

## The News Media Association's Response to the ICO's [Consultation](#): 'Consent or Pay' Business Models

1. The News Media Association (the “**NMA**”) is the voice of UK national, regional and local news media in all their print and digital forms - a £4 billion sector read by more than 46.2 million adults every month. Our members publish around 900 news media titles - from The Times, The Guardian, The Daily Telegraph and the Daily Mirror to the Manchester Evening News, Kent Messenger, and the Monmouthshire Beacon.
2. Free-to-access journalism is an important pillar of democracy, being a means for all to access high-quality and trusted journalism. Such news content from responsible publishers has never been more important in the age of deepfakes and social media, acting as a counterweight to mis- and disinformation. Premium news publishers employ trained and professional journalists, photographers, editors and lawyers working within robust systems to ensure their content is credible, accurate, and adheres to a code of standards, such as the Editors' Code of Practice.<sup>1</sup> There is great care taken to ensure that the information they provide is well-researched and verified.
3. However, while many publications are free-to-access, journalism is not free to create. There is a financial cost to sourcing, producing and verifying trusted journalism so that news publishers may continue to uphold their important role in democracy. To enable this, news publishers' businesses must be sustainable. Since online news has surpassed print, a key source of revenue to fund journalism has been via an advertising market enabled by cookies. The challenges facing news publishers are well documented. Numerous studies including the Competition and Markets Authority (the “**CMA**”) market study into the digital marketplace, Cairncross, Furman and various Select Committee reports have underscored the many ways publishers' business models have been undermined.
4. The Information Commissioner's Office's (the “**ICO**”) recent threats of enforcement notices on the placement of 'Reject All' cookies represents just one of the challenges of monetisation, potentially resulting in a 15-30 per cent drop in users opting into cookies, as per research undertaken by Consent Management Platforms. That impact is likely to be higher in reality. In relation to advertising, it is expected that there would be an impact of approximately £10-20 million in lost revenues per year, per publisher.
5. The placement of Reject All cookies in the second layer of cookie banners has been widely accepted as complying with the law for several years, and it is not clear why the ICO has decided to now interpret it more rigidly. If the direction of the ICO leans towards making cookies increasingly more challenging to use, there is a fundamental question to answer around how publishers can continue to make news free-to-access. It is through this lens that publishers, and other businesses, are looking towards 'consent or pay' models.

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<sup>1</sup> IPSO, “[Editors' Code of Practice](#)”, accessed 7 February 2023.

6. For businesses, a consent or pay model reflects the necessity of an alternative form of payment to fund services when cookies are disabled. It would indeed be concerning if publishers were expected to provide their content without any means of remuneration. Simultaneously, this option offers flexibility to consumers regarding their preferred funding method.
7. Considering the imperative to ensure the sustainability and monetisation of journalism, it is important that the door remains open to innovation towards alternative models like consent or pay. Therefore, we are pleased that the ICO has acknowledge that in principle *“data protection law does not prohibit business models that involve “consent or pay”*”. Additionally, we agree that the right balance must be struck between the right to privacy and the freedom to conduct business and, in the case of publishers, balanced against freedom of expression. It is not the wish of publishers to put consumers at a disadvantage via a consent or pay model, but to simply ensure some form of fair payment exists in the absence of cookies.
8. While we welcome this consultation, publishers find themselves compelled to implement a consent or pay model urgently, prior to the ICO providing definitive guidance on the matter, given the financial consequences of the ICO’s changed stance on ‘Reject All’ placement. There is a risk that the ICO will inadvertently squander the time and resources currently being invested by publishers in developing consent or pay models if, post-guidance, it adopts a divergent approach to that of publishers. The current situation has created significant ambiguity for publishers in terms of the rollout of the model, compounded by the risk of potential future ICO action for getting it wrong. In the absence of clear guidance, we urge the ICO to actively engage with publishers to provide as much clarity as possible in the interim.
9. Both in this engagement, and in the development of any subsequent guidance on consent or pay, publishers are keen to work with the ICO on issues including the clear communication to users of the offer being presented; the exercising of the choice presented to users; and the interaction of such a model with subscription models.
10. We are additionally concerned by the ICO’s strategy of issuing enforcement action against the top 100 websites, a group in which publishers constitute a significant portion. This has pressured publishers in particular to become some of the first websites to implement the consent or pay model in the UK and navigate it with their consumers.
11. The ICO has outlined four non-exhaustive factors that organisations are expected to consider when assessing whether there is valid consent from individuals. These factors are assessed in turn:
  - 11.1. **Power Balance:** The ICO considers that consent for personalised ads is unlikely to be freely given when people have little or no choice about whether to use a service or not, which could be the case when they are accessing a public service, or the service provider has a position of market power. We agree that it would be inappropriate for

