

Meta's Pay-or-Okay Model

An analysis under EU Data Protection, Consumer and Competition Law

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Abstract

Meta introduced its 'pay-or-okay' model to respond to heightened requirements as to the way it collects users' personal data for targeted advertising. This model entails giving users two options: paying for a tracking-free service or giving consent to personal data processing including targeted ads. While this resulted from the Meta ruling, in which the CJEU set out the requirements for freely given consent, this solution has caused a new wave of criticism, questioning whether it complies with EU law. More specifically, it raises potential concerns under data protection, consumer law, competition law and the Digital Markets Act. This paper analyses what issues this conduct creates under these areas of EU law and assesses the overall legality of the pay-or-okay model.

1. Introduction

In February 2019, the German competition authority (BKA) imposed on Facebook restrictions on the processing of users' personal data, following a finding that it was imposing exploitative business terms under Section 19(1) GWB (largely corresponding to Article 102 TFEU).¹ Facebook was found to be abusing its dominant position, because (i) it essentially forced users to agree to its terms and conditions, under which it could collect personal data off-Facebook platform,² *i.e.*, from the company's other services and

¹ Bundeskartellamt, 'Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing' (Case B6-22/16, 6 February 2019) <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4> accessed 26 March 2024.

² The BKA talks about third party sources as services owned by Facebook, like WhatsApp and Instagram, as well as third party websites that "embedded Facebook products such as the 'like' button,² or a 'Facebook login' option or analytical services such as 'Facebook Analytics', data". See: Bundeskartellamt, 'Background Information on the Facebook Proceeding' (Bundeskartellamt, 19 December 2017) <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.html?nn=3591568> accessed 26 March 2024.

third party websites, and further combine such data with users' Facebook profiles, and (ii) competitors were unable to gather such amount of data.³ The BKA argued that "there is no effective consent to the users' information being collected if their consent is a prerequisite for using the Facebook.com service in the first place".⁴ The finding of a lack of valid consent was tied to Facebook's dominance and the lack of alternative social networks on the market. The BKA maintained that the processing of personal data without a legal basis under the General Data Protection Regulation (GDPR) constituted an exploitative abuse of Facebook's dominant position.

Following Facebook's appeal, the Düsseldorf Higher Regional Court suspended the BKA's order in interim proceedings and filed a request for a preliminary ruling to the Court of Justice of the European Union (CJEU). Among other questions, the referring Court asked whether consent given by the user of an online social network to a dominant network operator can be considered freely given under the GDPR.⁵ The CJEU found that holding a dominant position does not prevent the operator of an online social network from obtaining valid consent from users within the meaning of Article 4(11) GDPR.⁶ At the same time, the Court stated that:

"such a circumstance must be taken into consideration in assessing whether the user of that network has validly and, in particular, freely given consent, since that circumstance is liable to affect the freedom of choice of that user, who might be unable to refuse or withdraw consent without detriment, as stated in recital 42 of the GDPR".⁷

The Court added that the imbalance resulting from a dominant position could favour the imposition of conditions that are not necessary for the performance of the contract.⁸ According to the CJEU, in order for consent to be valid, users must be free to refuse to give consent to data processing operations not necessary for the performance of the contract, and still be allowed access to an equivalent service without the data processing, if necessary for an appropriate fee.⁹

Following the *Meta* judgment, in October 2023, the European Data Protection Board (EDPB) adopted an urgent binding decision concerning Meta, at the request of the Norwegian Data Protection Authority (DPA). In this decision, the EDPB unequivocally found that Meta could not rely on contract and legitimate interests for behavioural advertising purposes.¹⁰ Given Meta's ongoing infringement of the GDPR, the EDPB decided that final measures had to be adopted by the Irish DPA. Accordingly, it instructed the Irish DPA to impose a ban on processing on Meta, relating to the processing of personal data collected for behavioural advertising purposes under the legal basis of contract and legitimate interest.¹¹

In response to this, in November 2023, Meta introduced the pay-or-okay model.¹² Users of Facebook and Instagram received notifications in which they were presented with a choice between the following two options:¹³

3 Bundeskartellamt (n 1), 11.

4 Bundeskartellamt (n 1).

5 *Meta*, Case C-252/21 [2023] ECLI:EU:C:2023:537, para. 140

6 *Meta* (n 5), para. 147.

7 *Meta* (n 5), para. 148.

8 *Meta* (n 5), para. 149.

9 *Meta* (n 5), para. 150.

10 EDPB, 'Urgent Binding Decision 01/2023 requested by the Norwegian SA for the ordering of final measures regarding Meta Platforms Ireland Ltd (Art. 66(2) GDPR)' (Adopted on 27 October 2023) <https://www.edpb.europa.eu/system/files/2023-12/edpb_urgentbindingdecision_202301_no_metaplatformsireland_en_o.pdf> accessed 26 March 2024.

11 EDPB (n 10).

12 Meta, 'Facebook and Instagram to Offer Subscription for No Ads in Europe' (30 October 2023) <https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/> accessed 26 March 2024.

13 See for the full notification: EUC, 'Choose to Lose with Meta - An Assessment of Meta's New Paid-Subscription Model from a Consumer Law Perspective' (2023) <https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-156_Annex_Legal%20assessment_Choose_to_lose_with_Meta_Legal_analysis.pdf> accessed 26 March 2024. BEUC is the umbrella organisation of independent consumers organisations in the EU Member States and the former European Economic Community.

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Use for free with ads

Discover products and brands through personalised ads, while using your Facebook and Instagram accounts for free. Your info will be used for ads.

[Your current experience]

This choice consists of either giving consent to Meta for targeted ads or paying a fee for an ad-free version of the service. Users thus face three options: i) pay for the ad-free version if they do not want to give consent; ii) use the ad-supported free version if they do consent; or iii) switch to an alternative provider if they are unwilling to pay or give consent.

Meta's pay-or-okay model has raised criticisms and complaints under EU data protection, consumer and competition laws.¹⁴ This includes complaints raised in front of the Spanish DPA¹⁵ and the Austrian DPA by the NGO Noyb.¹⁶ Noyb claims this model infringes the GDPR, since data is processed without a valid legal basis in violation of Article 6(1) GDPR. Another complaint among others was filed by consumer organisation BEUC, arguing that Meta's pay-or-okay model is in breach of the Unfair Commercial Practices Directive.¹⁷ Furthermore, the pay-or-okay model was adopted by Meta in response to the BKA's competition law case against it, which raises the question whether this model is capable of resolving the competition concerns or whether risks of anticompetitive outcomes persist. In the BKA case against Meta, the competition authority found that Meta had abused its dominant position by processing data without valid consent. Specifically, it argued that because of Meta's dominance, consent was not freely given. Furthermore, the BKA held that besides exploiting users, by processing the data Meta gained a competitive advantage. The theory of harm developed by the BKA in the *Meta* case also led to an analogous provision being included in the Digital Markets Act (DMA), which now creates an additional layer of obligations for gatekeepers in relation to their data processing practices. The Commission has opened an investigation in March 2024, in which it seeks to examine the compliance of Meta's pay-or-okay model with the DMA.¹⁸

This article analyses the legal issues raised by Meta's pay-or-okay model under these areas of EU law. Firstly, Meta's pay-or-okay model is analysed under the GDPR (Section 2), secondly the Unfair Commercial Practices Directive (Section 3) and finally Article 102 TFEU and the DMA (Section 4). The article culminates with a discussion which brings together the different threads of the analysis in the preceding Sections and concludes on the overall legality of the pay-or-okay model (Section 5).

¹⁴ Including detailed complaints by privacy organisation NOYB and consumer organisation BEUC. See the detailed discussions in Sections 2, 3, and 4 of this article.

¹⁵ Complaint submitted on behalf of complainant by Jorge García Herrero. See: <<https://jorgegarciaherrero.com/denuncia-a-meta-ante-la-aepd/>> accessed 26 March 2024.

¹⁶ Noyb, 'Complaint to the Austrian DPA against Meta under Article 77(1) GDPR' (November 2023) <https://noyb.eu/sites/default/files/2023-11/Complaint%20-%20Meta%20Pay%20or%20Okay%20-%20REDACTED.pdf> accessed 26 March 2024, paras 30-31; Noyb, 'Complaint to the Austrian DPA against Meta' (January 2024) <https://noyb.eu/sites/default/files/2024-01/Meta_Withdrawal_Complaint_REDACTED_EN.pdf> accessed 26 March 2024, paras 6, 8; For general reference: Noyb, <<https://noyb.eu/en>> accessed 26 March 2024.

¹⁷ BEUC (n 13) at 3, including screenshots of the notification.

¹⁸ European Commission, Press Release IP/24/1689 of 25 March 2024 'Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act' <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689> accessed 26 March 2024.

2. GDPR

Meta's pay-or-okay model triggers the application of two legal instruments, the GDPR and the ePrivacy Directive (ePD).¹⁹ The GDPR applies to the processing of personal data and requires data controllers to choose a legal basis for personal data processing. The ePD provides supplementary rules to the GDPR for the use of tracking technologies, for example, cookies or fingerprinting. To comply with the GDPR and the ePD, websites must obtain consent from EU users when tracking their behaviour for non-strictly necessary purposes;²⁰ advertising being such a purpose.²¹ The only way to assess with certainty whether consent is required is to analyse the purpose of each tracker on a given website/app.²² In case of a pay-or-okay model, end-users' consent is requested for tracking for behavioural advertising, triggering the application of Article 5(3) of the ePD.

