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META'S PAY-OR-OKAY MODEL: AN ANALYSIS UNDER EU DATA PROTECTION, CONSUMER AND COMPETITION LAW

Alessia D'Amico, Assistant Professor, Department of International and European Law, Utrecht University, a.s.damico@uu.nl

Dionysios Pelekis, Postdoctoral Researcher, Department of International and European Law, Utrecht University, d.pelekis@uu.nl

Cristiana Santos, Assistant Professor, Department of International and European Law, Utrecht University, c.teixeirasantos@uu.nl

Bram Duivenvoorde, Associate Professor, Molengraaff Institute for Private Law, Utrecht University, b.b.duivenvoorde@uu.nl

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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 advertisement. 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 ECJ 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.

Keywords

Pay-or-okay, GDPR, Digital Competition Law, DMA, UCPD, Meta, Consent

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 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.

[1] Bundeskartellamt, 'Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing', B6-22/16, 6 February 2019; available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4 [accessed on 26/03/24]

[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 or a 'Facebook login' option or analytical services such as 'Facebook Analytics', data". See: Bundeskartellamt, 'Background information on the Facebook proceeding, 19 December 2017'; available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.html?nn=3591568 [accessed on 26/03/24]

[3] Bundeskartellamt (n 1), 11

[4] Bundeskartellamt (n 1)

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 ECJ. 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 ECJ 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 ECJ, 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, on 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]

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[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, available at: https://edpb.europa.eu/system/files/2023-12/edpb_urgentbindingdecision_202301_no_metaplatformsireland_en_0.pdf [accessed on 26/03/24]
[11] EDPB (n 10)
[12] Meta, 'Facebook and Instagram to Offer Subscription for No Ads in Europe' (30 October 2023) available at https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/ [accessed on 26/03/24]
[13] See for the full notification, including these choices: BEUC, 'Choose to lose with Meta - an assessment of Meta's new paid-subscription model from a consumer law perspective' (2023), available at: https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-156_Annex_Legal%20assessment_Choose_to_lose_with_Meta_Legal_analysis.pdf [accessed on 26/03/24], 3. BEUC is the umbrella organisation of independent consumers organisations in the EU Member States and the former European Economic Community.

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[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 law.[14] This includes complaints raised in front of the Spanish DPA[15] and the Austrian DPA by the NGO Noyb.[16] Noyb claims this model infringes the GDPR. Another complaint 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 of whether it is capable of resolving the competition concerns or whether risks of anticompetitive outcomes persist. 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 on 26/03/24]

[16] Noyb, 'Complaint to the Austrian DPA against Meta under Article 77(1) GDPR', November 2023, , available at: https://noyb.eu/sites/default/files/2023-11/Complaint%20-%20Meta%20Pay%20or%20Okay%20-%20REDACTED.pdf [accessed on 26/03/24], paras. 30-31; Noyb 'Complaint to the Austrian DPA against Meta', January 2024, available at: https://noyb.eu/sites/default/files/2024-01/Meta_Withdrawal_Complaint_REDACTED_EN.pdf [accessed on 26/03/24] paras. 6, 8. See also, in general: https://noyb.eu/en [accessed on 26/03/24]

[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', available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689 [accessed on 26/03/24]

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. 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]

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 EBPB,[26] and the CJEU,[27] have confirmed so. Consent must comply with several requirements: prior, freely given, specific, informed, unambiguous, readable, 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), and further specified in Article 7(4) and Recital 42 of

[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), OJ 2002 L 201/37

[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 on 26/03/24]; 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 on 26/03/24]

[25] Datatilsynet, Press Release of 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 on 26/03/24]

[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), OJ 2016 L 119/1, Articles 4(11), 7

[29] This model is also coined under the term 'cookie paywalls'. DPA requirements on this model have been analysed against publisher's use of cookie paywalls. See: Victor Morel, Cristiana Santos, Yvonne Lintao, 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). Available at: https://doi.org/10.1145/3559613.3563205 [accessed on 26/03/24]

the GDPR. The request for consent should imply a voluntary choice to accept or decline the processing of personal data. Such 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. If the data subject has no real choice, feels compelled to consent, endures negative consequences (*e.g.* substantial extra costs) or detriment if they do not consent ,[30] 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*".[31] Making access to a website conditional on the acceptance of certain non-essential trackers can impact, in certain cases, the freedom of choice,[32] and consequently, the validity of consent.

