

# Pay or consent

Status quo on the European market

April 2024



## Management summary

### “Pay or consent” models

The “pay or consent” models offer users various options for visiting a desired website and using its content and services. The classic model usually offers two options. The user is free to choose whether to pay money for a digital service or opt for free use, provided they agree to advertising and tracking that requires consent.

In this market overview, we present the various models, the legal opinions on the permissibility of the model, as well as the design in detail, the framework conditions, and legal opinions of the BVDW.

### Legitimacy

The legitimacy and core function of “pay or consent” models was confirmed in a ruling by the ECJ on 4 July 2023. It found that users “may be offered an equivalent alternative which does not involve such data processing operations, in return for an appropriate fee” (para. 150). In addition, the legitimacy has already been confirmed by the German Data Protection Conference (DSK), the French data protection authority Commission Nationale de l’Informatique et des Libertés (CNIL) and other European data protection authorities. The task now is to jointly develop assessment criteria that make it possible to standardise legitimacy in individual cases. The European Data Protection Board (EDPB) has now been asked by three data protection authorities for an opinion on this in accordance with Article 64(2) GDPR. In addition, a consultation process has also been initiated in the United Kingdom by the ICO.

It remains to be seen what standards will be used to assess the voluntariness of consent. It depends on the specific design in the individual case, in particular on transparency towards users, no manipulation of user behaviour and the technical guarantee that the promised services of the subscription are fulfilled.

### Effects of introducing a “pay or consent” model

By introducing a “pay or consent” model, companies can ensure compliance with legal requirements and at the same time secure revenue by monetising the entire traffic. This is achieved through advertising revenue and through the fee a user pays when taking out a subscription. In the initial introduction phase, there may be a slight increase in the bounce rate, but this usually returns to the previous level after two to three weeks.

### Conclusion

For digital services, the implementation of a “pay or consent” model is legally compliant. From the user’s perspective, the model offers the opportunity to exercise their own informational self-determination. They can decide for themselves how they want to use the respective digital service and contribute to its financing.

### Disclaimer

This report was commissioned by the BVDW from conreri digital development GmbH. The author is David Pfau, Head of Data & Privacy at conreri.

## Overview of three “pay or consent” models analysed in this report

Variants	Consent path (tracking and advertising)	Paid subscription	Classification	Granular configuration options	Connection to other services	Price Paid subscription
<b>Variant 1</b> Spiegel	With advertising and tracking  Storage and processing of data for personalised advertising with profiling (Article 6 para. 1 lit. a) GDPR).	Read ad-free  No transfer of your data to advertisers. Use us for a fee without advertising tracking and practically ad-free.	Both ways give the user access to the free content of the website.  The model applies only to the website in question.	Yes, parts of the purposes can be deselected on the second level. The technical TCF 2.2 purposes, which are necessary for the purpose of personalised advertising, cannot be deselected.	With this offer, there is a paid content subscription, independent of the subscription. Paid content subscribers receive a discount when they take out the “Pai or consent”-model.	Per week 0.99 €  0,49 € for customers per week
<b>Variant 5</b> Rheinische Post	Continue with advertising  I would like to read the freely available content of Rheinische Post, including advertising and tracking. For this purpose, I provide my data on online behaviour in accordance with the user agreement. (Article 6 para. 1 lit. b) GDPR).	Continue with RP+  I would like to read the Rheinische Post including all RP+ articles without personalised advertising tracking and with greatly reduced advertising. Advantage overview	Both ways are concluded as a contract with the user and are each based on Article 6 (1) lit. b) GDPR.  It is not a “Paid or content” model, but two contractual relationships that allow access to the site.  This type of model can be referred to as a contract model.	No	At Rheinische Post, only an RP+ subscription is offered, which includes access to additional content and free of advertising.	Per week 1,00 €  After 52 weeks € 2 per week
<b>Variant 3, 4</b> Multi-Website Provider	Continue with advertising...  You consent to data processing and cookies for personalised advertising, tracking, usage analysis and third-party content. Consent can be revoked at any time via the data protection settings in the footer. (Article 6 para. 1 lit. a) GDPR).	... or with XXX  Visit XYZ* and over XXX other websites completely free of advertising banners, video advertising and personalised tracking for €3.99 / month.	The “Subscription” allows complete tracking and advertising freedom on all websites that cooperate with the Multi-Website Provider.  The Subscription is cross-site.  The website receives compensation for lost advertising revenue from users who use this variant.	The extent to which granular configurations of consent are possible is left to the individual offer.	Multi-Website Provider does not offer a content subscription in the moment.  However, in addition to the consent path and the subscription, the offering could also offer a third path in which the contractual relationship exists with the offer and includes additional content and free of tracking and advertising. This would be a mixture with the contract model.	€3.99 per month for all websites

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## 1. Background Information

The importance of advertising on the internet, in particular the function of refinancing content and services, is now generally recognised. The contribution of an advertising-supported business model to free access to information is that advertisers can target their messages to interested parties. This in turn enables many digital services to offer their content and services for free or at low cost, which in turn benefits users. Targeted advertising is therefore an integral part of the digital landscape and makes a significant contribution to maintaining a diverse internet that is accessible to all.

The question of the legality of the underlying data processing has been discussed at European and national level for years. It should be noted that the EU legislative institutions have clearly confirmed that personalised advertising is a legitimate business model and that they have only legislated very targeted restrictions on the ability to advertise based on profiling (e.g. in relation to minors, Article 28 para. 2 of the Digital Services Act (DSA) and the use of special categories of data, Article 26 para. 3 DSA). In addition, Article 3 para. 1 of the Digital Content Directive 2019/770 (see endnote 2), for example, recognises that consumers can pay for digital content or services either in money or with their personal data.

In practice, empirical evidence shows that for the vast majority of users, personalised advertising (as opposed to no advertising) has only a minimal and largely neutral impact on their user experience. While some users prefer personalised advertising to no advertising and other users prefer no advertising, most users are relatively indifferent.

