

‘PAY OR OKAY’?

**EMW RESPONSE TO THE ICO’S
CALL FOR VIEWS ON ‘CONSENT
OR PAY’ BUSINESS MODELS**

FOREWORD

During the last four weeks, our EMW Commercial, Technology and Data team have discussed and debated the validity of the ‘consent or pay’ model in the context of personalised advertising. I am delighted to share our response to the ICO’s consultation on this business model. This is a matter that has not been without controversy, and our internal debates have raised a number of wider questions:

- What does ‘freely given’ consent entail?
- What defines being ‘informed’?
- How active a role should the state take to ensure data subjects are informed?
- What harms are created by personalised advertising?
- How do we balance freedom of contract with fundamental control over our personal data?

Such questions do not always have simple answers. We hope, however, that our response reflects the thoughtful consideration given to them.

There is no value discussing this business model without mentioning Meta. The company’s numerous efforts to shoehorn its business model into a lawful basis under the GDPR have been rebuffed by data protection authorities across Europe as well as the CJEU, ruling that neither ‘legitimate interest’ nor ‘contract’ are valid bases for it to rely on to process user data for targeted advertising.

It is worth acknowledging Mr. Zuckerberg’s role in shaping this debate. Personalised advertising is clearly big business for him: in April last year, Meta’s CFO revealed that 10% of its global revenue (\$11.7 billion) stemmed from European user advertising so there is a clear impetus for the company to push opportunities to be able to continue to do so.

Consent appears to be the only remaining lawful basis remaining for the company to deploy targeted ads. If the ICO accepts the ‘consent or pay’ model, it could prompt wider adoption among online platforms. This model, after all, is the ‘business-friendly’ approach.

OUR FINDINGS

The EMW perspective suggests that a ‘consent or pay’ model can be compliant with data protection law. However, platforms unable to meet strict ‘valid consent’ requirements should adopt alternatives. We advocate for allowing businesses to operate within this model, alongside rigorous safeguards to ensure that consent is truly ‘freely’ given in accordance with the GDPR.

We would be remiss if we did not acknowledge the European Data Protection Board (EDPB) opinion rejecting the model entirely, on the day of this consultation deadline. Whilst the ICO is influenced by this opinion, it is not binding. It may choose to take its own direction.

THE AUTHORS

To those that assisted with facilitating this response, it would not have been possible to complete it without your support. Each of you has contributed significantly with your time, analysis, creativity, and passion. The content here reflects the culmination of numerous conversations, debate, and a desire to meet intellectual challenge – the EMW team in action. Please find a list of contributors at the end of this response.

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April 2024

Q1: DO YOU AGREE WITH OUR EMERGING THINKING ON 'CONSENT OR PAY'?

SHORT ANSWER

The ICO position is that a 'consent or pay' business model can be compliant with data protection law. We agree in principle, although it will depend on how such models are implemented and whether sufficient safeguards are put in place to protect individuals' rights.

LONG ANSWER

Under the UK GDPR, organisations need a lawful reason to process personal data. The position across European data protection law is that consent is the only lawful basis that an organisation may rely on to process personal data for targeted advertising. The ICO appears to corroborate this position.

UK data protection law sets a high standard for valid consent. It needs to be freely given, specific, informed, and unambiguous. In the context of personalised advertising, those factors are considered as follows:

- **Freely Given** - Individuals must have a 'real choice' and should be able to refuse consent without detriment. They should not be made to grant consent through pressure or a lack of alternatives.
- **Specific & Informed** - Individual users should understand exactly what they are consenting to. Consent for personalised advertising should only be obtained upon providing a clear explanation of the types of data collected (e.g. browsing history & demographics), the identity of the controller, how the controller intends to use the data, and the data subject's right to withdraw consent.
- **Unambiguous** – Consent should not be assumed by default. Clear, affirmative action is needed (pre-checked boxes are unlikely to be valid).

Under the 'Consent or Pay' model, users appear to have limited options. They can either, (1) consent to the processing (in order to use the service), or (2) pay to use the service. This raises the question of whether consent is truly 'freely given' if the alternative is being required to pay for the service.

We do not think that the concept of 'freely given' consent is inherently compromised by the options presented to the user. It is true that their ability to access the service is constrained. However, this is common in consumer contracts; businesses typically have the autonomy to establish their business model and how they wish to monetise their service. We would also note that this autonomy extends to users, allowing them to vote with their wallets as well. Modern market economics is built on the premise that users can choose to simply not use a service. In this respect, users are always entitled to simply refuse to use the service in question.

