"Pay Or Okay" Model Part I: Personalised Advertisement And Data Processing—A Legal Analysis

*By Pinar Bakirtaş**

I. Introduction

The better artificial intelligence (AI) technologies get at predicting our preferences, the more we feel that our every digital move is being constantly tracked. We often encounter online advertisements that seem to read our minds. For example, we might see a promotion for a travel agency immediately after searching for a flight. Thus, it is reasonable to question the legal basis for monitoring our online activities to create personalised advertisements.

One of the most prominent entities using personalised advertising is Meta, which includes the social platforms Facebook, Threads, Instagram, and WhatsApp. In the last two years, several European legal authorities have concluded that Meta's policy of processing user data for personalized advertisements contravenes the EU's General Data Protection Regulation (GDPR).[1] In response to those findings, in November 2023, the tech giant changed its privacy policy in the EU, the European Economic Area (EEA) and Switzerland. Since then, Meta's options are known as the "pay or okay" model, where:

(i) A paid version (monthly EUR 9.99 on the web or EUR 12.99 on mobile applications) of Meta services with no ads, guaranteeing that users' personal data is not processed for advertising purposes; or

(ii) A free of charge version requires users to "consent" to the processing of their personal data for advertising purposes.

A few days after Meta implemented this model, the Noyb-European Center for Digital Rights launched a GDPR complaint[2] to the Austrian Data Protection Authority, laying down claims against Meta's pay or okay model for personalised advertising.

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Against this background, this paper will analyse the pay or okay model. It will provide some relevant factors to seek a balance between data protection and free markets. This first part of the paper (Part I) will focus on data protection concerns. In addition, it will discuss possible alternatives to the model. It will also examine how the laws governing personalised advertisements may be constructed. The second part (Part II, in a subsequent issue) will address challenges in other fields, such as competition law, consumer protection, and unfair commercial practices, in order to holistically consider the legality of pay or okay models.

II. The History of Processing Personal Data for Personalised Ads

A. Legitimate Basis under the GDPR

Tailored advertising can be delivered to users individually by processing the personal data of each of them. In EU and EEA member states, any processing of personal data—such as collection, recording, organising, or structuring—must be based on a lawful ground outlined under Article 6 of the GDPR. Examples of lawful grounds for processing include "consent,"[3] "contractual necessity,"[4] and "legitimate interest."[5]

"Consent" refers to the agreement of the "data subjects," meaning identified or identifiable natural living persons, for the processing of their personal data. The consent referred to in Article 6 must be "freely given, informed, specific and unambiguous."[6] It could be withdrawn at any time.

"Contractual necessity," on the other hand, occurs when the data processing is required for the performance of a contract. Freedom to conduct a business is rooted within this ground. Some contractual obligations

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1. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119.

2. Noyb—European Centre for Digital Rights Complaint on Meta's pay or okay system <*https://noyb.eu/sites/default/files/2023-11/Complaint%20-%20Meta%20Pay%20or%20Okay%20-%20REDACTED.pdf*>.

3. GDPR (n 1) Art 6(1)(a).

4. GDPR (n 1) Art 6(1)(b).

5. GDPR (n 1) Art 6(1)(f).

6. GDPR (n 1) Art 4 (11).

require the processing of personal data in order for the contract to be fulfilled in relation to the data subject. The context of this ground is better understood when interpreted within the broader framework of GDPR[7] in line with principles laid out in Article 5 of the GDPR. Especially, fairness, lawfulness, transparency, purpose limitation and data minimisation standards are core to determining the applicability of contractual necessity.

