer protection and competition law addresses fair commercial practices and already applies to subscription-based and payment models. The primary consideration should be whether users are fully informed about the available options and the consequences of their choices.
- Any determination of the appropriateness of a fee needs to take into account the above-mentioned regulatory frameworks, as well as various market considerations and assessment of confidential commercial and financial information.
- The CMA is better positioned to assess the reasonableness of price (particularly since this may involve confidential commercial and financial information) given its expertise and experience of carrying out detailed economic analysis and its understanding of the relevant digital markets concerned.
- Guidance should not be prescriptive about how fees are calculated, since different methods may be used to calculate a fair and reasonable price, which could depend on factors that vary per provider. We welcome the ICO's indication that this is a decision for the provider.

Privacy by design

- This factor is broadly helpful but is not particular or unique to the questions around consent or pay models. It already applies to activities within the scope of the UK GDPR which the guidance can serve as a reminder for. The ICO should carefully target and justify any additional guidance in this space.
- For example, more guidance from the ICO on the nature and level of 'information' that is expected in this context would be helpful: organisations have been criticised both for giving not enough and too much information.
- Providers also need assurance about how they can explain the options and impact of different choices to consumers from a commercial perspective.
- We do not agree with the assertion that, under a consent or pay model, consumers 'can access the service without having to agree to the use of their personal information'. There is no obligation for providers to offer a 'data free' option if they choose to make access to their service dependent either on consent (for certain ad-related purposes, primarily related to targeting) or payment. Equally, providers are entitled to choose the features of a service and select a business model that is commercially viable. For reasons set out earlier in our response relating to scope and 'equivalence', this description is inaccurate and misleading.

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?

- Consent or pay models do not exist in isolation. They need to be considered in the context of how online services operate and function, how they use cookies and personal data, the other service options beyond consent or pay that they may have available, etc.
- The central focus of the ICO's guidance should be on how organisations should assess the different services they offer from a data privacy impact perspective e.g. transparency, choice, individual rights, etc. The ICO should refrain from expanding guidance outside its remit and avoid distorting commercial freedoms.
- More flexible guidance would be helpful on presenting choices in a fair and informative manner, such as how related/interdependent functions and purposes can be presentationally linked together and communicated (see also our response on 'privacy by design'). This relates to our earlier point about intrinsic and interdependent ad-related purposes and functions. In relation to both advertising and content/service delivery, single functions or purposes rarely operate in isolation from others. Delivery of personalised ads relies on multiple related functions. Ditto other types of advertising. Likewise, customers who choose a 'pay' option in preference to a personalised ad-supported option will still need to be asked to make choices about the use of cookies/personal data that support the functionality and/or ad model of the option they've chosen. The ICO's preferred "accept all/reject all" implementation is very inflexible in this regard and not only reduces ad yield for providers but prevents more informed decisions by consumers which bring benefits in terms of personalised content and other service features.
- Context-specific case studies and practical examples would be beneficial, based on the ICO's review of existing consent or pay models (whether in the UK or other markets) to highlight approaches that are more or less likely to be compliant with data protection and privacy law, and why.

Process and approach

- The ICO needs to show awareness that data protection law does not operate in a vacuum and nor is it paramount. Many service providers are facing challenging environments that threaten their ability to maintain viable businesses and provide valuable online content and services. There is ongoing and very significant architectural and structural change to the digital advertising market that is creating business challenges and uncertainty across the industry. In this context, increasingly prescriptive guidance on cookie consent and specific guidance on 'consent or pay' models adds further technical, resource and business challenges and exacerbates pre-existing issues. The ICO needs to be mindful of this broader context and be clearer about how it is considering its duties alongside other legal frameworks and rights. It is not immediately clear how the ICO has weighed these rights in its

emerging thinking, nor how it will ensure that these rights are balanced in any future guidance

- The ICO also needs to consider the impact of its regulatory position and approach on competition and on the availability of free-to-access content and services online.
- The ICO needs to ensure that its guidance addresses only those matters that are within its regulatory remit and competence and are explicitly tied to data protection/privacy law. Other matters should be addressed, if required/appropriate, by other regulators, in particular the CMA, with the DRCF playing a coordinating role.
- Regulatory assurance and certainty are critical. We would like to see more transparency and timely communication about:
 - Timing of future guidance both on 'consent or pay' models and on the points covered in the ICO's March letter (intrinsically linked functions, etc.). While we appreciate that the ICO is responding to 'live' questions from organisations reacting to its compliance activity and has therefore sought to set out its emerging thinking as quickly as possible, there are still outstanding questions and concerns. The lack of clarity about when guidance will be available, particularly where it is dependent on the DPDI Bill, is already creating uncertainty and potential regulatory risk for publishers who are in the process of adapting their business models in response to the ICO's cookie compliance work without having the benefit of final, detailed guidance, and creating consequent concerns about the timing of any future compliance activity focused on consent or pay models.
 - Reassurance that no enforcement-related activity will be carried out before final guidance has been published and organisations have had a reasonable opportunity to react to it.
 - The ICO's reaction to the EDPB's opinion on consent or pay models for very large online platforms and relevance to its own position/guidance
 - Engagement with/involvement of other relevant regulators in this process and open consultation in this regard with stakeholders

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

- Strongly agree
- Agree
- Neither agree nor disagree
- **Disagree**
- Strongly disagree
- Don't know / Unsure

Please explain your response.

- The ICO's emerging thinking on existing users would benefit from some more detailed explanation and clarification – it's not clear what additional risk, if any, exists and why existing users should be considered differently.
- It is also unclear which particular 'existing users' the ICO is referring to. This needs to be more clearly defined considering the range of service and payment options that exist, as outlined earlier in our response. Any additional consideration should only apply to existing users who may be affected by choosing not to consent and/or pay and not to existing users who've already consented or have made a choice to pay/subscribe/register etc. and made choices with respect to their data protection rights.
- The impact on that subset of existing users of introducing a 'consent or pay' model, including some people choosing to no longer use the service, will vary. From a business perspective, commercial organisations will consider the impact of changes to their business models on their users as part of their implementation plans, and in deciding how they want to handle the transition. Operationally this is not likely to be a straightforward task. However, there are no apparent data protection/privacy reasons why existing users should always require special consideration. Indeed, in nearly all cases existing users will be more informed as a result of their familiarity with the service, its features and its value to them.
- The main relevant consideration in terms of the treatment of existing users is whether there is any detriment to the user from withdrawing pre-existing consent and balancing that question against other rights. Where there is no 'power imbalance' then there should be a presumption of no detriment to consenting, withdrawing consent, paying or choosing not to access the service at all. In these cases, from a consent perspective, the ICO's guidance should not intervene in the relationship between a business and their existing customers.
- This factor may be potentially relevant where a 'power imbalance' has been determined to exist (see earlier comments) following a detailed and objective analysis of relevant factors, primarily the market power of the provider and whether or not the service is a public service. However, that is a matter for the CMA to address, and the CMA should be responsible for assessing compliance with relevant laws, as appropriate. Power balance, and how it affects 'consent or pay' models is not something that the ICO or data protection law/privacy considerations alone can determine.
- This would also be a redundant question for services that already have a 'consent or pay' model.
- The guidance should take into account that giving consumers a 'consent or pay' choice does not necessarily happen at the same time as they are choosing whether to accept or reject the use of cookies/personal data. There shouldn't be an assumption that this is a 'conversation' that happens in a single event.

