

Written Evidence to the ICO on the ‘Consent or Pay’ Model



17 April 2024

Summary of Written Evidence

1. This is a written submission of evidence to the Information Commissioner’s Office’s (“ICO”) consultation for views on the “consent or pay” model, closing 17 April 2024.
2. This submission is made by the Minderoo Centre for Technology and Democracy, an independent team of academic researchers at the University of Cambridge, who are radically rethinking the power relationships between digital technologies, society, and our planet.
3. The ICO is calling for views on the proposed “consent or pay” mechanism. According to Stephen Almond, Executive Director of Regulatory Risk at the ICO, this model “gives people the choice to use a website for free, but only if they consent to their personal information being used for personalised advertising, or pay a fee and not be tracked.”¹
4. In our remarks, we only address the two first questions asked by the ICO:
 - (i) Do you agree with our emerging thinking on “consent and pay”?
 - (ii) How helpful are the indicative factors in comprehensively assessing whether “consent or pay” models comply with relevant law?
5. In this submission, we argue that the proposed model offers users a choice between two consent models, which both must comport fully with the General Data Protection Regulation (“GDPR”) to fulfil the legal requirements under the Data Protection Act 2018.² Whether a user pays for a service is irrelevant from the perspective of data protection as an individual cannot through contract alleviate a data controller of their fundamental rights obligations. Thus, the ICO will need to consider whether the pay option also independently meets the conditions for consent as set out in Article 4(11) and 7 GDPR.³

¹ ICO, “ICO launches ‘consent or pay’ call for views and updates on cookies compliance work”, 6 March 2024 (<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/>).

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) OJ L 199 (<https://eur-lex.europa.eu/eli/reg/2016/679/oj>); Data Protection Act 2018 (<https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted>).

³ Article 4(11): “consent” of the data subject means any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her; Article 7 sets out the conditions for consent.

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

6. According to the ICO,

“[i]n principle, data protection law does not prohibit business models that involve ‘consent or pay.’ However, 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.”⁴

7. In its call for evidence submissions, the ICO explained that it will look “at “consent or pay” proposals in terms of how organisations: (1) ensure what they want to do is focused on people’s interests, rights, and freedoms; (2) evidence that people are fully aware of what happens when they interact with an online service; and (3) show that people are making informed, free choices about whether to engage or not.”⁵
8. Since first announced by Meta Platforms on 30 October 2023,⁶ the proposed “consent pay” model has been heavily criticised by civil society organisations, academics, and regulators.⁷ The announcement followed two Urgent Binding Decisions by the European Data Protection Board (“EDPB”) which banned the use of Article 6(1)(b) GDPR (necessary for the performance of contract) and Article 6(1)(f) GDPR (legitimate interest) as legal bases for the processing of personal data for the purpose of behavioural advertising.⁸
9. The forerunner to these two decisions were the decision by the Norwegian Data Protection Supervisor (“NO DPA”) to ban targeted advertising. Meta brought the matter to a Norwegian Court, which upheld the NO DPA’s decision in September 2023.⁹
10. Meta responded by shifting the legal basis for processing to Article 6(1)(a) GDPR (consent) and in so doing also gave its users a choice to either consent to having cookies trace and use their personal data for behavioural advertising, or to pay a subscription fee to avoid their personal data being commodified for that purpose. Specifically, “Meta will offer people in the EU, EEA, and Switzerland the choice to pay a monthly subscription to use Facebook and Instagram without any ads. They can alternatively continue to use these services for free while seeing ads that are relevant to them.”¹⁰

⁴ ICO (<https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/call-for-views-on-consent-or-pay-business-models/>).

⁵ *ibid.*

⁶ Meta, “Facebook and Instagram to Offer Subscription with No Ads in Europe”, 30 October 2023, updated 4 December 2023 (<https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/>).

⁷ See for example Forbrukerrådet, *Complaint to Datatilsynet under Article 77(1) of the European General Data Protection Regulation*, 29 February 2024 (<https://storage02.forbrukerradet.no/media/2024/02/2024-02-29-klage-pa-meta.pdf>).

