noyb

PAY or OKAY presents

99.9% CONSENT[1]

[1] May at best contain tiny traces of "freely given" and/or "genuine" choice of data subjects. Not suitable to save the news media.

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Table of Contents

Intro

This report provides a general overview about *pay or okay* (also called consent or pay) and its use by newspapers and magazines. *Pay or okay* describes a binary online request for consent, where refusing consent costs money and usually even requires to sign up to a subscription.

Given the upcoming guidelines by the EDPB on this topic, this report aims to provide helpful information for informed decision-making.

This report highlights the actual funding sources of the press within the EU/EEA and the role of advertisement among all funding sources. Furthermore, it describes different existing *pay or okay* variants. Particular attention is paid to the cost for consumers and the revenue for the controllers using *pay or okay*, as well as the objective wishes of users interacting with *pay or okay* banners.

Executive Summary

Since 2018 *pay or okay* has been introduced by news publishers in Austria, Germany, France, Italy, Spain and others. In 2023 Facebook and Instagram also implemented *pay or okay*. All known models come as a subscription, where data subjects automatically get billed – no matter if they use it or not.

False economic narrative:

Proponents of *pay or okay* largely rely on an alleged economic need to finance quality media and pretend that the 'personal data for content' model is the sole source of revenue and even the rescue of struggling news media. Especially news media is used as a vehicle to allow *pay or okay* for any controller, including websites with user-generated content and trivial information.

In fact, revenue streams of newspapers and magazines are diverse: Print and digital circulation of content (subscriptions, individual purchases), print and digital advertisement, events, funding from tech platforms, grants, e-commerce, direct and indirect funding by the public sector. In Europe, the biggest revenue stream of the press is circulation of its content, i.e. subscriptions and individual purchases.

Digital advertising only accounts for a share of approximately 10 % of the revenue of the press.

Furthermore, advertising revenue is on the decline and only 30 % of internet users are trackable.

Digital advertising includes all display advertising (requiring personal data or not), but also other forms of advertising such as sponsored content. Only half of all display advertising is reported to be 'programmatic', which requires personal data.

On average 5 % or less of newspaper and magazine revenue stems from processing of personal data for advertising purposes.

Some news publishers implement *pay or okay* together with a 'freemium' approach where only some content can be read without a premium subscription, leading to a so-called 'double paywall' – with *pay or okay* for the 'free' parts of the website and another 'premium' subscription for other content. In other cases, the pay option is included in a subscription or allows for a discount. Certain *pay or okay* solutions are also combined with an ad-free version of the website, while others only exclude tracking, but still show other ads.

Today, rejecting consent on the top 100 websites in Austria, France, Germany, Italy or Spain already costs € 1,264 per year on average – even as just 19.6 of these top 100 websites used *pay or okay*.

The average cost for refusing consent on one single news media websites is highest in France and lowest in Italy. While the argument by controllers is some form of 'economic fairness', costs for the pay option are mind-blowing when compared with advertisement revenue:

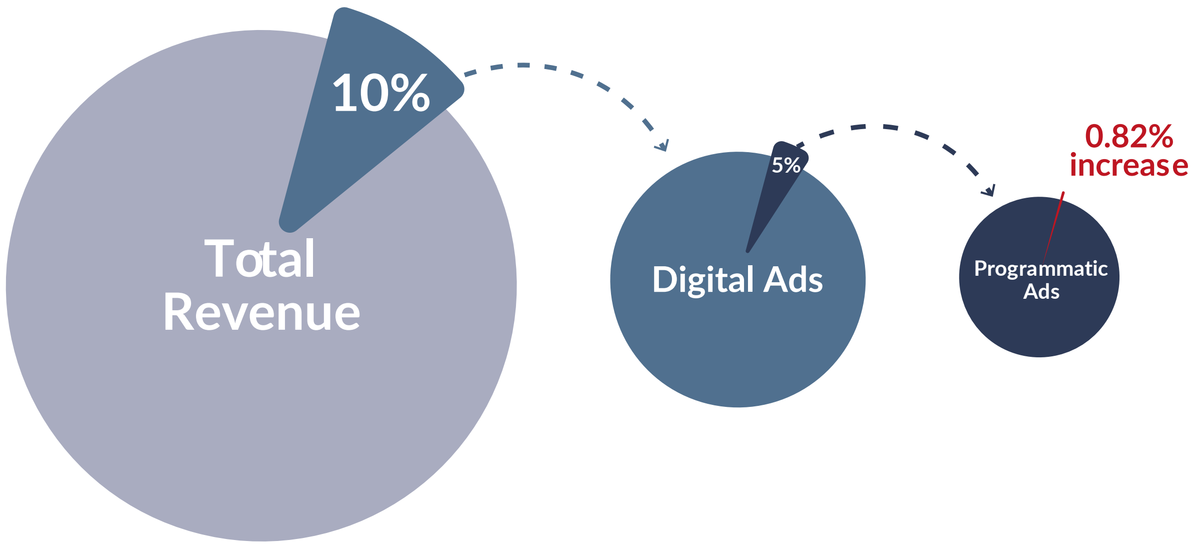
The cost to refuse consent on one single news website can often be higher than the reported revenue per user from digital advertising on all websites of a Member State.

In France, users pay around 800 % of the total digital advertising revenue per user, if they want to refuse consent for just one website.

Academic research shows that publishers earn € 0.24 per user and month from tracking. In contrast, this research shows that a publisher makes € 3.24 per user and month when choosing the pay option. The research further highlights that *pay or okay* increases 'cookie banner related income' by 16.4 %.

Given that on average only 5 % of revenue of the press comes from programmatic advertising, *pay or okay* would only increase the income of the press by 0.82% on average.

This minor increase will not save the news industry from its economic decline, but will surely kill the notion of 'freely given' consent in Europe.



Overall, all available evidence shows that websites use *pay or okay* in order to promote subscriptions and/or to increase consent rates to 99 % and more. The pay option is often promoted as genuine funding of the service while only playing a minor financial role, given that often only 0.1 % of data subjects choose the pay option.

The clear wording of the GDPR:

Obviously in relation to Article 6(1)(a) GDPR the only question is if consent is 'freely given.[1] According to the GDPR and the CJEU data subjects should have a genuine or free choice. If any system produces consent rates that do not match the true wishes of data subjects, it is manipulative.

> Between 0.16 % and 7 % of study participants express some acceptance of advertisement/tracking.

> Industry papers show consistent consent rates in a *pay or okay* system of 99 % to 99.9 %.

> A difference of more than 90% in users' wishes and actual consent rates is the painfully obvious antithesis of 'freely given' consent.

According to all case law and EDPB guidance, *pay or okay* is unlawful under current standards: Rejecting consent in a *pay or okay* banner requires countless additional steps, in addition to payment. This is more complicated and time-consuming than selecting a refuse option on the second layer of a cookie banner, which is already considered unlawful. Furthermore, it would be hard to sustain that pre-ticked boxes or a small and grey reject link are prohibited, but a 'reject fee' would be no relevant interference with the data subjects' free wishes. Data subjects would also have to sign up to a subscription to withdraw their consent in a *pay or okay* system, although Article 7(3) GDPR explicitly says that withdrawal should be as easy as consenting.

Consistency with previous EDPB findings:

Finally, the EDPB considered *pay or okay* already illegal for large online platforms. There seems to be no relevant difference between large online platforms and other controllers. There is also no way that the EDPB would be able to contain *pay or okay* to certain industry sectors, like news media. In other words:

> *Pay or okay* is such a massive interference with the free wishes of data subjects that factors like a 'network effect' or market dominance are becoming irrelevant – even tiny websites with trivial information obtain a 99 % consent rate.

> Any other controller (be it a phone provider, cloud storage, app, bank or airline) could equally charge for rejecting consent to processing of personal data. There is no logical or consistent path to contain *pay or okay* to certain sectors.

A different criterion for other controllers would very likely lead to successful litigation by large online platforms, as the GDPR does not differentiate between different types of controllers.

1. The (theoretically irrelevant) economic scope of this report

We acknowledge that the current discussion on *pay or okay* is largely focusing on the advertisement revenue of news media. *noyb* fully agrees and supports the intention that quality media needs proper funding in increasingly divided democracies.

However, we observe that the discussion around *pay or okay* is 'reframed' as a purely economic discussion. It heavily relies on extreme simplifications and arguments that are not backed up by any objective evidence or numbers – as shown in sections 2 to 9 of this report. A narrative has been formed that the European news media is 1:1 dependent on click rates on their consent buttons. In fact, the idea that *pay or okay* could single-handedly or in any relevant form save European news media is not based on known facts.

Despite addressing these economic arguments, we want to emphasize that under the GDPR, these (purely political) considerations should not be relevant. The validity of consent under Article 6(1)(a) GDPR does not depend on economic reasons. Instead it it needs to be *'freely given'*,[1] meaning that the data subject had a *'genuine or free choice'*.[2] The idea of 'saving the news media' is not relevant for making a legal determination under Article 6(1)(a) GDPR. In fact, all available evidence points at consent not being 'freely given', as shown in section 9 of this report.

While this report tries to shed some light into the true economics of *pay or okay*, Article 6(1)(a) of the GDPR does not make any exceptions for news media to sell personal data for financial gain.

2. Short history of pay or okay

The first *pay or okay* banner was introduced by the Austrian newspaper 'Der Standard' on its website https://www.derstandard.at/. A user unhappy with the consenting and paying dilemma lodged a complaint with the Austrian Data Protection Authority, who dismissed the complaint. The Authority did not considered the 'pay' option unreasonably expensive.[3]

This paved the way for *pay or okay* to become a common business approach for other media outlets and online platforms. In Germany, for example, many frequently visited media websites started asking their users for a payment or consent, for example, https://www.t-online.de/, https://web.de, https://www.welt.de/, https://www.faz.net, https://www.zeit.de/ and https://www.spiegel.de/.