Internal research shows that users who access with personalised advertising spend only slightly less time using the services than users who can access without advertising. Users regularly engage with personalised advertising by clicking on ads and buying products they see in ads (including repeat purchases). As users actively opt-in to advertising, this indicates that they are deriving value from personalised advertising.

The "pay or consent" models have evolved from the changing legal framework and the economic necessities of digital service providers in Europe. Since the GDPR came into force in 2018, there have been several legislative procedures, such as the TTDSG in Germany, and various positionings of relevant stakeholders on the design of consent banners and the legal leeway for service providers.

Regulatory developments are presenting the digital industry in Europe with unprecedented challenges. Technical requirements from browser manufacturers and mobile operating system providers, such as the blocking of third-party cookies, the masking of IP addresses and the introduction of ever more comprehensive data protection settings, further exacerbate the complexity of the situation.

The "pay or consent" model offers the user different options for using the content and services of the offer when calling up the website via a banner. The classic "pay or consent" model usually offers two distinct paths. Therefore, the solution can also be called a path model. The user can either give consent to advertising and tracking or pay a monetary

amount for the tracking- and largely ad-free use of the offer. Users are free to choose whether they want to pay money for a content offering, for example, or access it for free by consenting to advertising and tracking. The aim is to guarantee compliance with data protection regulations and at the same time ensure the sustainable financing of services.

These models support the exercise of genuine choice by users and access to valuable online services regardless of the economic means of the data subjects. Moreover, allowing these models does not mean that "privacy becomes a luxury and not a fundamental right". This argument reveals a confusion as to which fundamental right is actually being argued for – namely whether it is Article 7 of the EU Charter ("respect for private and family life") or Article 8 of the EU Charter ("protection of personal data"). Fundamentally, this argument ignores other relevant considerations, including the fact that neither of these rights (a) prohibits the use of personal data for personalised advertising or (b) grants a right to receive a commercial service free of charge. They are by no means absolute but must be carefully balanced against other fundamental rights and freedoms, in particular Article 16 of the EU Charter ("freedom to conduct a business"), which recognises that commercial service providers have a right to be able to finance the provision of their services.

The acceptance of tracking and ad-free subscriptions is currently low. However, this is simply because users prefer personalised advertising over non-personalised advertising and free services over paid services. There are several other reasons why usage rates should not be considered relevant when assessing the permissibility of a "pay or consent" model. For example, this would create strange incentives for service providers to introduce more intrusive advertising models based on low-quality advertising to increase subscriber numbers. This is because a service that serves intrusive, irrelevant, annoying, and disruptive adverts would be more likely to take up an ad-free subscription offer. In comparison, services that offer high quality advertising models where users find that personalised advertising has a positive or largely neutral impact on their user experience would effectively be penalised for doing so. This is highly undesirable in all respects, whether from a legal, commercial, political, market dynamics or consumer perspective.

## 2. Analysis of existing models on the market

Different variants of the model are currently offered on the market, which differ based on various criteria.

### a) Distinguishing criteria

The distinguishing criteria are explained below:

- **Linking with additional paid services:** The original form of the “pay or consent” model offers the option of tracking that requires consent and largely ad-free use of content without additional service components. In some cases, the subscription is offered at a reduced price for existing customers. Other conceivable service components are additional content (paid content) and services that can be obtained as part of the subscription.
- **Tracking freedom with or without advertising freedom:** The individual variants differ in that they offer either tracking-free use with non-personalized advertising only or tracking- and advertising-free use, whereby there are also different models regarding the remaining advertising volume.
- **Cross-site variants:** In addition to website-specific models, there are also cross-website models. In these models, the user takes out a subscription with a third party and receives tracking- and ad-free access on many affiliated websites as part of the subscription.
- **Granularity of consent:** Another criterion is the granularity of the consent. Most models available on the market do not offer the option of selecting or deselecting certain categories of data processing. So far, only a few variants offer a limited granular configuration option.
- **Invocation of different legal bases:** Some variants offered on the market are not based on consent, but on the legal basis of the contract, leading to differences in the type and scope of data protection-related information provided.

What all variants have in common is that users are asked to consent to data processing that requires their consent. Users are alternatively offered tracking-free and, in some cases, ad-free use of the content in return for payment. In some cases, users are also offered additional options for using the website, such as an extended offer with additional content.

The following section presents the most important variants on the market. The most significant distinguishing features are shown and includes a pictorial representation and other relevant information on the models.

### b) Variant 1 (Spiegel)

In the Spiegel.de model, users have the choice of either consuming the websites free articles with advertising and tracking or taking out a subscription. The subscription ensures the absence of advertising and tracking. What is meant by the greatest possible freedom varies

and must be considered in detail in the models. As a rule, it is based on not sharing user data with advertisers and excluding advertising tracking. Independent of the subscription, it is possible at Spiegel to take out a paid content subscription for additional content. Paid content subscribers receive a discount when taking out the model.

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- ... Personalisierte Anzeigen und Inhalte, Anzeigen- und Inhaltsmessungen, Erkenntnisse über Zielgruppen und Produktentwicklungen ausspielen: Anzeigen und Inhalte können basierend auf einem Profil personalisiert werden. Es können mehr Daten hinzugefügt werden, um Anzeigen und Inhalte besser zu personalisieren. Die Performance von Anzeigen und Inhalten kann gemessen werden. Erkenntnisse über Zielgruppen, die die Anzeigen und Inhalte betrachtet haben, können abgeleitet werden. Daten können verwendet werden, um Benutzerfreundlichkeit, Systeme und Software aufzubauen oder zu verbessern (Art. 6 S. 1 lit. a. und f. DSGVO).