⁸ (https://www.edpb.europa.eu/news/news/2023/edpb-publishes-urgent-binding-decision-regarding-meta_en#:~:text=Brussels%2C%207%20December%202023%20%2D%20Following,behavioural%20advertising%20purposes%20on%20the). See also the Court of Justice of the European Union, C-252/21, 4 July 2024, ECLI:EU:C:2023:537 (<https://curia.europa.eu/juris/documents.jsf?num=C-252/21>).

⁹ *Meta Platforms Ireland Limited v Staten v Datatilsynet*, case 23-114365TVI.TOSL/O8 and 23-114359TV-TOSL/O8, Tingretten decision 06 September 2023.

¹⁰ *Supra* note 6.

11. The reactions to the announcement were immediate. The EDPB issued an urgent Binding Decision banning “Meta’s data processing for behavioural advertising.”¹¹ The Decision followed the EDPB’s Binding Decision issued to Meta in December 2022 which “clarified that contract is not a legal suitable for processing of personal data carried out by Meta for behavioural advertising.”¹²

12. In February 2024, civil society organisations wrote to the EDPB asking for an Opinion that would recognise the ‘consent and pay’ model as illegal.¹³ The petitioners argued that the model was in contravention of Article 4(11) GDPR (setting out the definition of consent), Recital 42 GDPR, the EDPB’s *Guidelines 05/2020*,¹⁴ and the decision by the German Court (Bundeskartellamt) of 4 July 2024.¹⁵ They also argued that it would set a new industry standard, that the economics were different than for news publishers, and that it contravened several human rights, including those set out in the EU’s Charter of Fundamental Rights and Freedoms (CFR).¹⁶

13. One letter explained that:

“By forcing people to purchase their own rights, these subscription systems normalise a transformation of rights into commodities. They shift the narrative on which human rights were created, challenging their inalienable nature and the principle that they are intrinsic to a person by the very fact of human existence. Putting our right to privacy up for sale directly compromises the essence of the right and compromises the essence of human rights in general. No one can sell our rights because they are by definition, inalienable.”¹⁷

14. With this summary in mind, we make the following comments to the ICO’s emerging thinking on the “consent or pay model” to ensure that the regulatory guidance comports with the GDPR as mandated by the Data Protection Act 2018:

15. When considering the options for legal bases under Article 6 GDPR, the EDPB and the courts have only left the option of Article 6(1)(a) (consent) for the use of personal data in behavioural advertising. This also tallies with the consent requirement under the Privacy Directive regarding the use of third-party tracking cookies.¹⁸ Whether there is a payment

¹¹ Joseph Duball, “EDPB issues binding decision banning Meta’s targeted advertising practices,” IAPP, 1 November 2023 ([https://iapp.org/news/a\(edpb-issues-binidng-decisions-banning-metas-targeted-advertising-practices\)](https://iapp.org/news/a(edpb-issues-binidng-decisions-banning-metas-targeted-advertising-practices))).

¹² *Supra* note 8.

¹³ Access Now, Open Letter to the European Data Protection Board: Oppose “Pay or Consent models,” 7 March 2024 (<https://www.accessnow.org/press-release/open-letter-to-edpb-pay-or-consent/#:~:text=As%20such%2C%20E2%80%9CPay%20or%20Consent,for%20which%20it%20was%20created.>

¹⁴ EDPB, *Guidelines 05/2020 on consent under Regulation 2016/679* (https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf).

¹⁵ *Supra* note 13.

¹⁶ Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, OJ C 326 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT>); Article 12 of the Universal Declaration of Human Rights 1948 (<https://www.un.org/en/about-us/universal-declaration-of-human-rights>) and Article 8 of the European Convention of Human Rights and Fundamental Freedoms 1950 (https://www.echr.coe.int/documents/d/echr/convention_ENG).

¹⁷ *Supra* note 13.

