

# The ‘pay-or-consent’ challenge for platform regulators

Users expect online services to be free but some digital firms are now offering pay-or-consent options, affecting competition dynamics.

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Meta-owned Facebook’s original slogan, “*it’s free and always will be*”, illustrates what most users think about paying for online services. So far, Meta and other digital firms have offered most of their services for free to encourage user enrolment. Yet, free services are not really free. Most are funded by an advertising model built on users’ personal data.

There has been an ongoing clash between this model and European Union regulations, including the General Data Protection Regulation (GDPR) and the Digital Markets Act (DMA), which make it harder for these ad-funded services to rely on personal data. Increasingly, EU laws require users to give explicit consent to the collection and use of their personal data, whether is it collected inside (on-platform, eg only from Facebook) or outside the platform (off-platform, eg from applications and websites).

Several GDPR-related rulings against Meta in Germany<sup>1</sup>, Ireland<sup>2</sup>, Norway<sup>3</sup> and in Luxembourg by the European Court of Justice (CJEU)<sup>4</sup> have confirmed that platforms can only collect and use data with the user’s explicit consent. The DMA imposes additional obligations on gatekeepers – inevitable service gateways – that provide core platform services, including Meta-owned Facebook and Instagram<sup>5</sup>, to request consent as per the GDPR for collection and use of off-Meta data for personalised advertising (Recitals 36 and 37 and Article 5(2)(a) DMA). In response to the legal developments, Meta now relies on consent to collect on-Meta and off-Meta data<sup>6</sup>.

In addition, on 30 October 2023, Meta also said it will now offer a paid, ad-free version of its flagship products, Facebook and Instagram, to users who do not want to consent to the use of their data (the ad-free paid version). An ad-supported free version of these services will continue to be available if users do consent. In other words, Meta is now providing a pay-or-consent offer similar to a paywall.

This pay-or-consent offer might affect the dynamics of competition in platform markets. Users will have three options: 1) pay for the ad-free version if they do not want to give consent; 2) use the ad-supported free version if they do consent; or 3) find a competing provider if they are unwilling to pay or to give consent.

However, whether Meta can propose the ad-supported free version with the requirement to give consent to data use is legally a grey area. The GDPR requires a genuine choice, meaning users must have a real choice between accepting and refusing consent. For users who are unwilling to pay and unable to switch to an alternative provider, the only realistic option is to use the ad-supported free version, which only allows users to give consent.

National data protection authorities (DPAs) enforcing the GDPR, and the European Commission as the enforcer of the DMA might consider this offer non-compliant, requiring Meta to offer its ad-supported free version with an accept or decline consent offer, as Meta offer its services currently.

### **The pay-or-consent offer**

The legality of the pay-or-consent offer is a grey area. National data protection authorities (DPAs) have different views about the practice's legality, as the GDPR requires that users have a genuine choice between accepting or declining consent. This depends on whether users have realistic alternatives to the ad-supported free version when they want to withhold consent.

Pay-or-consent models are, for example, illegal in Belgium<sup>7</sup> but legal in France<sup>8</sup>. However, the French data protection authority imposes strict conditions. Users must have an alternative if they do not want to pay, and the payment must be appropriate. The economic rationale behind this payment is that digital firms have the right to be compensated for the advertising revenue they lose because they are unable to offer

personalised advertising that relies on trackers that track the user's web activity. The CJEU<sup>9</sup> and the DMA (Recitals 36 and 37 DMA) also consider that a paid version is legal if users who decline consent can access an equivalent service for an appropriate payment.

### **The existence of alternatives**

The first question authorities will have to answer is whether the ad-free paid version constitutes a realistic alternative to the ad-supported free version. Empirical studies have found that the answer is no. In a survey of 11,151 respondents (Akman, 2022), only 9 percent were willing to pay to continue using Facebook, were it to start charging a €5 monthly fee for the same quality service. Akman (2022) also found that 42 percent dislike being targeted by advertising, while 46 percent dislike data collection based on their activities, but are nevertheless unwilling to pay for ad-free services. Only 7 percent and 10 percent, respectively, would rather pay a fee for ad-free services, or have ad-funded services collect data on their activities. The upshot is that most users will not pay, irrespective of the amount, even for a higher quality ad-free version. Accordingly, the paid version is unlikely to be a realistic alternative for most users because in practice they will not pay.

A second question is whether competing services, including, in relation to Facebook, Snapchat, TikTok and BeReal, constitute realistic alternatives to the ad-supported free version. The answer to this will depend, first, on whether the competing services offer a free version with the ability for the user to accept or refuse consent. Second, it will depend on whether Meta users face barriers to switching due to factors including functionality, size of the user base, network effects and the ability to move data and their contacts to a competing service effortlessly and in a timely way. Two scenarios are possible:

1. If users face switching barriers, users who are unwilling to pay in practice will have no choice but to use Meta's ad-supported free version. This will leave them facing consent as the only option for access to Meta's ad-supported free version. Users could also stop using Meta services, but they would lose their connection with friends/followers. It is unlikely that users will stop using Meta's services if they use these services as the main gateway to connect with their followers. Accordingly, the ad-supported free version will unlikely be legal.

2. If users do not face barriers to switching, they might switch to competing services. The latter will compete to attract users who want to switch. New entrants might even appear on the market. Newcomers will likely offer only a free version of their services to encourage user enrolment. Existing alternatives might propose paid versions of their services to diversify their revenue streams, alongside a free version that enables users to accept or refuse consent to attract users unwilling to consent to Meta's ad-supported free service. In this scenario, the ad-supported free version will likely be legal. The Meta pay or consent offer might even facilitate the DMA contestability objective of easing entry barriers, as it might incentivise Meta users to switch to competing providers. However, this scenario is highly hypothetical as users might not be able to fully move from Meta's services to competing providers because of Meta's position as a main gateway for billions of users and businesses.

### **The consequences of the absence of genuine choice**

It is up to the DPAs and the Commission to define whether the ability to pay for Meta's ad-free version, or to use competing services constitutes sufficient alternatives if users want to withhold consent. If the answer is no because, in practice, users will not pay and will not switch because of high barriers to switching, then the ad-supported free version is unlikely to be legal under the GDPR and the DMA, as consent is the only choice for those wanting to access the ad-supported free version.

In particular, the DMA explicitly prohibits gatekeepers from subverting the user's autonomy to choose (Article 13(6) DMA), which is likely to be the case if users can only accept consent. If users have no genuine choice, Meta will still be able to offer an ad-free paid version. But, if Meta wants to keep its ad-supported free version, it will have to ensure that the ad-supported version provides a choice between accepting and declining consent, similar to today's 'accept-or-decline' offer, as opposed to the pay-or-consent offer.

### **References**

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## Endnotes

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