Freely given consent in the EDPB guidelines is composed of four elements: imbalance of power, unconditionality, granularity, and non-detriment. 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 of the GDPR.

2.1.1. Imbalance of power

The EDPB posits that when there is a clear imbalance of power in the relationship between the controller and the data subject, consent cannot be freely given.[33] Considering Meta's model, it is plausible to claim that an imbalance of power exists.[34] 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 monopoly on social networks that are 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.[35] Similarly, if certain cookies or other tracking technologies

[30] The EDPB Guidelines 05/2020 on consent refers 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, available at: https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf [accessed on 26/03/24]

[31] EDPB (n 30), para. 14

[32] Commission Nationale de l'Informatique et des Libertés, 'Cookie walls : la CNIL publie des premiers critères d'évaluation', 16 May 2022, available at: https://www.cnil.fr/fr/cookie-walls-la-cnil-publie-des-premiers-criteres-devaluation [accessed on 26/03/24]

[33] GDPR (n 28), Recital 43

[34] Noyb November 2023 (n 16); Noyb January 2024 (n 16)

[35] See also EDPB (n 30), para. 39

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.[36]

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 by article 7(2). 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*".[37]

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".[38] 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 in a series of documents. The 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".[39]

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 of the 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".[40] 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.

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[36] 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), p 6, available at: https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp208_en.pdf [accessed on 26/03/24]

[37] EDPB (n 30), para. 26

[38] Noyb November 2023 (n 16), para. 20

[39] EDPB, 'Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR)' Adopted 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 on 26/03/24]. See also EDPB, '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', Adopted 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 on 26/03/24]

[40] GDPR (n 28), Recital 32

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 of the GDPR, or without any negative consequences.[41] 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.[42] 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;[43] 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. Thus, the data subject is unable to withdraw consent for free and is hence unable to exercise their rights.[44]

2.2. EDPB and Data Protection Authorities' positions

Only a few DPAs have provided explicit positions on the pay-or-okay model;[45] namely, the Spanish,[46] French,[47] Danish,[48] Austrian[49] and German Data Protection Conference.[50] These authorities hold generally permissible positions about pay-or-okay practices and set concrete requirements toward the lawfulness of this model. Mostly recommended by these DPAs is the need for (i) an alternative that is reasonable,[51] and fair [52] without tracking for targeted ads. Some DPAs slightly disagree on the concrete similarity of such alternative. 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, [53] *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

[41] EDPB (n 30), para. 48
[42] EDPB (n 30), para. 46
[43] Noyb November 2023 (n 16), paras. 30-31
[44] Noyb January 2024 (n 16), paras. 6, 8
[45] 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.
[46] Agencia Española de Protección de Datos, 'Guía sobre el uso de las cookies', January 2024, p 29. Available at: https://www.aepd.es/guias/guia-cookies.pdf [accessed on 26/03/24]
[47] CNIL (n 32)
[48] Datatilsynet, Brug af Cookie Walls, 20 February 2023, available at: https://www.datatilsynet.dk/presse-og-nyheder/nyhedsarkiv/2023/feb/brug-af-cookie-walls [accessed on 26/03/2023]
[49] Österreichische Datenschutzbehörde, Decision on Complaint Dated 25 May 2018 GZ: DSB-D122.931/0003-DSB/2018, Issued on 30 November 2018, available at: 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 on 26/03/2023]
[50] Datenschutzkonferenz, 'Bewertung von Pur-Abo-Modellen auf Websites, Resolution of the Conference of Independent Data Protection Supervisory Authorities of the Federal and State Governments, March 22 2023, available at: https://datenschutzkonferenz-online.de/media/pm/DSK_Beschluss_Bewertung_von_Pur-Abo-Modellen_auf_Websites.pdf. [accessed on 26/03/2023]
[51] Datatilsynet (n 48); AEPD (n 46), p 29
[52] CNIL (n 32)
[53] DSK (n 50)