GDPR enforcement has demonstrated that data subjects' consent is the only legal basis for online behavioural advertising; several GDPR-related rulings against Meta in Germany,²³ Ireland,²⁴ Norway,²⁵ by the EDPB,²⁶ and the CJEU,²⁷ have confirmed so. Consent must comply with several requirements: prior, freely given, specific, informed, unambiguous, intelligible, accessible, and revocable.²⁸ Particularly relevant to the pay-or-okay model is the requirement of freely given consent. In this section, we discuss whether this model abides to this legal requirement for consent under the GDPR, also considering the concrete requirements put forth by DPAs on pay-or-okay models.²⁹

2.1 Requirements for freely given consent

Legal uncertainty exists about whether consent under the pay-or-okay model can be regarded as *freely given*, as prescribed by Article 4(11) GDPR, and further specified in Article 7(4) and recital 42 of the GDPR. The request for consent should imply an autonomous, voluntary choice to accept or decline the processing of personal data. Such a choice should be made in the absence of any kind of pressure to persuade users to give consent, or in the absence of negative consequences in case a user rejects consent to targeted ads.³⁰ If the data subject has no real choice, feels compelled to consent, endures negative consequences (e.g.

19 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37.

20 ePD (n 19), Article 5(3).

21 Cristiana Santos, Nataliia Bielova, Célestin Matte, 'Are Cookie Banners Indeed Compliant With the Law? : Deciphering EU Legal Requirements on Consent and Technical Means to Verify Compliance of Cookie Banners' [2020] Technology and Regulation 91, 97-99.

22 Article 29 Working Party, 'Opinion 04/2012 on cookie consent exemption' (WP 194, 7 June 2012).

23 Bundeskartellamt (n 1).

24 Irish Data Protection Commission, Final Decision against Meta Platforms Ireland Limited (Facebook service), DPC Inquiry Reference: IN-18-5-5, 31 December 2022, available at:

<<https://www.dataprotection.ie/sites/default/files/uploads/2023-04/Meta%20FINAL%20DECISION%20%28ADOPTED%29%2031-12-22%20-%20IN-18-5-5%20%28Redacted%29.pdf>> accessed 26 March 2024.

Irish Data Protection Commission, Final Decision: Meta Platforms Ireland Limited against Instagram, DPC Inquiry Reference: IN-18-5-7, 31 December 2022, available at:

<<https://www.dataprotection.ie/sites/default/files/uploads/2023-04/Meta%20FINAL%20Decision%20%28ADOPTED%29%20-%20IN-18-5-7%20-%2031-12-22%20%28Redacted%29.pdf>> accessed 26 March 2024.

25 Datatilsynet, Press Release (31 October 2023), 'Datatilsynets vedtak mot Meta utvides til EU/EØS og gjøres permanent', available at: <<https://www.datatilsynet.no/aktuelt/aktuelle-nyheter-2023/datatilsynets-vedtak-mot-meta-utvides-til-eueos-og-gjores-permanent/>> accessed 26 March 2024.

26 EDPB (n 10).

27 *Meta* (n 5), para. 1117.

28 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, arts 4(11), 7(2)-(3).

29 Victor Morel, Cristiana Santos, Yvonne Lintao, and Soheil Human, 'Your Consent Is Worth 75 Euros A Year – Measurement and Lawfulness of Cookie Paywalls' (21st Workshop on Privacy in the Electronic Society (WPES '22), Los Angeles, CA, USA, November 2022) <<https://doi.org/10.1145/3559613.3563205>> accessed 26 March 2024.

30 "Controllers must ensure that data subjects have a real freedom of choice when asked to consent to processing of their personal data, and they may not limit data subjects' autonomy by making it harder to refuse rather than to consent". EDPB, 'Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms' (17 April 2024) para 68.

substantial extra costs) or detriment if they do not consent,³¹ then consent will not be free nor valid, as cautioned by the EDPB: “Any element of inappropriate pressure or influence upon the data subject (which may be manifested in many different ways) which prevents a data subject from exercising their free will, shall render the consent invalid”.³² Making access to a website conditional on the acceptance of certain non-essential trackers can impact, in certain cases, the freedom of choice,³³ and consequently, the validity of consent.

Freely given consent in the EDPB guidelines is composed of four interrelated elements: imbalance of power, unconditionality, granularity, and non-detriment.³⁴ In this Section we argue that Meta's pay-or-okay model does not render consent free since it is requested in an unbalanced power relationship, it is conditional, not granular, and detrimental, all of which render consent unlawful under Article 6 GDPR.

2.1.1 Imbalance of power

The EDPB posits that, when there is a clear imbalance of power dynamic in the relationship between the controller and the data subject, consent cannot be freely given.³⁵ Considering Meta's model, it is plausible to claim that an imbalance of power exists.³⁶ Factors such as extreme market dominance, and inherently high network effects have created a ‘lock-in effect’, which makes it difficult for users to switch to another platform and entrenches user dependency on the platform. Furthermore, Meta has a gatekeeping position³⁷ on the social network market that is not dedicated to a specific topic (e.g. business network LinkedIn) or a specific age group (e.g. TikTok). Such factors arguably trigger an imbalance and a relationship of subordination.

2.1.2 Unconditionality

Article 7(4) and recital 43 of the GDPR create a presumption that consent is not freely given when services are offered upon the condition that users share personal information that is not necessary for the services offered.³⁸ Similarly, if certain cookies or other tracking technologies are not necessary for the services requested and only provide for additional benefits of the website operator, the user should be in a position to refuse them.³⁹

In the case of Meta, as its model makes access to the service dependent on user consent for processing of personal data that is not necessary for its service, *i.e.* advertising, it can be reasonably assumed that consent is forced, since it has been ruled that advertising is not necessary for a service to be provided to the user. As a result of the established presumption, Meta, as a controller, must prove that consent was freely given. In practice, this requires consent for data processing to be clearly distinguishable (untied, unbundled) from contracts or agreements, such as a paywall (second choice afforded to users), as required

31 The EDPB Guidelines 05/2020 on consent refer to other examples of detriment: deception, intimidation, coercion or significant negative consequences if a data subject does not consent (paragraph 47); compulsion, pressure or inability to exercise free will (paragraph 24). See: EDPB, ‘Guidelines 05/2020 on consent under Regulation 2016/679, Version 1.1’ (Adopted 4 May 2020) para 24, para 47, <https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf> accessed 26 March 2024.

32 EDPB (n 30), para. 14.

33 Commission Nationale de l'Informatique et des Libertés, ‘Cookie walls : la CNIL publie des premiers critères d'évaluation’ (16 May 2022) <<https://www.cnil.fr/fr/cookie-walls-la-cnil-publie-des-premiers-criteres-devaluation>> accessed 26 March 2024.

34 EDPB, (n 30), para. 19.

35 EDPB (n 30), paras 96-113.

36 Noyb, ‘November 2023’ (n 16); Noyb, ‘January 2024’ (n 16).

37 Commission Decision of 5 September 2023 designating Meta as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector (Cases DMA.100020 – Meta – online social networking services; DMA.100024 – Meta – Number-independent interpersonal communications services; DMA.100035 – Meta – Online advertising services; DMA.100044 – Meta – Online intermediation services - Marketplace) (notified under document number C(2023) 6105 final).

38 See also EDPB Guidelines on consent (n 31), Section 3.1.2.

39 The Article 29 Working Party guidance reads: “If certain cookies are therefore not needed in relation to the purpose of provision of the website service, but only provide for additional benefits of the website operator, the user should be given a real choice regarding those cookies”. See: Article 29 Working Party, ‘Working Document 02/2013 providing guidance on obtaining consent for cookies’ (WP 208, 2 October 2013) 6 <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp208_en.pdf> accessed 26 March 2024.

by Article 7(2) GDPR. As the EDPB reasserts, “the GDPR ensures that the processing of personal data for which consent is sought cannot become directly or indirectly the counter-performance of a contract”.⁴⁰

In this regard, Noyb asserts that linking consent to a payment has the effect that the fundamental right to privacy “is relinquished in exchange for a payment”.⁴¹ It explains that this solution frames privacy as a ‘paid service’ – a commodity – normalising a view that, by default, EU residents have no right to data protection and users have to ‘purchase’ their fundamental right from controllers. Noyb argues that this reasoning also corresponds to the arguments provided by the EDPB: the EDPB Binding Decision 3/2022 states that “the GDPR, pursuant to EU primary law, treats personal data as a fundamental right inherent to a data subject and his/her dignity, and not as a commodity data subjects can trade away through a contract”.⁴²

2.1.3 Granularity

Data subjects should be free to choose which purpose they accept, rather than having to consent to a bundle of processing purposes. Recital 43 GDPR clarifies that consent is presumed not to be freely given if the process for obtaining consent does not allow data subjects to give separate consent for different personal data processing operations. Recital 32 states that “Consent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, consent should be given for all of them”.⁴³ In the context of the pay-or-okay model, it is not clear whether users will still be tracked if they pay, and under which purposes instead of advertising. In case users consent to targeted ads, it is also not clear for what purposes besides advertising personal data might be processed.

