



## *Call for views on "Consent or Pay" business models*

Consultation response submitted by  
the Ada Lovelace Institute

Submitted 17 April 2024 to [consentorpay@ico.org.uk](mailto:consentorpay@ico.org.uk)

## Section 1: Your views on our approach

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.

The Ada Lovelace Institute welcomes the ICO's proactivity in addressing developments in ad-funded online business models. This is a critical issue for the health of digital environments and for protecting people's rights and freedoms online. We strongly agree with the focus on power balance and privacy by design as key criteria for assessment of the legality of the 'consent or pay model', however we disagree with criteria regarding price and monetisation for the reasons described below.

As many authors have pointed out, online advertising has been fuelling vast data harvesting by technology companies where online behaviour and private experiences are tracked, analysed and monetised.<sup>1</sup> This offers companies insights beyond shopping preferences, giving them a deeper understanding of habits and psychological tendencies, and enabling prediction and 'nudging' of future behaviour. These practices have been ongoing for the last two decades leading to unprecedented concentration of power and market dominance in the hands of a few large technology corporations.

The Ada Lovelace Institute reports such as *Rethinking data and rebalancing digital power*, characterise today's digital environments as disempowering, where individuals lack agency over how their data is generated and used, and asymmetrical where there are stark power imbalances between people, corporations and states.<sup>2</sup>

The power and dominance of large corporations goes beyond control over markets and control over price and quality of services offered to consumers. Digital platforms are now acting as gatekeepers of public interests, exercising more and more societal and democratic influence.<sup>3</sup> Large platforms have become – as a result of laissez-faire policies rather than by deliberate, democratic design – one of the building blocks for data governance in the real world, unilaterally defining the user experience and consumer rights. They have used a mix of law, technology and economic influence to place themselves in a position of power over

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<sup>1</sup> Cohen, J. E. (2019). Between Truth And Power: The Legal Constructions Of Informational Capitalism; Zuboff, S. (2019). The Age Of Surveillance Capitalism

<sup>2</sup> Ada Lovelace Institute (2022). Rethinking data and rebalancing digital power. Available at <https://www.adalovelaceinstitute.org/report/rethinking-data/>

<sup>3</sup> Busch, C., Graef, I., Hofmann, J., & Gawer, A. (2021). Uncovering blindspots in the policy debate on platform power: Final report. European Commission. <https://platformobservatory.eu/app/uploads/2021/03/05Platformpower.pdf>

users, governments, legislators and private-sector developers, creating dependencies at all levels.<sup>4</sup>

Against this background, which is foundational for informing the thinking on the ‘consent and pay’ model, we strongly agree with the ICO’s proposed criteria of power balances and privacy by design. However, we disagree with considerations around pricing. Where monetary assessments become part of the compliance check, this moves away from the ICO’s mandate to protect individuals with regard to the processing of personal data, and becomes a question of cost which obscures the fundamental issues at play.

In markets such as online advertising where extractive practices are so prevalent and where the level of data protection compliance is low (as surfaced by the ICO’s report into adtech and real time bidding), pricing and monetisation considerations are not the type of criteria which support data protection maturity and transform practices.<sup>5</sup> Instead, it becomes a discussion on privacy price tags and a missed opportunity to address the root cause, systemic imbalances in an economic system based on extracting people’s personal data with little to no public and regulatory scrutiny.

### 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
<b>Power balance</b>	Power balance <b>Very helpful</b>	Power balance Helpful	Power balance Neither helpful nor unhelpful	Power balance Unhelpful	Power balance Very unhelpful	Power balance Don't know / Unsure
<b>Equivalence</b>	Equivalence Very helpful	Equivalence Helpful	Equivalence <b>Neither helpful nor unhelpful</b>	Equivalence Unhelpful	Equivalence Very unhelpful	Equivalence Don't know / Unsure
<b>Appropriate fee</b>	Appropriate fee Very helpful	Appropriate fee Helpful	Appropriate fee Neither	Appropriate fee Unhelpful	Appropriate fee <b>Very unhelpful</b>	Appropriate fee Don't

