

AIG Position Paper on Consent or Pay

The Advertising Information Group (AIG), an informal European grouping of national advertising tripartites representing advertisers, advertising agencies and the media, along with several Brussels-based trade bodies, advocates for a genuine Single Market in commercial communications and supports responsible advertising self-regulation in the EU. AIG is also an industry member of the European Advertising Standards Alliance (EASA).¹

The “consent or pay” model has emerged as a significant point of discussion, particularly concerning the access to and financing of online content. Under this model, users are presented with a choice: either consent to data processing for the purposes of personalised advertising or pay a subscription fee to access services without tracking for such purposes. Although the European Court of Justice, through its decision in the *Bundeskartellamt v Meta Platforms* case (C252/21), has unequivocally confirmed the legality of consent or pay models under the GDPR, the European Data Protection Board (EDPB) has raised questions about the nature of freely given consent, the appropriateness of fees, potential power imbalances between service providers and users, and the broader implications for digital business models.

However, AIG strongly supports preserving the consent or pay model as a legitimate business approach, which is backed by both legal precedent and market practice. This position is reinforced by several key considerations: in several Member States, consent or pay models have been developed together with national Data Protection Authorities and are commonly used across European digital services, particularly in the news media sector. Furthermore, they are recognised in EU legislation and validated through various court decisions and regulatory guidance. The model provides a practical solution for sustaining quality digital content while respecting user choice. Imposing one-size-fits-all solutions such as the (exclusive) use of contextual advertising without considering the specificities of each business can significantly harm revenue generation, potentially threatening the viability of digital services and content creation. This could have far-reaching implications for media plurality and the sustainability of digital businesses across Europe.

Fundamental Rights and Business Considerations

At the core of this discussion lies the principle that data privacy and data protection, while crucial, are not absolute rights, as established in Recital 4 of the GDPR. These rights must be balanced with other fundamental freedoms, including media freedom and plurality (CFREU Article 11.2) and the freedom to conduct business (CFREU Article 16). Press publishers, for example, require sustainable revenue streams to compensate journalists and produce content. The GDPR was not conceived to impose uniform choices on internet users or dictate specific business models. We maintain that businesses should retain the freedom to determine their service features, provided these features comply with the provisions of the GDPR.

Legal Framework Supporting Consent or Pay

The legal foundation for consent or pay models is well-established within EU legislation and jurisprudence. Businesses have the right to select their commercial model to recover costs and generate profit, which in turn allows further investment. The EU Digital Content Directive 2019/770² and the Consumer Rights Omnibus Directive 2019/2161³ recognise that digital services may be provided in exchange for personal data as an alternative to monetary payment.

¹ <https://www.easa-alliance.org>

² [Directive - 2019/770 - EN - EUR-Lex \(europa.eu\)](#)

³ [Directive - 2019/2161 - EN - omnibus directive - EUR-Lex \(europa.eu\)](#)

This model has gained widespread adoption across Europe, particularly in the editorial media sector, and these models have been developed based on the feedback received from the competent Data Protection Authorities to ensure GDPR compliance. In Germany, prominent publications like Der Spiegel, Zeit and Bild have implemented consent or pay models. The District Court of Regensburg (GRUR – RS2024)⁴ has also noted that this business model is now commonplace.

The GDPR itself provides for such arrangements. Article 6(1) outlines legal bases for data processing without restricting contractual rights involving data use. Furthermore, the CJEU's ruling in the Bundeskartellamt v Meta Platforms⁵ case affirmed that users can be – and in case of a market dominant controller shall be – offered an equivalent alternative, if necessary for an appropriate fee, when refusing consent for non-essential processing.

“those users must be free to refuse individually, in the context of the contractual process, to give their consent to particular data processing operations not necessary for the performance of the contract, without being obliged to refrain entirely from using the service offered by the online social network operator, which means that those users are to be offered, if necessary for an appropriate fee, an equivalent alternative not accompanied by such data processing operations.” (para 150)

This position has been reinforced by various national authorities. The Norwegian Privacy Board, in the Grindr case, explicitly stated that service providers are not obligated to offer free services.⁶ German data protection authorities have recognised that personal data processing based on consent can be legitimate when a paid, tracking-free alternative is available.⁷

The Spanish AEPD⁸ has similarly acknowledged that access to services may be contingent on cookie acceptance if an alternative, not necessarily free, is provided.

“There may be certain cases in which non-acceptance of the use of cookies prevents access to the website or total or partial use of the service, provided that the user is adequately informed about this and an alternative is offered, not necessarily free, access to the service without having to accept the use of cookies.”

In light of the above, we believe that the legality of consent or pay models under the GDPR is well established.