¹⁸ The Privacy and Electronics Communications(EU Directive) Regulations 2003 (https://www.legislation.gov.uk/ukxi/2003/2426/pdfs/ukxi_20032426_en.pdf).

as a contractual matter is therefore irrelevant. Thus, the only way to see this model as legal under the GDPR would be to see it as two options of consent: (1) consent with permission to use personal data for behavioural advertising and (2) consent to use personal data only as far as it is not processed for personal advertising. Both would have to comport with all GDPR stipulations concerning consent as set out in Articles 4(11) and 7 GDPR and Recital 42.

16. If this analysis is correct, the question is not whether individuals should be allowed to pay to ensure that their personal data is not used in behavioural advertising, but whether this is framed as a consent (as different from a ‘mere’ purchasing) option to the user. In other words, for the pay option to be legal, it would have to be presented as two separate issues: (1) the contract for the purchase of online services behind a pay wall – governed by contract and therefore outside the remit of the ICO; *and* (2) a request for processing of personal data. In other words, these two operations cannot be bundled into one.¹⁹
17. The follow-on question then becomes whether individuals can consent to having their personal data used for behavioural advertising purposes. There may be many reasons why an individual would wish to see behavioural advertising, but the use of behavioural advertising also raises issues of fairness, especially in cases where users may feel they cannot afford to access a product unless they ‘pay’ with their personal data. In such cases, there is likely to be a violation of Articles 7 (privacy) and 8 (data protection) CFR.
18. While some see the issue of fairness as an issue of finding the right price (“appropriate fee”),²⁰ we support the view that any suggestion that personal data being used as payment mechanism is a violation of the fundamental rights and freedoms of an individual and should therefore be banned. As such, the consent option whereby individuals consent to having their personal data commodified for behavioural advertising purposes should be banned simply because it would be anathema to human rights doctrine to permit individuals to trade inalienable fundamental rights protection, such as data protection and privacy, in exchange for goods and services.

How helpful are the indicative factors in comprehensively assessing whether “consent or pay” models comply with relevant law?

19. The ICO lists the following indicative factors: (1) power imbalance; (2) equivalence; (3) appropriate fee; (4) privacy-by-design; (5) information given to users; and (6) the right to withdraw consent. We only have short comments to factors 1, 2, 5, and 6 as these are already clearly set out in the GDPR. Whether there is a power imbalance or equivalence are matters of fact, not law, and thus outside the scope of our comments. The information to users and the right to withdraw consent would apply regardless of the use of a “consent or pay” model and therefore does not engage unique issues to be discussed here.
20. As regards factor 3, the suggestion that consent somehow can be determined by an assessment of the appropriate fee is a misunderstanding of the nature of the legal bases in Article 6 GDPR. While we recognise that the Danish and French DPAs have suggested

¹⁹ *Supra* note 14.

²⁰ CNIL, “Cookie Walls: la CNIL publie des premiers critères d’évaluation,” 16 May 2022 (<https://www.cnil.fr/fr/cookie-walls-la-cnil-publie-des-premiers-criteres-devaluation>); Datatilsynet, “Cookie walls” (<https://www.datatilsynet.dk/hvad-siger-reglerne/vejledning/cookies/cookie-walls>).

that the concept of an appropriate fee can be used to determine whether consent was “freely given,”²¹ it is our opinion that whether there are fair terms and conditions for payment is a matter for the law of contract, not data protection. While the data processing principle includes a legal requirement of fairness (Article 5(1) GDPR), the perception of fairness on the part of a regulator as an external party cannot substitute the conditions for consent as freely given by the individual as set out in Article 4(11) GDPR and Article 7 GDPR. We therefore consider that the factor of appropriate fee is irrelevant in the assessment of whether “consent or pay” is legal under the GDPR for reasons stated in our answer to Question 1 above.

21. As regards factor 4, the “consent or pay” model may fail to comply with Article 25 GDPR on data protection by design and default, especially if it is found to be equivalence between these two services. In that case, one service would comply by offering more data protection in exchange for monetary payment, while the other would offer less data protection for the same service. This would mean two different levels of data protection, where one clearly would not offer protection by default. In this context, it is worth pointing out that privacy-by-design is a different concept to data protection by design and default, and thus the data protection standard here would be higher because it is not simply about keeping personal data pseudonymised or hidden from certain parties.

²¹ *ibid.*