This is of course an imperfect model; broader public safeguards also exist to protect consumers from excessively unfair commercial practices where ‘choice’ is so limited as to ensure consent cannot be truly freely given in practice. In the case of online platforms, one can imagine a scenario where a dominant social media platform leveraging network effects and addictive, attention-grabbing content could potentially tilt the balance in their favour, such that consent may not genuinely be freely given, especially if the party giving consent is a vulnerable person. However, in general, we do not think from a public policy perspective that the perceived detriment to consumers associated with being incentivised to allow their personal data to be used for personalised advertising in exchange for free access to a service, warrants a comprehensive rejection of ‘consent or pay’ as a business model.

We are also aware of the recently published EDPB statement which argues that large online platforms will not plausibly be able to comply with the requirements for valid consent under a ‘consent or pay’ model. Were the ICO to follow this position, we would advocate a more interventionist approach. A more aggressive ICO, rejecting ‘consent or pay’ entirely, could push platforms to adopt the alternative model proposed below:

- An entirely ad-free option that requires the user to pay a monthly subscription fee, as a ‘luxury’ option where an organisation can charge fees as they see fit;
- A non-subscription option where a user consents to providing their personal data, utilising targeted adverts for those who genuinely consent to personalised advertising; and
- A non-subscription option that utilises traditional, non-targeted adverts. This acts as the default option for users unless they fall within options 1 or 2.

Overall, whilst we did have concerns about how the resulting model would be implemented, we felt that the bigger question is not if an organisation could implement the model (which we think could be compliant with the law), but how it does so (which requires strict scrutiny from the ICO). We answer this in our review of the ICO’s indicative factors in Q2.

Q2: HOW HELPFUL ARE THE INDICATIVE FACTORS IN COMPREHENSIVELY ASSESSING WHETHER ‘CONSENT OR PAY’ MODELS COMPLY WITH RELEVANT LAW?

SHORT ANSWER

- Power Balance: Helpful, but we would appreciate more extensive guidance on the “appropriate” power balance necessary for consent to be validly provided.
- Equivalence: Helpful as a factor, but we would emphasise that limitations need to be clearly established on efforts to bundle the ‘paid’ service with excessive additional features.
- Appropriate Fee: Neither helpful nor unhelpful, as not enough consideration has been weighed on the difficulty in defining an “appropriate” fee.
- Privacy by Design: Very helpful factor, and crucial to ensure that options for an individual user are presented fairly.

LONG ANSWER

Power Balance:

This factor focuses on where there is a sufficiently detrimental imbalance of power between a provider and its users, to negate the ability of the user to freely consent. We think that ‘Power Balance’ is helpful as an indicative factor in assessing the legality of the ‘consent or pay’ model for a particular service.

A distinction should, in our view, be raised between essential and discretionary services. In circumstances where there is no choice for users but to use the service, there cannot be an argument that consent is ‘freely given’ and that the user is able to withdraw without detriment. As such, power balance will be relevant here. Where service providers are dominant and in non-essential sectors, the position becomes more nuanced. While such companies hold significant market power, users will often maintain the option to switch to alternative providers or not use the service if they reject the ‘consent or pay’ model. This would almost certainly be a question of degree.

A danger here is that what we mean by an ‘appropriate’ power balance between the parties is somewhat subjective. Power, by its nature, can manifest in a wide variety of ways and can subtly change over time. We would welcome clearer guidance on what scenarios are envisaged as being sufficiently ‘appropriate’ or ‘inappropriate’ power balances to determine the legality of the model.

Equivalence:

The 'equivalence' factor examines whether the value users receive for opting out of personalised advertising through a paid service genuinely matches the value proposition of the free service, with such advertising. Overall, we think that 'equivalence' as a factor is helpful in assessing whether the paid service offers a genuine alternative that respects user choice.

Factoring in the requirement that 'consent' be specific and informed, we would emphasise that users of the paid service should understand the primary benefit of doing so, is the removal of personalised advertising and tracking and not additional features. We are particularly concerned that platforms will downplay the privacy aspect of paid services and focus on the promotion of additional features, which has the potential to mislead users into making choices based on those features rather than their data privacy preferences. Can such a choice truly be regarded as 'informed'? Any such additional features in a paid service should in our view be limited and where implemented, clearly explained. We would suggest a model of 'consent or pay' can include the words 'or pay more' to clearly separate additional features and unbundle them from the paid service specifically to remove personal data tracking.