A similar trend was later seen in Italy, France and Spain on websites of big newspapers like https://www.lemonde.fr/, https://www.corriere.it/ or https://elpais.com/. Some websites in other countries also rely on *pay or okay*.[4]

As of now, Meta's online platforms and mobile apps Facebook and Instagram also use *pay or okay*.[5] There seems to be no logical limit that would prevent any other industry sector (like phone operators, operating systems, cloud providers or any smartphone app) to implement *pay or okay*. Companies like Content Pass GmbH even sell *pay or okay* solutions across websites.[6]

3. The (actual) aims of controllers for introducing pay or okay

Given that *pay or okay* seems to have minor effect on the income of publishers (see also 8.4), it seems obvious that media companies use *pay or okay* for different reasons. In personal talks with individuals and backed by publicly available information, *noyb* currently concludes that the following rationales are the basis to introduce *pay or okay*:

3.1. Consent banner used as 'promo' for subscriptions

As mentioned in section 5.1 of this report, one of the revenue streams for news

LE MONDE'S COOKIE BANNER IN SEPTEMBER 2024.

websites are subscriptions. They often use the *pay or okay* banner to advertise their subscription services. Examples of this practice include the French newspaper *'Le Monde'*:

It is therefore not surprising, that *pay or okay* in practice solely comes with a subscription option. Despite intensive work on the topic, *noyb* has not yet found a single page where the pay option would come in the form of a one-time payment for an article, a certain number of paid articles or other 'pay per view' models.

In practice all *pay or okay* models come as subscription services. This is an attempt to misuse cookie banners to advertise subscriptions.

3.2. *'Reject fee'* to increase consent rates to 99.9 % and bypass the GDPR

Consent banners should give users a *'genuine or free choice'*, which may be contrary to some websites' business model. For this reason, websites have long implemented so-called 'deceptive design patterns' that are meant to increase the consent rate far beyond any realistic *'genuine or free choice'* of users.

Following the logic of 'deceptive design patterns' that make rejections unattractive, companies may choose to impose a 'reject fee' upon users in order to drive them away from the rejection button and to forcefully increase the consent rates as much as possible. It is not surprising that a 'reject fee' is even more efficient than any other 'deceptive design pattern', such as hiding the reject button, or making it small or grey.

As mentioned by Dirk Freitag, CEO of the *pay or okay* service content pass, in his interview with 'OMKB':

'...what is much more important for the publisher is that the consent rates, which today are between 65 and 85 percent, are 99 percent for them [when using pay or okay*]. So that means you can make a lot more money from advertising [...].'*[7]

It is clear from this statement that the aim of the publishers is to drive consent rates up to 99 % for maximum advertising revenue.

Whether implemented by big players like Meta's Facebook or smaller news publishers, a consent rate of 99 % speaks for itself and highlights that there is a heavy bias towards one option.

> *Pay or okay* functions as the ultimate 'deceptive design'. By introducing a 'reject fee' websites can consistently achieve a 99 % consent rate, even when only a small percentage of users actually 'genuinely or freely' wishes to consent.

3.3. Fundamental opposition to the GDPR or an alleged 'legal hack'

In direct talks with representatives of news media, *noyb* also experienced elements of rather political or fundamental opposition to the GDPR, the ePrivacy Directive and the notion that their readers have a right to data protection that by default overrides the economic interests of websites or publishers.

In such conversations *pay or okay* was partly seen as a 'legal hack' to remedy what is perceived as a 'legal wrong' by the European legislator. In some instances, it was argued to be a reaction to decisions that online tracking for advertisement is not a legitimate interest under Article 6(1)(f) GDPR.

Some news media representatives politically disagree with the consent requirement in the GDPR and the ePrivacy Directive, They simply see *pay or okay* as a way to push back against EU law or undermine it, as it is seen as a 'legal wrong' by the legislator.

Obviously, this observation is anecdotal and cannot be backed up by statistics. However, this background could be an explanation why *pay or okay* was gradually adopted, despite limited economic benefits for news publishers.

3.4. Genuine funding of service?

As highlighted in section 5.1, digital advertising accounts for only about 10 % of the revenue of the press. Given the fact that digital advertising consists of many different types of advertisements (personalised or not), *pay or okay* increases the overall digital advertising revenue of news publishers only by a fraction. Moreover, taking into account the small amount of users that actually *'pay'* (usually less than 1 %), the percentage of this revenue is minimal (see section 8). Even if the ultimate goal for the publishers was to genuinely fund their service through the *'pay'* option in *pay or okay*, the price would be *economically* counter-intuitive since users have the option to access the content seemingly for free.

As shown in more detail in section 8.4 below, the overall revenue increase for news media is statistically in the realm of 0.82 %.

4. Variants of pay or okay

Pay or okay models vary and can be distinguished by different criteria. First and foremost, *pay or okay* models are connected to paywalls, which are used by publishers for content monetisation.[8] Paywalls usually come in the following different types:

- **The 'hard' and the 'metered' paywall:** With 'hard' and 'metered' paywalls readers get access to a set amount of free articles of their choice and are then asked to subscribe to the service. In essence, the approach follows the idea of 'free samples' to then get users to pay for the sampled service. Examples of these paywalls are the Financial Times or Le Monde.

- **The 'freemium paywall':** This category of paywalls works by dividing the content itself into 'premium' and 'free'. An example of this model is The Guardian, Der Spiegel or Die Zeit. In most cases basic information is available for free to get traffic to the news site, while more elaborate journalistic content is behind a paywall. The free content is therefore a beacon to increase traffic.

These two basic types of paywalls are regularly combined with *pay or okay* banners. For example, the industry group BVDW developed the following types of "*pay or okay*" approaches[9]:

- **Linking pay or okay with additional paid services:** Some *pay or okay* models have integrated the option of additional (paid) content while others offer the ad or tracking-free version of their website (for a reduced price) to existing customers.[10] Therefore, leading to the following types of models:
  - Websites that offer **'freemium' services** plus ***pay or okay:*** Readers are faced with a paywall for certain articles and a *pay or okay* banner on the same website. This model is also called a **'double paywall'**. This model is used to attract users to 'premium' articles that are written in-house and are behind a paywall. In such cases *pay or okay* may be used to increase the revenue from the 'free' part of the freemium model. An example of this would be Der Spiegel and Stern.[11]
  - **Discount models for existing subscriptions:** *Pay or okay* is combined with a discounted rate for alre existing subscribers – again linking *pay or okay* with subscriptions for premium content.
  - **Subscriptions that include pay of okay.** Another category which is hardly seen and which can be observed at Le Parisien's website is the case for (traditional) subscriptions that include *pay or okay* – linking "*pay or okay*" with the subscription to premium content.

In practice media companies regularly link *pay or okay* with subscriptions. Standalone *pay or okay* approaches are not very common for news media.

- Another ubiquitous practice for news publishers is to **bundle a *pay or okay* subscription with advertisement.** In these cases, news publishers seem to choose one of the two following approaches:
  - **Fully ad free:** Some *pay or okay* variants offer a version of their website completely free from advertising, when choosing the pay option.Examples of websites that block advertising entirely are *Le Parisien*[12], *Le Point*[13] and *El Mundo*[14], according to the information they provide. According to insights by *noyb* this could be caused by technical limitations that would allow to differentiate between personalised and non-personalised advertisement.
  - **Non-personalized ads:** Others remove only the personalised ads in the *pay* version of the website. These *pay or okay* models may still show contextual advertising to the paying users. This type of model is seemingly used by news websites such as *Kronen Zeitung*[15], *Zeit Online*[16] and *Stern*[17], in September 2024, according to the information they provide themselves on their websites.

> In practice, many media companies link *pay or okay* with a fully ad-free experience. Users need to pay for a fully ad-free service, even if they would otherwise be fine with a service supported by non-personalised advertisement.

- **Cross-site *pay or okay models:*** Third party services like Contentpass[18] and Freechoice[19] promise an ad or tracking-free experience on their affiliated websites in exchange for a monthly fee. However, a drawback of these solutions is that they offer a selection of websites with parallel geographic user bases (e.g. local news pages from different regions, where a user will realistically only be interested in their local website) or parallel interests (like 'ratgeber-darmgesundheit.de' a niche help page for gastrointestinal problems and 'torgranate.de' a niche statistics page for fans of German regional soccer clubs).[20] It seems unrealistic, that readers would use a combination of these websites.Instead websites can outsource the implementation and simply switch to a banner that yields a 99 % consent rate.

> Multi-site *pay or okay* approaches currently do not offer packages of websites that would realistically cover the information needs of an average user.

> Multi-page *pay or okay* banners seem to favour controllers. They allow a simple *pay or okay* implementation , while increasing consent rates to 99 % or more.

A typical trait of *pay or okay* is that the option to 'pay' is offered as a subscription. Consumers often do not (or forget to) cancel subscriptions, even when they hardly use a service. This can be seen with gyms: 67 % of gym subscribers never go to the gym.[21]

In many cases a website may only be used once or on an irregular basis (such as foreign news pages, recipe pages, special-interest pages and alike), making subscriptions extremely unattractive for a one-time user. Nevertheless, *noyb* was unable to find a single *pay or okay* website that would allow micropayments or per article payment. Users either have to enter into a long-term subscription that requires to cancel the subscription in time, or will have to consent to the use of their personal data.

Refusing consent in *pay or okay* banners is typically a long-term payment subscription.

Signing up for a long-term subscription seems counter-intuitive on a website a user does not visit on a regular basis.