2.1.4 Non-detriment

Detrimental consent refers to the case where the data subject is unable to refuse (or withdraw) consent without detriment, under recital 42 GDPR, or without any harm or negative consequences.⁴⁴ As per the EDPB, the controller needs to prove that withdrawing (and revoking) consent does not lead to any costs for the data subject, and, thus, to no clear disadvantage for those withdrawing (or revoking) consent.⁴⁵ In the context of pay-or-okay model, if the data subject rejects/withdraws consent, and does not pay the requested fee, they would not be able to use Meta’s social media services, which may constitute a detriment for the data subject if it becomes impossible for them to use a service that is part of their daily lives and has a prominent role regarding the participation in social life.⁴⁶

Noyb’s complaint against Meta referred to two disadvantages; first, it claimed that the effort users have to make to reject consent is significantly higher than to give consent, since users must enter payment data or set up an Apple or Google account for payment on iOS and Android devices;⁴⁷ second, users have to navigate through several windows and banners in order to find the page where they could actually withdraw consent. To withdraw consent, a data subject is forced to either subscribe and pay the monthly fee or delete their account; there is no other option to withdraw consent on the controller’s platform. Further, if the data subject rejects/withdraws consent, and does not pay the requested fee by Meta, a user will not be able to use the service, which may constitute a detriment for the data subject,⁴⁸ since Meta consists of a social media service that is decisive for a user’s participation in social life. Thus, the data subject is unable to withdraw consent for free and is hence unable to exercise their rights.⁴⁹

40 EDPB (n 30), para. 26.

41 Noyb, ‘November 2023’ (n 16), para. 20.

42 European Data Protection Board, ‘Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR)’ (5 December 2022) para 101; Available at: <https://www.edpb.europa.eu/system/files/2023-01/edpb_bindingdecision_202203_ie_sa_meta_facebookservice_redacted_en.pdf> accessed 26 March 2024; European Data Protection Board, ‘Guidelines 2/2019 on the processing of personal data under Article 6(1) (b) GDPR in the context of the provision of online services to data subjects Version 2.0’ (8 October 2019) para 54; Available at: https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines-art_6-1-b-adopted_after_public_consultation_en.pdf accessed 26 March 2024.

43 GDPR (n 28), Recital 32.

44 EDPB (n 30), para. 48.

45 EDPB (n 30), para. 46.

46 EDPB (n 30), paras. 86-88.

47 Noyb (November 2023) (n 16), paras. 30-31.

48 EDPB (n 30), para. 86.

49 Noyb (January 2024) (n 16), paras. 6, 8.

2.2 EDPB and Data Protection Authorities' positions

Only a few DPAs have provided explicit positions on the pay-or-okay model;⁵⁰ namely, the Spanish,⁵¹ French,⁵² Danish,⁵³ Austrian⁵⁴ and German Data Protection Conference.⁵⁵ These authorities set concrete requirements toward the lawfulness of the pay-or-okay practices. Mostly recommended by these DPAs is the need for (i) an alternative that is reasonable,⁵⁶ and fair⁵⁷ without tracking for targeted ads. Some DPAs slightly disagree on the concrete similarity of such alternatives. Some state that the content or service offered by the company must be to a large extent similar, while others posit for a *sameness* service,⁵⁸ *i.e.*, a genuinely equivalent service under both choices. Such equivalence entails that the paying visitors cannot have access to significantly more content than the visitors who give their consent. On the 'reasonable alternative' assessment, the French DPA recalls that possible imbalances need to be considered, for example, if the website has exclusivity on the content/service offered, or is a dominant or essential service provider,⁵⁹ which echoes the building blocks of freely given consent (discussed under Section 2.1.1). The DPAs also set requirements in relation to (ii) granularity of consent,⁶⁰ which means that users must have the possibility to consent or not (choose 'yes' or 'no') to any specific data processing, *i.e.*, to the different processing purposes on a granular basis; (iii) a price that is reasonable;⁶¹ (iv) processing of personal data that is necessary when users have paid;⁶² and, finally, (v) users being informed⁶³ of the fact that non-acceptance of the use of cookies might prevent access to the website or the total or partial use of the service.

The EDPB issued the Opinion o8/2024 on valid consent in the context of consent or pay models implemented by large online platforms.⁶⁴ It noted that a case-by-case analysis is necessary to assess the lawfulness of these models, but regards the requirements for a valid consent and other criteria as relevant:

- i) *informed consent*: it has to be clear to the data subject what exactly they would be paying a fee for, how that would affect the data processing involved, and they must know about the techniques involved in the profiling processes underlying behavioural advertising;
- ii) *specific consent*: large online platforms like Meta should assess whether providing behavioural advertising entails the processing of personal data for different purposes, and request separate consent for these purposes;

50 The Dutch, Norwegian and Hamburg DPAs have recently requested an EDPB opinion about this approach, while the Irish DPA will make public its position soon.

51 Agencia Española de Protección de Datos, 'Guía sobre el uso de las cookies' (January 2024) 29 <<https://www.aepd.es/guias/guia-cookies.pdf>> accessed 26 March 2024.

52 CNIL (n 33).

53 Datatilsynet, *Brug af Cookie Walls* (20 February 2023) <<https://www.datatilsynet.dk/presse-og-nyheder/nyhedsarkiv/2023/feb/brug-af-cookie-walls>> accessed 26 March 2023.

54 Österreichische Datenschutzbehörde, *Decision on Complaint Dated 25 May 2018 GZ: DSB-D122.931/0003-DSB/2018* (30 November 2018) <https://www.ris.bka.gv.at/Dokumente/Dsk/DSBT_20181130_DSB_D122_931_0003_DSB_2018_00/DSBT_20181130_DSB_D122_931_0003_DSB_2018_00.pdf> accessed 26 March 2023.

55 Datenschutzkonferenz, 'Bewertung von Pur-Abo-Modellen auf Websites' (Resolution of the Conference of Independent Data Protection Supervisory Authorities of the Federal and State Governments, 22 March 2023) <https://datenschutzkonferenz-online.de/media/pm/DSK_Beschluss_Bewertung_von_Pur-Abo-Modellen_auf_Websites.pdf> accessed 26 March 2023.

56 Datatilsynet (n 53); AEPD (n 51), p 29.

57 CNIL (n 33).

58 DSK (n 55).

59 CNIL (n 33).

60 Datatilsynet (n 53); Österreichische Datenschutzbehörde, Case 2023-0.174.027, decided on 29 March 2023, available at <https://noyb.eu/sites/default/files/2023-04/Standard_Bescheid_geschw%C3%A4rzt.pdf> accessed 26 March 2023 – see also <[https://gdprhub.eu/index.php?title=DSB_\(Austria\)-_2023-0.174.027](https://gdprhub.eu/index.php?title=DSB_(Austria)-_2023-0.174.027)> accessed 26 March 2023; DSK (n 55), para 4.

61 Datatilsynet (n 53); Landesbeauftragte für den Datenschutz Niedersachsen, 'Prüfung von Medienwebseiten in Niedersachsen abgeschlossen' (10 July 2023) <<https://www.lfd.niedersachsen.de/startseite/infothek/presseinformationen/pruefung-von-medienwebseiten-in-niedersachsen-abgeschlossen-223637.html>> accessed 26 March 2024; CNIL (n 33).

62 Datatilsynet (n 53).

63 AEPD (n 51), p 29.

64 EDPB (n 30).

- iii) *unambiguous consent*: consent for purposes other than ads should be actively selected by the user. Different options need to be equivalently presented, and the wording used should be framed in an accurate and transparent way;
- iv) *withdrawal of consent*: it should be clear that a user's decision to subscribe to the paid version of a service when they had first initially provided their consent constitutes a withdrawal of their consent. Conversely, the termination of the paid subscription is not equivalent to giving consent;
- v) *equivalent alternative*: a third option should be given by the controller free of charge, such as the "*Free Alternative Without Behavioural Advertising*", a service with a less privacy-intrusive form of advertising, such as contextual advertising, with functional equivalence (same features and functions).

In sum, and in the context of Meta's model, the *informed consent* requirement is deemed crucial to assess the voluntary nature of consent (including providing information about an equivalent alternative offer, the appropriateness of the price, and the purposes for which each personal data is processed for). In this context, Noyb's complaint argues that Meta's model infringes the informed consent requirement, claiming that the afforded choice does not inform users on whether they will be tracked after paying, and under which purposes and legal basis.⁶⁵ Moreover, several empirical consent-related studies already demonstrate that users read neither consent requests nor their policies, and thus this mandated information disclosure might be ineffective.⁶⁶

While the *price should be reasonable*, no metrics, factors, thresholds, or contexts are given by the EDPB or any DPA that can serve as assessment criteria for the appropriateness and reasonableness of the fee. The EDPB in its opinion merely recalls the need to account for the guiding principles of fairness and accountability when controllers determine whether the fee may hinder the data subject's ability to consent. Hence DPAs have full discretion on this matter, within a 'price regulator' role, though no DPA explains what this reasonability entails. The threshold of the reasonable rate will then depend on a case-by-case analysis of Meta's applied price per country and thus, per individual user.