Fee Determination and Market Dynamics

A central point of contention in the consent or pay debate concerns the determination of appropriate fees for the paid option. Some stakeholders have suggested that data protection authorities should play a role in determining or limiting these fees. However, such an intervention lacks a legal basis in data protection law and would represent an unprecedented intrusion into market dynamics and unjustified restriction of entrepreneurial freedom, therefore potentially undermining the economic sustainability of digital services.

The determination of appropriate fees falls outside the purview of data protection law – fundamentally, prices should be market driven and there should not be a general obligation to justify pricing decisions. While competition authorities may assess whether fees are excessive or predatory, they too should not be involved in determining fees. Fee determination involves complex business judgements, forecasting, and consideration of varying production costs

⁴ [LG Regensburg, Endurteil v. 15.04.2024 – 75 O 1040/23 - Bürgerservice \(gesetze-bayern.de\)](#)

⁵ [EUR-Lex - 62021CJ0252 - EN - EUR-Lex \(europa.eu\)](#)

⁶ [PVN-2022-22 Grindr - utlevering av personopplysninger uten gyldig samtykke - overtredelsesgebyr | Personvernemnda](#)

⁷ [DSK Beschluss Bewertung von Pur-Abo-Modellen auf Websites.pdf \(datenschutzkonferenz-online.de\)](#)

⁸ [guia-cookies.pdf \(aepd.es\)](#)

across providers. The fee must reflect both service value and production and delivery costs, not merely the price of personal data.

Any attempt to establish financial benchmarks for “appropriateness” would be arbitrary, given the dynamic nature of advertising revenue and user behaviour patterns. Regulatory intervention in pricing would impair market competitiveness, undermine businesses’ autonomy in price setting and infringe the fundamental right to run a business. As price fairness for consumers is often cited as a factor in this debate, it is worth considering that consumers are already protected from unfair commercial practices in the EU. By the same token, it would be unjustified to force companies to provide services at a loss.

Freely Given Consent and Power Dynamics

Critics of the consent or pay model often raise concerns about potential power imbalances between service providers and users, suggesting that this model may unduly pressure users into consenting to data processing. However, this perspective ignores established regulatory guidance as well as case law confirming the legality of the models. At the same time it overlooks the fundamental nature of market economics and individual agency in the broader digital ecosystem. It is essential to examine how the model actually enhances user choice while maintaining the viability of digital services, rather than diminishing it.

We argue that the consent or pay model safeguards users’ freedom to consent while acknowledging that access to private, for-profit services is not an inherent right. Users who decline both options retain the freedom to explore numerous market alternatives. This explicitly reflects the pluralistic nature of the European Internal Market, ensuring that users always have a genuine and free choice without incurring any detriments. However, this also means that the absence of an option for usage without any consideration does not, in and of itself, constitute a detriment. Rather it is a feature of the market economy. In fact, the consent or pay model enhances user freedom by providing two alternatives for its consideration. At the same time, it remains an optional business model for providers, who are free to decide whether to offer their services for a fee, finance it through data-based advertising, provide both options, or rely on a different business model altogether. However, the regulatory assessment may differ for service providers for which there is no alternative in the market.

Therefore, when evaluating the impact of consent or pay models, the key consideration should be whether users experience actual detriment from withdrawing consent, and how such effects balance against other rights. As shown, in most cases the consent or pay model generally broadens user choices to their advantage without any detriment.

However, the notion of detriment extends beyond individual user impact, particularly in the press and publishing sector. There are two crucial implications to consider: first, the potential consequences if publishers cannot effectively monetise their content through personal data and are hindered in acquiring subscribers, and second, the broader societal impact if all news and editorial content were to exist solely behind paywalls. These considerations underscore the importance of maintaining flexible business models that can support media plurality and access to information while respecting user choice. Furthermore, the two options of “consent” or “pay” are not mutually exclusive but often complement each other and allow potential subscribers to test the product without any fee before purchasing a subscription.

Regulatory Oversight and Competence

The implementation of consent or pay models has drawn attention from various data protection authorities across Europe. Given the broad areas being considered, it has raised important questions about regulatory jurisdiction and the appropriate boundaries of oversight. Data protection authorities are principally tasked with the enforcement of the GDPR. They are not market regulators, nor do they have an explicit mandate to examine pricing practices. Therefore, it becomes crucial to clearly delineate the role of the data protection authority, that

in many cases contributed to the development of consent or pay models, to ensure effective and appropriate supervision without overreach. Additionally, the EDPB's role in this context also requires careful consideration, especially as it lacks lawmaking and market-making powers.

An Equivalent Alternative

Another key consideration in the implementation of consent or pay models is the question of service equivalence between consent-based and paid versions of digital services. Some regulators and critics argue that both versions should be identical in all aspects except for the presence of personalised advertising. We urge caution against adopting rigid interpretations of business service delivery requirements that do not account for freedom of business nor that certain features require data processing to function and therefore cannot be translated into the processing-free version.