<sup>4</sup> Cohen, J. E. (2017). ‘Law for the Platform Economy’. U.C. Davis Law Review, 51, pp. 133–204. Available at: <https://perma.cc/AW7P-EVLC>

<sup>5</sup> ICO (2019). Update report into adtech and real time bidding. Available at <https://ico.org.uk/media/about-the-ico/documents/2615156/adtech-real-time-bidding-report-201906-dl191220.pdf>

			helpful nor unhelpful			know / Unsure
<b>Privacy by design</b>	Privacy by design <b>Very helpful</b>	Privacy by design Helpful	Privacy by design Neither helpful nor unhelpful	Privacy by design Unhelpful	Privacy by design Very unhelpful	Privacy by design Don't know / Unsure

Please explain your ratings.

As explained above, power imbalances and privacy by design are essential factors for assessing compliance of the ‘consent or pay’ model. However, this assessment should step away from including monetary qualifications. Fundamentally, privacy should be a right enjoyed by everybody, not only for those who can afford to pay. Including price considerations in the compliance assessment runs the risk of undermining the very essence of the right to data protection and would offer an implicit degree of legitimacy to a contestable economic system running on comprehensive behavioural portraits which are sold for profit.

We would recommend the inclusion of agency and autonomy considerations as part of the assessment, grounded in an analysis of the larger dynamics at play. Is this model really providing a fair choice for people? Is it fostering meaningful user agency and autonomy over how their data is being used? And more significantly, can there be freely given, informed and unambiguous consent when it’s an intrinsic part of a complex, opaque and extractive economic machine far beyond any description in a privacy policy?

The ICO’s own guidance on ‘freely given’ consent would seem to contradict the legitimacy of consent or pay models generally; if consent is the only alternative to paying for a service, it seems difficult to understand how a data subject is able to “refuse consent without detriment”, or withdraw consent easily without losing access. With reference to Article 7(4) and Recital 43, if a service can be provided with payment instead of consent, then the consent is arguably not necessary for provision of that service.

The EDPB decision on 17 April which disapproves with the model seems to point to the same questions of legality where the requirements for valid consent cannot be fulfilled if users are presented ‘only with a binary choice between consenting to processing of personal data for behavioural advertising purposes and paying a fee’.<sup>6</sup> The full details of the decisions will need to be analysed when the decision is made public, however it should be pointed out that the assessment of the ‘pay or consent’ model stretches beyond online platforms and should be analysed in different contexts and markets. For example, websites such as news outlets and popular online publications in many countries have deployed the same model if users do not consent to tracking.<sup>7</sup>

<sup>6</sup> NOYB (2024). EDPB Opinion: Meta cannot rely on ‘Pay or Okay’. Available at <https://noyb.eu/en/statement-edpb-pay-or-okay-opinion>

<sup>7</sup> NOYB (2024). ‘Pay or Okay’: 1,500 € a year for your online privacy? Available at <https://noyb.eu/en/pay-or-okay-1500-eu-year-your-online-privacy>

The need for including agency and autonomy considerations will also respond to public expectations. A recurrent theme in the Ada Lovelace Institute's review of evidence about public attitudes towards AI (which can be largely understood as data-driven technologies, including social media platforms) is the need for agency and control over data and how decisions are made.<sup>8</sup> These perceptions of technology have been present for a number of years, and seem to be intensifying with more wide spread AI development. For example, a 2020 study revealed that people felt they had little agency when it came to the use of their data online, and felt pessimistic about the impact of technology on their lives and on society in the future.<sup>9</sup>

Concerns about lack of privacy and control and the data that is extracted are further emphasised in a recent survey of the British public conducted by the Ada Lovelace Institute and The Alan Turing Institute.<sup>10</sup> In this study, 69% of people identified invasion of privacy as a concern around targeted consumer advertising and 50% were concerned about the security of their personal information. Other studies show that only a small proportion of people are willing to share their data in exchange for relevant advertising.<sup>11</sup>