Regarding *alternative services*, DPAs and the EDPB seem to require an alternative service provided by the data controller itself that is meaningful and fair, and, further, that the content and service be identical or similar between both offers. Regarding the third proposed option by the EDPB on a "*Free Alternative Without Behavioural Advertising*", recent studies claim that contextual targeting might be more problematic than profiling-based advertising, since it allows to reach audiences at a much finer granularity.⁶⁷ As such, this suggested third mechanism requires further policy scrutiny about the performance of contextual advertising compared to the status quo to encourage widespread adoption by Meta and/or other deployers of pay-or-okay models. Still, with respect to a meaningful alternative, it is relevant to consider some of the main findings of empirical studies. A user study by Müller-Tribbensee *et al.* confirmed that 99% of users choose the tracking option when confronted with this pay-or-okay model.⁶⁸ A web-measurement study by Morel *et*

65 Noyb (January 2024) (n 16), para. 64.

66 Aleecia M. McDonald and Lorrie Faith Cranor, 'The Cost of Reading Privacy Policies' (2009) 4(3) *Journal of Law and Policy for the Information Society* 542, 561; Nataliia Bielova, Cristiana Santos, Colin M. Gray, 'Two worlds apart! Closing the gap between regulating EU consent and user studies' (forthcoming, *Harvard Journal of Law & Technology*, vol 37) 21.

67 Tinhinane Medjkoune, Oana Goga, and Juliette Senechal, 'Marketing to Children Through Online Targeted Advertising: Targeting Mechanisms and Legal Aspects' (2023) in *Proceedings of the 2023 ACM SIGSAC Conference on Computer and Communications Security (CCS '23)* (Association for Computing Machinery, New York, NY, USA) 180–194 <https://doi.org/10.1145/3576915.3623172> accessed 24 July 2024; European Commission, Directorate-General for Communications Networks, Content and Technology, Armitage, C., Botton, N., Dejeu-Castang, L. et al., *Study on the impact of recent developments in digital advertising on privacy, publishers and advertisers – Final report* (Publications Office of the European Union, 2023) <https://data.europa.eu/doi/10.2759/294673> accessed 24 July 2024, pp. 141–157.

68 Timo Müller-Tribbensee, Klaus Miller, and Bernd Skiera, 'Paying for Privacy: Pay-or-Tracking Walls' (5 March 2024) 37 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4749217> accessed 26 March 2024.

*al.*⁶⁹ clarified that when contacting the CEO of subscription management platform Content Pass to better understand their pay-or-okay model, the authors were informed that 99.9% of visitors consent to tracking technologies. Akman's survey of 11,151 respondents mentioned that only 9% of users would be willing to pay to continue using Facebook, were it to start charging a €5 monthly fee for the same quality service.⁷⁰ Finally, an industry-based survey demonstrated that merely 3-10% of all users want their personal data to be processed for personalised advertising on Facebook.⁷¹ Empirical studies might provide insight on the (un)willingness to pay, and on the (un)fair alternatives under a pay-or-okay 'choice'. Regarding the specifics of the alternative service, such 'alternative' assessment would ultimately rely on the subjective interpretation of the data subject. So far, it remains unclear which criteria could objectively assess such identical services. Empirical research is further necessary to analyse users' perceptions of what alternatives could be considered (un)fair.

Finally, DPAs and the EDPB require *granular consent per purpose*, and thus that users are able to accept and reject per purpose. This requirement entails that consent per purpose could be situated at the first or second layers of a pay-or-okay banner, as per the EDPB Report of the work undertaken by the Cookie Banner Taskforce.⁷² Meta's model would need then to provide granular purposes and also a choice between accepting and declining consent per purpose (so far inexistent).

2.3 Conclusion

Considering the policy-based recommendations from EDPB and national authorities, it is expected that Meta's pay-or-okay model can *only be* considered to be lawful under the discussed requirements. Such legitimacy might trigger pay-or-okay models to go beyond news websites (where it is already being deployed), or social networks, and will be used within the specificities of each service provider, by any industry sector with an ability to monetise personal data via consent. This argument is already confirmed by Morel *et al.*, which proves these models are spread into business, tech, and entertainment websites.⁷³

The recommendations of the DPAs and the issued opinion by the EDPB are, apart from certain regulatory decisions issued by the Austrian and German Lower Saxony DPAs, soft law instruments, and thus not binding on Meta. Thus, in the context of DPAs, only the rulings of the Austrian and Spanish DPA-based complaints might force Meta to change the current model.

Moreover, most DPAs do not explicitly refer to the freely given consent requirement, but only implicitly when related to an alternative service requirement.⁷⁴ We argue that this lack of explicit reference to freely given consent results from the fact that DPAs, and the EDPB, assume freely given consent as a prime condition of legality under the GDPR framework, while their detailed guidance contains the second order conditions of legality. In other words, the guidance analysed presupposes that valid consent is present, and, based on that presumption, offers more detailed conditions for the legality of pay-or-okay models. A practice that is within the legality conditions discussed by the DPAs but which does not allow for freely given consent, would still be illegal under the GDPR. This is because, as shown in Section 2.1, the conditions for consent to

69 Victor Morel, Cristiana Santos, Viktor Fredholm, and Adam Thunberg, 'Legitimate Interest is the New Consent – Large-Scale Measurement and Legal Compliance of IAB Europe TCF Paywalls' (Proceedings of the 21st Workshop on Privacy in the Electronic Society (WPES '23), Copenhagen, Denmark, November 2023) <<https://doi.org/10.1145/3603216.3624966>> accessed 26 March 2024.

70 Pinar Akman, 'A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets' (2022) 16(2) Virginia Law and Business Review 217.

71 Gallup Institute, 'Facebook and Advertising - User Insights' (November 2019) 7 <https://noyb.eu/sites/default/files/2020-05/Gallup_Facebook_EN.pdf> accessed 26 March 2024.

72 As per point 8 of the Report, "a vast majority of authorities considered that the absence of refuse/reject/not consent options on any layer with a consent button of the cookie consent banner is not in line with the requirements for a valid consent and thus constitutes an infringement of the ePrivacy Directive" (EDPB, 'Report of the work undertaken by the Cookie Banner Taskforce' (17 January 2023) 4 <https://www.edpb.europa.eu/system/files/2023-01/edpb_20230118_report_cookie_banner_taskforce_en.pdf> accessed 26 March 2024).

73 Morel, Santos, Fredholm, and Thunberg (n 69) 4.

74 Only the DSK refers to the need to comply with all consent requirements (under Arts. 4(11) and 7 GDPR) for a lawful cookie paywall.

be freely given under the GDPR framework are not met in relation to Meta's pay-or-okay model, especially in relation to the imbalance of power and unconditionality.

3. Unfair Commercial Practices Directive

3.1 Complaint by BEUC

On 30 November 2023, consumer organisation BEUC filed a complaint against Meta's pay-or-okay model at the Consumer Protection Cooperation Network,⁷⁵ which is the network of EU consumer law enforcement authorities. BEUC argues that Meta's pay-or-okay model constitutes both an aggressive commercial practice and a misleading commercial practice.⁷⁶ In its complaint, BEUC reports that the notification announcing Meta's pay-or-okay model functioned as a lock-screen: it "disturbed and sometimes prevented access to the main interface of the service" (*i.e.* of Facebook and Instagram) and was "depriving the consumer from accessing their newsfeed as they would like until they select one of the two access options".⁷⁷ BEUC emphasises that consumers did not have an option to download one's data or to delete the profile within the lock-screen notification, although more tech-savvy consumers were able to navigate to their account page to download their data and/or close their account. BEUC also reports that consumers who tried to wait without making a choice, would sometimes (depending on the device) see the lock screen notification disappear for a while, before reappearing again.⁷⁸

3.2 Meta's pay-or-okay as an aggressive commercial practice

The first, and in our view most interesting complaint is that Meta's pay-or-okay model, according to BEUC, constitutes an aggressive commercial practice under Article 8 UCPD. This complaint is particularly interesting, since the prohibition of aggressive commercial practices was originally written to challenge blatant infringements of consumer autonomy in the offline context, protecting consumers in particular against acts of harassment, coercion and undue influence.⁷⁹ The possibility to apply Article 8 UCPD in relation to more subtle manipulation in the context of online commercial practices (including influencing techniques and choice architectures) has been raised in legal literature,⁸⁰ and the current complaint in relation to Meta's pay-or-okay model may provide a valuable test case in this regard.

On the basis of the facts of the case as stated by BEUC in its complaint, there is a good chance that the Meta's pay-or-okay model constitutes undue influence under Article 8 UCPD. Undue influence is defined in the UCPD as "exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision".⁸¹ From the CJEU judgment in *Orange Polska*, it follows that national courts

75 BEUC, Press Release BEUC-PR-2023-049 of 30 November 2023, 'Consumer groups file complaint against Meta's unfair pay-or-consent model', available at:

<https://www.beuc.eu/sites/default/files/publications/BEUC-PR-2023-049_Consumer_groups_file_complaint_against_Meta_unfair_pay-or-consent_model.pdf> accessed 26 March 2024.

76 In its complaint, BEUC also argues that Meta's pay or okay model also constitutes an infringement of the GDPR as and such also constitutes a breach of the UCPD. This avenue will not be discussed in detail here, since it relies, in essence, on the validity of the pay or okay solution under the GDPR. See part 3 of BEUC's complaint (n 13) and, for our assessment under the GDPR, Section 2 of this article.

77 BEUC (n 13) at 4, 8.

78 BEUC (n 13) at 8.

79 B.B. Duivenvoorde, 'Consumer Protection in the Age of Personalised Marketing: is EU law future-proof?' (2023) 8(2) *European Papers* 631-646.

