



EUROPEAN COMMISSION

## ***CASE DMA.100055 – Meta - Article 5(2)***

(Only the English text is authentic)

### **Digital Markets Act Regulation (EU) 2022/1925 of the European Parliament and of the Council**

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Article 29(1), 30(1) and 31(1) Regulation (EU) 2022/1925

Date: 23/04/2025

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Brussels, 23.4.2025  
C(2025) 2091 final

**COMMISSION IMPLEMENTING DECISION**

**of 23.4.2025**

**pursuant to Articles 29(1), point (a), 30(1), point (a), and 31(1), point (h), of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector**

**Case DMA.100055 – Meta – Article 5(2)**

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# COMMISSION IMPLEMENTING DECISION

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**pursuant to Articles 29(1), point (a), 30(1), point (a), and 31(1), point (h), of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector**

**Case DMA.100055 – Meta – Article 5(2)**

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 ‘DMA’),<sup>1</sup> and, in particular, Article 29(1), point (a) and Article 30(1), point (a), and Article 31(1), point (h), thereof,

After consulting the Digital Markets Advisory Committee,

Whereas:

## **1. INTRODUCTION**

- (1) On 5 September 2023, the Commission adopted a decision addressed to Meta Platforms, Inc., designating this company, together with all legal entities directly or indirectly controlled by it (collectively referred to as ‘Meta’) as a gatekeeper pursuant to Article 3(4) of Regulation (EU) 2022/1925 (the ‘Designation Decision’).<sup>2</sup>
- (2) Meta Platforms, Inc., is also the addressee of this Decision, adopted pursuant to Articles 29(1), point (a), 30(1), point (a), and 31(1), point (h), of Regulation (EU) 2022/1925. Meta Platforms, Inc., a publicly traded company founded in 2004 and headquartered in 1601 Willow Road, Menlo Park, California, 94025, United States of America,<sup>3</sup> is the parent company of a group of companies that operates, among others, social networking, messaging, and advertising services.
- (3) This Decision concerns Meta’s lack of compliance with Article 5(2) of Regulation (EU) 2022/1925. It finds that the ‘Consent or Pay’ advertising model implemented

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<sup>1</sup> OJ L 265, 12.10.2022, p. 1, ELI: <http://data.europa.eu/eli/reg/2022/1925/oj>.

<sup>2</sup> Commission Decision C(2023) 6105 final of 5 September 2023 designating Meta as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

<sup>3</sup> Meta’s notification pursuant to Article 3 of Regulation (EU) 2022/1925, Form for Gatekeeper Designation (GD), notified on 3 July 2023 (‘Form GD’), paragraph 7.

by Meta in the Union does not comply with the obligations laid down in Article 5(2) of Regulation (EU) 2022/1925. That model presents end users with the binary options of either consenting to the processing and combination of their personal data from Meta's non-ads core platform services ('CPSs') and distinct services (jointly referred to as 'Meta's Non-Ads Services'), including, but not limited to, its Online Social Network ('OSN') CPSs Facebook and Instagram; its Number-Independent Interpersonal Communication Services ('NIICS') CPS Messenger, its online intermediation service ('OIS') CPS Marketplace, and its distinct services Dating and Gaming Play, as well as their personal data obtained from third parties, on one hand, with data in Meta's online advertising service ('OAS') CPS Meta Ads, on the other, for the purpose of personalised advertising, or to pay Meta a monthly subscription fee to access Meta's Non-Ads Services without personalised advertising.

- (4) For the past two decades, Meta has collected and combined vast amounts of personal data of end users (user engagement data) through its online social networking platforms, as well as across third party services. This has enabled Meta to offer highly targeted advertisements and to build one of the most sophisticated and profitable advertising models. Today, Meta generates almost the entirety of its revenues from its advertising service.<sup>4</sup>
- (5) This extensive collection and processing of end users' personal data, in ways that end users were often unaware of or could not fully understand, together with an ever-growing user base, has brought a significant advantage to Meta in terms of accumulating personal data and profiling its end users, as compared to other market operators which do not have access to such vast amounts of personal data. Meta has thus become an indispensable gateway for advertisers in the Union to reach their targeted audience.
- (6) To mitigate the impact of the data-driven advantages enjoyed by gatekeepers, Article 5(2), of Regulation (EU) 2022/1925 gives end users the right to withhold their consent to the processing, combination, or cross-use of their personal data, in particular for the purpose of personalised advertising and obliges gatekeepers to provide those end users with the specific choice of a less personalised but equivalent alternative in the absence of such consent.
- (7) For the reasons set out in this Decision, the Commission finds that Meta's 'Consent or Pay' advertising model is not compliant with that provision. By offering end users the binary options of either consenting to a complete personal data combination for personalised advertising purposes or paying a monthly subscription fee for not being shown advertisements at all, Meta does not present its end users with the specific choice of a less personalised but equivalent alternative to the version of these services with personalised advertising and does not enable end users to provide valid consent, as required by Article 5(2), first subparagraph, of Regulation (EU) 2022/1925.
- (8) This Decision is structured as follows:
  - Section 2 summarises the administrative procedure relating to this case;

