Opinion on "Pay or Okay" Models Requested from the EDPB by the Norway Data Protection Authority ("NO SA"), Hamburg Supervisory Authority ("DE SA") and the Netherlands Supervisory Authority ("NL SA")

Dear members of the European Data Protection Board,

We have taken note of the EDPB's intent to address the "Consent or Pay" model in the context of large online platforms in an upcoming Opinion under Art. 64(2) of the GDPR, as well as the Board's agreement to consecutively develop Guidelines with a broader scope on this particular matter.

The upcoming Opinion comes at a time where companies of all types and origins are increasingly relying on such a business model as a means of maintaining the option to provide end-users with a free and open access to their online content and services without using traditional paywalls, and it will necessarily have ramifications on any subsequent Guidelines, even if the latter intend to have a broader scope.

We therefore urge the EDPB to engage in a public consultation over the Guidelines, with a view to properly address the concerns and interests of all relevant stakeholders, and to take into account the considerations below when drafting and discussing any Opinion or Guidelines on the "Consent or Pay" model. A correct understanding of the different interests and fundamental rights at stake is an important prior step to strike the appropriate balance between the right to data protection and the freedom to conduct business, neither of which is absolute, as clearly provided by Recital 4 of the GDPR. In that respect, we wish to draw the EDPB's attention to the initiative taken by the UK data protection authority to call for views on the "Consent or Pay" model in order to develop its position[1].

1) The assessment of "Consent or Pay" models must remain coherent with the existing case law and guidelines across the European Union and European Economic Area

Over the past years, several local regulators have issued guidance and recommendations on how to lawfully implement a "Consent or Pay" approach (and companies have made significant investments to comply with them):

- In May 2022, the CNIL (France) published their first list of assessment criteria[2]
- In February 2023, the Datatilsynet (Denmark) published dedicated guidelines[3]

[1] See https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/call-for-views-on-consent-or-pay-business-models/
[2] See https://www.cnil.fr/fr/cookie-walls-la-cnil-publie-des-premiers-criteres-devaluation
[3] See https://www.datatilsynet.dk/hvad-siger-reglerne/vejledning/cookies/cookie-walls

- In March 2023, the DSK (Germany) published an evaluation of their legality[4]
- In March 2023, the DSB (Austria) published dedicated FAQs on their assessment criteria[5]
- In January 2024, the AEPD (Spain) published updated guidelines on cookies that refer specifically to the possibility to provide a paid alternative to consent[6]

Additionally, the validity of "Consent or Pay" models has been recognised in case law and decisions, notably:
- By the Norwegian Privacy Appeals Board in Grindr's appeal against the Norwegian Data Protection Authority[7]
- By the French Council of State that confirmed the CNIL was not allowed to prohibit the use of "cookie walls" in its guidelines[8]
- By the Court of Justice of the European Union (CJEU) in the case between Meta Platforms and the Bundeskartellamt, which recognises that "*(...) 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*"[9]

We ask the EDPB to ensure the upcoming Opinion and Guidelines are consistent with and build on these established positions issued by the CJEU, local regulators, national courts and appeal bodies, as any diverging or contradicting interpretation will only aggravate legal uncertainty.

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[4] See https://www.datenschutzkonferenz-online.de/media/pm/DSK_Beschluss_Bewertung_von_Pur-Abo-Modellen_auf_Websites.pdf

[5] See https://www.dsb.gv.at/download-links/FAQ-zum-Thema-Cookies-und-Datenschutz.html#Frage_9

[6] See https://www.aepd.es/guias/guia-cookies.pdf

[7] See https://www.personvernnemnda.no/pvn-2022-22 [unofficial translation] "*The Tribunal agrees with Grindr that they do not have an obligation to offer a free dating app, and the Tribunal recognizes that a key feature of the business model for social media and applications is that data subjects "pay" for the use of social media and applications by accepting that their personal data is used commercially, for example by being disclosed to advertising partners. If the user had been given the choice between using the free version of the app or purchasing one of the two paid versions of the app before the registration process was completed, this would have meant that the requirement of voluntariness was met. The user would then have had a real choice as to whether they wanted to pay money to use the application, or whether they would rather "pay" with their personal data.*"