80 See *e.g.* Federico Galli, 'Online Behavioural Advertising and Unfair Manipulation between the GDPR and the UCPD' in M Ebers and M Gamito (eds), *Algorithmic Governance and Governance of Algorithms: Legal and Ethical Challenges* (Springer 2021) 109-135; J. Strycharz and B.B. Duivenvoorde, 'The exploitation of vulnerability through personalised marketing communication: are consumers protected?' (2021) 10(4) *Internet Policy Review* 1; E. Margaritis, 'Online Behavioral Advertising as an Aggressive Commercial Practice' (2023) 12(6) *Journal of European Consumer and Market Law* 243.

81 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22, art 2(j).

should not lightly conclude that a commercial practice constitutes undue influence.⁸² The case at hand was about a consumer who selected and requested a telecom contract via the website of the telecom company, and then had to sign the telecom contract in the presence of a courier in order to actually conclude the contract and start using the services. The consumer had the opportunity to access the details of the offer and the standard form contracts at the stage of selecting and requesting the telecom contract via the company's website. The CJEU ruled that such a practice constitutes undue influence only if the practice “actively entails, through the application of a certain degree of pressure, the forced conditioning of the consumer's will”.⁸³ In this context, the CJEU stresses that the practice must “put pressure on the consumer such that his freedom of choice is significantly impaired” in such a way to “make that consumer feel uncomfortable and thus to confuse his thinking in relation to the transactional decision to be taken”.⁸⁴

How does this translate to Meta's pay-or-okay model? On the basis of the facts as reported by BEUC, it seems that consumers were confronted with the notification without being informed beforehand (e.g. by email) about the choice that they would soon have to make, and without being informed of the details of this choice. This makes the pay-or-okay practice by Meta fundamentally different to the practice of the telecom provider in *Orange Polska*, in which the consumer was able to access the details of the offer and the standard form contracts. This is not to say that putting a consumer in a position to decide on a contract without having access to all information is *per se* an aggressive commercial practice. In fact, the CJEU in *Orange Polska* stresses that this is not the case. However, it does make sense that not having access to all information beforehand will play an important role in the assessment of whether a commercial practice constitutes undue influence by putting the consumer under pressure, in a way which may make the consumer feel uncomfortable, and thus to confuse their thinking in relation to the transactional decision they are about to take. In this context it seems particularly important that the consumer, as it seems without receiving prior warnings from Meta, was unable to access Meta's social media services – or at least was likely to have the impression to be unable to access these services. A factor that adds to the likely pressure is that the services offered by Meta are likely to be experienced as essential by many consumers. For example, consumers may be dependent on these services to contact people within their network, respond to unanswered messages, and access information about events. The argument that Meta's pay-or-okay model constitutes an aggressive commercial practice therefore seems to be a strong one, and a good test case for assessing the potential bite of the prohibition of aggressive commercial practices in relation to potentially unfair online choice architectures. Still, Courts will have to be *willing* to interpret undue influence in this way, since Meta's practice is not a ‘classic’ undue influence practice.⁸⁵

3.3 Meta's pay-or-okay as a misleading commercial practice

BEUC also argues that Meta's pay-or-okay model constitutes a misleading commercial practice. In particular, BEUC argues that Meta misleads consumers by giving the impression that under the paid subscription option the consumer will not be tracked and profiled, while Meta will still (i) use the consumer's data to personalise the Meta products (other than ads), (ii) provide measurement, analytics and business services, and (iii) provide and improve the products offered by Meta. BEUC also points out that consumers who will opt for the paid subscription will still not escape promotional content, e.g. in the form of sponsored posts by influencers. These arguments do not seem likely to succeed, since consumers are informed in the notification screen that “*your info won't be used for ads*” and that “*you'll still see posts and messages from businesses and creators*”.⁸⁶ As a consequence, it seems unlikely that the reasonably well-informed observant and circumspect average consumer, who serves as the benchmark for assessing the fairness of the practice,⁸⁷

⁸² *Orange Polska* [2019] Case C-628/17, ECLI:EU:C:2019:480.

⁸³ *Orange Polska* (n 82), para. 33.

⁸⁴ *Orange Polska* (n 82), paras. 46-47.

⁸⁵ In this context it may help that the European Commission's guidance to the UCPD, although non-binding, does suggest that online influencing techniques that are not typical cases of undue influence could – under circumstances – qualify as such. See: European Commission, Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market OJ 2021 C 526/1, Section 4.2 for examples.

⁸⁶ BEUC (n 13) at 3.

⁸⁷ See UCPD (n 76), Article 6, building upon the average consumer notion as introduced by the European Court of Justice in *Gut Springenheide*, Case C-210/96 [1998] ECLI:EU:C:1998:369. See also Recital 18 of the Preamble to the UCPD.

will expect that their data is not used for other purposes, and that they will no longer be exposed to types of promotional content other than ads served by Meta, like sponsored posts by influencers.

BEUC also argues that Meta's description of the 'free' subscription model as 'free' is misleading, taking into account that consumers are effectively paying with their personal data. However, it seems likely that courts will conclude that, given the information provided in the notification, it will be clear to the average consumer that they will indeed 'pay' with their personal data.⁸⁸

An argument that seems more likely to be successful is that Meta states that consumers "*need to make a choice*" because "*laws are changing in your region*". In this context, Meta also presents the 'free' option as "*your current experience*". BEUC rightly points out that this may lead the average consumer to think that nothing will change if they agree to the processing of their personal data for targeted advertising. In reality, this is not the case. As explained above, Meta has so far been processing personal data for advertising purposes without a valid legal basis under the GDPR. The need for the consumer to choose between a 'free' and a paid option is therefore not due to a change in laws. This may lead the average consumer to take a transactional decision they would not take otherwise, since the consumer will likely have the feeling that they will not be 'giving up' anything by consenting to the processing of their personal data – assuming that this is simply the default option in which nothing will change.

3.4 Conclusion

The UCPD does not stand in the way of pay-or-okay models as such. The likely infringement of Meta's pay-or-okay model lies in the specific way in which Meta has chosen to shape the model. In this sense, an important take-away is that the UCPD is likely to stand in the way of putting existing users under pressure by presenting them with a choice, while giving the impression that those users cannot make full use of the services before indicating their choice. In addition, the analysis of Meta's pay-or-okay model shows that companies should be meticulous in their communication towards consumers, and, in that sense, should be careful in re-framing the reasons for the necessity of the choice.

4. Art 102 TFEU and the Digital Markets Act

4.1 Abuse of dominance under Article 102 TFEU

Article 102 TFEU, which prohibits the abuse of a dominant position, is the primary competition law provision applicable to the pay-or-okay model pushed for by Meta. For Article 102 to apply, the relevant market must be defined; following which the dominance of the undertaking in question in that market must be established. Then, and only then, can the potential abuse of that dominance be analysed. Due to its inherent complexity, a full market definition and establishment of a dominant position is not within the scope of this paper. Nonetheless, the Bundeskartellamt in its decision against Meta, which gave rise to the *Meta* judgment, defined the relevant product market as a "private social network market".⁸⁹ Further, in the CJEU's judgment, the relevant market was referred to as a "market for online social networks for private users".⁹⁰ Such a product market definition would seem to be appropriate in the context of assessing Meta's pay-or-okay model. In geographic terms, the relevant market should be defined as the EU – something which is corroborated by the fact that Meta is considered to be a gatekeeper for the purposes of the DMA, showing its presence in the market throughout the Union. Further, while the notion of dominance in and of itself is an essential element for the application of Article 102, it is clear *in casu* that the dominance

⁸⁸ Describing something as "free" while the consumer does have to pay for the product is also prohibited *per se* under point 20 of Annex I to the UCPD (n 81). However, it seems likely that – at least in the context of paying for a product with personal data – this prohibition cannot be invoked if the trader explains to consumers how their personal data is used. See also European Commission (n 85), Section 3.4.

⁸⁹ Bundeskartellamt (n 1), 3-5.

⁹⁰ Meta (n 5), para 30.

threshold is met.⁹¹ Additionally, in this context, Meta's gatekeeper designation, while a different concept, can help in demonstrating Meta's dominance in the relevant market.

Abuses of dominance can be split into two broad categories – exclusionary abuses and exploitative abuses. It is worth noting from the outset that dominant undertakings are deemed to have a special responsibility not to abuse their dominant position.⁹² This means, as the Court has held, that practices that may very well be legal in and of themselves can fall within the scope of Article 102.⁹³ In the context of the above considerations, this Section will analyse the potential application of four abuses to Meta's nascent pay-or-okay model.

4.1.1 Excessive pricing

The arguably most relevant exploitative abuse is 'excessive pricing', under Article 102(a) TFEU, which can apply to abuses directly harming the consumer.⁹⁴ Under that abuse, the dominant undertaking charges a price for its service which is, per the case law, appreciably higher than what would occur under normal market conditions.⁹⁵ There is no specific threshold for when a price is excessive;⁹⁶ thus, the specifics of its application to the pay-or-okay model cannot be fully ascertained, despite some assessment methods being available to enforcers.⁹⁷ Nonetheless, it has been consistently argued by competition lawyers and economists that the 'typical' model of (potentially excessive) data collection by platforms represents a market failure,⁹⁸ and a potential exploitative (pricing) abuse in and of itself.⁹⁹ In this context we can see the pay-or-okay model as an extension of that market failure – end users of the platform, under the pay option, still provide their data but now they have the 'option' to not see personalised ads, for a premium. Thus, under the paid option, Meta is not only engaging in some, albeit limited, data collection, but is to an extent doubling down. If we consider this market failure, and the fact that Meta has been found to have 'excessive' profitability (even before the new model was introduced),¹⁰⁰ we can see that the market conditions are difficult to describe as normal, thus giving rise to the price charged being potentially excessive.