Finally, "legitimate interest" concerns "a lawful basis where companies use personal data in a way that individuals can reasonably expect."[8] While the GDPR allows processing personal data with legitimate interest, this can be overridden by the data protection right of data subjects. There are three requirements[9] that depend on legitimate interest in processing personal data. First, such processing must be "necessary" to serve the legitimate interest. Second, there should be a legitimate interest on the part of the controller or a third party. Any kind of legitimate interest in any context could be applicable, though it must be real, present and lawful. Third, a balancing exercise between the legitimate interests for processing personal data and other fundamental rights involved in the processing is required. It is probable that the balance would lean closer towards legitimate interest if there are preventive measures to protect the clashing fundamental rights.

B. The Dispute on the Appropriate Legal Basis for Processing Personal Data for Personalised Ads

i. The EDPB Decision

When the GDPR entered into force in 2018, Meta used contractual necessity[10] to justify its processing of personal data for personalised advertisements. This basis was ruled to be invalid by the European Data Protection Board (EDPB) (5 December 2022),[11] the entity responsible for ensuring a consistent application of the GDPR. One month later, Meta was fined by the Irish Data Protection Authority, prompting the company to switch its legal basis to legitimate interest.[12] Following this, the EDPB issued an urgent binding decision (1 November 2023).[13] The decision placed an EAA-wide ban to process personal data for personalised ads on the two mentioned legal bases.

ii. The CJEU Decision

On 4 July 2023, the Court of Justice of the European Union (CJEU) ruled on the processing of personal data under the GDPR.[14] The decision has significant implications for the application of consent as a legal basis for personal data processing. It emerged following the Bundeskartellamt's (German Federal Cartel Office) prohibition of Meta's processing of personal data obtained from third-party platforms (off-Facebook data). This was considered an abuse of dominant position by the Office. Additionally, the prohibition was against Meta's processing of personal data without the consent of data subjects. This decision was challenged before the Oberlandesgericht (Higher Regional Court) Düsseldorf which referred several questions to the CJEU.

Most strikingly, the CJEU suggested that if users declined consent for data processing, Facebook could offer services through alternative means "if necessary for an appropriate fee." This led to the company implementing a consent-based model known as pay or okay.

As a result, consent remains the sole legal basis for the processing of personal data for personalised advertisements.

III. Lawfulness of the Pay or Okay Licensing Model

A. Consent under the GDPR

i. Freely Given Consent

Article 4(11) of the GDPR requires, among other things, that consent be freely given. The same regulation also stipulates that if a person has no genuine or free choice, such consent should not

7. 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 [2019].

8. "What Is the Legitimate Interests Lawful Basis for Data Processing?" (*GDPR EU*) <*https://www.gdpreu.org/the-regulation/key-concepts/legitimate-interest/*>.

9. Gabriela Zanfir-Fortuna and Teresa Troester-Falk, "Processing Personal Data on the Basis of Legitimate Interests under the GDPR: Practical Cases" [2018] The Future of Privacy Forum <*https://info.nymity.com/hubfs/Landing Pages/Nymity FPF—Legitimate Interests Report/Deciphering_Legitimate_ Interests_Under_the_GDPR.pdf?hsCtaTracking=9cf491f2-3ced-4f9c-9ffa-5d73a77a773e%7C7469b2ec-e91c-4887-b5db-68d407654e23*>.

10. Erin Egan and Ashlie Beringer, "Complying With New Privacy Laws and Offering New Privacy Protections to Everyone, No Matter Where You Live" [2018] Meta News <*https://about.fb.com/news/2018/04/new-privacy-protections/*>.

11. EDPB, "EDPB Adopts Art. 65 Dispute Resolution Binding Decisions Regarding Facebook, Instagram and WhatsApp" (2022) <*https://www.edpb.europa.eu/news/news/2022/edpb-adopts-art-65-dispute-resolution-binding-decisions-regarding-facebook-instagram_en*>.

12. Data Protection Commission, "Data Protection Commission Announces Conclusion of Two Inquiries into Meta Ireland" (2023) <*https://www.dataprotection.ie/en/news-media/data-protection-commission-announces-conclusion-two-inquiries-meta-ireland#Meta*>.