5. The funding sources of media companies

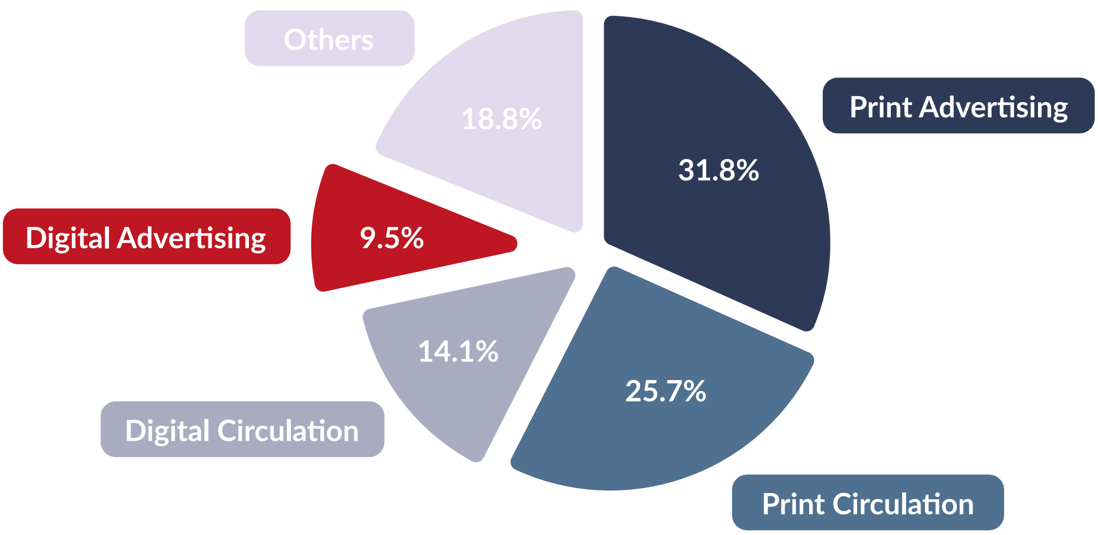
There is a recurring narrative that newspapers and magazines need to rely on digital advertisement in order to fund their content.[22,23] This narrative is wrong, as the following combination of (industry) sources clearly shows.

First and foremost, advertisement - and in particular online advertisement - is only one of many funding sources of these media companies. Among other options, these media companies also earn money through:[24]

- Subscriptions and/or membership
- Events
- Funding from platforms
- E-Commerce
- Donations or Philanthropy
- Related businesses
- In many EEA states funding from the public sector[25]

The following section will highlight the funding sources of newspapers and magazines beyond online advertising and in particular their importance. Thereafter this report will provide an overview of online advertising options for the press and their financial relevance.[26]

According to the World Association of News Publishers in its World Press Trends Outlook 2023-2024 revenues of news publishers are distributed as follows:



The European Media Industry Outlook provides for a similar picture. For 2021 (last year of actual data) the following revenue distribution was identified:[27]

- € 10.1 billion (~ 51.3 %) Print Circulation
- € 5.9 billion (~ 28.9 %) Print Advertising
- € 2 billion (~ 10.2 %) Digital Advertising
- € 1.7 billion (~ 8.6 %) Digital Circulation

While numbers and methodologies of both sources vary, they provide for a clear picture that digital advertising is only one of many revenue streams for news publishers.

According to the European Media Industry Outlook advertising revenue is 'on the decline' by 23.3 % between 2016 and 2021.[28] Online 'platforms such as Facebook or Google have managed to capture major shares of digital advertising revenues'.[29] This decline is also confirmed by the World Press Trends Outlook 2023-2024 report.[30] *Pay or okay* will therefore at best slow down this decline, but will not lead to any systematic change, that is clearly needed in the news media business.

The decline o f advertisement revenue for news media means that *pay or okay* is at best 'riding a dead horse' more aggressively, but cannot overcome a systematic funding problem.

5.1. Funding other than online advertisement

While online advertisement is indeed a funding source for newspapers and magazines, the newspaper industry receives substantially more funding through other sources. According to the European Media Industry Outlook, the **biggest revenue stream of the newspaper industry is the circulation** of its content.[31] As a general trend, the newspaper and magazine industry is currently said to diversify its revenue streams. Instead of relying on circulation and advertisement other income sources see increasing interest:[32]

'Revenues are becoming more diversified: *Other income streams – beyond the core reader and advertising revenues seen across digital and print – are expected to grow by 2.9% this year (from 18.8% to 21.7%) as events, grant funding and business services become more significant areas of focus for publishers.'*[33]

5.1.1. Circulation

Circulation generally covers the subscriptions and individual purchases of the content a newspaper or a magazine offers to its customers. There are different options such as print subscriptions, digital versions of print content, digital content that is only accessible through a digital subscription or digital pay-per-read subscriptions (sometimes referred to as micropayments).

It is noteworthy that the revenue stemming from print circulation is bigger than the revenue stemming from digital circulation. This is in line with the fact that print revenue in the press sector remains more important than digital revenue:

*'**Print drives more than half of all revenue:** When combined, print advertising and circulation generate more than half (57.5%) of the total income seen by our survey respondents. That represents a slight increase from the figure (56.8%) in our 2022-23 report.'*[34]

5.1.2. Print advertisement, classified and paid content

Still today print advertisements are a large source of revenue, making up to 31.8%[35] of all revenue of the press. While the privacy community is naturally largely occupied with digital advertisement, there is still large amounts of money spent on 'offline' or 'dumb' ads, like billboards, digital signage, radio, television and alike. Print advertisement is part of this realm of advertisement.

Traditionally many newspapers have also captured large part of the online and offline market for classifieds, including job advertisements or real estate advertisements – often for quite staggering prices compared to other forms of ads.

Many newspapers have also published various forms of 'paid content', like topical additions to their newspapers or branded secondary publications with paid content. Many newspapers also include paid content in their online portfolio.

5.1.3. Events, talks and alike

In a bid to diversify their income, newspaper and magazine publishers rely on events. As stated by the World Association of News Publishers in its World Press Trends Outlook, events are *'the leading area of emphasis for publishers'* beyond reader revenue (circulation) and advertising.[36]

Naturally, events come in different formats and with different audiences. As an example, the Financial Times offered 200 different events per year, whereas The Guardian hosts discussions with writers and journalists.[37] Similarly, *La Tribune Dimanche* is reported to have hold events in cafés across France.[38]

5.1.4. Other revenue streams

The importance of other revenue streams for the press beyond reader revenue (circulation), advertisement and events, should not be overlooked:

- **E-Commerce:** E-commerce, including areas like affiliate marketing,[39] is also considered an important source of revenue by media leaders.[40]

- **Direct (and indirect) press support:** In addition, as pointed out above, several states in the EEA fund the press through direct press support. Media companies in some cases also benefit from indirect press support, for example through tax exemptions or lower tax rates.[41] The amount of such support varies depending on the specific news outlet.[42]

- **Funding from tech platforms:** Revenue from agreements with tech platforms seems to be another relevant source of income. Such funding is linked to content licensing or innovation. It is reported to be the 'fastest growing income stream' aside from paid content with 33% of news media claiming it is now an important revenue stream.[43] Google, for example, is said to pay more than 300 publishers in the European Union.[44]

- **Grant Funding/Donations/Philanthropy:** Grants, which may also come from the same platforms, seem to be as relevant as funding through agreements with tech platforms.[45, 46]

6. Online Advertisement Revenue

Contrary to a recurring narrative, online advertising is only a fraction of about 10 % or less of publishers' revenue on average. Parts of this online advertisement revenue stems from ads requiring personal data, while another part does not require processing personal data (see below section 6.2).

According to a survey by the World Association of News Publishers there was an 11 % decline in digital advertising revenue recently, although more money is said to be spent on digital advertising. It is claimed that big tech platforms benefit from this tendency, but publishers do not.[47]

Online advertisement is on average only 10% of publishers' overall revenue.

Overall publishers' digital advertisement revenue is declining – by roughly -11% in 2023.

There is an overall trend that advertisement revenue is moving away from traditional media companies towards big tech platforms and digital advertisement networks. Although all of these players are subject to the same consent requirements.

6.1. Types of online advertisement on news websites

Online advertisement for newspapers and magazines can generally be divided in two categories:

- **Display ads:** Advertisement banners and other visible media content, from 'a static graphic to full motion video.'[48]

- **Native advertising:** Sponsored content that resembles the actual content of a publisher.[49]

Display ads can be further divided into:[50]

- **Directly sold ads:** The publisher sells the advertisement directly to an advertiser.[51]