While a premium service with privacy benefits strengthens the argument for a fair exchange, it does not necessarily guarantee freely given consent. Users may reasonably still feel pressured to choose the paid option if the free service with advertising is excessively restricted.

Appropriate Fee:

This factor looks at whether the paid service offers a cost that is fair in exchange for opting out of personalised advertising. We found this factor neither helpful nor unhelpful as explained by the ICO, and in need of scrutiny.

We were particularly concerned by the difficulty in establishing an appropriate fee. In Meta's implementation of the model, it originally proposed to charge €12.99 per month for Facebook and an additional €8 per month for a linked Instagram account totalling €251.88 per year. This was hugely disproportionate to Meta's own analysis of its figures placing the value per user across the two platforms at €62.88 for the period Q3 of 2022 to Q3 of 2023. We also note that Meta's initial proposed fee of €12.99 was slashed in half following pressure from European lawmakers. This does not indicate any clear, objective analysis behind what might be regarded as an 'appropriate' fee.

We were concerned that companies may set fees arbitrarily high so as to make privacy a luxury only affordable to those on higher incomes. We would suggest that some form of regulatory scrutiny or guidance would be necessary to ensure that the fees are justified. However, we would ask whether realistically the ICO has the resources to assess a question as subjective as 'appropriateness' of a particular fee, which seems well outside of the regulator's traditional remit regulating data protection.

Privacy by Design:

This factor asks whether the options are presented to the user with fairness and user privacy in mind. We think this factor is very helpful and is a key factor as to the legality of the implementation of the relevant model, but again requires further consideration.

‘Privacy by design’ is already a core principle in data protection law, and organisations should already be factoring this into their designs when processing personal data. Many organisations still operate ‘dark patterns’ designed to subtly encourage users to accept further tracking of their data, as well as other design mechanisms that limit user control over their experience of a website. Prevention of this will be a key challenge to address for platforms that operate on the business model; the reality is that an organisation that provides users with a paid option to remove tracking has every incentive to implement tactics that track data aggressively, maliciously, and as comprehensively as possible to push users to the paid option. If the ICO cannot effectively regulate against this issue, the online media landscape and the wider internet will be left worse for it.

Q3: ARE THERE ANY OTHER FACTORS THAT SHOULD BE CONSIDERED? OR ANYTHING ELSE YOU FEEL THE ICO SHOULD CONSIDER IN RELATION TO THE FACTORS?

SHORT ANSWER

Whilst we believe that the non-exhaustive list of four indicative factors outlined by the ICO and discussed in further detail in the preceding section has provided a useful catalyst for discussion, our view is that it would be prudent to consider some of these factors in further detail and provide some additional considerations to this list.

LONG ANSWER

The additional areas that we believe the ICO should consider before approving 'consent or pay' business models are as follows:

Appropriate fee:

This issue is one of the most important in considering whether the 'consent or pay' model will provide valid consent for personalised ads and has given rise to multiple concerns.

One such concern is that depending on the prices charged in lieu of consent, a position could arise whereby privacy becomes a privilege enjoyed only by the wealthy (with the term wealthy being used in the loosest sense, as someone who does not feel pressure to consent by virtue of financial constraints, however minimal the fee). It also follows that additional consideration should be given to those groups within society who are unable to work, or are from a low-income background, and whether their inability to pay for use of the service would result in the consent no longer being freely given as they lack a feasible alternative other than discontinuing their use of the service.

As a result of the above, we consider that for such proposed models to be viable in practice, care needs to be taken, and clear regulatory guidance issued, to prevent future abuse of this mechanism. In particular, we have concerns around the potential for platforms to abuse the system by implementing arbitrary price increases to reduce affordability and encourage users to revert to providing consent should they wish to continue using the service in question. Any prices introduced by platforms should be directly proportional to the amount of revenue made from the personal data and not used to create additional profit over and above that which is typically made from the use of targeted advertising.

Privacy by design:

Data subjects having an understanding of how their personal data is being used for targeted advertising and the fact that the service can be accessed by paying a fee instead of providing consent is critical and without it, consent is unlikely to meet the relevant threshold of being informed.