13. EDPB, "EDPB Urgent Binding Decision on Processing of Personal Data for Behavioural Advertising by Meta" (2023) <*https://www.edpb.europa.eu/news/news/2023/edpb-urgent-binding-decision-processing-personal-data-behavioural-advertising-meta_en*>.

14. C-252/21 *Meta Platforms Inc and Others v Bundeskartellamt* [2023] ECLI:EU:C:2023:537.

be considered as freely given. Under Meta's pay or okay framework, users are confronted with a fee of EUR 12.99 (on mobile apps) to exercise their right to privacy on Facebook or Instagram. It could be argued that at least some people cannot afford such a privacy fee. This is especially relevant considering average income per capita varies significantly among EEA states. If the individuals are not able to afford this rate of consent to personalised advertisements, one could infer that it is because they have no choice.

Conversely, a fee that is affordable to all consumers may not be a sound commercial strategy. Meta's success lies in part in its ability to convert user engagement (based on time spent per day on its platforms) into large advertising revenues. In 2023, Meta captured around 20 percent of U.S. digital ad spending, despite accounting for only 7.6 percent of overall digital media time.[15]

One could argue, to a certain extent, that the network effects of Meta services create a lock-in effect. The more contacts a user has on a given platform, the higher their reluctance to switch to competing platforms. Such reluctance among users could be in part caused by the difficulties or even impossibilities surrounding the transfer of connections and previous interactions to other platforms. Consequently, one might contend that at least some users, *i.e.*, those who cannot afford a EUR 9.99/12.99 monthly fee, are forced to allow their personal data to be processed. If this were the case, it would breach the obligations of the GDPR. However, recent developments show that users are, in fact, migrating from social media platforms to encrypted closed platforms such as WhatsApp and Telegram.[16] While a lock-in effect may exist, people's shifting interests in social media platforms may be reducing its impact.

Another point to consider is the potential imbalance in the relationship between data subjects (Meta's users) and the data controller (Meta), favouring Meta. This would likely impact the analysis of "freely given" consent within the scope of Recital 43 of the GDPR.

ii. Consent as a Pre-Requisite for Providing a Service

As EU Directive 2019/770 points out, "digital content or digital services are often supplied (…) where the consumer does not pay a price but provides personal data to the trader."[17] However, when assessing the validity of consent in terms of its voluntary nature (freely given consent), the GDPR emphasises that a user's consent cannot be made a condition to process their personal data unless it is "necessary" for the performance of the contract, *e.g.*, to use of a service.[18]

At this point, it is important to define the scope of "necessity" for the performance of a contract which is explained in the EDPB Guidelines.[19] According to the Guidelines, "necessity" must be interpreted "strictly." If there are "realistic, less intrusive alternatives" for the performance of the contract, processing personal data is not necessary. As observed by the decision of the EDPB, contractual necessity seems to refer to technical necessity only. So, if it is technologically possible to provide the service by alternative means, personal data processing should not be considered necessary for the performance of the contract. On the other hand, the term "realistic" in the Guidelines could include the economic viability of alternatives. A technically possible alternative may not be "realistic" from a financial perspective. In any event, according to the CJEU's Meta decision, personalised content, which is the result of processed personal data, is not necessary to perform Meta's services established in the contract with users. Therefore, Meta should not be allowed to make consenting to personalised advertisements a condition to access their services.

B. Clash of Fundamental Rights: Right to Privacy and Personal Data Protection Versus Freedom to Conduct a Business

The rights to privacy and personal data protection are fundamental rights established under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.[20] The pay or okay model could be seen as eroding the right to privacy, which should be equally available to all. However, it is made clear under Recital 4 of the GDPR that the right to data protection "is not an absolute right" and that it must be "balanced against other fundamental rights."