Wir weisen Sie darauf hin, dass Ihre Daten auch von Anbietern in Drittstaaten und den USA verarbeitet werden. USA-Anbieter müssen ihre Daten an dortige Behörden weitergeben. Ihre Rechte werden entsprechend Art. 45 ff. DSGVO geschützt (Angemessenheitsbeschluss, Zertifizierung, Standardvertragsklauseln).

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Figure 1: First level of the banner, Spiegel (April 2024)

### The most important facts:

- Way 1: Continue reading with tracking and advertising (Article 6 para. 1 lit. a) GDPR).
- Way 2: Conclusion of a subscription (paid contract for exemption from tracking and advertising).
- Both ways give the user access to the free content of the website.
- Independent of the conclusion of the subscription, it is possible to conclude a paid content subscription for additional content. Paid content subscribers receive a discount when taking out the tracking and advertising free subscriptions.
- The model applies only to the website in question.
- It is possible to select and deselect some of the purposes on the second level. The purposes that are necessary to display personalised advertising are mandatory.



### c) Variant 2 (Bild)

In the BILD.de model, users also have the choice of either consuming the websites free articles with advertising and tracking or taking out a subscription. With the subscription, the focus is on tracking and no advertising is played via the ad server. Only native advertising and self- advertising are played out via the content management system (CMS).

Datenschutz und Nutzungserlebnis auf BILD.de

Ohne Tracking und Cookies* nutzen	Mit Tracking und Cookies nutzen
<p>Nutzen Sie BILD.de ohne Tracking, Cookies und personalisierte Werbung für 3,99 EUR/Monat (rabattiert für BILDplus-Abonnenten 2,99 EUR/Monat). Informationen zur Datenverarbeitung im BILD Pur-Abo finden Sie in unserer <a href="#">Datenschutzerklärung</a> und in den <a href="#">FAQ</a>.</p> <p>Wenn Sie BILD Pur abonnieren, können Sie die auf bild.de verfügbaren Inhalte ohne Tracking und Cookies* lesen. Sofern Sie bereits BILDplus-Abonnent sind und BILD Pur zusätzlich abonnieren, können Sie auch die BILDplus-Inhalte ohne Tracking und Cookies* lesen.</p>	<p>Sie können unser Angebot auch nutzen, ohne einen Vertrag abzuschließen. Wir übermitteln in diesem Fall personenbezogene Daten an bis zu 285 <a href="#">Drittanbieter</a>, die uns helfen, unser Webangebot zu verbessern und zu finanzieren. In diesem Zusammenhang werden auch Nutzungsprofile (u.a. auf Basis von Cookie-IDs) gebildet, mit Daten von anderen Webseiten angereichert und auch außerhalb des EWR verarbeitet. Hierzu übermitteln wir an diese Drittanbieter auch Ihre Privatsphäreinstellungen bzw. Präferenz in Form einer codierten Zeichenfolge (sog. TC-String). Hierfür und um bestimmte Dienste zu nachfolgend aufgeführten Zwecken verwenden zu dürfen, benötigen wir Ihre Einwilligung. Indem Sie "Alle akzeptieren" klicken, stimmen Sie diesen (jederzeit widerruflich) zu. Dies umfasst auch Ihre <a href="#">Einwilligung in die Übermittlung bestimmter personenbezogener Daten in Drittländer, u.a. die USA</a>, nach Art. 49 (1) (a) DSGVO. Sie können Ihre Auswahl jederzeit unter "Widerruf Tracking" am Seitenende mit Wirkung für die Zukunft widerrufen.</p> <ul style="list-style-type: none"> <li>▶ Speichern von oder Zugriff auf Informationen auf einem Endgerät</li> <li>▶ Personalisierte Werbung und Inhalte, Messung von Werbeleistung und der Performance von Inhalten, Zielgruppenforschung sowie Entwicklung und Verbesserung von Angeboten</li> <li>▶ Fremdinhalte anzeigen (Soziale Netzwerke, Videos)</li> <li>▶ Verwendung und Weitergabe von Nutzerkennungen zu Werbezwecken</li> </ul>
<p>2</p> <p style="font-size: small;">* in BILD Pur werden keine einwilligungspflichtigen Datenverarbeitungen vorgenommen und nur solche Cookies und ähnliche Technologien verwendet, die zur Erbringung dieses Dienstes unbedingt erforderlich sind (§ 25 TTDSG). Weitere Informationen <a href="#">hier</a> abrufbar.</p> <p style="text-align: center; background-color: #f0f0f0; padding: 5px; border: 1px solid #ccc;"><b>Jetzt BILD Pur abonnieren</b></p> <p style="font-size: x-small; text-align: center;">Sie haben bereits ein BILD Pur-Abo? <a href="#">Jetzt anmelden</a></p>	<p style="text-align: center; background-color: #e00000; color: white; padding: 5px; border: 1px solid #ccc;"><b>Alle akzeptieren</b></p> <p style="font-size: x-small; text-align: center;">Details dazu finden Sie unter "Privatsphäre" am Seitenende.</p>

Figure 2: First level of the banner, Bild (April 2024)

#### The most important facts:

- Way 1: Continue reading with tracking (Article 6 para. 1 lit. a) GDPR).
- Way 2: Sign up for a subscription (paid contract for tracking freedom).
- Like variant 1 with the difference that no purposes can be selected or deselected on the second level.

### d) Variant 3 (contentpass)

Contentpass is a cross-site, independent "pay or consent" solution. The contentpass subscription offers users cross-site functionalities in one. Currently available on over 450 websites, contentpass has expanded its reach from Germany, Austria, and Switzerland, to also include UK, France, Italy, Spain, and Luxembourg.

Contentpass offers its service for all websites on the market. Most of the Consent Management Platforms (CMP) offer convenient integration options. Websites that integrate the service receive compensation from contentpass for the traffic generated by contentpass users. Thus, all users who use the websites content or services are monetized: many users via targeted advertising and contentpass users via compensation for lost advertising revenue.

