

To the  
**European Data Protection Board**  
Rue Montoyer 30  
1000 Brussels  
BELGIUM

February 16, 2024

### **‘Pay or okay’ – the end of a ‘genuine and free choice’**

Dear Members of the EDPB,

Over the next few weeks, the EDPB will issue what is likely to be its most significant opinion to date, determining whether Europeans continue to have a realistic option to refuse the processing of their personal data for the foreseeable future.

In November 2023, Meta adopted a new ‘pay or okay’ approach.<sup>1</sup> The Dutch, Norwegian and Hamburg SAs have now requested an EDPB opinion about this approach. It has also recently become public that Meta is actively lobbying individual SAs to support their approach.<sup>2</sup>

We are highly concerned about this vote and we urge the EDPB to issue a decision on the subject that aligns with the Fundamental Right to Data Protection. When ‘pay or okay’ is permitted, data subjects typically lose the ‘genuine or free choice’ to accept or reject the processing of their personal data, which was a cornerstone of the GDPR reform and repeatedly upheld by the CJEU, also in C-252/21 *Bundeskartellamt*.<sup>3</sup> With ‘pay or okay’ any website, app, or other consumer-facing company can simply put a price tag on any ‘reject’ option, ensuring that the vast majority of data subjects must accept the use, sharing, or selling of personal data – or pay a fee that can be more than 100x more expensive than the revenue generated by the use of personal data.<sup>4</sup>

When first faced with the ‘pay or okay’ approaches used by influential media outlets, some SAs seem to have attempted to privilege ‘pay or okay’, hoping to support a struggling industry sector that has suffered from the migration of advertising to big tech in the past 20 years. However, publishers only receive the breadcrumbs of a couple of cents per user when people accept online tracking.<sup>5</sup> The profits stay with large advertising networks and big tech platforms that heavily rely on a surveillance business model. The ‘pay or okay’ approach has therefore not shown a significant effect in the income levels of news publishers – thus, even the original inventors of the ‘pay or okay’ model have only continued to lose income.<sup>6</sup> ‘Pay or okay’ is therefore mainly a tool to drive up consent rates to almost 100%.

If ‘pay or okay’ is permitted, it will *not* be limited to news pages or social networks but will be employed by any industry sector with an ability to monetise personal data via consent. The GDPR does not provide for a different treatment per industry sector. In practice, this would successfully undermine the GDPR, the high European data protection standard and wash away all realistic protections against surveillance capitalism.

The irony of Meta’s present move is that earlier national decisions to support publishers are now being exploited by one of their biggest enemies. While we understand the ho-



pes of these previous national decisions, it is evident that they have failed and now pose an enormous risk for the functioning of the GDPR in all other sectors.

Data subjects across and beyond the EU are rightly concerned about the GDPR's usefulness, given the daily use of absurd consent banners and 'dark patterns' that undermine data subjects' 'genuine and free choice'. The EDPB has already held that, for example, using 'pre-ticked boxes', having a reject link embedded in a longer text or hiding a 'reject'-button on the second layer violates the GDPR.<sup>7</sup> These decisions were critical, as we know that these types of dark patterns increase consent rates from 3-10%<sup>8</sup> that genuinely want personalised advertisement to 79% or even 90%.<sup>9</sup>

Given that 'pay or okay' results in an even higher (forced) consent rate of more than 99.9%<sup>10,11</sup> we fail to see how charging up to € 251,88 for clicking a reject button<sup>12</sup> is legal when compared to moving the 'reject' option to the second layer or a 'pre-ticked' box. Industry sources even cite 'pay or okay' as a way to undermine SA enforcement action on consent banners (*"The demand for a deny-all button at the first level ... has prompted providers of digital content and services to introduce so-called [pay or okay] models"*).<sup>13</sup>

We agree with the Dutch SA that fundamental rights are not reserved to people that can afford it.<sup>14</sup> 'Pay or okay' frames privacy as a paid service – a commodity – normalizing a view that, by default, EU residents have no right to data protection and users have to 'purchase' their Fundamental Rights from controllers. We therefore urge SAs not to get entangled in debates about what exact sum might be deemed 'appropriate' when having to 'sell' Fundamental Rights. Engaging in a purely monetary assessment, would quickly turn SAs largely into 'price regulators' whenever consent is sold to users, when their role is to ensure that the 'free and genuine choice' of data subjects is respected. Especially because controllers tend to 'mix' unrelated elements (like quality or third-party content, advertisement, personalization, online tracking and access to services) into two options, complex assessments would be needed.