Therefore, the right to privacy and data protection must be weighed against the fundamental freedom to

15. Ethan Cramer-Flood, "Meta's Ad Revenue Share Vastly Exceeds Its Share of Consumer Time" (2023) <*https://www.emarketer.com/content/meta-s-ad-revenue-share-vastly-exceeds-its-share-of-consumer-time*>.

16. "The End of the Social Network" [2024] *The Economist* <*https://www.economist.com/leaders/2024/02/01/the-end-of-the-social-network*>.

17. Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136.

18. GDPR (n 1) Article 7(4).

19. EDPB Guidelines 2/2019 (n 7) Recital 24.

20. Charter of Fundamental Rights of the European Union (2000/C 364/01) [2000].

conduct a business as provided under Article 16 of the Charter. This results from "freedom to exercise an economic or commercial activity," "freedom of contract" and "free competition."[21] From this perspective, it could be said that a free market will keep the quality high and foster innovation at the best possible prices.[22] However, under the same provision, freedom to conduct a business should be in accordance with EU law, which includes the GDPR.

It should be noted that fundamental rights are "defensive rights of citizens against the state" and do not introduce, as a rule, obligations against private parties.[23] As a fundamental right, the same logic may be underpinning in data protection law. However, in the modern age fundamental rights have found a new arena to be performed: online platforms. Therefore, as within the GDPR, fundamental rights of data subjects do not only raise obligations against states but also against private companies like social media platforms. This obliges companies to find a balance between their freedom to conduct a business and, in this case, the right of data protection of data subjects. In that context, the objectives and principles under Articles 1 and 5 of the GDPR may be guiding.

C. Appropriate Fee

As previously mentioned, in its Meta decision the CJEU decided that Facebook's services can be offered without personal data processing when consent for such processing is refused "if necessary for an appropriate fee."[24] These few words arguably laid the foundation for the pay or okay system. The terms "necessary" and "appropriate" carry significant weight and require deeper analysis. Whether a fee is necessary will be analysed below under alternative options. It is also important to determine the appropriateness of Meta's fee as it contributes to examining the legality of Meta's new access regime.

Since the CJEU did not define "appropriate fee," in its complaint to the Austrian Data Protection Authority (para. 42), Noyb presented the following options:

a) A price that does not significantly manipulate the consent rates (the fact that almost all users consent to personal data processing is not considered genuine consent because, according to Noyb, it is not "freely given," as the other option is to pay);

b) A price that is affordable for users should the pay or okay model be adopted by other platforms (creating greater financial burden on the users as they may be forced to pay separate privacy fees to each platform);

c) A price that reflects the actual costs of offering services to a user (without personal data processing), plus a fair profit for the service provider;

d) A price that covers the profit to be made through personalised advertising.[25]

From a privacy-centric approach the first three options appear more beneficial for users as they consider the effect on the right to privacy and personal data protection of users. Meanwhile, the last option seems to adopt a free-market perspective and is more appreciative of the business model and profits built by companies such as Meta. The advantages of free markets should also be considered against a privacy-first approach. In a free-market economy, consumer demand designates the produced goods, contributes to economic growth and promotes innovation. Also, disruptive technologies emerge, which enhance efficiency and improve quality of life with a focus on people's needs for progression. For example, Facebook emerged as a disruptive technology itself[26] and Meta, as the company owning it, is now investing in next-generation technologies such as metaverse and AI solutions.[27]

Independently of which method the Court chooses to follow, perhaps calculating the fee based only on personalised advertisements is the more suitable approach. The fee is an alternative to processing personal data, which requires consent by the law. Therefore, the fee to reject such consent should only reflect the lost profit from the lack of that processing. Meanwhile, Meta's current paid alternative considers the fees to be gained by both personalised and non-personalised advertisements, as it prevents both.

D. The Pay or Okay of Newspapers

Proponents of pay or okay are hopeful of its validity, as press publishers have been implementing a similar structure with cookie paywalls.[28] These paywalls work

21. "EU Charter of Fundamental Rights Title II Freedoms Article 16—Freedom to Conduct a Business" (*FRA European Union Agency for Fundamental Rights*) <*https://fra.europa.eu/en/eu-charter/article/16-freedom-conduct-business*>.