In the last year, contentpass increased the price for users from €2.99 to €3.99, which speaks to the growth of the model. For the website operator, the integration is straightforward and there are no development costs. Contentpass regularly reviews the offers in its portfolio and guarantees users an advertising and tracking free experience. The company specifically checks the extent to which third-party providers are loaded without consent. Self-advertising is still permitted on the websites.



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1

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Besuchen Sie tagesspiegel.de\* und über 300 andere Websites völlig frei von Werbehainern, Videowerbung und personalisiertem Tracking für 3,99 € / Monat.

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Schon registriert? [↻ Mit contentpass einloggen](#)

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- ▶ Einbindung von externen Inhalten für journalistische Zwecke
- ▶ Nutzungsanalyse

\*Gilt nur für die teilnehmenden tagesspiegel.de Websites, nicht für die Apps.

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Figure 3: First level of the banner, Tagesspiegel (April 2024)

**The most important facts:**

- Way 1: Continue reading with advertising and tracking (Article 6 para. 1 lit. a) GDPR).
- Way 2: Conclusion of a subscription (paid contract for exemption from tracking and advertising).

- The "Contentpass" allows complete tracking and advertising freedom on all websites that cooperate with contentpass.
- The model is cross-site.
- The website receives compensation equivalent to lost advertising revenue from users who use this variant.

A modified variant has emerged, blending the contentpass cross-site model with a standalone subscription model. This variant incorporates the advertising and tracking consent path and the contentpass subscription, along with a separate offer from the website provider that links tracking and ad free functions with additional content. The website [www.radsport-news.com](http://www.radsport-news.com) can be used as an example.

### e) Variant 4 (Freechoice)

Freechoice is also a cross-site solution offered by marketer and consent management provider Traffactive. The Freechoice subscription offers users cross-site functionalities on all partner websites in one.

Freechoice offers its services to the websites in its own Traffactive network. The offer that integrates the service receives remuneration from Freechoice for the traffic generated by Freechoice users on its own website. This way, all users who use the offers content or services are monetized: many users via targeted advertising and Freechoice users via compensation for lost advertising revenue.

### Ihr Zugriff auf [kreiszeitung.de](http://kreiszeitung.de)

**Kostenfrei weiterlesen!**

Nutzen Sie dieses Angebot wie gewohnt mit nutzungsbasierter Werbung und Tracking zu den Bedingungen unseres **Nutzungsvertrages**.

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Ein Login – viele Tracking-freie Angebote! Online-Privatsphäre hier und wo auch immer Sie im Freechoice Angebot unterwegs sind.

**JETZT ABONNIEREN**

Bereits Freechoice Abonnent? [HIER ANMELDEN](#). 2

**Was heißt "kostenfrei weiterlesen"?**

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Notwendig	▼
Speichern von oder Zugriff auf Informationen auf einem Endgerät	▼
Personalisierte Werbung und Inhalte, Messung von Werbeleistung und der Performance von Inhalten, Zielgruppenforschung sowie Entwicklung und Verbesserung von Angeboten	▼
Verwendung genauer Standortdaten	▼
Endgeräteeigenschaften zur Identifikation aktiv abfragen	▼

**Hinweise zur Datenübermittlung in die USA:** Eine Übermittlung Ihrer Daten in die USA erfolgt nur im Rahmen der gesetzlichen Möglichkeiten.

DATENSCHUTZERKLÄRUNG    IMPRESSUM

Figure 4: First level of the banner, Kreiszeitung (April 2024)

### The most important facts:

- Way 1: Continue reading with advertising and tracking (Article 6 para. 1 lit. a) GDPR in conjunction with § 327 para. 3 BGB (Numbers with data).
- Way 2: Conclusion of a subscription (paid contract, use of the site without tracking, tracking-free advertising remains possible).
- The model is available across websites on all Freechoice partner sites.
- The website receives compensation for lost advertising revenue from users who use this variant.

### f) Variant 5 (Rheinische Post)

The Rheinische Post model deviates from the preceding models for several reasons. Firstly, the previous models are all based on obtaining consent in accordance with Article 6 para. 1 a) GDPR in the case of free access. Rheinische Post is taking a different approach here and entering a usage contract with users.

Furthermore, the Rheinische Post does not have a separate subscription and paid content subscription, but only the RP+ subscription, which includes both premium content and advertising freedom. This is exciting since, from the authors view, the RP does not really offer an alternative to the consent route, as the RP+ is a completely different product with more extensive services. This means that a legal assessment would have less emphasis on the voluntariness of consent and more on the discerning what data processing can be covered by a contract.



**Wie möchten Sie die Rheinische Post lesen? Sie haben die Wahl!**

**Weiter mit RP+**

Ich möchte die Rheinische Post inkl. aller RP+ Artikel ohne personalisiertes Werbettracking und stark werbereduziert lesen.  
Vorteilsübersicht

nur **1 € pro Woche**  
monatlich per Klick kündbar

**50 % sparen**

Bereits Abonnent? [Jetzt anmelden](#)

**Weiter mit Werbung**

Ich möchte die frei verfügbaren Inhalte der Rheinischen Post inkl. Werbung und Tracking lesen. Hierfür stelle ich meine Daten zum Online-Verhalten gemäß Nutzungsvertrag bereit.

**Akzeptieren und weiter**

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**Was bedeutet "Weiter mit Werbung" (RP basic)?**

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Figure 5: First level of the banner, Rheinische Post (April 2024)

### **The most important facts:**

- Way 1: Continue reading with advertising (Article 6 para. 1 lit. b) GDPR).
- Way 2: Take out a subscription: Contract for tracking and advertising freedom, plus additional features and premium content for a fee.
- Both path 1 (free use of content) and path 2 are concluded as a contract with the user and are each based on Article 6 para. 1 lit. b) GDPR.