[8] See https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-06-19/434684 [unofficial translation] "*By deducing such a general and absolute ban from the sole requirement of free consent, established by the regulation of April 27, 2016, the CNIL has exceeded what it can legally do, within the framework of a soft law instrument, enacted on the basis of 2°of I of article 8 of the law of January 6, 1978 cited in point 3. It follows that the contested deliberation is, to this extent, tainted with illegality.*"

[9] See the authoritative French version of the judgement that contains no reference to "necessity": https://curia.europa.eu/juris/document/document.jsf?text=&docid=275125&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1 "*(...) ces utilisateurs doivent disposer de la liberté de refuser individuellement, dans le cadre du processus contractuel, de donner leur consentement à des opérations particulières de traitement de données non nécessaires à l'exécution du contrat sans qu'ils soient pour autant tenus de renoncer intégralement à l'utilisation du service offert par l'opérateur du réseau social en ligne,* ***ce qui implique que lesdits utilisateurs se voient proposer, le cas échéant contre une rémunération appropriée, une alternative équivalente non accompagnée de telles opérations de traitement de données***."

We share the view that there is a need for a harmonised European approach, while taking into account the position that has already been validated by the CJEU and many regulators and on which many operators have already based their activities and economic choices.

We also believe that a consistent EDPB position is desirable in view of the European Union market. Inadequate interventions and consequently an imbalance in the market and a distortion of competition could undermine the competitiveness of companies, jeopardising, among other things, innovation and the overall efficiency of the market. A common approach that is consistent with the aforementioned positions of regulators will help to create a level playing field for all companies operating in the European Union and will ultimately benefit consumers.

2) The "Consent or Pay" model should not be framed as rendering data protection rights conditional to payment

The allegation that the "Consent or Pay" model amounts to end-users having to pay to protect their personal data is misleading[10] and ignores the compliance efforts undertaken by companies to meet the stringent requirements of the GDPR.

First, end-users that choose to consent do not on the same occasion waive their fundamental rights over the processing of their personal data. The GDPR precludes unlawful data processing and provides data subjects with the highest level of protection irrespective of the legal basis of the processing, including consent. In other words, there is no "paying" for data protection rights - data protection rights are guaranteed in any event.

Second, the "Consent or Pay" model essentially allows end-users to choose freely between two services that are equivalent in terms of content or service provided: one that is funded at least in part by third parties by way of personalised advertising and another that is funded by the end-user directly. The conditions for "freely given" consent under the GDPR continue to be met, as this equivalence ensures that there is no detriment to consenting, not consenting or withdrawing consent: end-users that do not wish to pay or to allow funding through personalised advertising cannot expect to benefit from the online content or service entirely for free.

Third, each business - which must at all times comply with the GDPR - benefits from the freedom to conduct business[11]. This entails the right to choose which business model it wishes to apply, and as a result which way(s) of remuneration it wishes to put in place. The fundamental right to data protection cannot negate the freedom to conduct business and does not create the right to use a commercial service for free: an appropriate balance must be found between the two. As from the moment where the requirements of the GDPR are met (see above), the

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[10] See press release from the Norwegian DPA relating to the request for an EDPB opinion on "Consent or Pay" here

[11] See art. 16 of the Charter of Fundamental Rights of the European Union.

freedom to conduct business must be considered as being on equal footing with the right to data protection.

In this regard, it is also important to recall what was introduced by Directive 2019/770[12], which confirms and validates the practice of providing digital content or services in exchange for personal data instead of payment. That directive (which has already been transposed in national law in certain Member States[13]) states that personal data can be made available by individuals for the purpose of receiving a service in accordance with the law, at a reasonable and fair price.