Even if the sale of the Fundamental Right to Data Protection would be accepted and the review would be reduced to a purely economic assessment, as indicated by the Irish DPA,<sup>15</sup> it is clear that the economics of 'pay or okay' would soon spiral out of control. The low subscription numbers, accounting for less than 0,1% of all users,<sup>16</sup> do not generate substantial income. We believe that Meta, and other companies likely to follow suit, are cognizant of the fact that a majority of users will neither be able nor willing to pay a fee.

Now a single social media provider charges € 251,88 per year.<sup>17</sup> European users have on average more than 35 apps on their phone<sup>18</sup> and usually share data with hundreds of platforms. The ability to pay for the Fundamental Right to Data Protection would quickly go beyond the budget of any average person. If every other provider would equally switch to 'pay or okay', a family of four with just 35 apps per phone would end up with a bill of roughly € 35.263,20 per year.<sup>19</sup> When the median income in the EU was at € 19.083 and as low as € 5.378 in some Member States.<sup>20</sup> This imposes a business model in which privacy becomes a luxury rather than a fundamental right, directly reinforcing existing discriminatory exclusion from access to the digital realm and control over personal data. The Fundamental Right to Data Protection would clearly become largely unavailable, not only to the 22.6% of the European population who are currently at risk of poverty or social exclusion.<sup>21</sup> We also note that 'pay or okay' prices have quickly increased, once SAs accepted them in principle.<sup>22</sup>

We, therefore, urge the EDPB and all SAs to firmly oppose 'pay or okay' to prevent creating a substantial loophole in the GDPR. The EDPB's opinion will shape the future of data protection and the internet for years to come. It is of utmost importance that the opinion truly ensures data subjects a 'genuine and free choice' regarding the processing of their personal data.



ApTI - Association for Technology and Internet, Romania

Bits of Freedom

Corporate Europe Observatory (CEO)

The Daphne Caruana Galizia Foundation

Deutsche Vereinigung für Datenschutz (DVD)

Defend Democracy

Digital Rights Ireland

Državljan D / Citizen D

Ekō

The Electronic Privacy Information Center (EPIC)

Elektronisk Forpost Norge (EFN)

European Federation of Public Services (EPSU)

epicenter.works - for digital rights

Eticas Foundation

Forbrugerrådet Tænk/The Danish Consumer Counsel

Forbrukerrådet (Norwegian Consumer Council)

Föreningen för digitala fri- och rättigheter (DFRI)