### **g) Variant 6 (Meta-Platforms: Facebook und Instagram)**

Meta has now also introduced paid subscriptions to the Facebook and Instagram platforms. Meta's subscription is currently only offered to users in the European Economic Area (EEA). The user's decision to continue to use the platform as usual with advertising is based on the legal basis of consent pursuant to Article 6 para. 1 lit. a) GDPR and justified by Meta with changing regulatory requirements in the region, including the Digital Markets Act (DMA).

The subscription relates to the respective user account. In the app, the first subscription currently costs €12.99 per month. Each additional account added to the account overview will be charged an additional €8.00. The web-based subscription amounts to €9.99 for the first account and €6.00 per month for each additional account to €6.00 per month. The different price, depending on the subscription channel, is the result of the fees charged by the respective app store providers when subscriptions are agreed in-app. Regardless of the subscription channel, the subscription is valid for both use on the web and in the app.

Meta's service promise includes that no more adverts will be displayed and that the user's own information will not be used to show that user ads. This does not affect the experience of organic personalisation, i.e. non-sponsored feed and news from other users, companies and influencers. Accordingly, Meta continues to offer a personalised product. Data processing for the purpose of personalising the organic feed is carried out on the basis of a user contract in accordance with Article 6 para. 1 lit. b) GDPR.

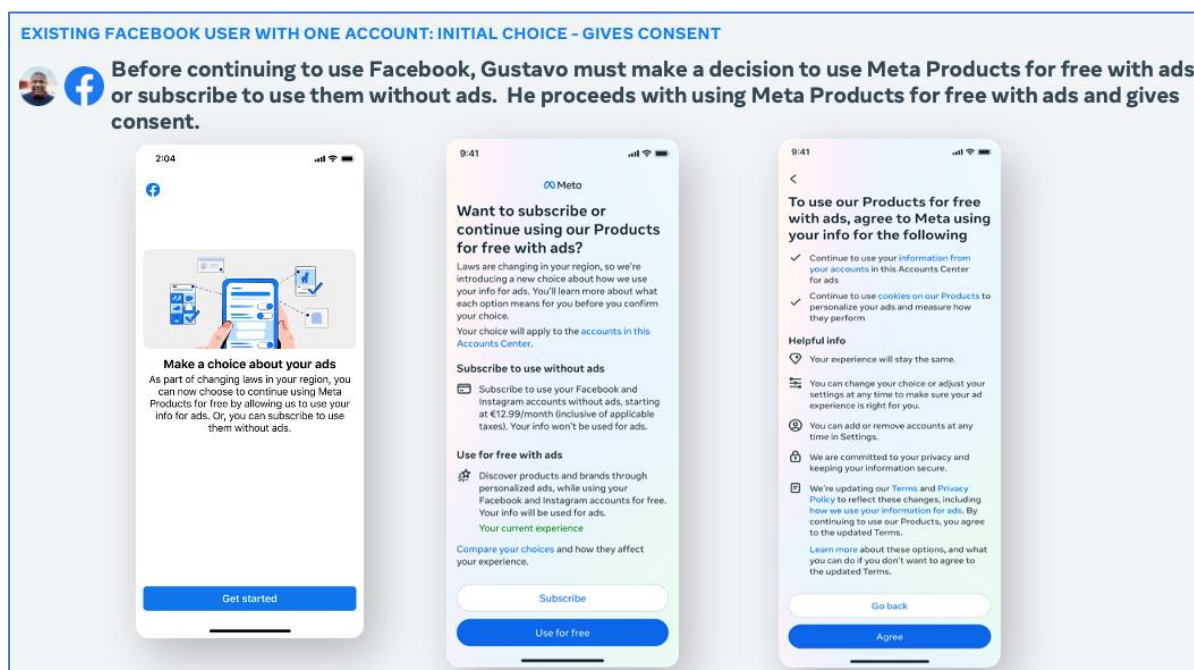


Figure 5: Different levels of the banner, Meta (April 2024)

It was recently reported that, as part of ongoing discussions with data protection regulators, Meta has offered to lower its subscription price to €5.99 per month and an additional €4.00 for additional accounts. A conclusive change of price is pending the regulator feedback.

## h) Other ad- and tracking-free approaches

In addition to the "pay or consent" approaches outlined above, other digital services consider the "ad-free and tracking-free use" of their own services and there are also alternative accesses instead of consent, which do not require payment. Google's video platform YouTube and the music service Spotify, for example, offer premium subscriptions that allow videos and music to be played without ad breaks.

German adtech provider Welect takes a different approach to those presented in this report. With Welect's choice-driven advertising, consumers themselves choose the adverts that are most relevant to them. According to Welect, this creates an organic interest targeting that completely does without cookies or other forms of user tracking. One use case that is offered as an alternative to the common consent dialogue gives users the option to choose between one of up to six video spots to watch or give their consent to data processing for the purposes of personalised advertising.

### 3. Legitimacy of "pay or consent" models

The implementation of the "pay or consent" approach is permissible under the current legal framework. The legal conformity of each individual model must be examined separately in each individual case.

#### a) General

In the case *Meta Platforms and Others vs. Bundeskartellamt* ("ECJ C-252/21"), the ECJ confirmed the legality of consents obtained by digital services and in particular by Meta Platforms Ireland through a "pay or consent" model. The CJEU confirmed that valid GDPR consent can be obtained for the processing of personalised advertising if it is ensured that users are not otherwise "forced to refrain from using the service altogether" by being offered an "equivalent service" that does not involve the processing of data for consent-based advertising for an "appropriate fee", provided this is accurate and/or proportionate (para. 149–154, see endnote 1).

In addition, the legitimacy was already confirmed by the German DSK in a joint decision of 22 March 2023 and the French data protection authority CNIL as part of the publication of uniform evaluation criteria on 16 May 2022.