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,[54] 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, [55] 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;[56] (iv) processing of personal data that is necessary when users have paid;[57] and, finally, (v) users being informed[58] 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[59] announced it will shortly issue its opinion on this model.[60] In December 2023, in response to the European Commission cookie pledge, it already stated that it cannot *in abstracto* assess whether the offering of a paid alternative to a service that involves tracking would ensure that a valid consent could be obtained for any processing for tracking of users for advertising purposes. It noted that a case-by-case analysis is necessary to assess whether consent for advertising purposes in valid, but regards the following assessment criteria as relevant:

i) informed consent: the information about alternative models/services to the provision of consent to tracking technologies for advertising purposes may serve as a relevant factor when assessing whether consent is valid;
ii) whether (in addition to a service using tracking technology and a paid service) another type of service is offered, for example, a service with a less privacy intrusive form of advertising, such as contextual advertising; and
iii) whether the data subject is able to exercise a real choice considering the different options provided to the user.

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 argued that Meta's model infringed 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.[61] Moreover,

[54] CNIL (n 32)
[55] Datatilsynet (n 48); 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 on 26/03/2023] – see also https://gdprhub.eu/index.php?title=DSB_(Austria)_-_2023-0.174.027 [accessed on 26/03/2023]; DSK (n 50), para. 4
[56] Datatilsynet (n 48); Landesbeauftragte für den Datenschutz Niedersachsen, 'Prüfung von Medienwebseiten in Niedersachsen abgeschlossen' 10 July 2023, available at: https://www.lfd.niedersachsen.de/startseite/infothek/presseinformationen/prufung-von-medienwebseiten-in-niedersachsen-abgeschlossen-223637.html [accessed on 26/03/24]; CNIL (n 32)
[57] Datatilsynet (n 48)
[58] AEPD (n 46), p 29
[59] EDPB, 'EDPB reply to the Commission's Initiative for a voluntary business pledge to simplify the management by consumers of cookies and personalised advertising choices –DRAFT PRINCIPLES (Ref. Ares(2023)6863760)', 13 December 2023, available at: https://www.edpb.europa.eu/system/files/2023-12/edpb_letter_out20230098_feedback_on_cookie_pledge_draft_principles_en.pdf [accessed on 26/03/24]
[60] EDPB, 'Minutes of the 89th Plenary Meeting', 16 January 2024, Point B.1.2: Request for mandate on Pay or OK model, available at: https://www.edpb.europa.eu/system/files/2024-03/20240116minutes89thplenarymeeting_public.pdf [accessed on 26/03/24]
[61] Noyb January 2024 (n 16), para. 64

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.[62]

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. 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 on Meta's applied price per country and thus, per individual user.

Regarding *alternative services*, DPAs 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. With respect to a meaningful alternative, it is relevant to consider some of the main findings of empirical studies on the use of pay-or-okay models. 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.[63] A web-measurement study by Morel *et al.*[64] clarified that when contacting the CEO of subscription management platform Contentpass 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 were willing to pay to continue using Facebook, were it to start charging a €5 monthly fee for the same quality service.[65] 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.[66] 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 assess objectively such identical services. Empirical research is further necessary to analyse users' perceptions of what alternatives could be considered (un)fair.

Finally, DPAs 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

[62] 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 in Volume 37 of the Harvard Journal of Law & Technology (JOLT), p 21.

[63] Timo Müller-Tribbensee, Klaus Miller, and Bernd Skiera, 'Paying for Privacy: Pay-or-Tracking Walls' (March 5, 2024), p 37. Available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4749217 [accessed on 26/03/24]

[64] 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). Available at: https://doi.org/10.1145/3603216.3624966 [accessed on 26/03/24]

[65] 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

[66] Gallup Institute, 'Facebook and Advertising - User Insights', November 2019, page 7. Available at: https://noyb.eu/sites/default/files/2020-05/Gallup_Facebook_EN.pdf [accessed on 26/03/24]

the Cookie Banner Taskforce.[67] 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. [68]

The recommendations of the DPAs 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.[69] 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 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

Consumer organisation BEUC reported 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".[70] 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

[67] 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''. See: EDPB, 'Report of the work undertaken by the Cookie Banner Taskforce', Adopted 17 January 2023, p 4, available at: https://www.edpb.europa.eu/system/files/2023-01/edpb_20230118_report_cookie_banner_taskforce_en.pdf [accessed on 26/03/24]

[68] Morel, Santos, Fredholm, and Thunberg (n 64), p 4.