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<sup>4</sup> Meta's ads offering currently accounts for approximately 97.5% of its annual global revenues. See Meta's Form GD, paragraph 9, [...].

- Section 3 sets out the legal framework for assessing Meta’s compliance with Article 5(2) of Regulation (EU) 2022/1925 in relation to its ‘Consent or Pay’ advertising model and assesses Meta’s arguments in that respect;
- Section 4 describes Meta’s ‘Consent or Pay’ advertising model for assessing compliance with Article 5(2) of Regulation (EU) 2022/1925;
- Section 5 finds that Meta has not complied with Article 5(2) of Regulation (EU) 2022/1925 in relation to the ‘Consent or Pay’ advertising model;
- Section 6 addresses and rebuts Meta’s allegations of procedural shortcomings;
- Section 7 concludes on the duration of the infringement of Article 5(2) of Regulation (EU) 2022/1925;
- Section 8 identifies the addressees of this Decision;
- Section 9 sets out the amount of the fine imposed on Meta;
- Section 10 sets out the order addressed to Meta to cease and desist from not complying with Article 5(2) of Regulation (EU) 2022/1925 in relation to the ‘Consent or Pay’ advertising model; and
- Section 11 sets out the amount of periodic penalty payments imposed on Meta to comply with the cease and desist order.

## 2. PROCEDURE

- (9) The Designation Decision lists the following CPSs provided by Meta which individually constitute an important gateway for business users to reach end users: (i) the OSN CPS Facebook; (ii) the OSN CPS Instagram; (iii) the OAS CPS Meta Ads; (iv) the NIICS CPS WhatsApp; (v) the NIICS CPS Messenger; and (vi) the OIS CPS Marketplace. Gaming Play and Dating, while not listed in the Designation Decision as important gateways for business users to reach end users, were identified in that decision as ‘other services’ provided by Meta which are distinct from the OSN CPS Facebook. From the date of its designation as a gatekeeper, Meta had six months to comply with the obligations of Regulation (EU) 2022/1925 in relation to the CPSs listed in the Designation Decision.
- (10) On 7 September 2023, Meta presented, during a meeting with the Commission services, its plan to introduce a ‘Subscription for No Ads’ (‘SNA’)<sup>5</sup> (*i.e.*, the ‘Pay’ aspect of its ‘Consent or Pay’ advertising model) to its end users as a measure to comply with Article 5(2) of Regulation (EU) 2022/1925. On 30 October 2023, Meta announced on its website that it would be offering end users of Facebook or Instagram who reside in the EU, European Economic Area (‘EEA’), and Switzerland (the ‘European Region’)<sup>6</sup> the choice to continue using these services for free with personalised advertisements (the ‘With Ads option’) or against a subscription fee (€9.99/month on the web or €12.99/month on iOS and Android) without

<sup>5</sup> During this meeting Meta presented a slide deck titled ‘Introduction to Subscription for No Ads’ describing this plan [...]. On 12 September 2023, Meta also submitted the materials that it had provided to the Irish Data Protection Commission on the proposed subscription solution (as submitted on 8 September 2023) [...].

<sup>6</sup> The European region also includes a limited number of additional European countries and territories. See Meta’s Compliance Report of 6 March 2024, paragraph 62 [...].

advertisements (the ‘SNA option’),<sup>7</sup> and rolled these options out between 3 and 10 November 2023.<sup>8</sup> On 23 November 2023, the Commission sent Meta a request for information (‘RFI’) about that option. Meta replied to the RFI of 23 November 2023 in three different instalments, namely on 13 December 2023,<sup>9</sup> 21 December 2023,<sup>10</sup> and on 19 January 2024.<sup>11</sup>

