

## Call for views on “consent or pay” business models

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We very much welcome the ICO’s Call for views. Please find hereunder our feedback to the “consent or pay” business models. Our comments are presented after a quotation from the proposed text by the ICO in a box.

### Emerging thinking on “consent or pay”

Regarding the case of “consent or pay” business models – a typical representation of which can be found in cookie paywalls, we aim to provide our evidence-based feedback on this particular issue.

#### What does the law say about “consent or pay”

Data protection law allows for a wide range of different approaches and business models. It balances fundamental rights like the right to privacy with other rights, like the freedom to conduct a business.

As our [guidance says](#) some types of access mechanisms aren’t likely to comply with expectations in data protection law for consent to be ‘freely given’. For example, where they don’t provide people with a free choice about whether to receive personalised ads. This can be the case with cookie walls that deny access to a service unless users consent to personalised ads.

The Guidance needs to disambiguate between two different consent requests: “cookie walls” and “cookie paywalls” which are often conflated. Cookie walls have been declared illegal by the EDPB.<sup>1</sup> “Cookie paywalls” or “consent or pay” triggers compliance issues with data protection law.

Regarding EU data protection law and what it says about “consent or pay”, we want to point out that in the EU, the Danish, Estonian, Spanish, German, Austrian and French DPA cookie paywall guidelines while legitimising in general the use of cookie paywalls according to concrete requirements, are not yet consistent with each other regarding their requirements, and this divergence triggers a different level playing field for both publishers and data subjects in the EU.<sup>2</sup>

<sup>1</sup> EDPB. Statement of the EDPB on the revision of the ePrivacy regulation and its impact on the protection of individuals with regard to the privacy and confidentiality of their communications, 2018

<sup>2</sup> D’Amico, Alessia Sophia and Pelekis, Dionysios and Santos, Cristiana and Duivenvoorde, Bram, Meta’s Pay-or-Okay Model: An Analysis Under EU Data Protection, Consumer, and Competition Law (March 28, 2024). Utrecht University School of Law Research Paper Forthcoming, <https://dx.doi.org/10.2139/ssrn.4787609>; Victor Morel, Cristiana Santos, Viktor Fredholm, and Adam Thunberg, ‘Legitimate Interest is the New Consent – Large-Scale

In 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.

This paragraph should detail how “Consent or pay” models comply with a freely given, informed, and revocable consent in concrete and preferably with several examples for clarity.

Several critics have been pointed out regarding “Consent or pay” that do not render consent **specific**. Such models need to indicate per choice, whether:

- if users pay, will they still be tracked, and under which concrete purposes instead of advertising, or
- if users consent to targeted ads, for other purposes, besides advertising, personal data might be processed.

Furthermore, specific consent requires granular consent per purpose, and thus that users are able to accept and reject per purpose. This requirement entails that consent per purpose could be situated at the first or second layers of a “Consent or pay” banner, as per the EDPB Report of the work undertaken by the Cookie Banner Taskforce.<sup>3</sup> Such models need then to provide granular purposes and also a choice between accepting and declining consent per purpose.

Regarding **revocable** consent, the guidance should clarify that withdrawing consent should be as easy as to give consent. Such easiness of withdrawal should be specified in terms of

- i) level of effort (which should be the same),
- ii) accessible and permanent mechanism;
- iii) measurable criteria that need to be identified, such as the time spent and the number of steps or actions necessary to withdraw are the same as acceptance.<sup>4</sup>

Regarding a **freely given** consent requirement, the data subject should be able to exercise a real choice considering the different options. The alternative to consent consists in paying for a subscription-based fee. However, Morel et al.<sup>5</sup> confirm that even if data subjects pay for such subscriptions, they are still tracked (under the legal basis of legitimate interest) for non-necessary purposes. Further, Rasaii et al.<sup>6</sup> observe that cookie paywalls collect “42

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Measurement and Legal Compliance of IAB Europe TCF Paywalls’ (Proceedings of the 21<sup>st</sup> Workshop on Privacy in the Electronic Society (WPES ’23), Copenhagen, Denmark November 2023). Available at: <https://doi.org/10.1145/3603216.3624966>, page 3.

