

# CONSENT OR PAY: ONE RULE FOR SOME (LARGE ONLINE PLATFORMS), ANOTHER RULE FOR EVERYONE ELSE?

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**Weil**

## THE BACKGROUND

The “consent or pay” model is the choice between users consenting to their personal data being used for behavioural advertising for access to an online service or paying a fee for access to the service (without the processing of personal data for behavioural advertising).

The model partly has its roots in the European Court of Justice (“**CJEU**”) decision in *Bundeskartellamt*, which set the ball rolling for the adoption of ‘consent or pay’ when the court stated that users refusing to give consent to behavioural advertising must be offered, “*if necessary for an appropriate fee*”, an equivalent alternative service not accompanied by such data processing operations.

In November 2023, Meta introduced a subscription model in the EEA and Switzerland giving users the option to pay (€12.99 a month) to avoid targeted advertisements. However, the model had been used by news outlets in Austria and Germany as early as 2021 which, while challenged by Schrem’s European data privacy civil rights group, *noyb*, has been permitted in principle by the relevant regulators. Most recently, in July 2024, a number of UK news outlets, including the Daily Mail, began requiring readers to pay for access if they did not consent to the processing of their personal data behavioural advertising purposes.

So is the “pay or consent” model, otherwise known as “pay or OK” model, OK after all? Maybe for some, but probably not for all (at least for large online platforms in the EU).

## LARGE ONLINE PLATFORMS

After requests from the Dutch, Norwegian and German (Hamburg) data protection authorities for an opinion, the European Data Protection Board (“**EDPB**”) concluded in its Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms (“**EDPB Opinion**”) that **in most cases, it will not be possible for large online platforms to comply with the requirements for valid consent under the GDPR if they provide users only with a binary choice between consenting to processing of personal data for behavioural advertising purposes and paying a fee.**

In particular, the EDPB Opinion stated that large online platforms could provide a third option – an alternative that does not require payment of a fee – suggesting this could be achieved by offering the equivalent service with a different form of advertising involving the processing of less or no personal data (for example, using contextual advertising).

However, the EDPB stopped short of both saying large online platforms need to offer this third option or ruling that the “consent or pay” model was unlawful (something it could not do in any event as a result of the *Bundeskartellamt* decision). Instead the EDPB noted that such models can still operate provided GDPR consent requirements are met. So, it might have left the door open for large online platforms, but it appears only barely ajar:

- A key part of valid consent under the GDPR is that it is freely given, including that the user does not suffer detriment as a consequence of refusing or withdrawing consent. The EDPB Opinion notes that detriment can result from users not being able to access services that play a prominent role in daily life, including social media services. Such detriment may be more acute where lock-in effects (i.e. where the user cannot easily move to another service, for example, users who have built up a following on that platform) or network effects (i.e. everyone is using that platform, so it is unrealistic or difficult for the user to use a different service) are present. This will be a difficult or impossible hurdle for the larger online platforms to overcome. Large online platforms may need different approaches for different categories of users.
- In addition, while payment does not automatically equate to detriment to the user, detriment can be financial if the fee is set inappropriately high so as to nudge the user towards consenting. Accordingly large online platforms will need to think carefully about, and be able to justify, the level of any fee.
- An imbalance in power will also affect whether consent can be considered to be freely given. The market position of the online platform is a key factor here, and again lock-in or network effects are demonstrative of an imbalance in power. The onus is on the platform to prove there are no adverse consequences for the user. Again, a tall hurdle for those dominant online platforms.

Nonetheless, while that metaphorical door is only slightly ajar, the EDPB Opinion is non-binding. It remains to be seen if Member State DPAs follow this. Meta also hope to challenge the EDPB Opinion at the CJEU.

## OTHER ADVERTISING-FUNDED BUSINESS MODELS?

The EDPB Opinion is limited in scope to “consent or pay” models employed by ‘large online platforms’. While this term is not definitively defined (and so organisations will need to make their own assessment), the EDPB provides a list of non-exhaustive elements that may be taken into account when making that determination, including the volume of users, market position, and the geographical extent of processing. Accordingly ‘large online platforms’ may include designated ‘gatekeepers’ under the EU Digital Markets Act and ‘very large online platforms’ under the EU Digital Services Act.

So has the EDPB then created a two tier system with one rule for ‘large online platforms’ and another for advertising-funded businesses not falling within this category? Maybe.

The EDPB has said it will develop further guidelines on consent or pay models which will have a “broader scope”, so it is wait and see (although we think the answer is likely to be the same principles apply, but it will be easier for these organisations to demonstrate valid consent).

## THE UK POSITION

The UK data protection regulator, the Information Commissioner’s Office (“**ICO**”), initial view is that in principle, UK data protection law does not prohibit “consent or pay” business models. On the face of it, this might appear more promising for ‘large online platforms’ in the UK. However, unlike the EDPB Opinion, the ICO’s initial view is not limited in scope to large online platforms, but applies to advertising-funded business models more generally. Given this, we wouldn’t expect it to reach the same conclusion as the EDPB Opinion, and it remains to be seen if the ICO take a narrower approach for ‘large online platforms’.

Still, consistent with the EDPB Opinion, the ICO emphasises that any organisation considering such a model must be careful to ensure that consent has been freely given, is fully informed, and capable of being withdrawn without detriment. These are all UK GDPR consent requirements, and all factors that were highlighted in the EDPB Opinion as potentially difficult for large online platforms to satisfy. The ICO also identifies four (non-exhaustive) factors that organisations need to consider when assessing whether valid consent has been given: power balance, equivalence, an appropriate fee, and presentation of fair and equal choices, which on the face of it, also align with factors set out in the EDPB Opinion and again make it difficult for large online platforms.

However, as ever, the devil is in the detail and the ICO has only laid out its initial view, which it will further develop later this year following its March 2024 call for views on “pay or consent” business models (which closed on 17 April 2024). The ICO has also specifically stated that it will take account of regulatory and industry developments in the UK and other jurisdictions.

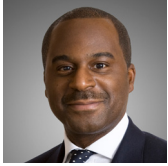
The big question is will the ICO take a more forgiving approach to “consent or pay” than in the EDPB Opinion, in particular for large online platforms? Is this an area where the UK and EU data protection regimes meaningfully diverge post-Brexit? The ICO have been known to be more practical than its EU counterparts, and so this could be a real possibility.

## WHAT ARE WE WAITING FOR?

- The outcome of Meta’s challenge to the EDPB Opinion. How far will this get?
- Supervisory authorities’ decisions on any particular consent or pay models (remember: the EDPB Opinion is non-binding).
- Further EDBP guidance on use of “consent or pay” by organisations that are not large online platforms.
- The ICO’s more developed view on “consent or pay” under the UK GDPR.
- The outcome of the European Commission investigation into Meta under the EU Digital Markets Act. The questions surrounding “consent or pay” is not only relevant to the GDPR and e-Privacy legislation. On 1 July 2024 the European Commission found (as part of its preliminary findings) that Meta’s “pay or consent” advertising model fails to comply with the Article 5(2) of the EU Digital Markets Act. This requires that gatekeepers seek users’ consent to combine their personal data between designated core platform services and other services of the gatekeeper, and where such consent is refused, that user should have access to a less personalised but equivalent alternative.

# FOR MORE INFORMATION

If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to the authors listed below.



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