- (11) On 19 January 2024, 13 June 2024, 21 June 2024, 28 June 2024, 28 August 2024, 25 October 2024, 21 January 2025, and 19 March 2025, the Commission discussed Meta’s SNA option with Ireland’s Data Protection Commission (‘IE DPC’), which is the competent lead supervisory authority for Meta’s processing operations in the Union pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council (General Data Protection Regulation or ‘GDPR’).<sup>12</sup> The Commission has continued to cooperate closely with the IE DPC in the context of the present investigation. This Decision is without prejudice to any pending investigation with respect to Regulation (EU) 2016/679.
- (12) On 5 February 2024, 30 April 2024, 22 May 2024, and 20 September 2024, 18 November 2024, and 7 March 2025<sup>13</sup> Meta’s ‘Consent or Pay’ advertising model was discussed within the High-Level Group for the Digital Markets Act<sup>14</sup> and its data related obligations sub-group.<sup>15</sup>
- (13) Pursuant to Article 3(10) of Regulation (EU) 2022/1925, Meta has to comply, since 7 March 2024, with the obligations laid down in Regulation (EU) 2022/1925, in particular Article 5(2), in relation to the CPSs and distinct services listed in the Designation Decision. On 6 March 2024, Meta submitted to the Commission a compliance report pursuant to Article 11(1) of Regulation (EU) 2022/1925 (the ‘Compliance Report’)<sup>16</sup> describing the measures it has implemented to ensure compliance with its obligations, which included the ‘Consent or Pay’ advertising model. The Commission has analysed that Compliance Report to determine whether

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<sup>7</sup> In this Decision, the Commission will use the term ‘SNA option’ to refer to the SNA solution as this was the precise term used by Meta to describe that solution in Meta’s Compliance Report of 6 March 2024, [...].

<sup>8</sup> Meta’s press release available at <https://about.fb.com/news/2024/11/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/>, last accessed on 31 March 2025 [...].

<sup>9</sup> Meta’s reply to questions 1, 5 and 12, 13 and 14 of the RFI of 23 November 2023 (Tranche 1), [...].

<sup>10</sup> Meta’s reply to questions 3a., 3c., 4, 6 to 11, 15a. and b., and 16 to 23 to the RFI of 23 November 2023 (Tranche 2), [...].

<sup>11</sup> Meta’s reply to questions 2a. to c., 3b., 4 and 7 to the RFI of 23 November 2023 (Tranche 3), [...].

<sup>12</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, pp. 1–88, ELI: <http://data.europa.eu/eli/reg/2016/679/oj>).

<sup>13</sup> The relevant minutes are publicly available at public at the following webpage: Register of Commission expert groups and other similar entities (available at <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=3904>).

<sup>14</sup> Commission Decision of 23 March 2023 on setting up the High-Level Group for the Digital Markets Act, C(2023) 1833 final.

<sup>15</sup> The ‘Digital Markets Act data related obligations sub-group’ was established by the Commission after the consultation of the members of the High-Level Group for the Digital Markets Act with the adoption of the respective Terms of Reference on 2 February 2024. This sub-group provides the forum to ensure coherence and effective complementarity in the implementation of the obligations pursuant to Articles 5(2), 6(9), 6(10), and 6(11), of Regulation (EU) 2022/1925 and of other sectoral legislation applicable to designated gatekeepers, including the requirements resulting from Regulation (EU) 2016/679.

<sup>16</sup> Meta’s Compliance Report Pursuant to Article 8(1) and Article 11 of Regulation (EU) 2022/1925, 6 March 2024 [...].



the measures implemented by Meta, including its ‘Consent or Pay’ advertising model, ensure compliance, as from 7 March 2024, with the obligations laid down in Article 5(2) of Regulation (EU) 2022/1925. In addition, on 19 March 2024, the Commission held a public workshop with interested stakeholders to receive their views on the Compliance Report.