3) The notion of reasonable price cannot be addressed independently by the EDPB

Recital 43 of the GDPR provides considerations that consent may not be freely given where there is a clear imbalance between the individual and the controller, and the EDPB guidelines on consent state that such imbalance can occur when individuals are at risk of significant negative consequences if they do not consent, such as substantial extra costs[14]. The possibility of such imbalance leading to consent not being freely given therefore requires a case-by-case assessment of whether the paid alternative to consent can be considered reasonable rather than substantial.

The notion of a reasonable price in a "Consent or Pay" model, which may be included in the discussions of the EDPB, has to be subject to various regulatory considerations. It entails implications in terms of data protection, consumer law and competition law and also influences

[12] See for example recital 24 of the directive 2019/770, which labels the act of providing personal data to a trader in order to receive digital content or digital services as a common practice: "*Digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader. Such business models are used in different forms in a considerable part of the market. While fully recognising that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity, this Directive should ensure that consumers are, in the context of such business models, entitled to contractual remedies. This Directive should, therefore, apply to contracts where the trader supplies, or undertakes to supply, digital content or a digital service to the consumer, and the consumer provides, or undertakes to provide, personal data. The personal data could be provided to the trader either at the time when the contract is concluded or at a later time, such as when the consumer gives consent for the trader to use any personal data that the consumer might upload or create with the use of the digital content or digital service. Union law on the protection of personal data provides for an exhaustive list of legal grounds for the lawful processing of personal data. This Directive should apply to any contract where the consumer provides or undertakes to provide personal data to the trader. For example, this Directive should apply where the consumer opens a social media account and provides a name and email address that are used for purposes other than solely supplying the digital content or digital service, or other than complying with legal requirements. It should equally apply where the consumer gives consent for any material that constitutes personal data, such as photographs or posts that the consumer uploads, to be processed by the trader for marketing purposes. Member States should however remain free to determine whether the requirements for the formation, existence and validity of a contract under national law are fulfilled.*"

[13] See for Italy the Legislative Decree no. 173 of 4 November 2021 https://www.gazzettaufficiale.it/eli/id/2021/11/26/21G00186/sg

[14] See https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf "*Imbalances of power are not limited to public authorities and employers, they may also occur in other situations. As highlighted by the WP29 in several Opinions, consent can only be valid if the data subject is able to exercise a real choice, and there is no risk of deception, intimidation, coercion or significant negative consequences (e.g. substantial extra costs) if he/she does not consent.*"

business models of the companies concerned. It is a complex exercise requiring several kinds of expertise to properly assess all possible ramifications.

Consequently, as it is already acknowledged in existing guidance from local regulators[15], any discussion within the EDPB regarding reasonable price criteria or calculation methods for a given service should be conducted in liaison with competition authorities and consumer protection authorities. No price can be assessed - let alone an assessment of whether it is a "reasonable price" - without first defining the relevant market (geographically and based on the nature of the service or content provided) and an economic analysis that takes into account the characteristics of the content or service provided. DPAs have no legal mandate to do so, while competition and consumer protection authorities have been doing this exercise daily for 50 years.

Given the growing collaboration between data protection and competition authorities[16], we are confident that the EDPB intends to cooperate with the ECN and CPCN throughout the discussions to ensure its upcoming position takes into account the interplay between data protection, competition and consumer laws.

4) An overwhelming majority of Europeans want to decide which online services they pay for, and which they do not have to pay for because they are funded by advertising

Regulators and the EDPB appear to be increasingly taking conservative positions that aim at removing the flexibility provided by the GDPR in terms of legal grounds under Article 6(1) GDPR, i.e. the possibility for a controller to determine which legal ground is appropriate, and notably whether consent is more appropriate than other legal grounds. Such a stricter stance has the effect of pushing a large number of processing activities into a category where only consent appears to be tolerated by regulators as the appropriate legal basis. For example, the EDPB's strict position in its draft guidelines on Article 5(3) of the ePrivacy Directive suggests that the EDPB would require GDPR-compliant consent for a whole range of innocuous operations, such as the delivery of contextual advertising.

Yet if data protection regulators continue to view consent as the default legal basis for processing activities commonly pursued in the online space, and if consent itself becomes subject to additional requirements, it may no longer be feasible for businesses to maintain a free (or lower-priced) and ad-funded access option to their online content and services - leaving end-users with only paid access options.