<sup>3</sup> As per point 8 of the Report, “a vast majority of authorities considered that the absence of refuse/reject/not consent options on any layer with a consent button of the cookie consent banner is not in line with the requirements for a valid consent and thus constitutes an infringement of the ePrivacy Directive”. See: EDPB, ‘Report of the work undertaken by the Cookie Banner Taskforce’, Adopted 17 January 2023, p 4, available at: [https://www.edpb.europa.eu/system/files/2023-01/edpb\\_20230118\\_report\\_cookie\\_banner\\_taskforce\\_en.pdf](https://www.edpb.europa.eu/system/files/2023-01/edpb_20230118_report_cookie_banner_taskforce_en.pdf).

<sup>4</sup> As recommended by the French DPA, <https://www.cnil.fr/sites/cnil/files/atoms/files/recommandation-cookies-et-autres-traceurs.pdf>.

<sup>5</sup> Ibid, page 4.

<sup>6</sup> Ali Rasaii, Devashish Gosain, and Oliver Gasser, Thou Shalt Not Reject: Analyzing Accept-Or-Pay Cookie Banners on the Web <https://www.devashishgosain.com/assets/files/paper-cameraready.pdf>.

*times more tracking cookies compared to “regular” cookie banner websites*”. Such afforded options means that consent is not freely given.

## What do organisations need to consider?

The issues that “consent or pay” touches on are complex and we continue to develop our position in this area, taking account of regulatory and industry developments in the UK and other jurisdictions. We’ll expand on our thinking later this year when we consult on updated guidance on cookies and similar technologies.

In line with our 2021 Commissioner’s Opinion on online advertising, we’ll be looking at “consent or pay” proposals in terms of how organisations:

- ensure what they want to do is focused on people’s interests, rights and freedoms;
- evidence that people are fully aware of what happens when they interact with an online service; and
- show that people are making informed, free choices about whether to engage or not.

Caution should be taken while “considering industry developments in the UK and other jurisdictions” that are not based on scientific evidence and could shape the ICO’s guidelines.

The guidance needs to be cognizant of the main findings of scientific empirical peer reviewed studies on “consent or pay” models that reflect on what end-users want, and their privacy perceptions. A user study by Müller-Tribbensee et al. confirmed that 99% of users choose the tracking option when confronted with this pay-or-okay model.<sup>7</sup> A web measurement study by Morel *et al.*<sup>8</sup> clarified that when contacting the CEO of subscription management platform contentpass to better understand their pay-or-okay model, the authors were informed that 99.9% of visitors consent to tracking technologies. Akman’s survey of 11.151 respondents mentioned that only 9% of users were willing to pay to continue using Facebook, were it to start charging a €5 monthly fee for the same quality service.<sup>9</sup> Empirical studies might provide insight on the (un)willingness to pay, and on the (un)fair alternatives under a pay-or-okay ‘choice’.

Furthermore, there is a fundamental problem with “Consent or pay” model – the widespread use of such models – already way beyond from news websites, including as well entertainment, computers and technology, and business<sup>10</sup> categories of websites could undermine privacy regulations and user expectations by making the right to privacy something that users must actively purchase rather than a fundamental right that is protected. This way, privacy will gradually be considered as an add-on not necessarily needed and something luxury to pay for it

<sup>7</sup> Timo Müller-Tribbensee, Klaus Miller, and Bernd Skiera, ‘Paying for Privacy: Pay-or-Tracking Walls’ (March 5, 2024), p 37. Available on SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4749217](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4749217).

<sup>8</sup> Ibid.

<sup>9</sup> Pinar Akman, ‘A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets’ (2022) 16(2) Virginia Law and Business Review 217.

<sup>10</sup> Morel et al., Legitimate Interest is the New Consent, op. cit., Appendix.

As a starting point, we expect organisations thinking about a “consent or pay” model to consider a range of factors when assessing whether it will provide valid consent for personalised ads in the relevant context. These factors are non-exhaustive and we welcome feedback on our approach.

### Power balance

To what extent is there a clear imbalance of power between the service provider and its users? 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 access to online public services should not be subject to consent or pay, in that it would introduce a clear imbalance to users of such services.

Another factor of power imbalance is reflected on a website's exclusivity on the content or service offered. Typically, newspapers – the main type of websites hosting cookie paywalls<sup>11</sup> –, can fall under such exclusivity of content in the case of the biggest players, insofar that major newspapers are in a position of market power.

Regarding such a case where a service provider has a position of market power, additionally, the guidance should include factors such as i) high network effect that can potentially create a ‘lock-in’ effect, and ii) monopoly on the concrete sector/user’s age group.

We also want to point out that all digital services addressing vulnerable data subjects (like children) trigger power imbalance relationships.