This is illustrative of issues beyond how consent is given and there is an acute need for people's voices to be heard and represented in discussions about how their data is collected and used. Merely ticking a consent box does not equate agency and control over data. One juror from the Citizens' Biometrics Council established by the Ada Lovelace Institute described the connection between consent and larger dynamics as: 'One of the things that really bugs me is this notion of consent: in reality [other] people determine how we give that consent, like you go into a space and by being there you've consented to this, this and this. So, consent is nothing when it's determined how you provide it.' – Jury member, The Citizens' Biometrics Council<sup>12</sup>

Furthermore, citizens' juries the Ada Lovelace Institute convened on health systems in 2022 found that 'agency over personal data was seen as an extension of the need for transparency around data-driven systems'. Where a person is individually affected by data, jurors felt it was important to have adequate choice and control over its use.<sup>13</sup> As one jury

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<sup>8</sup> Ada Lovelace Institute (2023). *What do the public think about AI? Understanding public attitudes and how to involve the public in decision-making about AI*. Available at

<https://www.adalovelaceinstitute.org/evidence-review/what-do-the-public-think-about-ai>

<sup>9</sup> Miller, C., Kitcher, H., Perera, K., Abiola, A. (2020). *People, Power and Technology: The 2020 Digital Attitudes Report*. London: Doteveryone. Available at:

<https://doteveryone.org.uk/report/peoplepowertech2020>

<sup>10</sup> Ada Lovelace Institute and Alan Turing Institute (2023). *How Do People Feel about AI? A Nationally Representative Survey of Public Attitudes to Artificial Intelligence in Britain*. Available at

<https://www.adalovelaceinstitute.org/report/public-attitudes-ai/>

<sup>11</sup> Competition and Markets Authority (2020). *Online platforms and digital advertising market study*. Available at

[https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final\\_report\\_Digital\\_ALT\\_TEXT.pdf](https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf)

<sup>12</sup> Ada Lovelace Institute (2021). *The Citizens' Biometrics Council. Recommendations and Findings of a Public Deliberation on Biometrics Technology, Policy and Governance*. Available at

<https://www.adalovelaceinstitute.org/project/citizens-biometrics-council/>

<sup>13</sup> Ada Lovelace Institute (2022). *The Rule of Trust: Findings from Citizens' Juries on the Good Governance of Data in Pandemics*. Available at

<https://www.adalovelaceinstitute.org/wp-content/uploads/2022/07/The-rule-of-trust-Ada-Lovelace-Institute-July-2022.pdf>

member put it: 'If we are giving up our data, we need to be able to have a control of that and be able to see what others are seeing about us. That's a level of mutual respect that needs to be around personal data sharing.' – Jury member, *The Rule of Trust*<sup>14</sup>

These notions of meaningful engagement and expression of choice and of respect are subsumed under agency and autonomy considerations and would enable a more accurate evaluation of compliance rather than the focus on appropriate fee and equivalence. It would respond to people's expectation of more specific, granular and accessible information about what data is collected, who it is used by, what it is used for and what rights data subjects have over that use.<sup>15</sup>

However, the ICO is rightly pointing to privacy by design and by default as key criteria for compliance in the 'consent or pay' model, as a strong level of protection is essential and it cannot rely on the individual having to make decisions at every step of the data flow. Protection needs to be ensured regardless of whether people know how to protect their data or not.

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

In relation to the monetary criteria proposed, equivalence and appropriate fee, it should be noted that low subscription numbers in the EU could be indicative of the fact that the majority of users will not afford or will not be willing to pay a fee, therefore resulting in a situation where companies are not in fact replacing revenue streams from advertising with subscription models. This runs the risk of further sedimenting contestable existing practices and potentially encouraging scope creep with other industries implementing this model as well, leading to unattainable circumstances for individuals and for safeguarding privacy rights.