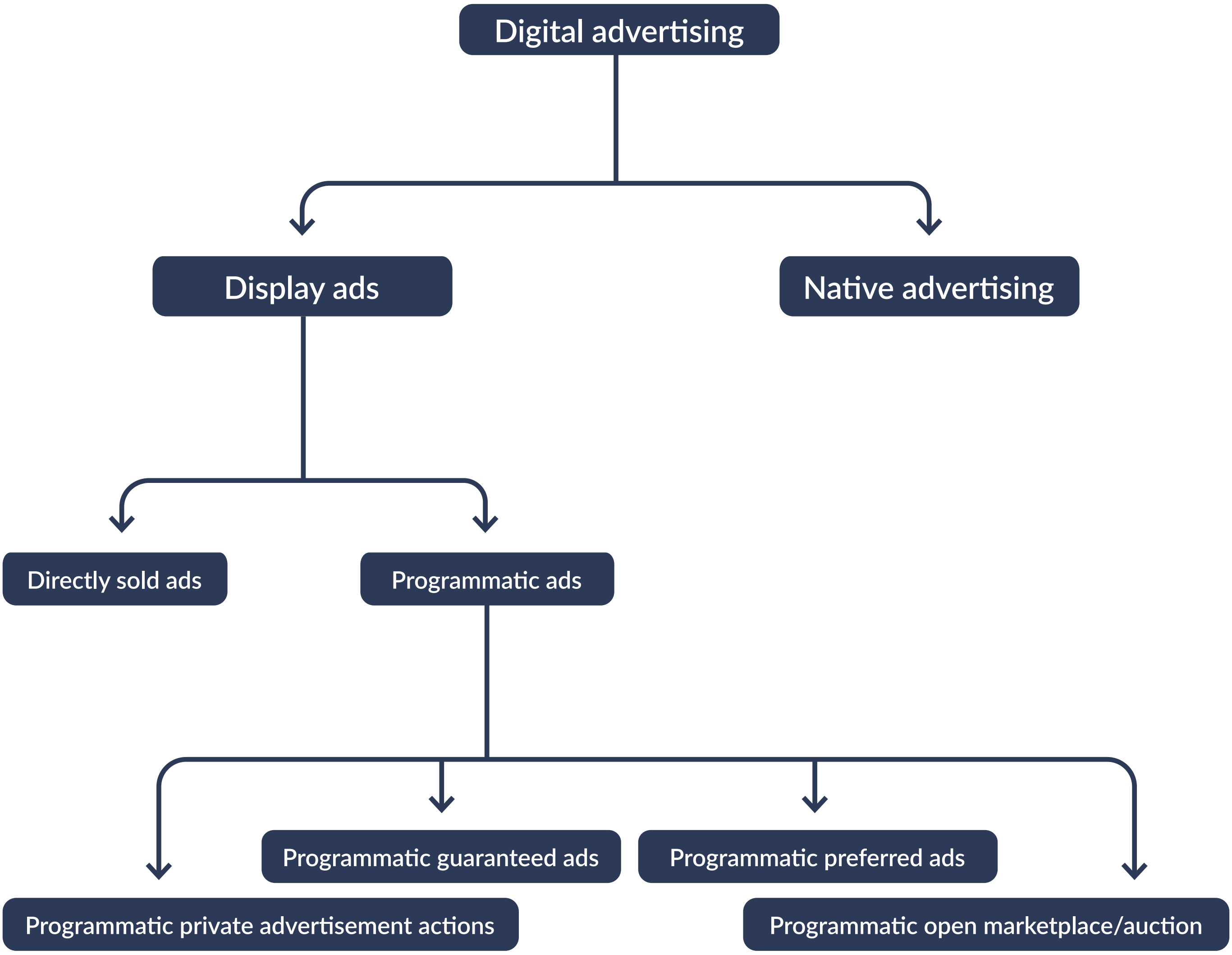
- **Programmatic guaranteed ads:** A publisher sells, through automated means, a guaranteed volume of advertisement impressions to an advertiser for a fixed price.[52]

- **Programmatic preferred ads:** A publisher offers an advertiser preferential access to possible advertising spaces for a fixed price that the advertiser can accept or not.[53]

- **Programmatic private advertisement auctions:** Consists of a bidding process with only a selected number of advertisers, which are usually selected by the publisher. This type of auction provides for exclusivity.[54]

- **Programmatic open marketplace/auction:** Advertisement spaces are sold on an open exchange to the highest bidder. Any person on the advertisement network can bid in these auctions.[55]

Programmatic guaranteed, preferred and sometimes private auctions are also grouped as **programmatic direct** advertisement,[56,57] because they involve some sort of direct relationship with the advertiser.



Reports indicate an increasing tendency towards directly sold advertisement:

'As publishers hope to see an advertisement revenue boost in 2024, they are moving deals from the open marketplace to direct-sold. In this world, data and audience insights are essential for publishers to deepen their direct advertiser relationships and improve business outcomes.'[58]

Bloomberg Media, for example, decided to abandon the open marketplace.[59]

Forecasts say that as of 2024 directly sold ads account for 75% 'of total programmatic digital display advertisement spend', whereas open marketplace ads would only account for 8,5%.[60]

Also Google suggests in its News Initiative to prioritise ads in the following order 'Direct sales, Programmatic preferred and guaranteed deals, Programmatic private auction, Programmatic open auction'.[61]

In direct talks, noyb was informed that many news publishers still make more revenue from 'dumb' advertisement that is directly sold, than from programmatic advertisement. Programmatic advertisement is therefore largely used when any internal inventory is already placed, to not have 'empty' pages. In other words: Tracking advertisement is still more revenue than nothing, but by far not the profitable end of the spectrum of online advertisement.

A possible reason for moving away from programmatic advertising may be related to a big part of the advertisement revenue going to big platforms and intermediaries. Only 40 % of advertisement revenue in programmatic advertising are estimated to be received by the publisher.[62]

The World Association of News Publishers states that more than 50 % of global advertisement spending goes to *'Alibaba, Alphabet, Amazon, ByteDance (owner of TikTok and Douyin) and Meta'*.[63]

Programmatic advertisement is dominated by large online platforms and advertisement networks. It is less and less of a viable revenue stream for news media.

Media representatives concur that tracking advertisement is not very profitable. Third-party tracking advertisements have been compared with 'economy class' on an airplane to fill the empty space not occupied by business or first class passengers.

In relation to *pay or okay* it can therefore be assumed that relaxing the rules on 'freely given' consent will mainly benefit big tech platforms, advertisement networks and other websites – not news media.

6.2. Revenue share of online advertising by type

Only a part of the digital advertising revenue of newspapers and magazines stems from advertising involving the use of personal data.

A distinction can be made between advertising that does not (necessarily) rely on the use of personal data and other advertisement that is based on tracking user behaviour.

6.2.1. Non-personal data

Advertisers can run advertisements linked to a certain medium or content without necessarily of using the users' personal data.[64] This is usually called contextual advertising. Contextual ads can be sold directly, but are also offered by advertising platforms (intermediaries).[65]

In addition, native advertising, that is sponsored content, also works without using personal data.

Numbers from the industry platform IAB Europe suggest that of all display advertising in Europe in 2023 (excluding social media and search advertising) 48.1 % is not programmatic advertising and therefore does not necessarily require the processing of personal data.[66] For example, advertising that may be shown to users if they refuse to consent to being tracked for targeted advertising.

This proportion is likely similar for the newspaper and magazine industry overall.

6.2.2. Targeting via personal data

Programmatic ads on the other hand require the processing of personal data.[67,68]

As stated by IAB Europe of all display advertising in Europe in 2023 (excluding social media and search advertising) 51.9 % is programmatic advertising.[69]

If we apply this proportion to the newspaper and magazine industry, then roughly half of the advertisement shown entails the processing of personal data.

As directly sold ads tend to be more expensive,[70] it can be safely assumed that programmatic advertising at best makes up for half of the digital advertising revenue of newspapers and magazines. In line with the numbers presented previously that means that only a maximum of about 5 % of the revenue by the press is linked to processing of personal data for advertising purposes.

On average only about 5% of a news publishers' revenue is generated via advertisements that require the use of personal data.

6.2.3. Large numbers of online users are not trackable

The efficiency of online advertising involving the tracking of users (and the use of their personal data) is further called into question by the technical limitations of tracking.

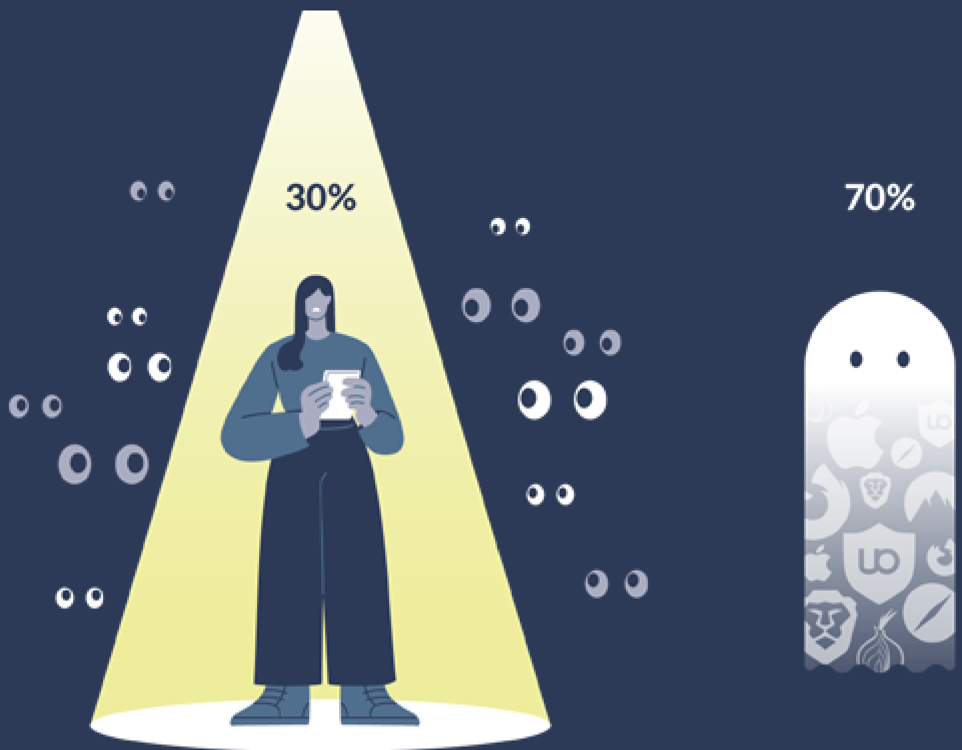
Web browsers like Safari and Firefox are blocking third-party cookies by default.[71] Furthermore, users can resort to browser add-ons and other ways of ad-blocking both on mobile and other devices.[72]

Due to increased technical blockage of tracking and cookies, only 30 % of internet users are even exposed to targeting.[73] Or in the words of a blog post: '70% of the internet is effectively playing hide-and-seek with adtech.'[74]

At the same time, it is pointed out that not being able to target Apple users (who are statistically the most affluent users) shows a lack of strategic awareness.[75]

Overall, digital advertisement based on (actually functioning) tracking plays a minor role for newspapers. The technical limitations of tracking with only 30% of the internet being visible to adtech suggest that relying on tracking users is a rather inefficient way of advertising and will be increasing technically blocked – despite artificially inflating consent rates via *pay or okay*. The overall trend in browsers (Safari, Firefox, Brave, etc.), mobile operating systems (iOS) and alike goes towards robust technical tracking protections.