[69] 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.

[70] BEUC (n 13) at 4, 8.

navigate to their account page to download their data and/or close their account. BEUC also reported 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 re-appearing again.[71]

On 30 November 2023, BEUC filed a complaint against Meta's pay-or-okay model at the Consumer Protection Cooperation Network,[72] which is the network of EU consumer law enforcement authorities. BEUC's argues that Meta's pay-or-okay model constitutes both an aggressive commercial practice and a misleading commercial practice.[73]

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.[74] 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,[75] 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 influenced 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".[76] From the ECJ judgment in *Orange Polska*, it follows that national courts should not lightly conclude that a commercial practice constitutes undue influence.[77] 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

[71] BEUC (n 13) at 8.

[72] 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 26/03/2024]

[73] 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.

[74] BB Duivenvoorde, 'Consumer Protection in the Age of Personalised Marketing: is EU law future-proof?' (2023) European Papers 631

[75] See *e.g.* F 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), J Strycharz and BB Duivenvoorde, 'The exploitation of vulnerability through personalised marketing communication: are consumers protected?' (2021) 10(4) Internet Policy Review 1; and E Margaritis, 'Online Behavioral Advertising as an Aggressive Commercial Practice' (2023) 12(6) Journal of European Consumer and Market Law 243.

[76] 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 OJ 2005 L 149/22, Article 2(j).

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

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 or selecting and requesting the telecom contract via the company's website. The ECJ 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".[78] In this context, the ECJ 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".[79]

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 ECJ 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.[80]

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

[78] *Orange Polska* (n 77), para. 33

[79] *Orange Polska* (n 77), paras. 46-47

[80] 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.

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) providing and improving 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*".[81] 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,[82] 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.[83]

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 "*continue using for free*". 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 deceiving existing users 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.

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[81] BEUC (n 13) at 3.

[82] 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.

[83] 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 76). 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 80), Section 3.4.

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. 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 threshold is met.[84] 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.[85] 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.[86] 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), which can apply to abuses directly harming the consumer.[87] 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.[88] There is no specific threshold for when a price is excessive;[89] thus, the specifics of its application to the pay-or-okay model cannot be fully ascertained, despite some assessment methods being available to enforcers.[90] 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,[91] and a potential exploitative (pricing) abuse in and of itself.[92] In this context we can see the pay-or-okay model as

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[84] 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 OJ 2009 C 45/7, paras. 13-15

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

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

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

[88] *United Brands Company v Commission,* Case 27/76 [1978] ECLI:EU:C:1978:22, paras. 250-252; *Autortiesību un komunicēšanās 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

[89] *General Motors Continental v Commission,* Case 26/75 [1975] ECLI:EU:C:1975:150, paras. 11-12; *Autortiesību un komunicēšanās konsultāciju aģentūra* (n 88), para. 55. See also: *Attheraces Ltd & Anor v The British Horseracing Board Ltd & Anor* Rev 2 [2007] EWCA Civ 38

[90] *United Brands* (n 88), paras. 251-252;*, Autortiesību un komunicēšanās konsultāciju aģentūra* (n 88), paras. 37-42

[91] The modelling focuses, as luck would have it, on Google/Alphabet and Facebook/Meta. See: Nick Economides & 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, p 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, p 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

[92] See: 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,

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),[93] we can see that the market conditions are difficult to describe as normal, thus giving rise to the price charged being potentially excessive.