This perspective also raises practical challenges and potentially restricts innovation in business models. Digital business models complement the diverse range of services they support. Not only is this diversity explicitly protected by Article 16 of the Charter, which upholds the freedom to conduct a business (Note that Recital 4 of the GDPR also explicitly requires that fundamental rights be balanced), a blanket standardisation of the market, such as determining whether a service constitutes “additional premium features,” would threaten business models and violate existing legal principles. Instead, a case-by-case approach should be taken to evaluate equivalence and equivalent alternatives that might be offered within the consent or pay model.

It is also important to emphasise that the standard established by the GDPR is the principle of freely given consent, not the one of equivalent offers. Thus, reasonable variations/adjustment between the offers, or specific incentives towards an option versus another does not, in our opinion, prevent consent from being freely given. Ultimately, publishers and content providers should remain free to design additional offers, such as premium offers, bundles of access and other features.

A Third Free Alternative without Behavioural Advertising

Moreover, suggestions for a third alternative that is both free and without behavioural advertising (“Free Alternative Without Behavioural Advertising”) that have been repeatedly demanded by critics of the model warrant closer examination.

It is important that any requirement is interpreted in the context of the law. The Digital Markets Act (DMA), specifically Article 5(2) in conjunction with Recital 36, imposes specific obligations exclusively on so-called gatekeepers to restore a fair and contestable digital market for competitors and consumers. Hence, the provision of a “Free Alternative Without Behavioural Advertising” articulated in the EDPB's Opinion 08/2024⁹ concerning Large Online Platforms responds to the DMA's goal of limiting gatekeepers' market power via data accumulation. It should not be interpreted as a general requirement for the entire digital ecosystem.

In addition, the GDPR does not, at any point, obligate service providers to provide a “Free Alternative Without Behavioural Advertising.” The CJEU, when outlining the legal framework of the GDPR in the *Bundeskartellamt v Meta Platforms* ruling, noted that even for gatekeepers no such obligation exists.

In addition to the legal implications, there are commercial consequences. Research indicates that removing behavioural ads reduces revenue significantly, with EU ad prices dropping 18-

⁹ https://www.edpb.europa.eu/system/files/2024-04/edpb_opinion_202408_consentorpay_en.pdf

23% when user tracking is unavailable.¹⁰ Thereby, the suggestion for alternative approaches like contextual advertising presents significant challenges, as click-through rates for contextual advertising are substantially lower than behavioural advertising, threatening business viability.¹¹ In this context, it is also worth highlighting that consumers consistently state that they prefer relevant ads.¹² Against this backdrop, it is not the role of the EDPB to speculate on best-practice approaches for business models.

Consequently, obligating companies to offer a third alternative that is both free and without behavioural advertising would be *contra legem* under the GDPR, economically unsustainable, and distort market dynamics. It must be clear that offering a third free alternative without behavioural advertising should be a voluntary choice and never a legal obligation.

Conclusion

The “consent or pay” model represents a legally sound, market driven approach that balances user privacy with business sustainability. We argue for its preservation and continued development:

First, the consent or pay model’s legal foundation is robust, supported by EU legislation, court decisions, and regulatory guidance across multiple Member States. The EU Digital Content Directive, the Consumer Rights Omnibus Directive, as well as rulings applied by various national authorities and courts have explicitly recognised the legitimacy of offering digital services in exchange for either personal data or monetary payment.

Second, the model enhances rather than undermines user choice. By providing clear alternatives, it enables users to make informed decisions about their privacy preferences while maintaining access to digital services. Importantly, users who consent to data processing retain all their fundamental rights under the GDPR, ensuring ongoing protection.

Third, the economic viability of digital services, particularly in the press and publishing sector, depends on flexible business models. Alternative approaches, such as relying solely on contextual advertising or imposing options without fees or data processing would significantly impact revenue generation and threaten the sustainability of digital content creation, media plurality and access to information.

Fourth, regulatory oversight of these models should respect clear regulatory boundaries. While data protection authorities have a legitimate role in assessing consent validity, pricing and market dynamics should remain within the purview of competition authorities and market forces.

Finally, the consent or pay model represents a pragmatic solution to the challenge of sustaining digital services while respecting user privacy. Rather than restrict this model, regulatory focus should be on ensuring its fair implementation while allowing for continued innovation and adaptation to evolving market conditions and technological capabilities.

Advertising Information Group
31 January 2025

¹⁰ [The Economic Value of User Tracking for Publishers by Rene Laub, Klaus M. Miller, Bernd Skiera :: SSRN](#)

¹¹ [EPRS_STU\(2020\)654180_EN.pdf \(europa.eu\)](#) (page 104)

¹² http://edaa.eu/wp-content/uploads/YOV_external-report_27.06.pdf (page 26)