- (14) On 25 March 2024, the Commission adopted a decision opening proceedings pursuant to Article 20(1) of Regulation (EU) 2022/1925 in relation to Meta’s ‘Consent or Pay’ advertising model (the ‘Opening Decision’), with a view to the possible adoption of a decision pursuant to Articles 29, 30 and 31 of that Regulation. During the investigation following the adoption of the Opening Decision, the Commission analysed in particular whether Meta’s ‘Consent or Pay’ advertising model, and the resulting data flows between the OAS CPS Meta Ads and Meta’s Non-Ads Services, comply with the obligations laid down in Article 5(2) of Regulation (EU) 2022/1925.
- (15) On 16 April 2024, the Commission held a virtual state of play meeting with Meta to discuss the opening of the investigation on Meta’s ‘Consent or Pay’ advertising model. On 22 April 2024,<sup>17</sup> the Commission sent Meta a RFI, followed by further RFIs on 22 May 2024<sup>18</sup> and 9 December 2024.<sup>19</sup> On 13 February 2025, the Commission sent Meta a final RFI. On 1 May 2024, Meta responded to the RFI of 22 April 2024<sup>20</sup> and, on 3 June 2024, Meta responded to the RFI of 22 May 2024.<sup>21</sup> On 7 January and 13 January 2025, Meta responded to the RFI of 9 December 2024.<sup>22</sup> On 28 February and 7 March 2025, Meta responded to the RFI of 13 February 2025.<sup>23</sup>
- (16) Between November 2023 and January 2025, several consumer associations, including the European consumer organisation BEUC and the Federation of German Consumer Organisations VZBV, a non-profit civil rights organisation, a privacy-focused consulting firm, as well as other interested third parties such as Alliance Digitale and IAB Europe, engaged with the Commission and presented their assessment orally during meetings or in written submissions on Meta’s ‘Consent or Pay’ advertising model and on related aspects, including the European Data Protection Board’s (‘EDPB’) Opinion 08/2024 on ‘Valid Consent in the Context of ‘Consent or Pay’ Models Implemented by Large Online Platforms’ (the ‘Opinion 08/2024’), Meta’s changes to the ‘Consent or Pay’ advertising model and the compliance of Meta with Regulation (EU) 2022/1925, Regulation (EU) 2016/679 and Directive 2005/29/EC.<sup>24</sup>

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<sup>17</sup> RFI PO1, 22 April 2024 [...].

<sup>18</sup> RFI PO2, 22 May 2024 [...].

<sup>19</sup> RFI PO3, 9 December 2024 [...].

<sup>20</sup> Meta’s reply to the RFI of 22 April 2024, [...].

<sup>21</sup> Meta’s reply to the RFI of 22 May 2024, [...].

<sup>22</sup> Meta’s reply to the RFI of 9 December 2024 tranche 1, [...] and Meta’s reply to the RFI of 9 December 2024 tranche 2, [...] respectively.

<sup>23</sup> Meta’s reply to the RFI of 13 February 2025 tranche 1, [...] and Meta’s reply to the RFI of 13 February 2025 tranche 2, [...] respectively.

<sup>24</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair

- (17) On 1 July 2024, the Commission communicated to Meta its preliminary findings pursuant to Article 29(3) and 34(1) of Regulation (EU) 2022/1925 (the ‘Preliminary Findings’). In the Preliminary Findings the Commission informed Meta of its preliminary conclusion that Meta’s ‘Consent or Pay’ advertising model does not comply with the requirements laid down in Article 5(2) of Regulation (EU) 2022/1925 regarding the personal data flows between Meta’s Non-Ads Services and the OAS CPS Meta Ads. According to the Commission’s preliminary view, Meta’s ‘Consent or Pay’ advertising model: (i) does not present end users of Meta’s Non-Ads Services with the specific choice of a less personalised but equivalent alternative to the advertising-based service it offers where those end users consent to the combination of their personal data from Meta’s Non-Ads Services in and with data from the OAS CPS Meta Ads, and (ii) its configuration does not enable end users to freely consent to such combination of personal data within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679.<sup>25</sup>
- (18) On the same day, Meta’s external legal advisors requested access to the Commission’s file pursuant to Article 34(4) of Regulation (EU) 2022/1925 and Article 8 of Commission Implementing Regulation (EU) 2023/814.<sup>26</sup> In particular, Meta’s external legal advisors requested, on behalf of Meta, access to the non-confidential version of the documents referenced in the Preliminary Findings in accordance with Article 8(2) of Implementing Regulation (EU) 2023/814, as well as full access to all documents contained in the Commission’s file without redactions in accordance with Article 8(3) of Implementing Regulation (EU) 2023/814.
- (19) On 2 July 2024, the Commission provided Meta (and Meta’s external legal advisors) with non-confidential versions of all documents referenced and relied upon in the Preliminary Findings, pursuant to Article 8(2) of Implementing Regulation (EU) 2023/814, with the exception (under Article 8(4) of Implementing Regulation (EU) 2023/814) of the minutes of meetings between the IE DPC and the Commission, held on 19 January 2024, 13 June 2024, 21 June 2024 and 28 June 2024.
- (20) In application of Article 8(3) of Implementing Regulation (EU) 2023/814, Meta’s external legal advisors were granted access to the Commission’s file at the Commission’s premises via a data room between 3 July 2024 and 9 July 2024 pursuant to the Terms of Disclosure laid down in a Commission decision of 25 June 2024 (the ‘Data Room Decision’).<sup>27</sup> Pursuant to the Data Room Decision, Meta’s external legal advisors were granted access to all documents in the case file with the exception (under Article 8(4) of Implementing Regulation (EU) 2023/814) of the minutes of meetings mentioned in recital (19) of this Decision.<sup>28</sup>

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Commercial Practices Directive’) (OJ L 149, 11.6.2005, pp. 22–39., ELI: <http://data.europa.eu/eli/dir/2005/29/oj>).

