

The 'Pay or OK' model

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At the request of several supervisory authorities, the European Data Protection Board (EDPB) has issued an opinion on 'consent or pay' models of large online platforms in connection with behavioural advertising.

The background to this is (also) a ruling by the ECJ in the case 'Meta Platforms INC. v. Bundeskartellamt' of July 4th 2023, which dealt with this issue.

➤ Definitions

With **consent or pay** models, a data controller offers users the choice between several options for accessing an online service. The user can

- consent to the processing of their personal data and will only be given access to the service if they agree to the data controller tracking and targeting them with behavioural advertising;
- receive access to the online service against payment of a fee without processing their personal data for this purpose.

Behaviour-based advertising is based on data collected by observing user activity on the Internet (e.g. pages visited, time spent on them, number of page views, likes given, location).

The user data collected in this way, sometimes combined with the data provided by the user (e.g. when creating an online account or logging in), allows conclusions to be drawn about the user's preferences and interests.

This form of advertising is considered to be particularly intrusive as it gives the data controller a very detailed picture of the user's personal life. It also harbours considerable risks for the fundamental rights and freedoms of users and can enable discrimination and manipulation.

➤ Assessment of the EDPB

In Opinion 08/2024, the EDPB states that personal data should not be regarded as a tradable commodity. Online platforms should take care not to turn the fundamental right to data protection into a function that data subjects have to pay to use.

Therefore, it should not be a standard that the alternative to the service that does not process data for behavioural advertising is subject to a charge. Rather, online platforms should offer users a free '**equivalent alternative**' (e.g. non-behavioural advertising). This was also stated by the ECJ.

Such an alternative can, in principle, be considered equivalent if it differs only to the extent that it is necessary because the data controller cannot process personal data for behavioural advertising purposes.

A key question concerns the assessment of the **validity of consent**.

➤ Criteria for valid consent

For the data subject's consent to be considered '**freely given**', specific criteria must be met.

Firstly, **a fee must not be such** that the data subjects **are prevented** from making a free choice. Data controllers should check on a case-by-case basis whether a fee is appropriate and, if so, how high it should be.

In addition, the voluntariness is questionable when non-paying users are excluded from the service, especially if the service plays a prominent role or is crucial for participation in social life or access to professional networks. Data controllers must also assess whether there is **an imbalance of power between them and the data subject**. This is done on the basis of the provider's position in the market, the existence of lock-in or network effects, the extent to which the user utilises the service and the main target group of the service.

The element of **conditionality**, i.e. the question of whether access to goods or services requires consent even though data processing is not necessary for the fulfilment of the contract, is another criteria for assessing whether consent is freely given.

Another condition is **granularity**: The data subject should be free to choose which purpose of processing they accept, rather than being confronted with a request for consent that bundles several purposes.

Valid consent must also be **'specific'**, i.e. given for one or more specific purposes, and based on an unambiguous expression of will. Any misleading behaviour must be avoided.

In addition, the information process set up should allow the user to fully and clearly understand the value, scope and consequences of their choices.

The EDPB also addresses the **withdrawal of consent** and advises controllers to carefully consider how often consent should be 'renewed'.

The statement is not binding for the member states, but it is important. The EDPB lays down basic principles for legislation and the behaviour of authorities in the states.

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