In relation to subscription-paying users, they will in all likelihood still be seeing some form of ads – just not behavioural ones. 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.[94] 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.[95] 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.[96] 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,[97] 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 brings, 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

176; Daniele Condorelli an 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.oecd.org/2021-10-31/566602-abuse-of-dominance-in-digital-markets-2020.pdf [accessed 26/03/24]

[93] See: UK Competition and Markets Authority, *Online Platforms and Digital Advertising: Market Study Final Report*, 2020, paras 2.73-2.81. Available at: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf [accessed 26/03/24]

[94] 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 48)

[95] See also Section 3.3

[96] See, *e.g.*, 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), C(2021) 724 final

[97] Per Meta's Earnings Presentation for Q3 2023 (*i.e.*, prior to the implementation of the pay-or-okay solution), its quarterly average revenue per user in Europe for Facebook was $19.04, which translates to $6.34 per month, which translates to under €6 ARPU per month. The numbers can be found at: https://s21.q4cdn.com/399680738/files/doc_earnings/2023/q3/presentation/Earnings-Presentation-Q3-2023.pdf [accessed 26/03/24]; and corroborated by Forbes, which uses them as a source: https://www.forbes.com/sites/bethkindig/2024/01/11/social-media-stocks-one-metric-shows-metas-clear-leadership/?sh=6eaaf6ec2717 [accessed 26/03/24]

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,[98] while the Danish one argued that the data collection and processing ought to be restricted only to what is necessary.[99] 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.[100] Finally, Meta can always further increase the price they charge to customers (we all recall the price hikes in streaming subscription services),[101] especially if we take into account the lock-in effects of social networking platforms.[102] 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 be indeed 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.

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.[103] 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.[104] 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

[98] Datenschutzbehörde Österreich, 'FAQ zum Thema Cookies und Datenschutz', 20 December 2023, available at: https://www.dsb.gv.at/download-links/FAQ-zum-Thema-Cookies-und-Datenschutz.html#Frage_9 [accessed 26/03/24]; CNIL (n 32). See also: Mario Martini and Christian Drews, 'Making Choice Meaningful – Tackling Dark Patterns in Cookie and Consent Banners through European Data Privacy Law' (2022), p 20-22, available at SSRN: https://ssrn.com/abstract=4257979 [accessed on 26/03/24]

[99] Datatilsynet (n 48). See also: Martini and Drews (n 98), p 20-22,

[100] See Section 2.2

[101] See: Sarah Fischer, 'Almost every big streaming service is getting more expensive', Axios 25 July 2023, available at: https://www.axios.com/2023/07/25/streaming-prices-2023-comparison-raise; https://www.statista.com/chart/27983/prices-of-video-streaming-subscriptions-in-the-us/ [accessed 26/03/24]

[102] Benjamin Krischan Schulte, *Staying the Consumption Course: Exploring the Individual Lock-in Process in Service Relationships*, (2015) Springer; Botta and Wiedemann (n 91), p 84-86; Yongqiang Sun, Dina Liu, Sijing Chen, Xingrong Wu, Xiao-Liang Shen, Xi Zhang, 'Understanding users' switching behavior of mobile instant messaging applications: An empirical study from the perspective of push-pull-mooring framework' [2017] Computers in Human Behavior 727

[103] *United Brands* (n 88), para. 233; *Irish Sugar v Commission,* Case T-228/97 [1999] ECLI:EU:T:1999:246, para. 125

[104] *United Brands* (n 88), 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

discriminated customer needs to suffer a competitive disadvantage.[105] 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,[106] 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,[107] 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.[108]

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.[109] 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.[110]

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[105] *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 104)

[106] 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

[107] *MEO* (n 105), para. 35

[108] See: OECD, Personalised Pricing in the Digital Era: Background note by the Secretariat (2018), available at: https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf [accessed 26/03/24]; 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, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2022/734008/IPOL_STU(2022)734008_EN.pdf [accessed on 26/03/24]

[109] See, *e.g.*: 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), available at: https://op.europa.eu/en/publication-detail/-/publication/c82dc8c6-ec15-11e5-8a81-01aa75ed71a1/language-en [accessed on 26/03/24]