The chance of *pay or okay* increasing revenue by news publishers is increasingly diminished as most users use software that blocks online tracking.



7. Economics of pay or okay: Costs for consumers

If users do not consent to tracking and instead want to refuse consent, a *pay or okay* system obliges them to pay a certain amount of money for this refusal of consent – a so-called *'reject fee'*.

This system will quickly cost consumers a significant amount of money, in particular if we consider *pay or okay*'s current popularity and potential growth. The fact that *pay or okay* at current price levels is quickly unsustainable is undeniable if the following numbers are projected and compared with average EU income levels..

7.1. Costs for top 100 websites in pay or okay jurisdictions: € 1.264

Let us take for example the top 100 websites in EU Member States that currently show a high use of *pay or okay* on websites: Austria, France, Germany, Italy and Spain. In Spain, for example, *pay or okay* usage increased significantly, once that system was accepted in principle by the national data protection authority.[76] In March 2024, *noyb* visited the top 100 websites of these countries and noted down the overall cost of rejecting consent per year.

In Germany, rejecting consent on the **29 of the top 100 websites** that used *pay or okay* (including news, weather, 'social' media networks and others) amounts to an overall cost of over € 1.528,87 per year,[77] which is equivalent to about 5 % of the mean net income in Germany.[78]

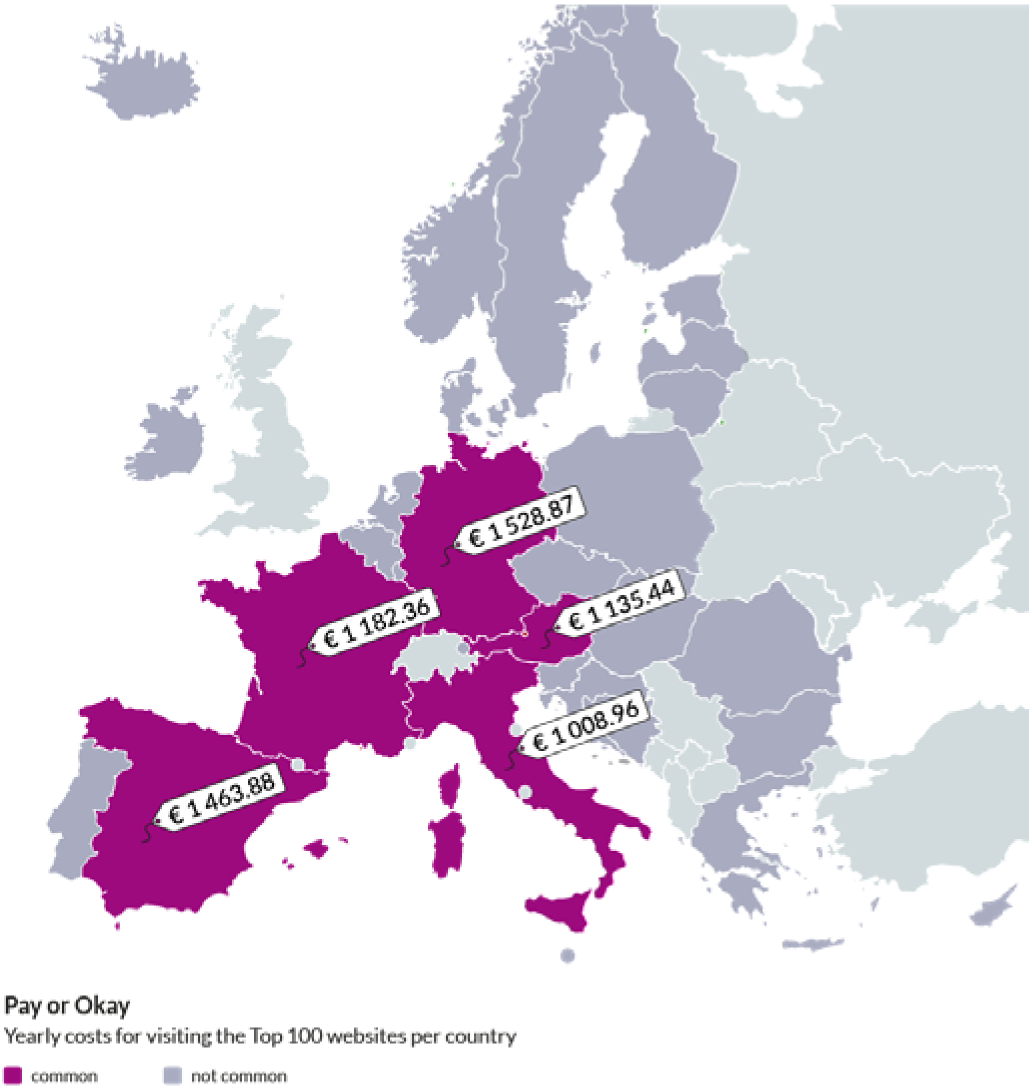
In other words: Data subjects would have to spend 1 of 20 work minutes throughout the year to click 'reject' only on 29 of the top 100 websites in Germany.

This means that just the costs to click 'reject' on 29 of the top 100 websites in German would exceed the yearly spending for clothing and shoes at 3.6% or for health at 4.1%.[79]

The corresponding amount for the other countries:

- Spain (21 of the top 100 pages): € 1.463,88 per year,[80] which is equivalent to 7.1 % of the 2023 mean net income in Spain.[81]
- France (14 of the top 100 pages): € 1.182,36 per year,[82] which is equivalent to 4.3 % of the 2023 mean net income in France.[83]
- Austria (17 of the top 100 pages): € 1.135,44 per year,[84] which is equivalent to 3.2 % of the 2023 mean net income in Austria.[85]
- Italy (17 of the top 100 pages): € 1.008,96 per year,[86] which is equivalent to 4.4 % of the 2023 mean net income in Italy.[87]

These costs are just for refusing consent. Many of these websites require additional payments for accessing their actual content in full, for example on the German website spiegel.de users have to take out the 'SPIEGEL+' subscription.



7.2. Costs based on the average number of mobile apps

In addition to visiting websites, an average user has around 40 apps installed on their phone.[88] Assuming that in the midterm all of these apps could switch to a *pay or okay* approach, rejecting consent would entail significant costs. Let us take the price of rejecting consent on German websites as a possible reference for refusing consent in apps: € 52.72 per app per year.[89] The yearly costs would be an additional € 2,108.80 per year and user. For a family of four the cost would already rise to € 8,435.20 per year.

If the average app would charge the same amount as a 'reject fee' as the average website, a family of four would be faced with costs of € 8,435.20, amounting to 36.56 % of the mean income in the EU27 in 2023.[90]

7.3. Costs for individual news websites in pay or okay countries in 2024

While the above shows the cost of refusing consent for any kind of website, the following information is meant to give further insight on the cost for consumers on **news websites** in different European countries in 2024.

The following table provides an overview of the price of refusing consent for different news websites in France, Spain, Austria, Germany and Italy. In these countries *pay or okay* is common:

PUBLISHER	CHEAPEST OFFER PER USER/YEAR AS OF OCTOBER 2024
Le Parisien	66,88 €
Le Point	132,89 €
Courrier international	77,89 €
French average	119,54 €
El Mundo	14,99 €
El Pais	132,00 €
ABC	47,88 €
La Vanguardia	48,00 €
El Periodico	30,00 €
El Correo	47,88 €
El Diario Vasco	47,88 €
Spanish average	52,66 €
Der Standard	98,90 €
Heute	59,88 €
Kurier	43,20 €
Kronen Zeitung	59,88 €
Austrian average	65,47 €
t-online	35,88 €
web	47,88 €
Bild	47,88 €
Der Spiegel	51,48 €
Focus online	47,88 €
Welt	47,88 €
Zeit	62,40 €
Frankfurter Allgemeine Zeitung	59,88 €
Süddeutsche Zeitung	132,88 €
Stern	58,80 €
German average	59,28 €
Corriere della Sera	14,99 €
La Repubblica	12,00 €
Il Sole 24 Ore	10,00 €
La Stampa	12,00 €
Italian average	12,25 €

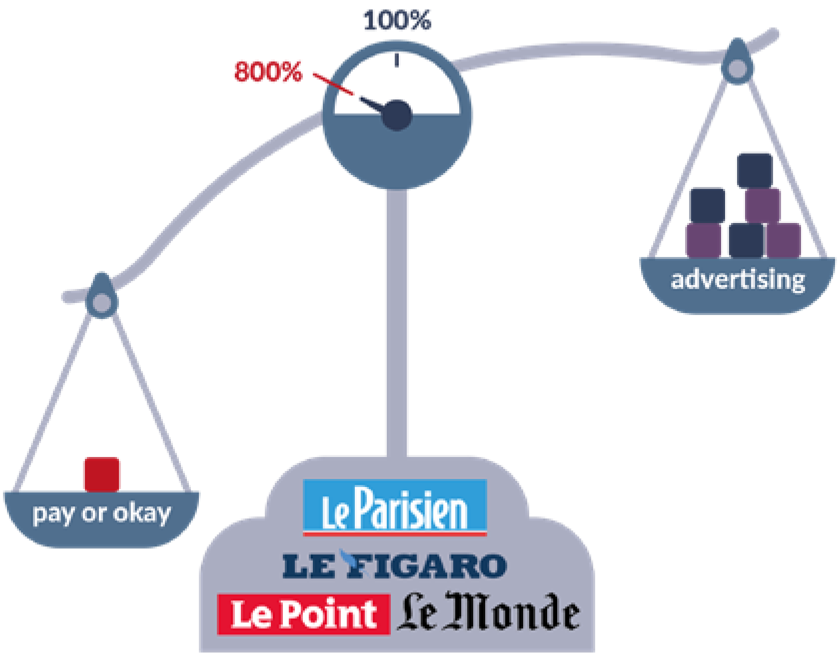
Given that consumers do usually engage with more than one news source,[91] the cost per consumer for refusing consent is likely a multiple of the averages stated above. Online news can be easily referenced on social media platforms and news aggregators. This is why accessing different news sources online is easier than with traditional print papers. Accessing *pay or okay* news sources even sporadically still implies a subscription for a reader if they want to refuse consent.