For all models, the question arises as to whether consent is voluntary and therefore effective under data protection law within the meaning of Article 4 No. 11 GDPR. If the voluntary nature of consent presupposed that the service offered could alternatively be used free of charge without the use of cookies or other tracking mechanisms requiring consent, this would reduce the incentive for users to opt for a paid subscription. This would undermine the purpose pursued by the service providers to finance the respective online offers with the "pay or consent" models, which would lead to a considerable interference with the private autonomy and professional freedom of the respective providers.

According to the fifth sentence of Recital 42 of the General Data Protection Regulation, "consent should be presumed to be voluntary only where (the data subject) has a genuine choice and is therefore able to refuse or withdraw consent without detriment".

Various positions of relevant stakeholders are presented later. At this point, it should be mentioned that, according to publications by the DSK, the CNIL, the Austrian, Spanish and Danish data protection authorities, the voluntary nature of consent can be assessed based on the appropriateness of the alternative, the transparent presentation of the options and the underlying data processing, such as the granularity of the consent.

#### b) Voluntariness of consent in the context of a possible power imbalance

According to Recital 43 para. GDPR, a "clear imbalance" between the data subject and the controller precludes the voluntary nature of consent.

In principle, it cannot be assumed that there is an imbalance between digital services and users because, unlike in the relationship between public authorities and citizens, there are usually ways of circumventing this in the case of private online services due to the large

number of comparable offers. In the opinion of the DSK, a comparable selection is often not considered sufficient to affirm voluntariness, as this depends on a comparable offer from other market participants and its subjective categorisation by the data subject. This view is not convincing, especially in view of the objectively assessable variety of offers, which makes an "examination of the market situation" superfluous. Furthermore, the opinion of the DSK is not compatible with the wording of the GDPR, which expressly lacks this wording in comparison to § 28 para. 3 BDSG old version.

In the legal opinion "[Challenges for telemedia providers in accordance with the requirements of the TTDSG and the GDPR](#)" by Prof Dr Jürgen Kühling, he also takes the view that the protective purpose of the requirement of voluntariness does not apply if the individual can fall back on other, equivalent offers on the market. According to the prevailing opinion in the literature, it is not necessary for the offers to be identical.

It should also be noted that even if there are no alternatives on the market, it cannot be assumed that consent is not voluntary if the service itself offers an equivalent service by means of a payment alternative, as this represents a genuine choice for the user. Furthermore, there are no special rules for "large and popular online services" or "dominant" companies. Neither the GDPR nor the EDPB guidelines on consent prescribe or justify a higher threshold for consent the more popular a service is or becomes. A company's market power is not considered to be one of the circumstances in which an imbalance of power could exist that would invalidate consent, whether in relation to the charging of a subscription fee or otherwise.

The ECJ also expressly recognises that the dominant position of a service provider is irrelevant to the validity of consent in the context of a payment or consent model: "The fact that the operator of an online social network holds a dominant position on the market for online social networks does not, in itself, preclude the users of such a network from being able to give effective consent." (ECJ C-252/21 para. 149 – 154, see endnote 1).

Furthermore, the EU competition rules make it clear that dominant companies are not prevented from introducing a price for their services – and making a profit from this. Dominant companies can therefore legitimately charge for their services and are not obliged to provide access to their services free of charge. Furthermore, the general principle of equal treatment and non-discrimination in EU law prohibits treating comparable situations differently and different situations equally.

It would be disproportionate to impose blanket obligations on "large online platforms" through an opinion of the European Data Protection Board, whereas the ECJ in Case C-252/21 requires a careful case-by-case assessment of processing activities, including those of dominant companies.

### **c) Voluntariness of consent in the context of pricing**

The GDPR regulates the legal basis for data processing, but not pricing or the organisation of business models. The competence of data protection authorities does not extend to the



price regulation of digital services, or the regulation of business models (including advertising models) offered on the market. It is not the role of DPAs to speculate on the viability of the controller's business and even less on alternative business or advertising models to the model chosen by the controller, or to decide whether the controller should be obliged to offer a different form of "equivalent alternative" service to the one it has chosen.

The GDPR does not contain detailed rules on price regulation, any attempt to take a position in this regard based on the GDPR would violate the fundamental EU principle of legal certainty (i.e. the rules should be clear and precise so that individuals can clearly understand their rights and obligations). As a result, the data protection authorities will therefore only be able to assess whether a subscription fee is reasonable, i.e. not disproportionate, unrealistic, or in other words that the fee does not lead to significant economic pressure.

The GDPR must be interpreted in accordance with the fundamental rights enshrined in the Charter (Recital 4 GDPR) and an appropriate balance must be struck between the competing fundamental right to data protection under Article 8 of the Charter and the freedom to conduct a business under Article 16 of the Charter. Article 16 of the Charter protects the freedom to engage in economic or commercial activities, including the freedom to contract, which in turn includes the freedom to set the price of a service and to operate under a freely chosen business model.

Therefore, when assessing whether charging a reasonable fee is compatible with Article 6 para. 1 lit. a) GDPR, the controller's interest in providing its services based on its business model, which is protected by Article 16 of the Charter, must be taken into account. Any restriction on the freedom of controllers to choose their business model and to set a reasonable price for their services constitutes an unlawful interference with Article 16 of the Charter and does not fulfil the conditions of Article 52 para. 1 of the Charter.

#### **d) Voluntariness of consent in the context of purpose bundling**

The German data protection authorities also assess voluntariness based on the bundling of purposes in the context of consent, although there is no conclusive case law on this to date. Contrary to the opinion of the German Data Protection Conference, the BVDW considers this type of model to be permissible even without the possibility of granular selection and deselection of purposes at a second level of the consent query.

The wording of Article 6 para. 1 lit. a) GDPR states that "the data subject has consented to the processing of personal data concerning him or her for one or more specified purposes". This shows that it is possible under data protection law to give consent for multiple purposes. If one also considers recital 43 sentence 5 GDPR in this context - " Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case " - it becomes clear that separate consent for different purposes is not required per se, but only if this is "appropriate in the individual case".