[110] 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), available at: https://one.oecd.org/document/DAF/COMP(2018)2/en/pdf [accessed on 26/03/24]; Michal Gal, 'Abuse of Dominance - Exploitative Abuses', in Lianos and Geradin (eds) *Handbook on European Competition Law*, (2013) Edward Elgar; F Bostoen,

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.[111] In this context, the Amending Communication,[112] the DG Comp Policy Brief,[113] and recent case law on Article 102,[114] 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),[115] 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 DMA[116] 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.[117] 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.[118] 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;

'Online Platforms and Pricing: Adapting Abuse of Dominance Assessments to the Economic Reality of Free Products' (2019) 35(3) Computer Law & Security Review

[111] Case AT.40588, opened March 2021 against Pharmaceutical Industries Ltd and Teva Pharmaceuticals Europe BV (together, Teva); Case AT.40577 opened 20 June 2022 against Vifor Pharma. See also the Commission's Press Releases regarding those: Antitrust: Commission opens formal investigation: Teva (europa.eu) (Teva) [accessed on 26/03/24]; Antitrust: Commission sends Statement of Objections to Teva (europa.eu) (Teva); Antitrust: Commission opens investigation (europa.eu) (Vifor Pharma) [accessed on 26/03/24]. See also, for a discussion of this rather old but forgotten type of abuse: John Wolff, 'Unfair Competition by Truthful Disparagement', (1938) 47(8) The Yale Law Journal, 1304

[112] 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, available at: https://competition-policy.ec.europa.eu/system/files/2023-03/20230327_amending_communication_art_102_annex.pdf [accessed on 26/03/24]

[113] European Commission, Competition Policy Brief, Issue 1, March 2023, available at: https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf [accessed on 26/03/24]

[114] *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

[115] Srinivasan (n 91)

[116] 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) OJ 2022 L 265/1.

[117] DMA (n 116), Article 5.

[118] DMA (n 116), Article 5(2).

gatekeepers shall not process data in set ways, *unless* they receive consent within the meaning of the GDPR.[119] 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,[120] and to be able to freely choose to opt-in to the data processing.[121] 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).[122]

Since the GDPR entered into force, the problem with placing the responsibility on individuals through the concept of consent has been criticised repeatedly.[123] 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).[124] 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'.[125]

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".[126] 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.[127]

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[119] GDPR (n 28), Articles 4(11) and 7.
[120] DMA (n 116), Article 5(2).
[121] DMA (n 116), recital 36.
[122] See discussion on the GDPR in section 2.
[123] 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' (January 22, 2023). Available at SSRN: https://ssrn.com/abstract=4333743 [accessed on 26/03/24]
[124] Alexandre De Streel and Giorgio Monti, 'Data-Related Obligations In the DMA', Centre on Regulation in Europe (CERRE), *Implementing the DMA: Substantive and Procedural Principles*, (January 2024), p 71, available at https://cerre.eu/wp-content/uploads/2024/01/CERRE.BOOK_.DMA_.17JAN.pdf [accessed on 26/03/24]
[125] DMA (n 116), recital 36.
[126] DMA (n 116), recital 37.
[127] See also section 2.2.

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.[128] 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.[129]

In March 2024 the Commission opened a non-compliance investigation under the DMA, among other things, concerning Meta's pay-or-okay model.[130] 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 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.[131] 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.[132]

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 principles 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

[128] See also section 2.2.
[129] Meta (n 12)
[130] European Commission (n 18)
[131] Competition and Markets Authority, 'Online platforms and digital advertising Market Study Final Report' 1 July 2020, paras 5.304-5.330. Available at: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf [accessed 26/03/24]. See also Srinivasan (n 91) for a discussion on the evolution of Facebook's commercial outlook vis-à-vis privacy concerns.
[132] Massimo Motta, 'Self- Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases', Barcelona School of Economics Working Paper 1274 (2022) , p 3-7; 10-18; 21-29. Available at: https://bse.eu/sites/default/files/working_paper_pdfs/1374_0.pdf [accessed 26/03/24]

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 might 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.[133] 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 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-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

[133] See *e.g.*, Aspen (n 96). See also: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_526 [accessed 26/03/24]

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.