22. "The Benefits of Competition" (*Autoridade da Concorrencia*) <*https://www.concorrencia.pt/en/adc-mission-and-goals*>.

23. Jürgen Bering, "Fundamental Rights Obligations of Digital Corporations" <*https://freiheitsrechte.org/en/themen/digitale-grundrechte/grundrechtsbindung-der-digitalkonzerne#:~:text=Fundamental rights protect the freedom,on private individuals and companies.*>.

24. CJEU Meta (n 14) paragraph 150.

25. Noyb (n 2) paragraph 42.

26. Stefan F.Dieffenbacher, "18 Disruptive Innovation Examples 2023" (2023) <*https://digitalleadership.com/blog/disruptive-innovation-examples/#:~:text=Facebook%2C a prime example of,online connections among college students.*>.

27. Andrew Bosworth, "Living in the Future" (*Meta News*, 2023) <*https://about.fb.com/news/2023/12/metas-2023-progress-in-ai-and-mixed-reality/*>.

28. "Facebook and Instagram to Offer Subscription for No Ads in Europe" (*Meta News*, 2023) <*https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/*>.

as follows: if a user does not consent to cookies to share their personal data, they must pay to access the content. Hence, it is a pay or okay system particular to media outlet websites. To date, the privacy fee presented by cookie paywalls has been a grey area where national data protection authorities have taken different approaches on the issue.[29] Meta quotes decisions of French[30] and German[31] authorities on the cookie paywall dilemma to support its practice.[32] However, the mentioned decisions require the fulfilment of certain conditions for allowing cookie paywalls. For example, the German authority highlights the requirement of freely given consent. As analysed above, Meta's compliance with this requirement seems unclear under the new policy. Therefore, how the decisions of cookie paywalls will affect the considerations on pay or okay by the data protection authorities remains to be seen.

The cookie paywall decisions might have two implications: (i) rejection of consent might require a fee under some circumstances, and (ii) this might especially be the case when another fundamental right/freedom is concerned. Regarding media outlet cookie paywalls, this was the freedom of media.[33] The struggle of news media[34] that would affect the freedom of the media could have been a factor that weighed in for this instance. It remains to be seen if freedom to conduct a business will be given the same weight.

E. EDPB's Decision on Pay or Okay Models of Large Online Platforms

On 25 January 2024, the data protection authorities in Norway, the Netherlands, and Hamburg asked the EDPB to issue an opinion on the matter of pay or okay models.[35] The EDPB published its opinion on 17 April 2024, addressing large online platforms.[36] These are exemplified as "very large online platforms" under the Digital Services Act and as "gatekeepers" under the Digital Markets Act. In the end, the Board opined against "binary" pay or okay models and noted that "controllers should consider providing data subjects with an 'equivalent alternative' that does not entail the payment of a fee." If they want to charge a fee to give access to their platforms, they should provide a further free alternative without personalised ads, *e.g.*, instead offering fewer or zero personalised ads. Providing a further free alternative without personalised ads is considered a very important criterion to assess the validity of consent as noted by the EDPB.

Waiting for the above-mentioned developments will impact the current framework, thus it is relevant to examine alternative mechanisms that could be introduced instead of the applied pay or okay system.

IV. Alternative Options

A. Differentiating between Personalised and Contextual Advertisements

Personalised advertisements are not the only way to make targeted advertisements. There are also non-personalised advertisements including contextual advertisements which do not require the processing of personal data. Therefore, a fee may not be "necessary" at all, keeping in mind the mentioned CJEU's Meta decision that explained an alternative could be provided "if necessary for an appropriate fee." In the end, allowing users to deny consent to personalised advertisements without incurring a fee may be an option for implementing consent under the GDPR. Large online platforms could provide a genuine free choice in line with the recent EDPB opinion where users could select one of the following:

(1) A free of charge version where the user either
   (a) consents to personalised ads or
   (b) refuses consent to personalised ads and is subject to non-personalised ads (*e.g.*, contextual ads)

(2) A paid version without any ads, personalized or non-personalized. (In this third option, users would be paying for the value of an ad-free service and not for protecting their right to privacy and data protection.)