91 See: *AKZO*, Case C-62/86 [1991] ECLI:EU:C:1991:286, para. 60; *British Airways*, Case T-219/99 [2003] ECLI:EU:T:2003:343, paras. 211-215; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7 paras. 13-15.

92 *Michelin v Commission*, Case 322/81 [1998] ECLI:EU:C:1983:313, para. 57.

93 *AstraZeneca v Commission*, Case C-457/10 P [2012] ECLI:EU:C:2012:770, paras. 131-150.

94 *Europemballage Corporation and Continental Can Company Inc. v Commission*, Case 6/72 [1973] ECLI:EU:C:1973:22, para. 26.

95 *United Brands Company v Commission*, Case 27/76 [1978] ECLI:EU:C:1978:22, paras. 250-252; *Autortiesību un komunikēšanās konsultāciju aģentūra v Latvijas Autoru apvienība v Konkurences padome*, Case C-177/16 [2017] ECLI:EU:C:2017:689, para. 55. See also: *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne*, Case C-323/93 [1994] ECLI:EU:C:1994:368; *Corinne Bodson v SA Pompes Funèbres des Régions Libérées* Case 30/87 [1988] ECLI:EU:C:1988:225.

96 *General Motors Continental v Commission*, Case 26/75 [1975] ECLI:EU:C:1975:150, paras. 11-12; *Autortiesību un komunikēšanās konsultāciju aģentūra* (n 95), para. 55. See also: *Attheraces Ltd & Anor v The British Horseracing Board Ltd & Anor* Rev 2 [2007] EWCA Civ 38.

97 *United Brands* (n 95), paras. 251-252; *Autortiesību un komunikēšanās konsultāciju aģentūra* (n 95), paras. 37-42.

98 The modelling focuses, as luck would have it, on Google/Alphabet and Facebook/Meta. See: Nick Economides and Ioannis Lianos, 'Restrictions on Privacy and Exploitation in the Digital Economy: a Competition Law Perspective' [2019] UCL Centre for Law, Economics and Society (CLEs) Research Paper Series 5/2019, 13-30; Dina Srinivasan, 'The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy' (2019) 16(1) *Berkeley Business Law Journal* 39; Marco Botta and Klaus Wiedemann, 'EU Competition Law Enforcement vis-à-vis Exploitative Conducts in the Data Economy: Exploring the Terra Incognita' [2018] Max Planck Institute for Innovation and Competition Research Paper No 18-08, 21-33; See also: Viktoria Robertson, 'Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data' [2020] 57 *Common Market Law Review* 161-190..

99 Liza Lodvdahl Gormsen and Jose Tomas Llanos, 'Facebook's exploitative and exclusionary abuses in the two-sided market for social networks and display advertising' (2022) 10(1) *Journal of Antitrust Enforcement* 90, 97-107. Daniele Condorelli and Jorge Padilla, 'Harnessing Platform Envelopment in the Digital World' (2020) 16(2) *Journal of Competition Law & Economics* 143, 176. Daniele Condorelli and Jorge Padilla, 'Data-Driven Envelopment with Privacy-Policy Tying' (2024) 134(658) *The Economic Journal* 515. OECD Global Forum on Competition, *Abuse of Dominance in Digital Markets: Background note by the Secretariat* (2020), 57, available at: <<https://web.archive.org/2021-10-31/566602-abuse-of-dominance-in-digital-markets-2020.pdf>> accessed 26 March 2024.

100 See: UK Competition and Markets Authority, *Online Platforms and Digital Advertising: Market Study Final Report* (2020) paras 2.73-2.81 <https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf> accessed 26 March 2024.

In relation to subscription-paying users, they will not be seeing ads, but they will still be presented with content from businesses, or influencer marketing. At the same time, *some* data will still be necessarily collected and processed, even if that data is only limited to what is *stricto sensu* necessary for the functionality of the platform.¹⁰¹ The current model is permeated by an overall lack of transparency and certainty over exactly what ads subscription-fee-paying consumers will be seeing, over exactly what data will be collected and processed, and over exactly how those ads and that data will be monetised.¹⁰² However, this lack of transparency does not mean that Meta will not be extracting value from those consumers *on top* of the not insubstantial subscription fee. In other words, Meta will still be generating revenue from subscribers (even if said revenue is lower than what it is for non-subscribers who consented to processing) while also charging them a subscription fee.

Excessive pricing is an established if historically underutilised type of abuse; that is to say that the Commission does have the competence to scrutinise practices by dominant undertakings which may entail excessive pricing, and has done so recently in the pharmaceutical sector.¹⁰³ Of course, the question of whether the price is *actually* excessive can only be answered following an economic analysis, but given that Meta's average revenue per user in Europe is *circa* €6 per month,¹⁰⁴ charging those very users between €9.99 and €12.99, while *still collecting and processing* their data with the economic benefits said collection and processing bring, would seem to constitute a price appreciably higher than what normal market conditions would dictate. In effect, Meta is both charging a price for its services, *and* still continues to extract data from its users – data which fuels its primary revenue generating model; thus Meta ends up effectively being paid twice, once monetarily and once with data, for its service.

The French and Austrian DPAs have made the legality of pay-or-okay models conditional on, *inter alia*, the price being charged being fair/reasonable,¹⁰⁵ while the Danish one argued that the data collection and processing ought to be restricted only to what is necessary.¹⁰⁶ This in effect means that excessive pricing and/or data collection are not only potentially problematic under the prism of competition law, but also under the GDPR.¹⁰⁷ Finally, Meta can always further increase the price they charge to customers (we all recall the price hikes in streaming subscription services),¹⁰⁸ especially if we take into account the lock-in effects of social networking platforms.¹⁰⁹ Based on the above, even if Meta *only* received the subscription fee for its service under pay-or-okay, the price would still possibly be excessive – however, given that they still collect and process data and show (less profitable but still lucrative) ads on top of the subscription fee, the overall price paid (monies and data) is more likely to indeed be excessive. In brief, Meta's average revenue per user is lower than the subscription fee, and, for those users, Meta can still generate some revenue on top of the fee.

¹⁰¹ It is worth noting that the limitation of processing to what is necessary is a condition for the legality of pay-or-okay models, per the Danish Data Protection Authority; See: Datatilsynet (n 53).

¹⁰² See also Section 3.3.

¹⁰³ European Commission, 'Commission Decision of 10 February 2021 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.40394 - Aspen)' (2021) C(2021) 724 final, available at <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40394/40394_5350_5.pdf> accessed 24 July 2024.

¹⁰⁴ Meta Platforms, Inc., 'Q3 2023 Earnings Presentation' (2023) 24 <https://s21.q4cdn.com/399680738/files/doc_earnings/2023/q3/presentation/Earnings-Presentation-Q3-2023.pdf> accessed 26 March 2024; Beth Kindig, 'Social Media Stocks: One Metric Shows Meta's Clear Leadership' Forbes (11 January 2024) <<https://www.forbes.com/sites/bethkindig/2024/01/11/social-media-stocks-one-metric-shows-metas-clear-leadership/?sh=6eaaf6ec2717>> accessed 26 March 2024.

¹⁰⁵ Datenschutzbehörde Österreich, 'FAQ zum Thema Cookies und Datenschutz' (20 December 2023) <https://www.dsb.gv.at/download-links/FAQ-zum-Thema-Cookies-und-Datenschutz.html#Frage_9> accessed 26 March 2024; CNIL (n 33); See also Mario Martini and Christian Drews, 'Making Choice Meaningful – Tackling Dark Patterns in Cookie and Consent Banners through European Data Privacy Law' (2022) 20-22 <<https://ssrn.com/abstract=4257979>> accessed 26 March 2024.

¹⁰⁶ Datatilsynet (n 53). See also: Martini and Drews (n 105) 20-22.

¹⁰⁷ See Section 2.2.

¹⁰⁸ Sarah Fischer, 'Almost every big streaming service is getting more expensive' (Axios, 25 July 2023) <<https://www.axios.com/2023/07/25/streaming-prices-2023-comparison-raise>> accessed 26 March 2024; <<https://www.statista.com/chart/27983/prices-of-video-streaming-subscriptions-in-the-us/>> accessed 26 March 2024.

¹⁰⁹ Benjamin Krischan Schulte, *Staying the Consumption Course: Exploring the Individual Lock-in Process in Service Relationships* (Springer 2015) 67-92; Botta and Wiedemann (n 98) 84-86; Yongqiang Sun, Dina Liu, Sijing Chen, Xingrong Wu, Xiao-Liang Shen, Xi Zhang, 'Understanding users' switching behaviour of mobile instant messaging applications: An empirical study from the perspective of push-pull-mooring framework' [2017] *Computers in Human Behavior* 727.