7.4. User cost versus all national digital advertising revenue of the press

The narrative by *pay or okay* proponents largely focuses on an allegedly *'fair compensation'* for rejecting consent and exercising the Fundamental Right to Data Protection under Article 8 of the Charter of Fundamental Rights.

However, a comparison between the average costs stated above with the annual revenue (per user) from display/digital advertising for the press, shows that this revenue is significantly lower than the average cost for refusing consent.[92] In short, consumers are paying substantially more for refusing consent than a publisher makes money of online advertising in general.

COUNTRY	Revenue per user from display advertising on all press websites	Average Costs to 'reject' on only a single press website
FRANCE	€ 14.89[93]	€ 119.59 (= 803%)
ITALY	€ 10.01[94]	€ 12.25 (= 122%)
SPAIN	€ 10.56[95]	€ 52.66 (= 498%)



This is a rather rough comparison. It should be taken into account that these numbers reflect all display/digital advertising – whether it is targeted or not. That means that the annual revenue per user from *targeted advertising* is even lower that the numbers above. As shown above in section 6.2 only about half of display advertisement online is programmatic.

The (average) yearly cost for consumers when they refuse consent for just one news website usually exceeds all display advertisement revenue per user in the entire country.

In Spain, consumers pay roughly 498 % of the money earned by newspapers and magazines with advertising, in France this number amounts to astonishing 803 %, whereas in Italy a single newspaper 'only' charges 122 % of the entire digital press advertisement revenue of the country.

This observation is in line with the academic research presented in section 8 and all other information on massive overcharging for refusing consent in *pay or okay* compared to advertisement revenue.

7.5. Averages versus low-income data subjects

The above numbers are based on averages, however 21.6 % of EU residents are at risk of poverty or social exclusion.[96] Some EU Member States have significantly lower incomes than the EU average[97] and many individuals simply cannot make ends meet because of personal, health or family reasons. Even if the average EU data subject would be able to pay for clicking *'reject'*, many data subjects would not have a *'genuine or free choice'* if prices are set based on an average.

21.6 % of EU residents are at risk of poverty or social exclusion. Some EU Member States have significantly lower income levels than the EU average. The right to have a 'genuine or free choice' shall not only be protected for the average EU resident, but all data subjects.

It is very unlikely that *pay or okay* could ever ensure that people at risk of exclusion will not be further excluded from digital products or deprived of 'freely given' consent.

7.6. Actual reasons for the high price point chosen

Overall, the approach by *pay or okay* proponents seems utterly unreasonable and economically questionable. In *noyb*'s experience, the actual reasons for disproportionate pricing seems to be based on the following factors:

- **The pay option is not for 'average users' but for the 0.1% 'extreme users':** In *noyb*'s direct talks, publishers regularly highlighted that the only users that would ever choose the pay option, would be heavy and therefore 'high value' users that visit a news website dozens of times per day. Obviously, such users see more advertisements, engage with a website much more and are a higher 'loss' if they want an advertisement free option. Consequently, the price point for the pay option was chosen for the 0.1% of the *'top revenue users'* not for the other 99.9% of users. This means that by definition *pay or okay* would always be uneconomical for almost all data subjects.

- **The pay option should be a step towards subscriptions:** Publishers generally associate content with a price. These prices are largely inspired by previous print subscriptions and current digital subscriptions. When *pay or okay* is used as a segue to subscriptions, the price point may not be too far off from a paid subscription, as this would call into question the price of subscriptions. It therefore seems that prices are more inspired by the price for these subscriptions than by lost revenue for advertisement.

- **The 'pay' option must pay for itself:** Some publishers also highlighted the technical, organizational and legal costs to implement *pay or okay* instead of a normal cookie banner. These additional costs were then divided among the 0.1 % of users that choose the *'pay'* option to *'refinance'* the costs of bypassing the GDPR via users.

- **Alleged 'bounce rates' when introducing** *pay or okay***:** Some news papers informally claimed that higher bounce rates are a result of introducing *pay or okay* that must be factored into prices. However, academic research suggests that no change in online traffic occurred. Based on actual data of several publishers, researchers did not find a higher rate of users leaving a website after implementing a *pay or okay* banner: *'Overall, our analysis suggests that implementing a pay-or-tracking wall leads to no significant decrease in publishers' online traffic. Users do not seem to leave and abandon the publisher after being confronted with a pay-or-tracking wall.'*[98]

- **The 'pay' option does not make use of non-personal advertisement:** Because only 0.1 % of users choose the 'pay' option, publishers offering completely ad-free alternatives did not invest in a third option with non-personal advertisement, which would still bring significant revenue. This could reduce the price of the *'pay'* option, but seems undesired.. Overall, this leads to a state where generally only two extremes (tracking or no advertisement) are available – other than in print media, radio or TV.

- **The pay option is based on political pushback against the GDPR:** Finally, there seems to be an element of purely political pushback against EU law (namely the GDPR and ePrivacy Directive) that seems to inspire the implementation of *pay or okay*.

Overall, the pay option was never designed to be a 'fair' alternative for an average user, let alone an occasional user, but at best an acceptable deal for the 0.1 % heavy users.

Primarily *pay or okay* seems to be a political tool to push back against the GDPR and/or a step towards subscriptions, which equally inspired overinflated prices for the pay option.

7.7. Summary: Pay or okay would lead to unsustainable costs for data subjects

It is painfully obvious, that the use of *pay or okay* leads to unsustainable costs for data subjects, in particular if the model spreads beyond just an average of 19.6 of the top 100 pages or just individual apps.[99]

Already the current costs for the reject option on just 29 of the 100 most visited websites can surpass average household expenses for clothing and shoes or health.

It is to be expected that a general allowance by the EDPB would mean that almost all cookie banner providers (in the EU six providers have a market share of around 95%)[100] will quickly adopt pay or okay, making it the ubiquitous means of any consent interface in Europe on the web and for mobile apps. Rejecting consent would become economically unattainable for most.

Overall, only the rich would be able to afford a right to data protection anymore – if they would bother to create and pay for hundreds of accounts on every website and app.

8. Economics of pay or okay: Revenue for controllers

8.1. Revenue from Tracking

A recent study by Müller-Tribbensee, Miller and Skiera calculated the advertisement revenue per user and month of two top 50 German news publishers.[101] According to their study, a top-50 publisher's revenue in the cases where tracking is enabled, is € 0.24 per user, monthly. Moreover, assuming that 99 % of the users accept tracking in the case of a *pay or okay* scheme, that the publisher has a million users and taking into account this 'tracking revenue' per user, the total revenue of the publisher from tracking is € 237,600.[102,103]

> Overall, online advertisement is reported to make up to 24 Cents per user and month.

There is very little evidence on the increase in advertisement revenue based on the availability of personal data for tracking. In an often-cited US study, the presence of personal data in a bid request has only increased the revenue for the publisher for around 4%.[104] The Dutch public broadcaster NPO even reported to have earned more money once they abandoned targeted advertising.[105]

> The amount of additional revenue from the use of personal data is reported to be 4 %. In other cases contextual advertising showed higher revenue.

8.2. Publishers' revenue from the pay option

On the other hand, according to the study by Müller-Tribbensee, Miller and Skiera the same top 50 publisher, with the same number of users, makes € 3.24 per user per month from the pay option. Assuming that 1 % of users, which amounts to 10,000 users, pays when faced with the *pay or okay* wall the revenue of the publisher is € 32,400.[106]

These numbers are at the lower end of the numbers in section 7.3 above, where price points between € 2.99 and € 11.07 can be observed on German *pay or okay* news websites.

8.3. Extremely inflated price point

Overall, the publishers' ultimate goal is to generate income (as they are almost always organised as a for-profit business). *Pay or okay* models are one of the ways publishers generate additional income – not a 'fair' compensation for the revenue lost when data subjects do not consent to tracking.

The average price for individuals to refuse consent (the pay option) is with € 3.24 (not including VAT) obviously way higher than the tracking income estimated to be € 0.24 per user and month. Despite the rather high amount estimated for advertisement revenue in this example, the pay option still costs thirteen times more than the money earned with tracking. Even if we assume a cheap pay option costing only € 1 per month, this would still be four times more expensive than the tracking revenue. Where refusing consent is more expensive, e.g. € 12.99 on lemonde.fr, the difference is even more striking at 54 times the money earned with tracking.

8.4. Minimal revenue increase, as users don't pay

However, despite the extremely inflated prices for the pay option, news publishers only make tiny additional revenue from *pay or okay*, even in the most positive circumstances. In practice the *'pay'* option is, in addition to other reason, too expensive to be chosen. This begs the question if the *'pay'* option is deliberately increased to provide a fake choice.

This conclusion is reinforced by the study mentioned above, in which the researchers compare the already high revenue generated by a 'normal' cookie banner and a *pay or okay* wall. In the first prediction, the publisher makes € 232,000 in total revenue from both the acceptance and the refusal of cookies with a 'normal' cookie consent banner. In this scenario advertisement without consent would make 4 cents less per user and month. In the second prediction, the publisher makes € 270,000 when using a *pay or okay* banner.[107]

	Option	Share of users	Number of users	Revenue per user (€)	Revenue per Option (€)	Total Revenue (€)
Cookie Consent Banner	**Tracking**	80 %	800,000	0,24	192,000	**232,000**
	Costless Refuse	20 %	200,000	0,20	40,000	
Pay-or-Tracking Wall	**Tracking**	99 %	990,000	0,24	237,600	**270,000**
	Pay	1 %	10,000	3,24	32,400	
					Rel. Difference	**+ 16,4%**

TABLE 1: ADAPTED FROM THE RESEARCH BY MÜLLER-TRIBBENSEE ET AL., PAGE 38

Considering the numbers from Müller-Tribbensee et al. *pay or okay* brings about an increase in 'cookie banner related income' of about +16,4 %.[108] However, this revenue does not come primarily from the pay option, but from the increase of 19 % in the consent rate – so from more tracking.

