

To: edpb@edpb.europa.eu

European Data Protection Board (EDPB)
Rue Wiertz 60
1047 Brussels
BELGIUM

Brussels, 15 April 2024

Open letter to the European Data Protection Board: We Urge the Board to Acknowledge the European Commission's additional concerns about 'Consent or Pay'

Dear Chair of the EDPB,
Dear EDPB Members,
Dear EDPB Secretariat,

In the forthcoming adoption of the Opinion on Article 64(2) GDPR, your decision holds profound significance for the future landscape of data protection within the European Economic Area and beyond.

As digital rights organisations, our concerns about the gravity of the 'Consent or Pay' model have been voiced through two open letters, reflecting widespread apprehension about the consequences of such a model. Moreover, the mounting pressure from diverse stakeholders, including Members of the European Parliament and European consumer organisations, underscores the urgency of the situation at hand. In view of the seriousness of the context, we are reaching out again to add considerations as you deliberate on this pivotal issue. We hereby reiterate our calls for you to oppose 'Consent or Pay' firmly and ask you to uphold such opposition when you consecutively develop Guidelines on the topic with a broader scope as agreed during the 13th February 2024 plenary.

It is imperative to underscore that the European Commission recently also expressed significant additional concerns regarding the 'Consent or Pay' model and highlighted its potential conflicts with both data protection and consumer law. Firstly, on 25th March, the EU Executive announced it had initiated an investigation under the Digital Markets Act (DMA) against Meta.¹ Article 5(2) DMA requires gatekeepers to obtain consent within the meaning of Article 4(11) GDPR. When assessing Meta's compliance with the provision, the Commission *"is concerned that the binary choice imposed by Meta's 'pay or consent' model may not provide a real alternative in case users do not consent"* and may lead to a continuing accumulation of personal data by gatekeepers. Additionally, we point out that the payment upon which the 'Consent or Pay' model relies could be deemed a degradation of service conditions, constituting circumvention under Article 13(6) DMA which corresponds to the fairness principle under Article 5(1)(a) GDPR. Given that both acts refer to Article 4(11) GDPR, this underscores pressing need to protect freely given consent consistently in the context of the DMA as well as under the GDPR.

Equally important, this is not the first instance where the European Commission expressed doubts about the 'Consent or Pay' model, clearly stating that *'asking consumers to pay does not appear a credible alternative to tracking their online*

¹ https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689

*behaviour for advertising purposes that would legally require to obtain consent.*² The Commission's 'Initiative for a voluntary business pledge to simplify the management by consumers of cookies and personalised advertising choices' (commonly known as the 'Cookie Pledge') sought to offer a third alternative to this model by suggesting an additional option for a 'less privacy intrusive form of advertising.'

The EDPB's response to the Commission's proposal clarified that this 'less intrusive' option should be offered free of charge. Your remarks were furthermore unequivocal in emphasising the importance of consent, underlining that it 'can only be valid if the data subject is able to exercise a real choice.' This insistence on genuine user choice underscores the fundamental principle that consent must be freely given. However, the current 'Consent or Pay' model sets in stone a coercive dynamic, leaving users without an actual choice. The continued acceptance of this model undermines the fundamental principles of consent and perpetuates a system that prioritises commercial interests over individual rights.

As you prepare to shape guidelines on the 'Consent or Pay' model, we urge you to refrain from endorsing a strategy that is merely an effort to bypass the EU's data protection regulations for the sake of commercial advantage and advocate for robust protections that prioritise data subjects' agency and control over their information.

Emphasising the need for genuine choice and meaningful consent aligns with the foundational principles of data protection legislation, the larger context of all relevant CJEU rulings and serves to uphold the fundamental rights of individuals across the EEA.

Yours sincerely,

Signatories

EDRi European Digital Rights

Access Now

Državljan D / Citizen D, Slovenia

Digital Rights Ireland

Electronic Frontier Norway

Federación de Consumidores y Usuarios CECU

Forbrukerrådet (Norwegian Consumer Council)

Panoptykon Foundation

Poliscope, Croatia

Homo Digitalis, Greece

² https://www.edpb.europa.eu/system/files/2023-12/edpb_letter_out20230098_feedback_on_cookie_pledge_draft_principles_en.pdf, page 4.

IT-Pol Denmark

ApTI, Romania

Forbrugerrådet Tænk (Danish Consumer Council)

EKPIZO -Greek Consumer Association

Norwegian Consumer Council

dTest, o.p.s., (Czech consumer organization)

Digitalcourage, Germany

Hermes Center for Transparency and Digital Human Rights, Italy

Privacy International

Wikimedia Europe

Bits of Freedom

Deutsche Vereinigung für Datenschutz e.V. (DVD)

noyb – European Center for Digital Rights