At present, many social media platforms allow users to create an account if they are aged 13 or older. As a result, the requirements of Article 8 UK GDPR in relation to parental consent and the utilisation of technology to verify that the consent is being provided by someone with parental responsibility should be actively enforced. Moreover, information should be provided to the parent in a way that highlights how their children's data will be used with any distinctions between how the data of children and adults is used being prominently highlighted. This step should occur at the outset of the profile creation process.

We also acknowledge and agree with the ICO's comment that "organisations need to give special consideration to the treatment of existing users of the service, who may understand the organisation's current approach and use the service extensively in their daily lives", and question the extent to which individuals who use the service extensively will be more likely to provide consent to simply prevent having their access to the service removed as many social media platforms have been proven to be addictive.

Refreshing consent:

One point not covered in the ICO's guidance is the notion of consent refreshing. The degradation of consent quality over time is entirely plausible, and a company that relies on consent should actively confirm if it is still explicit and valid.

As stated by the ICO in their guidance entitled 'How should we obtain, record and manage consent?' this should, as a maximum timeframe, be refreshed every two years, with fresh consent being sought where the processing operation or purpose evolves. Specifically, the use of personal data to provide targeted advertising should not create an umbrella processing operation and where new forms of advertising are developed and utilised by the platforms in question over time, an explanation of how the data is being used in new ways should be made available to the user along with an option to withdraw consent.

Children's consent should also be refreshed more regularly in line with the current ICO guidance on the matter.

Withdrawing consent without detriment:

If 'consent or pay' models are propagated across multiple sectors and industries, this could give rise to issues around whether consent can be withdrawn without the user suffering a detriment.

Our current thinking on this point is that, where the only option available to a user is to stop using a service if they withdraw consent and refuse to pay, then they are inherently suffering a detriment. Whilst the argument can be made that social media platforms are not an existential need like water or electricity, our concern relates to the potential for this model to be rolled out beyond social media to public services or those that society considers necessary, both from a practical perspective and/or based on current societal expectations. If this were to happen then the detriment suffered by the user is likely to be significant.

Consequently, if a service provider is in a position of power but is not "necessary" and/or there is a viable alternative offering which does not depend on a 'consent or pay' model, they could arguably have more freedom over the 'consent or pay' model they choose to implement.

Q4: DO YOU AGREE THAT ORGANISATIONS ADOPTING 'CONSENT OR PAY' SHOULD GIVE SPECIAL CONSIDERATION TO EXISTING USERS OF A SERVICE?

SHORT ANSWER

We strongly agree that special consideration to existing users should be used by organisations adopting 'consent or pay'. Existing users that have used a 'free' version of the service are susceptible to a detriment created by loss aversion, in a manner that new users facing the 'consent or pay' choice are not.

LONG ANSWER

Many users of social media use these platforms under the misleading pretence that they are receiving a free service. For existing users, the change in 'payment' method should be clearly communicated to ensure that consent is freely given.

There is a marked psychological difference between the nudging of individuals to continue using the service as they were previously, instead of fairly presenting individuals with two options for how they would like to use a service. Individuals are impacted by 'loss aversion' – the tendency to wish to avoid losing something we already have. This can make a user more likely to accept continued data processing than to actively choose, in an informed manner, between consenting to their data being processed or alternatively pay a subscription fee. In this regard, consent may not genuinely be given 'freely' without sufficiently clear user education.

From the perspective of existing users, the very introduction of a 'consent or pay' model could be a form of detriment. To withdraw a service currently being enjoyed unless a user agrees to now pay a fee would be a form of detriment. Additionally, those already using the service may deem it a 'necessary' service, especially those in a vulnerable position. For such persons, the dominance of the platform, lack of viable alternatives, and having the user previously integrated within the platform ecosystem requires more of the service provider to ensure they understand the decisions to be taken.

It is therefore highly important that the design of the consent structure places emphasis on the 'informed' element of consent for those existing users. We queried the ways in which organisations might take special measures to ensure informed consent of their users, such as a grace period to ensure that users have time to consider their options without feeling pressured to make a quick decision. However, we would strongly recommend that the ICO considers this matter in depth, so that organisations can better serve their existing users when switching to the new business model.

INPUT AND CONTRIBUTORS

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