<sup>25</sup> Commission’s Preliminary Findings, 1 July 2024, recital (111), [...].

<sup>26</sup> Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council (OJ L 102, 17.4.2023, p. 6, ELI: [http://data.europa.eu/eli/reg\\_impl/2023/814/oj](http://data.europa.eu/eli/reg_impl/2023/814/oj)).

<sup>27</sup> C(2024) 4780 final. The Data Room Decision, together with its Annexes, sets out the Terms of Disclosure under which access to the file in case DMA.100055 was provided to Meta’s specified external advisers pursuant to Article 8(3) and (4) of the Implementing Regulation.

<sup>28</sup> For the avoidance of doubt, as indicated in recital (11) of this Decision the Commission has also had meetings with the IE DPC on 28 August 2024, 25 October 2024, 21 January 2025, and 19 March 2025.

- (21) On 8 July 2024, Meta sent a letter to the Commission under Article 8(5) of Implementing Regulation (EU) 2023/814 relating to the access to file that Meta had been granted. In that letter, Meta raised a number of concerns related to access to file as provided in the Terms of Disclosure of the Data Room Decision which allegedly compromised Meta's rights of defence and made additional requests which are described further in Section 6 of this Decision.
- (22) On 10 July 2024, the Commission contacted Meta's external legal advisors regarding adjustments to be made to their draft data room report, as it contained extensive direct quotes in breach of the Terms of Disclosure of the Data Room Decision. On 11 July 2024, the data room report was finalised and could be shared with Meta.
- (23) On 17 July 2024, the Commission replied to Meta's letter of 8 July 2024, responding to Meta's claims concerning the alleged breach of rights of defence in relation to access to file and rejecting some of Meta's additional requests,<sup>29</sup> as further discussed in Section 6 of this Decision.<sup>30</sup> This prompted Meta to address a second letter to the Commission on 1 August 2024 on the same topic, to which the Commission replied by email on 30 August 2024 (see Section 6 of this Decision).
- (24) On 5 August 2024, Meta responded to the Preliminary Findings contesting the Commission's preliminary conclusions on non-compliance. On 7 August 2024, Meta shared with the Commission submissions which were filed with the IE DPC on 26 July 2024 in relation to the EDPB's Opinion 08/2024, namely a 'Submission to the [IE] DPC in respect of Opinion 08/2024', an 'Independent Economic Assessment on Freely Given Consent', and an 'Independent Economic Assessment on Value of Behavioural Advertising'.
- (25) Since 6 March 2024, Meta has been discussing with the Commission, the potential introduction of an alternative advertisement offering, in addition to the SNA option, as part of its overall compliance solution with Article 5(2) of Regulation (EU) 2022/1925 for its OAS CPS Meta Ads. To this end, Meta provided several presentations and spontaneous submissions to the Commission describing that alternative proposal. Such alternative proposal, in Meta's intention, [Confidential – contains business secret]. Discussions with the Commission on the alternative offer continued throughout the following 8 months, including submissions,<sup>31</sup> replies to RFIs,<sup>32</sup> and meetings.<sup>33</sup>

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However, these meetings were out of the scope of the 'access to file' procedure which took place in July 2024 as they were held, chronologically, after that time.

<sup>29</sup> The minutes of the meetings of the High-Level Working Group for the Digital Markets Act and Digital Markets Act data related obligations sub-group of 5 February 2024, 30 April 2024, and 22 May 2024 were initially also excluded from the data room on the basis of Article 1 of the Data Room Decision and they were, therefore, not uploaded in the data room. In Meta's letter of 8 July 2024, Meta requested to be provided with such minutes. The Commission indicated in its letter of 17 July 2024 that these minutes were published without redactions in the Commission's Expert Group Register and are therefore fully accessible online for Meta and its specified external advisers (Section 6 of this Decision).

<sup>30</sup> Commission's reply to Meta's request of 8 July 2024 under Article 8(5) of the Implementing Regulation (EU) 2023/814 relating to the access of file that Meta has been granted in Case DMA.100055, C(2024)5241 final.