Furthermore, the context in which the ad free model has emerged is worth noting. As the IAB report describes, the reason for industry players to introduce the 'pay or okay' model was partly connected to pressures to implement more accessible privacy controls such as a 'reject all' button which would shield users from tracking: 'The demand for a deny-all button at the first level of consent banners from data protection regulators and consumer protection agencies, as well as the significance of consent-based data processing for data-driven business models, has prompted providers of digital content and services to introduce so-called PUR models. The objective is to ensure compliance with data protection regulations while also securing sustainable funding of their content and services.'<sup>16</sup>

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<sup>14</sup> Ada Lovelace Institute (2022). The Rule of Trust: Findings from Citizens' Juries on the Good Governance of Data in Pandemics. Available at <https://www.adalovelaceinstitute.org/wp-content/uploads/2022/07/The-rule-of-trust-Ada-Lovelace-Institute-July-2022.pdf>

<sup>15</sup> Ada Lovelace Institute (2022). Who Cares What the Public Think?. Available at <https://www.adalovelaceinstitute.org/evidence-review/public-attitudes-data-regulation>

<sup>16</sup> IAB Europe (2023). PUR models Status quo on the European market. Available at [https://iab europe.eu/wp-content/uploads/PUR-Modelle-bvdw\\_20231004-en.pdf](https://iab europe.eu/wp-content/uploads/PUR-Modelle-bvdw_20231004-en.pdf)

Going further back, the very existence of cookie banners is a questionable implementation of the 2002 ePrivacy Directive. One of the purposes of the directive was to eliminate spyware, web bugs, hidden identifiers and other similar trackers that could be placed on the user's device without their knowledge. It did not interfere with technical storage or access for facilitating communication. The directive required prior, informed notice, but there was no restriction for this to be achieved at browser level or through other control centres expressing user preferences (Article 5(3) of the ePrivacy Directive). Under the guise of GDPR implementation in 2018 which required companies to provide specific and accurate information about how personal data is being processed, as well as to ask for prior consent and to offer the possibility to opt out, the industry then went for the implementation of even less appropriate versions of cookie banners, instead of scrutinising their data collection practices.

Further, initiatives such as the 'Do Not Track' header which were meant to help users more easily exercise their data rights by signalling an opt-out preference from website tracking have stopped due to insufficient deployment, demonstrating the significant challenge in obliging platforms to facilitate the use of standards in the services they deploy where incentives are not aligned.<sup>17</sup>

### **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.

It is questionable whether users of organisations introducing the 'consent or pay' model have a real choice. They seem to be a double loss. First, they are already using the service and have consented to their data being processed and analysed. An option to re-consent will not bring any meaningful changes or new choices in their case. Further, if they choose to pay for an ad free model, this does not repair or reverse the information that was already processed for advertising purposes and there is no guarantee that insights from previous data would not be used in users with similar profiles (i.e. 'pay' users that opt for the ad free model left a trail that can still be used for targeting 'consent' users with similar profiles). Second, switching to alternative services is not easily accessible or desirable if users have invested in building their online presence and will not be incentivised to switch even if they disagree with the changes.

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<sup>17</sup> Efforts to standardise the 'Do Not Track' header ended in 2019 and expressing tracking preferences at browser level is not currently a widely adopted practice. More information is available here: <https://www.w3.org/TR/tracking-dnt/>

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

Fundamentally, privacy should not be a right reserved and enjoyed only for the ones who can afford to pay. Introducing 'pay or okay' models will likely lead to social inequalities with those who cannot afford to pay being vulnerable, exposed and giving in more quickly to exploitative systems.

The discussion goes beyond inequality. In a future where vast quantities of data are used to feed and train AI services in all aspects of our lives – from decisions about how we govern ourselves, to our legal system, education and immigration – everybody will be affected in the long run.

While we look forward to contributing to the ICO's generative AI consultations, there is currently no mechanism for people to object to their data being fed into large language models making it even more important to consider the wider implications of the 'consent or pay' model. Without robust privacy protections beyond relying on individual consent or payment, there is a risk of accelerating harms from AI and data-driven technologies and entrenching the same problematic power dynamics.