some services to operate under a consent or pay model. For example, Big Tech platforms that consumers and businesses have no choice but to operate through due to their entrenched and substantial market power. When deciding which companies have an unfair power advantage over consumers, the ICO should consider the platforms that will receive “Strategic Market Status” (**SMS**) designation under the Digital Markets, Competition and Consumers Bill once the Bill is enacted and the CMA’s SMS designations have occurred. However, given the plethora of media options available to consumers, allowing them to choose from a diverse array of titles both nationally and internationally, it is important that the ICO recognises the existence of a robust power balance between consumers and publishers. This balance empowers consumers to ‘vote with their feet’ by opting for alternative titles if they are unwilling to neither consent nor pay.

- 11.2. The issue of power balance is one principally of competition, and it is not something the ICO should weigh-in on alone. The CMA is the appropriate regulatory body to assist on this point, particularly given its market research into tech platforms and their interrelation with publishers. We recommend that the ICO works with the CMA on the consent or pay model, along with the Digital Regulation Cooperation Forum as appropriate.
- 11.3. **Equivalence:** The ICO considers that the ad-funded service should offer an experience equivalent to the paid-for service under a consent or pay model. While we do not oppose this notion, it is crucial to acknowledge that some publishers operate subscription services alongside their freely accessible content. These subscriptions often provide more comprehensive journalism covering a wider array of topics, in addition to puzzles and other features. European publications like [Corriere della Sera](#) provide consumers with the choice to either accept cookies, pay a fair fee commensurate with its economic value, or subscribe to their premium content. It is imperative to distinguish between premium subscription packages and paying a fair fee in lieu of accepting cookies used for ad monetisation purposes, ensuring they are not erroneously conflated.
- 11.4. It is important to stress that publishers operate differently from one another, providing different packages and offers. What is equivalent for one publisher may not be the same for another. Therefore, the ICO’s approach to equivalence should allow for flexibility, recognising the distinct nature of each website’s business model.
- 11.5. **Appropriate Fee:** We have observed in Europe that several major news brands, such as Der Spiegel, Bild, Le Monde, La Repubblica, and Corriere della Sera, operate under a consent or pay model. This approach has approval from European data protection authorities, contingent upon ensuring that the subscription cost does not surpass the revenue lost due to the inability to deliver cookies. We agree that consumers should be afforded a genuine choice between consenting or paying, without their decision being influenced by unwarranted fees vastly outweighing the economic value of cookies used for ad monetisation purposes.

- 11.6. It is important to recognise that a formulaic, one-size-fits all approach to determining appropriate fees will not work. Moreover, the ICO is not a price regulator. Publishers operate on different models, with varying inherent and hidden costs. In this regard, the ICO must give sufficient flexibility to publishers to determine what an appropriate fee is, accounting for the unique nature of their respective operations.
- 11.7. ***Privacy by Design:*** The ICO considers that the choice between consenting and paying must be presented fairly and equally. This entails offering transparent information about the implications of each choice for consumers, a principle we support. We also align with the ICO's position that, in accordance with the UK GDPR, consumers should have the right to revoke their consent at any time. However, in such cases, it is crucial that access to content is temporarily suspended until the consumer decides whether they prefer to pay a reasonable fee instead or continue using the content while accepting cookies.
12. We appreciate the opportunity to contribute to the ICO's initial considerations regarding consent or pay business models. We recommend that the ICO works closely with the Digital Regulation Cooperation Forum, and particularly the CMA, given the breadth of this area. Acknowledging the multifaceted challenges encountered by publishers in maintaining revenue streams while providing free access to news, it is imperative that the ICO supports innovation and adaptable solutions to guarantee ongoing access to quality journalism. We would welcome the chance to engage with the ICO further and continue this discussion in greater depth.

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News Media Association