<sup>31</sup> On 4 March 2024, Meta submitted a 'Briefing Paper: Proposal for a less personalised Ads offering', [...] which '[Confidential – contains business secret]', noting that a '[Confidential – contains business secret]'. On 14 May 2024, Meta submitted a slide deck [Confidential – contains business secret], [...]. On 5 June 2024, Meta submitted a 'Briefing Paper on its "Less Personalised Ads" Proposal', [...]. On 10 June 2024 Meta submitted a 'Note on why Meta's Less Personalised Ads Proposal satisfies the

- (26) After a substantial evolution of the model, [Confidential – contains business secret], on 12 November 2024, Meta announced the rollout of an additional option (the ‘Additional Ads option’) for its end users in the European Region in relation to the display of advertisements on Meta’s Non-Ads Services. Meta claims that this Additional Ads option includes display of advertising on those services, but that it uses less personal data for such purpose. The Additional Ads option also introduces ‘ad breaks’ (*i.e.*, the display of unskippable advertisements). This Additional Ads option would be offered in addition to the With Ads option (with personalised advertising) and the SNA option. Meta also announced that it would lower the price of the SNA option from €9.99 to €5.99/month on the web, or from €12.99 to €7.99/month on iOS and Android.
- (27) This Decision does not assess Meta’s Additional Ads option and its impact on Meta’s compliance with the obligations laid down in Article 5(2), first subparagraph, of Regulation (EU) 2022/1925. This Decision’s finding that Meta has not complied with the obligations laid down in Article 5(2) of Regulation (EU) 2022/1925 only concerns its ‘Consent or Pay’ advertising model for the time period during which that model, as described in Section 4.2 of this Decision, applied. This limitation of the scope of this Decision is without prejudice to the Commission’s ability to investigate Meta’s Additional Ads option or any further changes to its advertisement offering, and to assess their compliance with Regulation (EU) 2022/1925 at a later stage.
- (28) On 6 March 2025, Meta submitted to the Commission their annual compliance report pursuant to Article 11(1) of Regulation (EU) 2022/1925 (the ‘2025 Compliance Report’). In this report Meta refers to the provision of the Additional Ads option following the Commission’s feedback, while maintaining that the ‘Consent or Pay’ advertising model is fully compliant with Regulation (EU) 2022/1925.<sup>34</sup>

### **3. LEGAL FRAMEWORK FOR THE ASSESSMENT OF COMPLIANCE WITH ARTICLE 5(2) OF REGULATION (EU) 2022/1925**

#### **3.1. Key legal principles**

- (29) Pursuant to Article 5(2), first subparagraph, point (a), of Regulation (EU) 2022/1925, gatekeepers may not process, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of the CPSs of the gatekeepers. This means that, in practice, gatekeepers are not allowed to process personal data of end users using third party services that rely on

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requirements of GDPR and the guidance set out in the EDPB Opinion’, [...]. On 29 August 2024, Meta proposed further changes/concessions to their ‘Less personalised ads’ proposal [...]. On 3 October 2024 Meta submitted an additional briefing paper on Meta’s revised Less Personalized Ads Proposal [...], [Confidential – contains business secret]. On the 29 October 2024 the Commission responded with written questions [...], and on 15 November 2024, Meta submitted a ‘[Confidential – contains business secret]’, [...].

<sup>32</sup> On 9 December 2024 and 13 February 2025, the Commission sent Meta RFIs in relation to the functioning and the roll-out of the Additional Ads option, [...].

<sup>33</sup> On 26 March, 26 April, 8 May and 21 May 2024, the Commission held four meetings with Meta to discuss Meta’s alternative proposal. On 19 June 2024, 5 September 2024, and 5 February 2025, the Commission held three other state of play meetings with Meta to provide feedback to the different proposed versions of that alternative.

<sup>34</sup> Meta’s Compliance Report Pursuant to Article 8(1) and Article 11 of Regulation (EU) 2022/1925, 6 March 2025, paragraph 139 [...].

the gatekeepers' OAS CPS to serve advertisements on the gatekeepers' own services or on other third parties' services.