This reasoning could also be based on Recital 42 of the GDPR where consent cannot be freely given if the data subject is "unable to refuse or withdraw consent without detriment." The EDPB Guidelines outline detriment as meaning "any costs for the data subject."[37] This interpretation would prohibit Meta from charging a fee to consumers in exchange for their personal data. Others claim that, for there to be any detriment, one must be entitled to access to these private services and

29. Victor Morel and others, "Your Consent Is Worth 75 Euros A Year—Measurement and Lawfulness of Cookie Paywalls" (Association for Computing Machinery 2022) <*https://victor-morel.net/publication/wpes2022/WPES2022.pdf*>.

30. "Cookie Walls: La CNIL Publie Des Premiers Critères d'évaluation" (2022) <*https://www.cnil.fr/fr/cookie-walls-la-cnil-publie-des-premiers-criteres-devaluation*>.

31. "Bewertung von Pur-Abo-Modellen Auf Websites" (2023) <*https://www.datenschutzkonferenz-online.de/media/pm/DSK_Beschluss_Bewertung_von_Pur-Abo-Modellen_auf_Websites.pdf*>.

32. "Facebook and Instagram to Offer Subscription for No Ads in Europe" (n 28).

33. Charter (n 20) Article 11.

34. Astrid Henningsen and Adam Krčál, "Public Financing of News Media in the EU Final Report" (2023).

35. Natasha Lamas, "European Digital Rights Groups Say the Future of Online Privacy Is on a Knife Edge" [2024] Tech Crunch <*https://techcrunch.com/2024/02/15/no-consent-or-pay-pls/*>.

36. EDPB, "EDPB Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms" (2024) <*https://www.edpb.europa.eu/system/files/2024-04/edpb_opinion_202408_consentorpay_en.pdf*>.

37. EDPB, "EDPB Guidelines 05/2020 on Consent under Regulation 2016/679" (2020) <*https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf*>.

this would make social media services close to an essential facility.[38]

On the other hand, it could be argued that a fee may be "necessary" to compensate for the revenues forgone from personalised ads that cannot be recouped by contextual ads.[39] Accordingly, the above mentioned option (1) (b), *i.e.*, a free of charge version where the user refuses to consent to personalised ads and is subject to non-personalised ads, could be modified as an option under the paid version in point (2). In that case, the options could be modified as follows:

(1) a free of charge version where the user consents to personalised ads

(2) a paid version

(a) where the user refuses consent to personalised ads and is subject to non-personalised ads (where the fee is considerably less than option (2) (b) as it only corresponds to the lost margin from personalised ads that cannot be generated by non-personalised ads.)

(b) without any ads, personalized or non-personalized.

The above suggestions depend on whether such social media services could be provided and profits could be compensated (at least partly) by non-personalised advertisements. However, some suggest that such an advertising technique may not be so appropriate for social media platforms.[40]

B. Prohibiting Personalised Advertisements

A second alternative could be to impose an outright ban on personalised advertisements. Some privacy concerns associated with personalised advertisements include using AI analytics to infer information about individual users.[41] Also, since the personal data obtained from Facebook or Instagram is combined with data from third-party sources (off-Facebook data), there is a risk of re-identification of personal data with the use of data collected from a diverse range of sources.[42]

However, such a radical solution does not appear to be on the radar of EU policy makers. Especially considering the recently debated AI Act, the EU does not consider personalised advertising services under its category of prohibited systems.[43] Indeed, the introduction of the Digital Markets Act[44] and the Digital Services Act[45] suggests that the EU favours considering this issue in terms of, respectively, regulating competition and transparency obligations.