4.1.2 Discriminatory pricing

This analysis leads organically to a second price-related issue, namely discriminatory pricing, under Article 102(c) TFEU. Meta's pricing policy already allows for differing prices, based on the user's location. However, since what is being 'purchased' relates to the protection of a fundamental right, it would make sense for the price to be uniform. In any case, Meta would need to be able to explain the difference in its price point across different Member States – bearing in mind that discrimination based on nationality, if truly occurring, is for all intents and purposes unjustifiable.¹¹⁰ The key conditions for this type of abuse are that the dominant undertaking enters into equivalent and comparable transactions with other trading parties, and that dissimilar conditions are applied by the dominant undertaking to those equivalent transactions.¹¹¹ An additional criterion, namely that the discriminatory behaviour must restrict competition downstream, has been developed in the case law – in effect this means that the discriminated customer needs to suffer a competitive disadvantage.¹¹² It is nonetheless difficult to see how the latter condition could normatively apply in relation to the pay-or-okay model, as the pricing discrimination *in casu* would not be exclusionary (as it does not aim to foreclose other undertakings). Rather, despite the rarity of exploitative discriminatory pricing,¹¹³ the abuse in this instance would indeed be exploitative, as both types of abuse are possible in relation to price discrimination under Article 102(c). As the abuse would be exploitative, it would be odd for the exclusionary logic permeating the recent case law,¹¹⁴ such as the requirement that the end customer has faced a *competitive* disadvantage, to be fully applied. In the case that a fully personalised pricing strategy (or even personalised data collection) is implemented, those would also likely create issues in the context of price discrimination.¹¹⁵

4.1.3 Unfair Commercial Practices

A further potential abuse under Article 102 TFEU in relation to the pay-or-okay model could relate to unfair commercial practices, which also conceptually includes unfair contractual terms. This type of abuse can exist even if other more specialised legal regimes, such as contract law or consumer protection law, apply, while at the same time the abusive practices do not need to directly derive from whatever contract exists between the parties. Reflecting the Commission's enforcement priorities, most of the theory relating to unfair commercial practices as an abuse of dominance relates to business-to-business relationships.¹¹⁶ Nonetheless, there is nothing to suggest that this type of abuse cannot take place in a business to final customer relationship – especially if those practices lead to exploitative outcomes. In the context of the pay-or-okay model, as explained above, the emergence of such exploitative outcomes is not out of the question. At the same time, due to the focus of the enforcement, there is very limited guidance as to what practices or contractual terms would qualify as "unfair". Nonetheless, the quasi-take-it-or-leave-it nature of the pay-or-okay model (which relates to the unilaterality of the imposition of the practice), the substantial imbalance of bargaining power between Meta and its users, and the transfer of costs to the weaker parties coupled with the (even more) unfair allocation of the surplus created, would all be relevant. Thus, a plausible argument can be made that the conditions imposed by the pay-or-okay model are indeed unfair, under Article 102.¹¹⁷

110 *United Brands* (n 95), para. 233; *Irish Sugar v Commission*, Case T-228/97 [1999] ECLI:EU:T:1999:246, para. 125.

111 *United Brands* (n 95), paras. 225-229; *British Airways v Commission*, Case C-95/04 P [2007] ECLI:EU:C:2007:166, paras. 136-141. See also: *Hoche GmbH v Bundesanstalt für Landwirtschaftliche Marktordnung*, Case C-174/89 [1990] ECLI:EU:C:1990:270, para. 25.

112 *MEO - Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, Case C-525/16 [2018] ECLI:EU:C:2018:270, paras 24-37; See also: *British Airways* (n 111).

113 *MEO - Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, Case C-525/16, Opinion of AG Wahl [2017] ECLI:EU:C:2017:1020, paras 79-80.

114 *MEO* (n 112), paras 34-35; *MEO* (n 113), paras 32-35.

115 See: ECD, *Personalised Pricing in the Digital Era: Background note by the Secretariat* (2018) <[https://one.oecd.org/document/DAF/COMP\(2018\)13/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf)> accessed 26 March 2024. P. Rott, J. Strycharz, F. Alleweldt, 'Personalised Pricing', Study for the Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies (November 2022) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2022/734008/IPOL_STU\(2022\)734008_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/734008/IPOL_STU(2022)734008_EN.pdf)> accessed 26 March 2024.

116 European Commission, Council of Europe, Directorate-General for the Internal Market and Services, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain: Final Report* (2014) <<https://op.europa.eu/en/publication-detail/-/publication/c82dc8c6-ec15-11e5-8a81-01aa75ed71a1/language-en>> accessed 26 March 2024.

117 "It is worth noting that non-price elements, such as fairness, ought to reflect dimensions which are important to consumers, to prevent legal uncertainty". See: OECD, *Non-price Effects of Mergers: Background note by the Secretariat* (2018) <[https://one.oecd.org/document/DAF/COMP\(2018\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)2/en/pdf)> accessed 26 March 2024; Michal S Gal, 'Abuse of Dominance - Exploitative Abuses' in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar Publishing 2013) 385-422; Frederik Bostoen, 'Online Platforms and Pricing: Adapting Abuse of Dominance Assessments to the Economic Reality of Free Products' (2019) 35(3) *Computer Law & Security Review* 123-135.

4.1.4 Disparagement

A final potential, exclusionary, type of abuse could be disparagement. This is a rather novel type of abuse, but National Competition Authorities and the Commission have started paying more attention to it, with a number of cases popping up, primarily in the pharmaceutical sector. The Commission's two decisions on disparagement argue, *grosso modo*, that a systematic campaign of disparagement which contains misleading information could lead to anticompetitive foreclosure.¹¹⁸ In this context, the Amending Communication,¹¹⁹ the DG Comp Policy Brief,¹²⁰ and recent case law on Article 102,¹²¹ all describe anticompetitive foreclosure as conduct that adversely impacts the effective competitive structure, even without necessarily producing the full exclusion or marginalisation of competitors. If Meta uses the introduction of the pay-or-okay model to systematically exalt the quality of the service it offers (especially in relation to privacy, as it has done in the past),¹²² then, given the actual realities of the model (*i.e.*, the fact that a subscriber's data is still being collected and processed, just not for advertising), it could be argued that Meta could be abusing its dominant position by disparaging its competitors on the privacy front, aiming to increase its market share.

4.2 The Digital Markets Act

The DMA¹²³ is considered one of the centrepieces of the European digital strategy and aims to ensure the contestability and fairness of digital markets, by imposing obligations on gatekeepers. Given data's central role in digital markets, it is unsurprising that the DMA contains provisions controlling gatekeepers' data practices.¹²⁴ Article 5(2) DMA restricts gatekeepers' data accumulation in order to help create a level playing field between gatekeepers and other market players. To this effect, gatekeepers are not allowed to combine or cross-use personal data from their core platform service with the data deriving from other services or from third parties.¹²⁵ The caveat is that the restriction only applies if users have not given consent. Accordingly, Article 5(2) does not contain an outright prohibition of data processing, but rather a qualification of it; gatekeepers shall not process data in set ways, *unless* they receive consent within the meaning of the GDPR.¹²⁶ Consent under the DMA is thus defined by reference to the GDPR, and, just as under the GDPR, requires users to be presented with a specific choice,¹²⁷ and to be able to freely choose to opt-in to the data processing.¹²⁸ Here an overlap between the DMA and the GDPR is created, since the GDPR is already applicable to the forms of data processing contained in Article 5(2).¹²⁹

118 European Commission, *Case AT.40588: Pharmaceutical Industries Ltd and Teva Pharmaceuticals Europe BV* (opened March 2021); *Case AT.40577: Vifor Pharma* (opened 20 June 2022); European Commission, 'Antitrust: Commission Opens Formal Investigation: Teva' (Europa, 26 March 2024) <<https://europa.eu/press-release/teva>> accessed 26 March 2024; European Commission, 'Antitrust: Commission Sends Statement of Objections to Teva' (Europa) <<https://europa.eu/press-release/teva-objections>> accessed 26 March 2024. European Commission, 'Antitrust: Commission Opens Investigation: Vifor Pharma' (Europa, 26 March 2024) <<https://europa.eu/press-release/vifor-pharma>> accessed 26 March 2024; John Wolff, 'Unfair Competition by Truthful Disparagement' (1938) 47(8) *The Yale Law Journal* 1304.

119 European Commission, 'Annex to the Communication from the Commission: Amendments to the Communication from the Commission Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (C(2023) 1923 final, 27 March 2023) <https://competition-policy.ec.europa.eu/system/files/2023-03/20230327_amending_communication_art_102_annex.pdf> accessed 26 March 2024.

120 European Commission, *Competition Policy Brief*, Issue 1 (March 2023) <https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_o.pdf> accessed 26 March 2024.

121 *Unilever Italia Mkt. Operations*, Case C-680/20 [2023] ECLI:EU:C:2023:33, para. 36; *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others* [2022] Case C-377/20 ECLI:EU:C:2022:379, para. 44.

122 Srinivasan (n 98).

123 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1.

124 DMA (n 123), Article 5.

125 DMA (n 123), Article 5(2).

126 GDPR (n 28), Articles 4(11) and 7.

127 DMA (n 123), Article 5(2).

128 DMA (n 123), recital 36.

129 See discussion on the GDPR in section 2. See also Alessia D'Amico, 'The DMA's Consent Moment and its Relationship with the GDPR' (2024) *European Journal of Risk Regulation*, advance online publication <https://doi.org/10.1017/err.2024.38>.