- (30) Pursuant to Article 5(2), first subparagraph, point (b), of Regulation (EU) 2022/1925, a gatekeeper is prohibited from combining the personal data of end users from one of its CPSs with the personal data of those end users from its other CPSs or distinct services, or with personal data of the same end users from third party services. In contrast to Article 5(2), first subparagraph, point (a), of Regulation (EU) 2022/1925, Article 5(2), first subparagraph, point (b), of that Regulation does not specify any specific purpose for such combination. Therefore, Article 5(2), first subparagraph, point (b), of that Regulation applies in relation to any purpose for which the data is used, including for the purpose of serving personalised advertising to those end users.
- (31) Article 5(2), first subparagraph, point (c), of Regulation (EU) 2022/1925, read in conjunction with recital 36 of that Regulation, prohibits a gatekeeper from cross-using the personal data of end users from a relevant CPS in the gatekeeper's other services, including CPSs, and vice versa, where those services/CPSs are '*not provided together with, or in support of*' the relevant CPS.<sup>35</sup> This provision also does not specify any specific purpose for such cross-use and thus it applies regardless of the purpose, including for the purpose of serving personalised advertising to end users.
- (32) Article 5(2), first subparagraph, points (a), (b), and (c), of Regulation (EU) 2022/1925 on processing, combining, or cross-using personal data seeks to address gatekeepers' enhanced access to personal data of end users, which provides gatekeepers with potential advantages in terms of accumulation of data, thereby raising barriers to entry and hindering contestability in digital markets.<sup>36</sup>
- (33) The prohibitions laid down in Articles 5(2), first subparagraph, points (a), (b), and (c), of Regulation (EU) 2022/1925 do not apply, pursuant to Article 5(2) first subparagraph, of that Regulation, where two cumulative conditions are satisfied. First, the gatekeeper has presented the end users with the specific choice to process, combine, or cross-use their personal data within the meaning of points (a), (b), and (c), of that provision, respectively, across its CPSs and distinct services. Second, the end user has given his or her consent to such processing, combination, or cross-use.
- (34) As regards the first condition (*i.e.*, 'specific choice'), since Regulation (EU) 2022/1925 does not provide a definition of 'specific choice'<sup>37</sup>, that notion is to be interpreted in accordance with its usual meaning in everyday language, while also taking into account the context in which that notion occurs, the objectives pursued by the legislation of which it forms a part, and the origins of that notion.<sup>38</sup>
- (35) The dictionary definition of 'choice' traditionally refers to the act of choosing and presupposes options from which a choice can be made. Article 5(2) of Regulation

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<sup>35</sup> Therefore, Article 5(2), point (c), in conjunction with recital 36 of Regulation (EU) 2022/1925 implies that it is possible for a gatekeeper to cross-use the personal data of end users without their consent when the data is cross-used between services/CPSs provided together with, or in support of each other.

<sup>36</sup> Recital 36 of Regulation (EU) 2022/1925.

<sup>37</sup> Neither Regulation (EU) 2022/1925, nor other Union legislation define the notion of 'specific choice' referred to in Article 5(2), first subparagraph, of that Regulation.

<sup>38</sup> See Judgement of 9 July 2020, *Constantin Film Verleih*, C-264/19, EU:C:2020:542, paragraph 29 and the case-law cited.

(EU) 2022/1925 qualifies the choice that end users must be given as ‘specific’, which is generally understood to mean ‘particular, clear and exact’. The term ‘specific choice’ under Article 5(2) of Regulation (EU) 2022/1925 thus presupposes that the user can choose between two or more specific options. Article 5(2) of that Regulation, however, does not expressly indicate what the object of that ‘specific choice’ must be. It is therefore necessary to consider the purpose and the context of that provision.

- (36) The Commission observes, in this regard, that Regulation (EU) 2022/1925 aims at ensuring contestable and fair markets in the digital sector to the benefit of businesses and end users.<sup>39</sup> The legislature’s intention in formulating Article 5(2) of Regulation (EU) 2022/1925 is clarified specifically in recitals 36 and 37 of that Regulation. Those recitals expressly underscore the correlation between the accumulation of personal data and the erosion of market contestability.<sup>40</sup> Recital 36 of Regulation (EU) 2022/1925 explains that the gatekeeper ‘*should enable end users to freely choose to opt-in to such data processing [...] by offering a less personalised but equivalent alternative, and without making the use of the core platform service or certain functionalities thereof conditional upon the end user’s consent*’.
- (37) Recital 37 of Regulation (EU) 2022/1925 further clarifies that the ‘less personalised alternative should not be different or of degraded quality compared to the service provided to the end users who provide consent, unless a degradation of quality is a direct consequence of the gatekeeper not being able to process such personal data or signing in end users to a service’. That implies that the less personalised service, to be offered as an alternative to the service provided to users who grant consent, should not itself involve personal data use that would require consent pursuant to Article 5(2) of Regulation (EU) 2022/1925. Moreover, after recalling the requirements for valid consent under Regulation (EU) 2016/679, recital 37 of Regulation (EU) 2022/1925 states that ‘*[a]t the time of giving consent, and only where applicable, the end user should be informed that not giving consent can lead to a less personalised offer, but that otherwise the core platform service will remain unchanged and that no functionalities will be suppressed*’.