In addition, the hidden non-transparent collection of personal data and sensitive data can influence any power balance scenario. For example, news websites might fall in the category of sites revealing information about special categories of data (Article 9(1) GDPR), since reading about certain topics could reveal one’s political opinion or health status<sup>12</sup>. Also, information about people’s media use and reading habits is generally sensitive<sup>13</sup>.

### Equivalence

Are the ad-funded service and the paid-for service basically **the same**?

For example, if a service provider offers a choice between personalised ads and a ‘premium’ ad-free service that bundles lots of other additional extras together, then this wouldn’t be the case.

<sup>11</sup> Morel et al., Legitimate Interest is the New Consent, op. cit., Appendix.

<sup>12</sup> Wesselkamp, V., Fouad, I., Santos, C., Boussad, Y., Bielova, N., and Legout, A. In-Depth Technical and Legal Analysis of Tracking on Health Related Websites with ERNIE Extension. In WPES 2021 - 20th Workshop on Privacy in the Electronic Society (Seoul, South Korea, Nov. 2021).

<sup>13</sup> Zuiderveen Borgesius, F., van Hoboken, J., Fahy, R. P., Irion, K., and Rozendaal, M. An assessment of the commission’s proposal on privacy and electronic communications. Directorate-General for Internal Policies, Policy Department C: Citizen’s Rights and Constitutional Affairs (2017).

The guidance should provide scenarios wherein both choices are considered to be the same and the other way around. Current cookie paywalls offer only the options to either accept consent for ad tracking purposes (advertising or third-party analytics), or in alternative, a tracking-free paid subscription.

Regarding the option to accept consent to tracking purposes, we recently observed a novel model coined *double paywalls*, which consists in conditioning the access to the content of a website with a new paywall although the user has already consented to all data collection from a cookie paywall in the front page and thus avoided to pay a fee (e.g. <https://liberation.fr>). In this case, the two options provided are not similar, because in the consent choice a data subject cannot access the entirety of the website. On the following websites, a data subject is hence burdened twice. We contend that an unregulated online market of cookie paywalls can lead to varied implementations, including double paywalls.

Within the option of a paid subscription, mostly recommended by several regulators DPAs is the need for an alternative that is reasonable<sup>14</sup>, and fair<sup>15</sup> without tracking for targeted ads. The content or service offered by the company must be a genuinely equivalent<sup>16</sup> service under both choices. Such equivalence entails that the paying visitors cannot have access to significantly more content than the visitors who give their consent.

Furthermore, as outlined in the section titled “What do organisations need to consider?” end-users do not perceive these choices as equivalent, since they do not want to pay in order to access the service's content.

### Appropriate fee

Is the fee appropriate? Consent for personalised ads is unlikely to be freely given when the alternative is an unreasonably high fee. Fees should be set so as to provide people with a realistic choice between the options, with the provider capable of providing objective justification of the appropriateness of the level.

As shown in Morel et al.<sup>17</sup> monthly subscriptions can rise up to 75 euros a year for one newspaper (e.g. DerStandard). As a result, subscribing to several news outlets or other

<sup>14</sup> Datatilsynet, Brug af Cookie Walls, 20 February 2023, available at: <https://www.datatilsynet.dk/presse-og-nyheder/nyhedsarkiv/2023/feb/brug-af-cookie-walls>; Agencia Española de Protección de Datos, ‘Guía sobre el uso de las cookies’, January 2024, p 29. Available at: <https://www.aepd.es/guias/guia-cookies.pdf>.

<sup>15</sup> Commission Nationale de l'Informatique et des Libertés, ‘Cookie walls : la CNIL publie des premiers critères d'évaluation’, 16 May 2022, available at: <https://www.cnil.fr/fr/cookie-walls-la-cnil-publie-des-premiers-criteres-devaluation>.

<sup>16</sup> Datenschutzkonferenz, ‘Bewertung von Pur-Abo-Modellen auf Websites, Resolution of the Conference of Independent Data Protection Supervisory Authorities of the Federal and State Governments, March 22 2023, available at: [https://datenschutzkonferenz-online.de/media/pm/DSK\\_Beschluss\\_Bewertung\\_von\\_Pur-Abo-Modellen\\_auf\\_Websites.pdf](https://datenschutzkonferenz-online.de/media/pm/DSK_Beschluss_Bewertung_von_Pur-Abo-Modellen_auf_Websites.pdf).