Revenue increases from *pay or okay* mainly stem from the increase in the consent rate – against the data subjects' 'genuine or free choice' – not from data subjects actually paying.

Overall, while refusing consent in a *pay or okay* system entails a significant cost for the users, the publisher revenue from *pay or okay* models does not make up as much of their income as one could imagine. As mentioned in section 5 the percentage of press revenue that comes from digital advertising in general is about 10 % or less. According to industry estimates, around half of display advertising is programmatic advertising (see section 6.2).

Given that at best around 5 % of the press revenue comes from programmatic advertising. That 5 % of revenue from programmatic advertising would only marginally increase by 0.82 % if *pay or okay* is in place.

It is, therefore, not feasible to fund a news website, let alone, a full publishing service with a *pay or okay* model, which is why *pay or okay* is merely a side-income or – more likely – a step towards subscriptions camouflaged as a cookie banner.

	Option	Share of users	Number of users	Revenue per user (€)	Revenue per Option (€)	Total Revenue (€)
Cookie Consent Banner	**Tracking**	80 %	800,000	0,24	192,000	**232,000**
	Costless Refuse	20 %	200,000	0,20	40,000	
Pay-or-Tracking Wall	**Tracking**	**99 %**	**999,000**	**0,24**	**239,760**	**243,000**
	Pay	**0,1 %**	**1,000**	**3,24**	**3240**	
					Rel. Difference	**+ 4,8%**

If we adapt the numbers by Müller-Tribbensee et al. slightly in order to take into account the 99,9 % consent rate advertised by companies (see section 9.2), the increase in 'cookie banner related income' shrinks further to merely +4,8 %.

In this, more realistic scenario, and given the estimation of 5 % revenue from programmatic advertising, the overall income of news publishers would only increase by 0.24 % if *pay or okay* is in place. Even if we considered that all digital advertisement revenue amounts to 10 % (personalised ads, contextual ads, sponsored content, etc.) this 10 % revenue would only increase by 0.48 % with *pay or okay*.

It is therefore totally unrealistic that *pay or okay* would in any way save the press.

8.5. Summary: pay or okay will not save the news industry

With the information outlined it becomes clear that *pay or okay* will not save the news industry from its forecasted economic decline.[109] Digital advertising based on tracking and targeted ads only is a minor revenue stream accounting for at best 5 % of the overall revenue of a press company and income from this source is in decline.

This low revenue through targeted advertising would only marginally increase by 0.24 % through *pay or okay* at a 99.9% consent rate. Even when generously considering all digital advertising revenue (including sponsored content, contextual and personalised ads, among others) the revenue increase would only account for 0.48 %, This slight benefit comes mainly from more people consenting and a very limited number of people subscribing (rejecting consent).

However, this minor increase in revenue should not mislead to think that it would substantially reverse the trend that revenues of the press are in free fall. In order to put this into perspective: Press revenues already dropped by -19.3 % between 2016 and 2021 and are forecasted to drop even further.[110] In other words, *pay or okay* could at best delay some of these revenue declines, but is in no way able to reverse the course of the larger economic shifts in the news business. Instead accepting *pay or okay* will surely kill the notion of 'freely given' consent in Europe.

9. The only relevant legal question: Can 99.9 % be ‘freely given’ consent?

According to recital 42 of the GDPR consent is not freely given *‘if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment’*. The aim of the element ‘freely given’ in Article 4(11) GDPR is to ensure that the data subject’s wishes are respected and they are not pushed or nudged to consent. This idea is also recalled by the CJEU in its Judgment of 4 July 2023.[111]

The CJEU also stated that in the case of refusing consent, a user should have an equivalent alternative *‘if necessary for an appropriate fee’*.[112] However, it is not clear what ‘if necessary’ and ‘appropriate fee’ means. This is even less clear in the light of recital 42 of the GDPR.

Therefore, it is time to objectify this discussion and focus on facts: Free wishes of users can be measured. If any system produces consent rates that do not match the true wishes of users then it is manipulative. Thus, in such systems users are misled not to express their free or genuine choice.

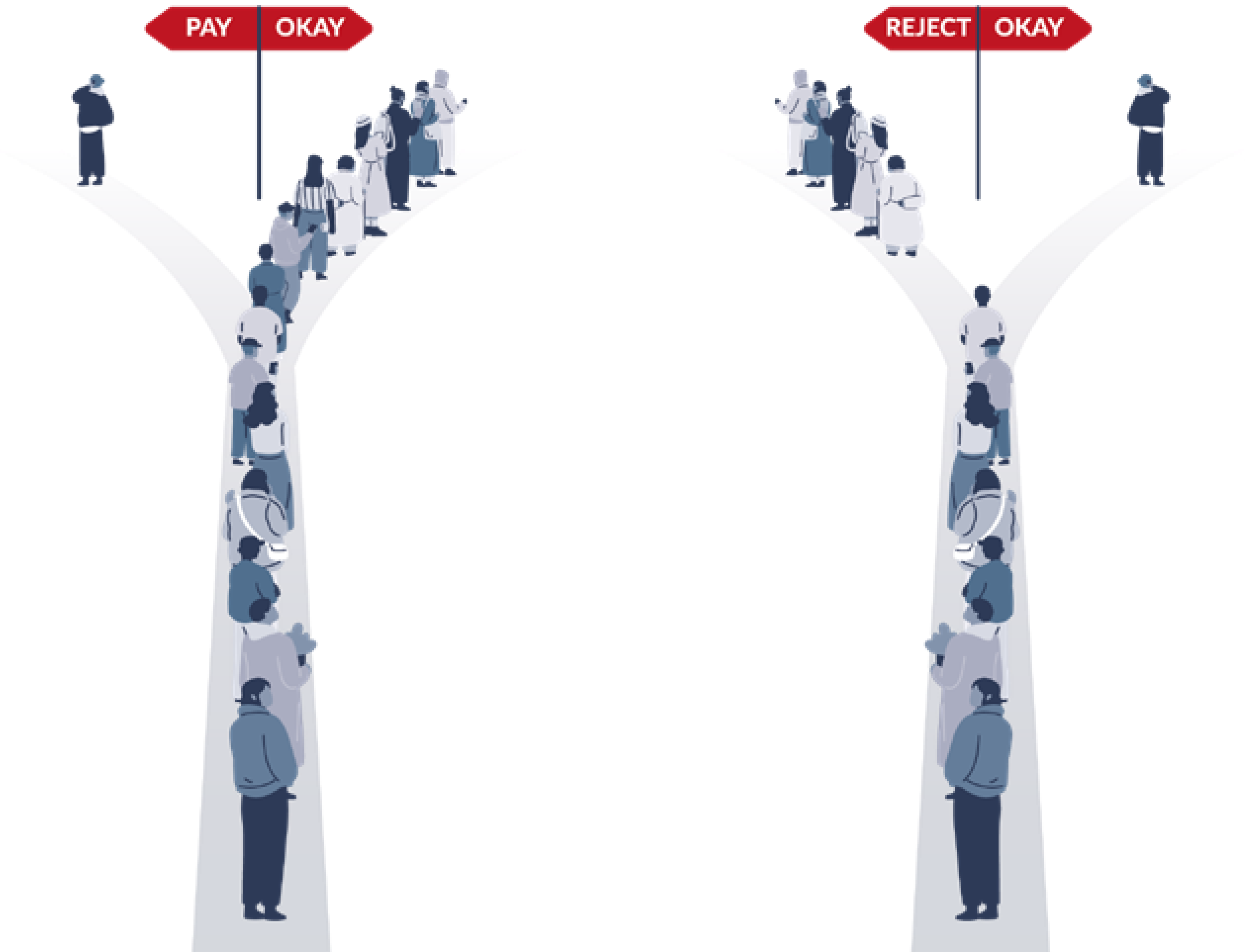
The CJEU and the EDPB have accepted this when it comes to silence *(‘pre-ticked boxes’)* and for a range of different deceptive design patterns *(‘dark patterns’)*.[113] *Pay or okay* interferes in an even more substantial way with user wishes, as the following numbers confirm.

9.1. Objective numbers: User’s genuine or free choice

In a study about cookie banner design the authors found that with no option preselected by default within a banner only 0.16 % of users would select the ‘Accept’ option. They compared this result to a bigger sample (of more than one million people) from a consent management platform, where this number was 5.59 % of users. They also cite another study that found that *‘about 3 % of users are willing to accept marketing cookies’*.[114] This is in line with numbers regarding Facebook: A study found that only 7 % of users favoured Facebook *‘collecting my data on the internet for ads’*.[115] In all these cases, the willingness to consent is between 0.16 and 7 %.

If users are asked openly if they want to be tracked online for advertisement and when also informed about the details of such tracking, such numbers are expected to be even lower than the numbers received via (often ignored or quickly clicked through) consent interfaces.

Depending on the study and setup data subjects have a *‘genuine or free’* wish of 0.16 % to at best 7 % to consent in a banner and/or to personalised advertisement.