Despite this, some surveys show that an overwhelming majority of users enjoy personalised advertisements because getting irrelevant ads frustrates them.[46] However, other surveys show intriguing results. When the consumers were asked about the personal data collection activities to generate personalised advertisements, only 17 percent found it was proper.[47]

V. Conclusion

The new pay or okay framework has shaken up the privacy field. "Legitimate interest" and "contractual necessity" as grounds for processing personal data for personalised ads were rejected by the EDPB's binding decision, leaving "consent" as the only viable option. The consent-based approach resulted in pay or okay schemes giving the user a choice to either (i) pay or (ii) consent to data processing for personalised ads. One thing is for sure: consent must be freely given by the data subject. Also, the "necessity" in the performance of a contract carries value in the interpretation of valid consent under the GDPR. Depending on whether "necessity" implies technical possibility and/or economic viability, this might create opposite outcomes. Consent may not be necessary for the performance of a contract in terms of technological possibilities. Still, there could be financial constraints to perform the contract without making consent a condition to access.

38. Mikołaj Barczentewicz, "Pay or OK: Practical Considerations for Adtech and Beyond" (IAPP, 2024) <*https://iapp.org/news/video/pay-or-ok-practical-considerations-for-adtech-and-beyond/*>.

39. This perspective would include the financial aspect of understanding necessity as well.

40. *Ibid*.

41. Leslie K John, Tami Kim and Kate Barasz, "Ads That Don't Overstep" (*Harvard Business Review*, 2018) <*https://hbr.org/2018/01/ads-that-dont-overstep*>; Amitai Richman, "Re-Identification of Anonymized Data: What You Need to Know" (2023) <*https://www.k2view.com/blog/re-identification-of-anonymized-data*>.

42. Gary LaFever, "Beyond GDPR: Unauthorized Reidentification and the Mosaic Effect in the EU AI Act" [2023] IAPP <*https://iapp.org/news/a/beyond-gdpr-unauthorized-reidentification-and-the-mosaic-effect-in-the-eu-ai-act/*>.

43. "EU AI Act: First Regulation on Artificial Intelligence" (*European Parliament*, 2024) <*https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence*>.

44. Article 5, Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1.

45. Article 26, Regulation (EU) 2022/2065 of The European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.

46. Holly Pauzer, "71 percent of Consumers Prefer Personalized Ads" (*Adlucent*) <*https://www.adlucent.com/resources/blog/71-of-consumers-prefer-personalized-ads/*>.

47. Ross Benes, "Do People Actually Want Personalized Ads?" (*Emarketer*, 2019) <*https://www.emarketer.com/content/do-people-actually-want-personalized-ads*>.

The CJEU Meta decision is crucial as it forms the basis of the pay option. What would be an appropriate fee in such a case constructs a hot debate as it should not turn the right to privacy into a commodity.

The EDPB's recent opinion, which is against a two-fold pay or okay system, will guide all data protection authorities when it comes to large online platforms. It will likely force these platforms to provide users a free-of-charge option that allows them to refuse consent for processing their personal data. An option which, thus far, has not been available.

In the present sphere, legal considerations about other ways to consider personalised advertisements are ongoing. A sensible method to understand consent as a legal basis under the GDPR could be to allow users to choose voluntarily whether they want to be subjected to personalised advertisements or not. Opting for personalised advertisements should ideally not be subject to a fee, as lost profits generated by personalised ads should be offset by non-personalised targeted ads. Also, companies could create value from an entirely ad-free paid subscription. If we take the issue one step further, legislators could also consider banning personalised advertisements entirely, considering the privacy risks they entail. However, this seems unlikely at present, and for this point consumer attitudes to personalised ads could be relevant. ■