

## **EMMA and ENPA stand by the legitimacy of press publishers' binary "Consent or Pay" models**

The financial sustainability of European professional media, which is a precondition to fulfil their democratic role, is increasingly under pressure. This is all the more concerning, considering the current time of geopolitical tensions and information manipulation. The private press sector is threatened from multiple fronts, including the control of digital distribution channels and advertising markets by a handful of digital gatekeepers, the decrease in print sales as well as the exploitation and unfair competition by AI companies.

Against this background, all revenue becomes crucial for the free press to succeed in the transition to largely or entirely digital business models. In this regard, digital revenues from both subscriptions and advertising are indispensable, and the development of GDPR compliant "Consent or Pay" models, where readers can choose whether to contribute to the financing of editorial content with their consent to personalised advertising or through a monetary fee, becomes an increasingly valuable option across the EU.

EMMA and ENPA are highly concerned about the public consultation by the Italian Data Protection Authority on "Consent or Pay". First and foremost, the consultation seems to be based on a negative assumption against such model – which is incomprehensible, considering that "Consent or Pay" models have been confirmed GDPR compliant in many Member States by Data Protection Authorities (DPA) and Courts as well as at the ECJ level.

In other words, any prohibition or restriction in Italy would go against the ECJ decision in case C 252/21 and the legal assessment of other Member States which confirmed the legality of "Consent or Pay" under the GDPR if certain conditions are met. A decision against this model might set a dangerous precedent in questioning the conclusions of the ECJ, including in view of the ongoing reflection at European level. It would be concerning and create significant legal and economic uncertainty if publishers who have successfully implemented "Consent or Pay" models confirmed to be GDPR compliant were suddenly confronted with a prohibition, despite the ruling of the EU's highest court. Moreover, prohibiting such models in Italy would distort competition, whereas binary "Consent or Pay" models remain allowed in other Member States, leading to a lack of harmonisation and legal discrepancies.

In particular, a prohibition of this model in Italy might lead to press publications in Italy having fewer legitimate financing avenues than their counterparts in other Member States, or to push them to offer their products to Italian readers for a monetary fee only. In practical terms, a reader in Italy would have to pay to access the same content that a reader in Spain or Germany can read for free. Such financing and competition issues would not be limited to press publications: as this model is used by a variety of online services, including weather forecasts, email communication, social media, etc, Italian consumers might be forced to pay a fee for services that consumers in other Member States can access for no monetary costs thanks to "Consent or Pay" models.

In fact, this model allows readers in all economic circumstances to access professional information, while being viable for media businesses. Professional media have high production costs, so it is not an option to offer content for free or at a loss. Press publications are businesses, therefore asking users to pay for content, be it via a fee or consent, is a legitimate sale just like those

in the offline world, where readers are not allowed to take a newspaper from a kiosk without paying. As such, any restriction of “Consent or Pay” models, including their prohibition or the imposition of a “third alternative” without payment nor targeted advertising, might force them to move their content behind a paywall, risking to foreclose access to professional information. With “Consent or Pay” this risk does not exist, as citizens can access content for no monetary cost through the “consent” option and can move to a different media outlet if they do not wish to consent. The readers’ free choice is enabled by pluralism in the media market, rather than by imposing a “third alternative”.

The imposition of a “third alternative” would cause incalculable damage to the free press and to citizens’ freedom of information. In particular, contextual advertising alone is normally not financially viable for publishers, as demonstrated by cases of publications trying to exclusively rely on this model and having to revert back to personalised advertising for financial reasons. A prohibition or restrictions would also harm publications that rely mainly on digital subscriptions. In fact, most of them have a section accessible via “Consent or Pay” essential for attracting subscribers by allowing them to test the product first.

Lastly, it is not appropriate to use the Commission fine of Meta’s “Consent or Pay” model as an argument against such models in general. In fact, the fine was based on the Digital Markets Act (DMA) and not on the GDPR. Meta must comply with additional DMA obligations due to its status as a gatekeeper platform, that does not apply to any press publication. In fact, it is even under consideration at European level to introduce an assessment of the effects of data and consumer protection policies on the media, in light of situations where one-size-fits-all initiatives might jeopardise the sustainability of a sector essential to democracy.

In fact, in its decision to sanction Meta’s “Consent or Pay” model, the Commission recognises the difference between social networks that act as intermediaries for content obtained organically, and services that provide access to internally-produced content protected by intellectual property rights, such as press content, for which users are more prone to recognise the value as they are accustomed to paying a price for that service in the offline world. Therefore, the sanction against Meta’s “Consent or Pay” model should not be understood as a general precedent but rather as limited to gatekeeper platforms within the scope of the DMA.

In conclusion, EMMA and ENPA stand by the legitimacy and use of binary “consent or pay” models and call on Data Protection Authorities to consider the financing needs of private media, competition issues, and the damage to society if professional information were to only be available for a monetary fee, or if its plurality decreased as a result of lack of viable financing avenues. Against this background, any decision on “Consent or Pay” models in Italy would not only be redundant in light of case C 252/21 but also cause irreparable damage to the Italian press and set a precedent dangerous for the European press sector as a whole.