Since the GDPR entered into force, the problem with placing the responsibility on individuals through the concept of consent has been criticised repeatedly.¹³⁰ One shortcoming, in particular, occurs when individuals do not have a choice in concentrated markets. In this respect, the power disparity between platforms and individuals may preclude the granting of GDPR-compliant consent, in particular by preventing consent from being freely given, as recognised in *Meta*. To address the difficulty of guaranteeing that consent given to a dominant company is freely given, the DMA introduces explicit requirements to safeguard consent. The DMA envisages that gatekeepers offer two options to users: one that involves the forms of data processing under Article 5(2) and that relies on consent, and another one that does not involve these forms of processing (and that may be offered for a fee instead).¹³¹ Whether consent for the first option is freely given depends on whether the second option, which does not involve consenting to the forms of data processing under Article 5(2), can be considered an 'equivalent alternative'.¹³²

It will need to be determined what the personalised and non-personalised version of a service must look like in order for consent to be valid. This is something that has not been subject to much debate yet, but it appears that two aspects will need to be taken into account. Firstly, it will need to be determined what an equivalent, non-personalised, service must look like. In the DMA it is stated that "the less personalised alternative should not be different or of degraded quality compared to the service provided to the end users who provide consent, unless a degradation of quality is a direct consequence of the gatekeeper not being able to process such personal data".¹³³ It is clear that the gatekeeper must be able to show that the decreased quality of the non-personalised service compared to the personalised one is related to the fact that the feature in question can only be offered if the user consents to the collection of data otherwise forbidden by Article 5(2) DMA.¹³⁴

Secondly, the potential fee charged for the non-personalised service will need to be scrutinised. The DMA itself does not indicate what kind of fee would be legitimate. However, it seems evident that it must be proportionate to the service offered, in order to constitute a realistic alternative to the personalised service.¹³⁵ For instance, it is doubtful whether the fee that Meta started charging users for the non-personalised version of Facebook and Instagram of €9.99 or €12.99 per month (depending where it is purchased) is appropriate.¹³⁶

In March 2024 the Commission opened a non-compliance investigation under the DMA, concerning, among other things, Meta's pay-or-okay model.¹³⁷ The Commission will investigate whether Meta complies with Article 5(2); in particular, the concern is that the binary choice given to users does not constitute a valid choice and does not prevent the accumulation of personal data.

4.3 Conclusion

The potentially abusive conduct analysed in the Article 102 TFEU section relates, primarily, to exploitative abuses. However, the emergence of exclusionary effects cannot be fully discounted. The pay-or-okay model would signify a substantial shift in the sector. It has been argued by the UK's CMA that the emergence of user-centric approaches, and of stricter data protection and privacy regulations can have the effect of entrenching

130 Bart W. Schermer, Bart Custers and Simone van der Hof, 'The Crisis of Consent: How Stronger Legal Protection May Lead to Weaker Consent in Data Protection' (2014) 16 *Ethics and Information Technology* 12; Daniela Messina, 'Online Platforms, Profiling, and Artificial Intelligence: New Challenges for the GDPR and, in Particular, for the Informed and Unambiguous Data Subject's Consent' [2019] *Media Laws* 159; Damian Clifford, Inge Graef and Peggy Valcke, 'Pre-Formulated Declarations of Data Subject Consent—Citizen-Consumer Empowerment and the Alignment of Data, Consumer and Competition Law Protections' (2019) 20 *German Law Journal* 679; Daniel Solove, 'Murky Consent: An Approach to the Fictions of Consent in Privacy Law' (22 January 2023) <<https://ssrn.com/abstract=4333743>> accessed 26 March 2024.

131 Alexandre De Streel and Giorgio Monti, 'Data-Related Obligations in the DMA' in Centre on Regulation in Europe (CERRE), *Implementing the DMA: Substantive and Procedural Principles* (January 2024) 71 <https://cerre.eu/wp-content/uploads/2024/01/CERRE.BOOK_.DMA_.17JAN.pdf> accessed 26 March 2024.

132 DMA (n 123), recital 36.

133 DMA (n 123), recital 37.

134 See also section 2.2.

135 See also section 2.2.

136 Meta (n 5).

137 European Commission (n 18).

dominant positions, and making market entry more complex for emerging competitors, who would no longer be able to rely on the methods that made the now-dominant undertakings dominant.¹³⁸ Motta adds to this, arguing that raising rivals' costs (and implicitly denying them scale) can lead to foreclosure, especially in the context of imperfect rent extraction and the dynamism of the markets in question.¹³⁹

In summary, while the pay-or-okay model is still in its early days and its precise effects are not yet fully appreciable, it is clear that it can in principle give rise to a number of abuses under Article 102 TFEU. As explained, those abuses relate primarily to the price (and variation of said price) being charged, and to the 'fairness' of the practices and terms offered. At the same time, the potential for the practice to give rise to exclusionary abuses also exists; however, those will only become appreciable once the model has been in place and its effects can be properly analysed and ascertained.

Under the DMA, Meta's pay-or-okay model follows what appears to be the intention behind Article 5(2). It provides users with an alternative if they do not wish their personal data to be processed in certain ways, which in principle ensures that consent is freely given. This, in turn, should lead to greater market contestability by lowering the competitive advantage gatekeepers have through the accumulation of data. However, whether consent to the data processing is truly freely given depends on whether the paid option can be considered an equivalent alternative. In order to determine this, the Commission will have to determine whether the fee charged is adequate, and whether the non-personalised (paid) version is not of a lower quality than the personalised version. Furthermore, since consent under the DMA is linked to the GDPR, the determination of the compliance of the pay-or-okay model under the GDPR should have an effect on compliance with the DMA as well.

5. Conclusion

This paper has analysed the legal issues raised by Meta's pay-or-okay model, assessing its compliance with the GDPR, the UCPD, Article 102 TFEU, and the DMA.

Under the GDPR, we contend that Meta's pay-or-okay model fails to ensure that consent is freely given since it is requested in an unbalanced power relationship, conditional, non-granular, and detrimental way, which renders consent unlawful under Article 6 of the GDPR. While DPAs acknowledge the lawfulness of pay-or-okay models, they provide further requirements specific to those models, such as the reasonability of the price, and equivalence of alternatives, but without the necessary criteria to concretely appraise such requirements. In effect, while Meta's model could, subject to changes, be compliant with the DPAs' various conditions, the user's consent in relation to Meta's model cannot be argued to be freely given, meaning that the practice is not in line with the GDPR.

Under the UCPD, it has become clear that the approach could constitute an aggressive commercial practice by pressuring consumers into making a decision, as well as a misleading commercial practice by giving the false impression that the choice is presented due to a change in laws.

Under Article 102 TFEU, while exploitative abuses have not always been regarded as an enforcement priority, the Commission has shown a willingness to explore such abuses in recent years.¹⁴⁰ The analysis in Section 4.1 has shown that the pay-or-okay model has the potential to lead to a number of exploitative abuses, while

¹³⁸ Competition and Markets Authority, 'Online Platforms and Digital Advertising Market Study Final Report' (1 July 2020) paras 5.304–5.330 https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf accessed 26 March 2024. See also Srinivasan (n 98) for a discussion on the evolution of Facebook's commercial outlook vis-à-vis privacy concerns.

¹³⁹ Massimo Motta, 'Self-Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases' (Barcelona School of Economics Working Paper 1274, 2022) 3-7, 10-18, 21-29 <https://bse.eu/sites/default/files/working_paper_pdfs/1374_0.pdf> accessed 26 March 2024.

¹⁴⁰ See e.g., Aspen (n 103). See also European Commission, 'Statement by Executive Vice-President Vestager on the Commission decision to accept commitments by Aspen to reduce prices for six off-patent cancer medicines by 73% addressing excessive pricing concerns' (10 February 2021) https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_526 accessed 26 March 2024.

the emergence of exclusionary effects is also plausible. In its current formulation, Meta's pay-or-okay model seems likely to at least give rise to exploitative abuses, perhaps representing a good opportunity for the Commission to revisit its approach to such abuses.

Under the DMA, the pay-or-okay model seems to be precisely what the Regulation envisages, although the text of the DMA is vague when it comes to the exact requirements for the model. However, it must be borne in mind that consent under the DMA is defined by reference to the GDPR. Therefore, if the pay-or-okay model is in breach of the GDPR, because it invalidates a freely given consent, gatekeepers cannot legally process personal data in the ways listed in Article 5(2).

In sum, it has been shown that while the pay-or-okay model can raise questions of legality under all the frameworks discussed, it is not *per se* illegal under consumer protection law, competition law, and the DMA. In other words, under these three legal regimes, lawfulness issues can be resolved – they are issues with the *specifics* of Meta's model. At a first glance, this seems to also be the case for the GDPR, as the various DPAs that have expressed detailed views on this practice of pay-or-okay (albeit not specifically on Meta) have established a list of requirements towards a compliant cookie paywall model. However, under the GDPR legal regime, it has been argued that consent in the context of Meta's pay-or-okay model cannot be described as freely given. Bearing in mind the foundational value of this requirement, it is submitted that the analysis of the DPAs assumes freely given (and informed) consent as a prerequisite for the legality of any pay-or-okay model. Thus, it would appear that Meta's pay-or-okay model is *per se* illegal in relation to the GDPR. In conclusion, therefore, while those legality conditions of Meta's pay-or-okay model stemming from consumer protection law, competition law, and the DMA can be theoretically resolved, those rooted in the GDPR's prime condition of consent seem to be insurmountable.



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