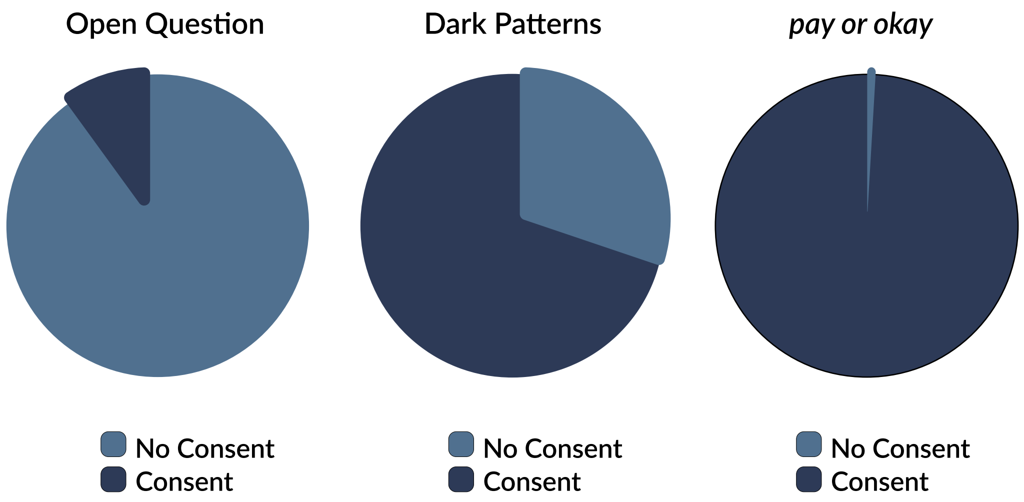


9.2. Objective numbers: 99.9% consent rates

According to industry numbers many German-speaking *pay or okay* websites report consent rates of 99 to 99.9% or, alternatively, 1% or less of users choosing the pay option.[116] The first version of this industry report with these numbers is no longer available on the corresponding website, but can be found elsewhere.[117]Academic research confirms that in a real-world *pay or okay* setting approximately 99 % of people consented.[118] Companies selling *pay or okay* systems are also advertising that consent rates of more than 99.9% can be achieved.[119, 120]

These numbers relate to websites that do not have a 'network effect' contrary to Facebook, Instagram, TikTok and similar platforms. Therefore, it is very likely that the network effect does **not** play a role in user consent choices.

Pay or okay generates wholly artificial consent rates of almost exactly the opposite of the *'genuine of free'* wishes of data subjects. If only 0.16% to 7 % of data subjects wish certain processing activities, but 99.9% of them get it, we produce nothing but a *'North Korean consent rate'.*



9.3. Inconsistency with CJEU and EDPB position on deceptive design patterns

The European Data Protection Board defines deceptive design patterns (also called dark patterns) in the following way:

'Deceptive design patterns aim to influence users' behaviour and can hinder their ability to effectively protect their personal data and make conscious choices.'[121]

That design patterns may influence decision-making is highlighted by academic research:

'This design relies on the finding that when making choices, especially when they are made in an environment with a lot of information and in a context where users are goal-oriented and have little time (all characteristics of online choices), users tend to use mental shortcuts (heuristics), to get to a decision quicker and preserve their mental bandwidth.'[122]

Users have even developed a certain tendency to give their consent out of habit.[123]

The European Data Protection Board expressed that a consent banner – contrary to an extended praxis – should contain both, the *'accept'* and the *'reject'* option, on the same layer of this banner.[124] That way both options are equally quickly accessible and require only one click.

While for common cookie banners the effort to make each choice should be the same, with *pay or okay* the situation is different: Selecting the *accept* option usually requires one single click. In contrast, refusing consent requires setting up an account, going through an online payment process and usually identifying with name and address. It is common knowledge that this takes several minutes. This stark contrast in effort and time for *pay or okay* banners is likely another important reason for extremely high *'North Korean consent rates'*. There seems to be no legal reason that would allow differentiating (common) consent banners from *pay or okay* banners in this regard. Instead, the GDPR requires a 'genuine or free choice' for both of them.

It is hard to comprehend why hiding a 'reject' button on a second layer of a consent banner or requiring to remove a pre-ticked box (both just one additional click) is illegal under the GDPR, while requiring a 'reject fee' and an entire checkout-process, as well as taking out a subscription, should somehow not interfere with the *'genuine or free choice'* of users.

The EDPB and CJEU case law would risk being highly inconsistent if '*pay or okay*' would be allowed, while other 'dark patterns' were gradually banned.

This is further highlighted by recital 80 of the Regulation (EU) 2024/900 on the transparency and targeting of political advertising that refers to consent under the GDPR:

'Refusing to give consent or withdrawing consent should not be more difficult or time-consuming to the data subject than giving consent.'

9.4. Inconsistency with the right to withdrawal

In any *pay or okay* system, withdrawing consent leads to the necessity to use the *'pay'* option. In practice, this means that Article 7(3) GDPR cannot be reconciled with a *pay or okay* system. It is simply not as easy to withdraw consent as to give it, when the withdrawal of consent involves a payment.

A *pay or okay* system can, by definition, not allow that withdrawal is as easy as consent, as required by Article 7(3) GDPR.

9.5. Legal for one, legal for all!

Finally, in its Opinion 08/2024 the European Data Protection Board stated that for large online platforms relying on a binary choice between consenting or paying a fee is generally not legal.[125] Meta sued the EDPB over this Opinion, even though this Opinion is not directly addressed to Meta.[126] Meta has thus a clear interest in using *pay or okay*.

If *pay or okay* would be greenlighted for the press this would certainly lead to further litigation by Meta and potentially other large online platforms. In such a case, the EDPB would have to answer the obvious question:

Why would *pay or okay* be legal for some website but not for large online platforms?

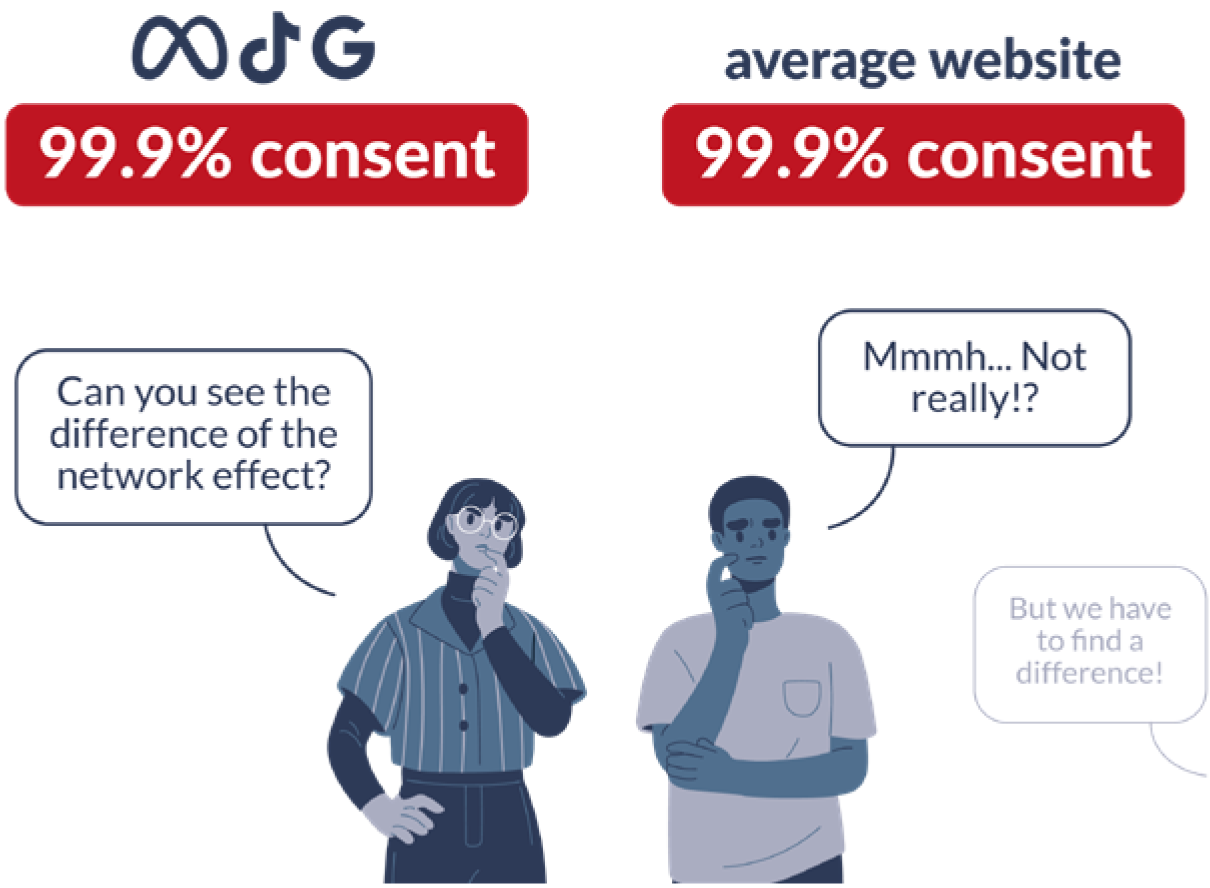
No legal provision seems to support such a differentiation by the EDPB. The GDPR does not foresee different categories of controllers under Article 4(11) GDPR which is even recognised by the EDPB in the Opinion 08/2024.[127] The articles of the GDPR only contain a few exemptions for smaller companies, which are not related to obtaining consent.

Any other controller (such as phone providers, cloud storage and app providers, banks, airlines) could equally charge for rejecting consent to processing of personal data. There is no logical or consistent path to contain *pay or okay* to certain sectors.

In addition, when consent rates for recipe or weather websites are already 99 % or higher, there seems to be no reason to believe that any particular situation of a large online platform like the 'network effect' makes a substantial difference in user choices.

Information about the weather or about baking an apple strudel has no 'network effect' or any other element that the EDPB highlighted in Option 08/2024, but still sees consent rates of 99.9 % in a *pay or okay* system. There seems to be no legal or factual hook to legitimize any differentiation between *pay or okay* by large online platforms and other websites.

If *pay or okay* is legal for normal websites, it would not be coherent to prohibit it for large online platforms.



Sources

CHAPTER 1

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2 Recital 42 GDPR

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