Consequently, an "Accept All" button that enables consent to all data processing at the same time is not per se inadmissible in terms of voluntariness. Contrary to the opinion of the data protection authorities, the bundling of purposes does not lead to a lack of voluntariness of the users consent decision, nor should the assessment of voluntariness be primarily based on this criterion.

The debate about granularity relates not only to the different purposes regarding the GDPR, but also to the question of the extent to which a consent can cover several legal acts. It is legally permissible and common practice for consent to cover both elements and purposes of the GDPR and ePrivacy. The bundling of consent with regard to different legal acts is also standard in the area of advertising consent in the context of the Act against Unfair Competition (UWG) and the GDPR in Germany. For large market participants who also fall under the DMA, it is also possible to obtain this consent as part of the "pay or consent" model. From the point of view of transparency and information, it is even recommended that the user obtains consent for the purpose of advertising and that the three legal areas are presented transparently.

#### **e) Permissible data processing in the subscription model**

In their statement on "pay or consent" models, the German data protection authorities state that, in principle, no data processing requiring consent should be active in the paid alternative to consent, as the user has made a conscious decision in favour of the subscription and against data processing requiring consent (point 3).

However, essential data processing operations that enable the website to function may continue to be used. In Germany, for example, the "absolute necessity" pursuant to Section 25 para. 2 No. 2 TTDSG must be considered in this context.

In the opinion of the BVDW, the provider is still permitted to obtain specific consent, for example for content displayed by third parties, including videos and graphics. It is recommended that a two-click solution be implemented, and that consent be requested via a button before the content is displayed.

In addition, reach measurement and processing for the personalisation of content by the controller should also be possible if it is a personalised service.

## 4. Position of relevant Stakeholders

The most important points of view of the relevant interest groups are set out below. The position of the EDPB and that of the British data protection authority, the ICO, will clearly be influential.

### a) Position of the German data protection authorities

The German DSK has developed a unified stance on “pay or consent” models in the Media Working Group. This position was published on March 22, 2023 in the resolution [Evaluation of PUR subscription models on websites](#).

For the DSK, the models are legally possible. However, the DSK restricts and assesses the permissibility of these models based on three criteria:

- Equivalent alternative: the subscription must be an equivalent alternative to the service that users receive through their consent to tracking and advertising (para. 1).
- Legal compliance of consent: The effectiveness requirements for consent standardized in the GDPR, i.e. in particular those in Article 4 No. 11 as well as Article 7 GDPR, must be met (para. 1).
- Granularity of consent: Users must be able to consent or not to the different purposes of data processing on a granular basis (para. 4).

The DSK assesses the equivalence of the subscription models by considering two main factors: Firstly, that the same content and services are behind the subscription (para. 1), and secondly, that subscribers pay a standard market fee for it (para. 2). On a first reading of the decision, it seems that DSK makes the assessment of equivalence more dependent on price than CNIL, which refrains from influencing pricing but places the responsibility on the provider of the service.

Background discussions with data protection authorities have already shown for some time that they are deviating from their original position and are generally accepting the “pay or consent” models. Their previous approach to judging legitimacy was primarily based on whether a user had the option to selectively choose and reject purposes and processing on a second level, in addition to consenting to all data processing and subscribing. The underlying logic was that, from the authors view, regulators were assessing the consent pathway separately from the subscription, rather than looking at the entire model. Although the wording of Article 6 para. 1 lit. a) GDPR "The data subject has consented to the processing of personal data relating to him or her for one or more specified purposes" suggests that multiple purposes may be included in a consent case, the German data protection authorities maintain their own position.

The data protection authorities now recognise that only some of the data processing operations can be deselected at the second level. Purposes that are necessary for the financing of the service may be bundled and mandatory.

## **b) Position of the European Data Protection Board (EDPB)**

In 2020, the EDPB issued a statement on cookie walls and clarified its position on this issue. It should be noted that the terms “pay or consent” models and cookie wall are not interchangeable. A cookie wall refers to a request for consent that is a prerequisite for visiting the website without offering an alternative means of access.

In its [Guidelines 05/2020 on consent under Regulation 2016/679](#), the EDPB is currently of the opinion (para. 38, 39) that cookie walls are to be classified as unlawful if no reasonable alternative (para. 40, 41) is offered. This can also be understood to mean that cookie walls with an alternative path, such as “pay or consent” models, are permissible if the controller offers a reasonable alternative. This finds further support in the EDPB’s statement that only substantial extra costs may invalidate consent (para. 24).

The Federal Commissioner for Data Protection and Freedom of Information in Germany has also commented on this topic. He considers cookie walls to be permissible if "a comparable service is also offered without tracking, for example as paid access to the online offer."

It remains to be seen how this position will change considering the upcoming decision.

## **c) Position of the Austrian data protection authority**

On April 11, 2023, the Austrian data protection authority published a decision on proceedings between the news website Der Standard in Austria and the data protection organization NOYB in the context of a complaint against Der Standards model.

First of all, it is interesting how differently [Der Standard](#) and NOYB interpret the [decision](#). Once again, it shows how important interpretive autonomy is.

In summary, the case was centered on NOYBs objection to the lawfulness of the data processing operations based on the model on the website of Der Standard and filing a complaint with the authority.

The main findings are presented below:

### **Previous position of the Austrian data protection authority**

- The Austrian data protection authority had already addressed the contested issue (legitimacy of "Pay or okay") in 2018 and decided that a paid subscription can be a viable alternative to consent (GZ: DSB-D122.931/0003-DSB/2018).
- The 2018 decision will not be overturned but will be supplemented after consultation with additional regulators and various rulings of the European Court of Justice.
- Validity of consent in a particular case
- With reference to Directive (EU) 2019/770, it is recognized that contractual aspects for the provision of content and digital services may require the provision of data by the consumer.