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[15] See for example https://www.cnil.fr/fr/cookie-walls-la-cnil-publie-des-premiers-criteres-devaluation [unofficial translation]"*It is not up to the CNIL to set a threshold below which a price can be considered reasonable, which is a case-by-case analysis*."

[16] See for example the joint declaration between the CNIL and the French competition authority signed 12 December 2023
https://www.cnil.fr/fr/protection-des-donnees-et-concurrence-la-cnil-et-lautorite-de-la-concurrence-signent-une-declaration

However, 85% of Europeans want to decide which online services they pay for and which they don't have to pay for because they are funded by advertising[17]. Put differently, end-users largely prefer to have "Consent or Pay" choices than to be restricted to only one option (e.g. only paying subscriptions). In that context, the ability to provide end-users with a service free of charge or at a lower cost, due to that service being (partially or fully) funded by advertising, is precisely a circumstance that guarantees the availability of greater choices for end-users irrespective of their financial means, both at the level of a specific service or content and more broadly among a wider and more diverse set of online services and content.

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We thank you in advance for taking into consideration the request for a public consultation as well as the concerns and topics mentioned above, as part of your ongoing assessment of the "Consent or Pay" model.

List of signatories

IAB Europe: IAB Europe is the European-level association for the digital marketing and advertising ecosystem. Through its membership of national IABs and media, technology and marketing companies, its mission is to lead political representation and promote industry collaboration to deliver frameworks, standards and industry programmes that enable business to thrive in the European market.

Alliance Digitale: Alliance Digitale is the leading professional association for digital marketing players in France. It was formed in 2022 from the merger of IAB France and the Mobile Marketing Association France. Alliance Digitale's main mission is to structure the development of the digital marketing industry and promote innovative, responsible and interoperable solutions by defining industry standards and best practices. The association is also a privileged interlocutor for public authorities, the media and other professional organisations in matters of digital regulation and the promotion of an open Internet. The association brings together the vast majority of digital marketing players in France, representing more than 250 companies (Brands, Media, Agencies, Tech).

IAB Italia: IAB Italia is the Italian chapter of the Interactive Advertising Bureau, the leading association of digital marketing and advertising. Since 25 years it has significantly contributed to

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[17] See the study conducted by an independent third-party research agency Savanta, with a total sample size of 2,439 surveyed individuals:
https://iabeurope.eu/wp-content/uploads/2021/04/IAB-Europe_What-Would-an-Internet-Without-Targeted-Ads-Look-Like_April-2021.pdf
See the study conducted on the Spanish market for IAB Spain, with a total sample size of 1,010 surveyed individuals
https://iabspain.es/estudio/i-estudio-sobre-el-estado-de-la-privacidad-digital/

the diffusion of digital culture and to the acceleration of market growth in Italy through the development of ethical and sustainable communication.
IAB Italia pursues its mission through the realisation of vertical events, special projects, training activities and with IAB Forum, the largest Italian event dedicated to marketing and digital innovation on the most relevant issues for the industry, involving top national and international speakers. The Association has more than two hundred members, among the main Italian and international operators active in the interactive advertising market.

IAB Spain: IAB Spain undertakes a comprehensive mission as a forum for meeting and representing the digital advertising industry in Spain. Since its inception in 2001, IAB Spain has played a crucial role in the promotion and development of digital advertising. IAB Spain's mission unfolds on various strategic fronts: With the aim of contributing to the proper regulation of the sector, by contributing, assisting, and fostering conversations with public administrations. Furthermore, IAB Spain proactively works on creating industry standards, with the goal of establishing guidelines and best practices that promotes the sustainable and ethical growth of digital marketing, advertising and therefore promoting innovation and positivities for the society. Members of IAB Spain encompass a wide range of stakeholders in the digital advertising ecosystem, including digital and audiovisual publishers, platforms, media agencies, marketing and advertising agencies, advertisers, consulting firms, technology providers, advertising networks, and others, such as eCommerce and research institutes.