Hermes Center

Homo Digitalis

Irish Council for Civil Liberties

IT-Pol Denmark

#jesuislà

noyb – European Center for Digital Rights

Panoptikon Foundation

Privacy International

Resource Center for Public Participation

Stichting Onderzoek Marktinformatie

Wikimedia Europe

Xnet, Institute for Democratic Digitalisation

- <sup>1</sup> <https://autoriteitpersoonsgegevens.nl/actueel/ap-privacy-is-een-grondrecht-niet-alleen-voor-rijke-mensen>, <https://www.datatilsynet.no/en/news/aktuelle-nyheter-2024/request-for-an-edpb-opinion-on-consent-or-pay/>
- <sup>2</sup> <https://www.deutschlandfunk.de/mogelpackung-auch-in-den-abo-varianten-trackt-meta-munter-weiter-dlf-df9a1897-100.html>, at minute 8:25
- <sup>3</sup> CJEU in C-252/21 Bundeskartellamt, paragraph 143, relying on Recital 42 GDPR.
- <sup>4</sup> The procedure before the Austrian SA in DerStandard.at revealed roughly €0,04 to €0,10 revenue from personalized advertisement per monthly unique visitor, while charging € 8,90 for a “PUR” subscription.
- <sup>5</sup> See above, footnote 4 above, or US findings that suggest the personalized advertisement was only leading to 4% more revenue for publishers ([https://weis2019.econinfosec.org/wp-content/uploads/sites/6/2019/05/WEIS\\_2019\\_paper\\_38.pdf](https://weis2019.econinfosec.org/wp-content/uploads/sites/6/2019/05/WEIS_2019_paper_38.pdf))
- <sup>6</sup> DerStandard has lost 14% in revenue between 2018 (€ 55,1 million) and 2023 (€ 60 million), if adjusted for inflation (26.5%) – in line with the previous trend. Consequently, allowing “pay or okay” by the Austrian SA did not change the problematic state of play for quality journalism.
- <sup>7</sup> Report of the Cookie Banner Taskforce of 17 January 2023 or CJEU in C-673/17 *Planet 49*.
- <sup>8</sup> [https://noyb.eu/sites/default/files/2020-05/Gallup\\_Facebook\\_EN.pdf](https://noyb.eu/sites/default/files/2020-05/Gallup_Facebook_EN.pdf), page 7.
- <sup>9</sup> See e.g. usercentrics Whitepaper (<https://share.noyb.eu/s/ttMLi8MqBL4AM9M>, page 6) or <https://www.quantcast.com/blog/choice-powers-one-billion-consumer-consent-signals/>
- <sup>10</sup> Morel et. al., Legitimate Interest is the New Consent – Large-Scale Measurement and Legal Compliance of IAB Europe TCF Paywalls, page 3; <https://arxiv.org/pdf/2309.11625.pdf>
- <sup>11</sup> The largest online news website in Germany (Spiegel Online) reported 17,200 “PUR” subscriptions, while having 20 million users that now needed to consent (<https://devspiegel.medium.com/wie-unser-pur-angebot-f%C3%BCr-werbefreies-lesen-ankommt-f92abaa0640d>), leading to a consent rate of 99.914%.
- <sup>12</sup> Cost for a connected Facebook and Instagram account paid via mobile phones.
- <sup>13</sup> IAB paper on ‘PUR Models’ ([https://iabeurope.eu/wp-content/uploads/PUR-Modelle-bvdw\\_20231004-en.pdf](https://iabeurope.eu/wp-content/uploads/PUR-Modelle-bvdw_20231004-en.pdf), page 8): “The demand for a deny-all button at the first level of consent banners from data protection regulators and consumer protection agencies, as well as the significance of consent-based data processing for data-driven business models, has prompted providers of digital content and services to introduce so-called PUR models. The objective is to ensure compliance with data protection regulations while also securing sustainable funding of their content and services..”
- <sup>14</sup> <https://www.autoriteitpersoonsgegevens.nl/actueel/ap-privacy-is-een-grondrecht-niet-alleen-voor-rijke-mensen>
- <sup>15</sup> Politico of 16 January 2024, citing Helen Dixon: “It’s going to come down to looking at issues surrounding this particular case and the issue of what an ‘appropriate fee’ may mean...”
- <sup>16</sup> Morel et. al., Legitimate Interest is the New Consent – Large-Scale Measurement and Legal Compliance of IAB Europe TCF Paywalls, page 3; <https://arxiv.org/pdf/2309.11625.pdf>
- <sup>17</sup> Based on € 12,99 for an Instagram or Facebook account on iOS and Android, plus € 8 if it is linked with another account, <https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/>. Once the accounts are linked, it is not possible to only pay for one of the services.
- <sup>18</sup> See numbers by Google at <https://www.thinkwithgoogle.com/marketing-strategies/app-and-mobile/average-number-of-apps-on-smartphones/>
- <sup>19</sup> Based on € 20,99 per month, multiplied by the average 35 apps per phone, 12 months and four phones.
- <sup>20</sup> [https://ec.europa.eu/eurostat/databrowser/view/ilc\\_di03/default/bar?lang=en](https://ec.europa.eu/eurostat/databrowser/view/ilc_di03/default/bar?lang=en)
- <sup>21</sup> <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20230614-1>
- <sup>22</sup> For example, ContentPass that moved from € 1,99 (2022) to € 3,99 (2024), DerStandard moved from € 6 to € 8,90.