- The granularity is used as a decisive criterion for the voluntariness of consent, with reference to Guidelines 05/2020 loc. cit., para. 43 f., of the EDPB. In this context, the GDPR refers to Recital 43 sentence 2 GDPR: "Consent shall not be deemed to be freely given if consent cannot be given separately for different processing operations of personal data, even if this is appropriate in the individual case."
- It is noted that the standard currently requires a single consent for numerous processing operations without providing a comprehensive explanation for why other processing operations are included in addition to consent for targeted advertising and advertising measurements. This suggests the assumption of a model in which only the "hard" refinancing purposes are binding on the user. However, this viewpoint lacks consideration that analytics tools and social plugins also contribute to the monetization of the offer.
- The reference to the possibility of using other news portals as justification for voluntariness is not accepted by the authority.
- In the opinion of the authority, such "blank consent" without granularity would lead to the real danger that many offers on the Internet (such as those from Facebook or Google) would follow this practice. The authority sees this as a serious encroachment on the fundamental right to data privacy of those individuals who cannot afford a subscription option. Such reasoning in the present decision seems very questionable and politicizes data protection. In addition, the position appears to be invalid following the ECJ's statements in this report, which has already been cited several times.

## **Conclusion**

- A paid subscription can still be an alternative to consent in Austria, especially since data subjects must be granted a certain degree of autonomy over the processing of their data.
- However, processing must be limited to what is absolutely necessary. There will be an interesting debate about what falls under this category.
- The design of the granularity regarding the processing purposes will also be crucial here.

### **d) Position of the CNIL and the Danish data protection authority**

On May 16, 2022, the French data protection authority CNIL published the first [evaluation criteria in connection with cookie walls and so-called PUR models](#). The publication was triggered by numerous complaints and the question of legality in practice. As a result, the CNIL recognizes that many free services on the Internet are financed by personalised advertising.

CNIL cites a June 19, 2020, Council of State decision on cookie walls, which states "that the requirement of free consent cannot justify a general ban on the practice of tracker walls, since the free consent of individuals must be assessed on a case-by-case basis, taking into

account in particular the existence of a genuine and satisfactory alternative in the event of rejection of cookies."

Therefore, in the view of the CNIL, "pay or consent" models are fundamentally compliant with data protection. According to the CNIL's assessment criteria published in May 2022, a genuine choice and the opportunity for voluntary consent to an alternative, fee-based access without tracking, for instance, can be considered acceptable if the price charged is reasonable in the individual case. It remains to be clarified to what extent the providers of the model must demonstrate and prove the appropriateness of their pricing.

The Danish Data Protection authority suggests in its guidance on cookie walls that "companies wishing to use a cookie wall where the alternative to visitor consent is payment must not set an unreasonably high price for the payment alternative." The guidance further states, "It is not the role of the Danish Data Protection authority to elaborate on the pricing of content, services, etc." Companies therefore have wide discretion in evaluating and determining the specific amount that a payment alternative must represent to obtain the visitors consent for the processing of personal data.

Factors such as the scope of the data, its associated informative value and lifespan, as well as the customary market price for comparable offerings can serve as assessment criteria for measuring the "useful data value". The amount of advertising revenue lost when choosing the subscription can also be considered when determining the appropriateness of the price. If editorial content is also published in a print format in addition to the online offering, the price for the print version can also be used as an aid in determining an appropriate price for the paid alternative to the online offering.

## 5. Future Outlook and Developments

The use of "pay or consent" models is generally permitted under the current legal framework. However, the legal conformity of the respective model depends on how it is designed in each individual case. To create legal certainty for all parties involved, common assessment criteria must be defined. The assessment criteria should be derived from the GDPR and be applied in the same way for all digital services.

Transparency, including information about an equivalent alternative offer, is crucial for the voluntariness of consent. The technical implementation of the performance promise is also essential, e.g. the waiver of the use of tracking technologies requiring consent, unless this has been expressly agreed in addition. From the BVDW's point of view, the latter point is crucial to advocate "pay or consent" models across the board. This must be examined by the data protection authorities on a case-by-case assessment.

These models preserve the free and open Internet as we know it, as the only alternative for many services would be to offer their services behind paywalls. These models support the exercise of real choice by users and access to valuable online services regardless of their economic means. The authorisation of these models does not mean that "privacy becomes a luxury and not a fundamental right".

The authorisation of "pay or consent" would not undermine the role of data protection authorities in assessing compliance with the GDPR. Data protection authorities will continue to have a wide range of powers to assess the controller's compliance with the GDPR. For example, they will be able to assess the transparency of information given to users to ensure they are making an informed decision, and the way consent is obtained, including the ability to challenge the use of bundled consent or the use of dark patterns.

These models are often criticised by data protectionists, as the right to privacy and data protection is presented as inviolable and absolute. All other interests and therefore also other fundamental rights are unilaterally subordinated. The BVDW is of the opinion that the debate should be conducted objectively to find pragmatic solutions. A balance must be found that considers the rights and needs of all parties involved in an appropriate and effective manner. This includes the right to privacy and data protection, but also the freedom of providers to define and offer their own business model. At this point, it should also be considered that the legislator currently explicitly provides for the commercialization of data, for example in the German data strategy. Instead of getting lost in ideological trench warfare, ways should be sought together to utilise the opportunities without sacrificing privacy.

The emerging debate surrounding fundamental rights regarding the "pay or consent" model is concerning, as a distorted perception of it can cause significant harm far beyond the scope of this individual model. The positions safeguarded by fundamental rights clash daily, and it is important to find ways to address these opposing positions. Data protection and the economic interests of service providers are not irreconcilable opposites. A one-sided presentation is a major threat to data-driven business models and therefore to European competitiveness in the international innovation race.