

GDPR Update : Consent or Pay!

The European Data Protection Board (the “EDPB”) recently issued its opinion (the “Opinion”) on the “Consent or Pay” models being utilized by certain large online platforms. The Opinion was issued following a request from the Norwegian, Dutch and German data protection supervisory authorities. The EDPB was asked to provide its opinion on whether such models can satisfy the requirements for valid consent under GDPR when consent is sought to process personal data for the purposes of behavioural advertising. The referring authorities requested that these questions be considered in light of the CJEU’s recent judgment in the Bundeskartellamt case (C-252/21).

What is consent and pay?

Consent or pay models, are scenarios where a data controller offers data subjects a choice between at least two options in order to access an online service that it provides. Data subjects can either consent to the processing of their personal data for a particular purpose (typically personalized advertising) or pay a prescribed fee to gain access to the service without their personal data being processed for that purpose.

Online platforms are not defined under the GDPR and for the purposes of its opinion the EDPB identified a number of elements to be assessed on a case-by-case basis.

EDPB’s Opinion

In the Opinion the EDPB highlighted the need for data controllers to comply with all requirements of the GDPR and in particular the need for valid consent to have been provided where this is the basis of the right to process the relevant personal data being relied upon. The EDPB stated that in most cases it will not be possible for large online platforms to comply with the requirement for valid consent if they only offer users a choice between consenting to the processing of their personal data for behavioral advertising and paying a fee. The EDPB concluded that models relating to behavioral advertising may only be considered as valid to the

extent that such platforms can demonstrate that all requirements for valid consent are met in line with the principle of accountability. The EDPB found that controllers should consider providing data subjects with an equivalent alternative to access the service which does not require the payment of a fee in order to demonstrate that the consent was freely given in accordance with the GDPR. They also stressed the need to comply with other principles provided for under GDPR such as proportionality, purpose limitation, data minimalization and fairness.

Conclusion

The Opinion highlights the need for data controllers to ensure that they are compliant with all aspects of GDPR obligations and in particular that data subjects’ consent is freely given and valid for GDPR purposes. The EDPB has clearly indicated that that “consent or pay” models should not be the default option and that large online platforms should consider the appropriateness of having various alternative options for data subjects.

Next Steps

The EDPB has confirmed that it will develop and issue new guidelines on “consent or pay” models. The data protection team at Clerkin Lynch will continue to monitor this topic as it evolves.



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