<sup>17</sup> Victor Morel, Cristiana Santos, Yvonne Lintao, and Soheil Human. 2022. Your Consent Is Worth 75 Euros A Year - Measurement and Lawfulness of Cookie Paywalls. en. In Proceedings of the 21st Workshop on Privacy in the Electronic Society. ACM, Los Angeles CA USA, (Nov. 2022), 213–218. isbn: 978-1-4503-9873-2. <https://doi.org/10.1145/3559613.3563205>, page 5

services (such practice appears to spread into business, tech, and entertainment websites, see Morel et al.<sup>18</sup>) may incur significant costs for users, despite a seemingly moderate cost per month per service.

The guidance must include assessment criteria and contexts to determine when a fee is reasonable and appropriate.

Moreover, fees should be justified based on the benefits service providers could have received if the users consented instead of deciding to pay not to be tracked. Otherwise, considering different groups of people pertaining to different social classes, and their income levels, expenditures, and specific contexts, it is complex and subjective to have a fair price from different people's points of view. For certain disadvantaged populations, regardless of the price, they will always opt for a non-paid option that offers the same service, as they have different priorities for their spending.

### Privacy by design

Are the choices presented **fairly and equally**? This means giving people clear, understandable information about what the options mean for them and what each one involves (see below). Consent for personalised ads is unlikely to be freely given when people **don't understand how their personal information is being used** or that they can access the service without having to agree to the use of their personal information. 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. This may lead to a difference in power balance (for example, users may find it hard to switch) or have implications for how choices are presented.

We want to highlight that websites using "consent or pay" business models deploy deceptive design techniques (also called dark patterns), in particular, promoting unbalanced choices. We have seen several cookie paywall designs where the consent option stands out with highlighted colours, while the payment choice remains understated in plain white or grey. We have also noticed the pay option hidden in small letters outside of the "consent or pay" banner.

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<sup>18</sup> Morel et al., Legitimate Interest is the New Consent, op. cit., Appendix.

## What do organisations using “consent or pay” need to tell people?

Remember, when an organisation relies on consent it must be able to demonstrate that it's valid. There must be no room for any doubt that people have been properly **informed** about what will **happen with their personal information** and what this means for them. This means organisations must inform people about how they (and any other organisations they work with) intend to use their personal information as **payment for the service they receive** – as well as what it means if **they decide to say no**, now or in the future. Being upfront and honest with people about what happens to their personal information when they use the service is a good thing. It will build their trust and confidence in what the organisation is doing and how it protects people's personal information.

Organisations using “consent or pay” models must inform users about the alternative to consent to ads, the appropriateness of the price, the purposes for which each personal data is processed for, whether users are tracked even if they pay and under which purposes and legal basis. However, several empirical consent-related studies already demonstrate that users read neither consent requests nor their policies, and thus this mandated information disclosure might be ineffective.<sup>19</sup>

## What if people later want to withdraw consent?

The UK GDPR gives people a specific right to withdraw consent. Organisations need to tell people about this, and offer them **easy ways to withdraw consent at any time**. Remember, it must be as easy for people to withdraw consent as it is to give. Organisations must also ensure people can withdraw their consent without detriment. Where people decide to withdraw consent organisations will need to make sure that this is communicated to other organisations that they have shared people's personal information with.

The guidance needs to make clear that easiness to withdraw consent entails i) the same level of effort, ii) in a permanent (at any time), iii) accessible way. The Guidance needs to provide measurable criteria to determine in practice what means easiness to withdraw. For example, the French DPA proposed the time spent and the number of actions necessary to withdraw consent.<sup>20</sup>

Moreover, the guidance should also identify the design of the withdrawal solution. In this line, the EDPB<sup>21</sup> recommends a persistent icon/button, or a website footer link.

<sup>19</sup> Aleecia M McDonald and Lorrie Faith Cranor, 'The Cost of Reading Privacy Policies' (2009) 4(3) Journal of Law and Policy for the Information Society 542, 561; Nataliia Bielova, Cristiana Santos, Colin M Gray, 'Two worlds apart! Closing the gap between regulating EU consent and user studies', forthcoming in Volume 37 of the Harvard Journal of Law & Technology (JOLT), p 21.

<sup>20</sup> "La simplicité de l'accès peut notamment se mesurer au temps passé et au nombre d'actions nécessaires pour effectivement retirer le consentement" (paragraph 42) <https://www.cnil.fr/sites/cnil/files/atoms/files/recommandation-cookies-et-autres-traceurs.pdf>

<sup>21</sup> EDPB - Report of the work undertaken by the Cookie Banner Taskforce , op. cit.