<sup>39</sup> Article 1(1) of Regulation (EU) 2022/1925; see also recitals 3, 4, 7, 8, 32, 33 and 34 of that Regulation. The market failures related to contestability and fairness which the legislator wanted to address by enacting the Regulation (EU) 2022/1925 consist *inter alia* in decreases in end users’ choice, being the result of, in particular, nearly zero marginal costs for the gatekeepers, very strong network effects, a significant degree of dependence of users towards the gatekeepers, lock-in effects, a lack of multi-homing, vertical integration, data-driven advantages for the gatekeepers, and the unfair nature of certain practices by the gatekeepers (recital 2 of Regulation (EU) 2022/1925).

<sup>40</sup> Recital 36 of Regulation (EU) 2022/1925: ‘*Gatekeepers often directly collect personal data of end users for the purpose of providing online advertising services when end users use third party websites and software applications. Third parties also provide gatekeepers with personal data of their end users in order to make use of certain services provided by the gatekeepers in the context of their core platform services, such as custom audiences. The processing, for the purpose of providing online advertising services, of personal data from third parties using core platform services gives gatekeepers potential advantages in terms of accumulation of data, thereby raising barriers to entry. This is because gatekeepers process personal data from a significantly larger number of third parties than other undertakings. Similar advantages result from the conduct of (i) combining end user personal data collected from a core platform service with data collected from other services; (ii) cross-using personal data from a core platform service in other services provided separately by the gatekeeper, notably services which are not provided together with, or in support of, the relevant core platform service, and vice versa; or (iii) signing-in end users to different services of gatekeepers in order to combine personal data. [...]*’.

- (38) As regards the second condition (*i.e.*, ‘consent’), Article 5(2) of Regulation (EU) 2022/1925 refers to Article 4, point (11), and Article 7 of Regulation (EU) 2016/679 to define the consent that the end user must give for the gatekeeper to process, combine, or cross-use his or her personal data within the meaning of Article 5(2), first subparagraph, points (a), (b), and (c), of Regulation (EU) 2022/1925, across the gatekeeper’s CPSs and distinct services.
- (39) Therefore, in contrast to the notion of ‘specific choice’ which is an independent notion under Regulation (EU) 2022/1925, the notion of ‘consent’ is further specified by reference to Article 4, point (11), and Article 7 of Regulation (EU) 2016/679.
- (40) Article 4, point (11), of Regulation (EU) 2016/679 defines ‘consent’ as ‘any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her’.
- (41) Article 7 of Regulation (EU) 2016/679 sets the conditions for consent to be valid. It provides that:
- 1. Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.*
  - 2. If the data subject’s consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.*
  - 3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.*
  - 4. When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.’*
- (42) In that regard, recital 32 of Regulation (EU) 2016/679 clarifies that ‘[c]onsent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, consent should be given for all of them.’ Furthermore, recital 42 of Regulation (EU) 2016/679 explains that ‘for consent to be informed, the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended. Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.’ Finally, recital 43 of Regulation (EU) 2016/679 explains that ‘[c]onsent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case, or if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance’.

### 3.2. Meta's arguments

- (43) In its response to the Commission's Preliminary Findings, Meta, in substance, questions the legal framework upon which the Commission relied in its Preliminary Findings to assess Meta's compliance with Article 5(2) of Regulation (EU) 2022/1925. Meta's overarching claim on the legal framework in this regard questions the presence of two distinct conditions of 'specific choice' and 'valid consent' in the first subparagraph of that provision. In substance, Meta supports this claim in the following manner.
- (44) **First**, Meta claims that the Commission's reliance on the condition of a 'specific choice' is not supported by the legislative history nor the *travaux préparatoires* of Regulation (EU) 2022/1925.<sup>41</sup> Meta holds that the intent of the legislature was to build upon the existing legislative framework of Regulation (EU) 2016/679, whereby the mention of a 'specific choice' in the text of Article 5(2) of Regulation (EU) 2022/1925 does not imply a separate condition of 'specific choice', separate from the condition of 'consent' as per Regulation (EU) 2016/679, but rather a link to '*the broader assessment of whether users are able to freely consent to data processing in line with the GDPR.*'<sup>42</sup>
- (45) **Second**, Meta claims that the Commission relies on '*a new and unfounded concept of 'specific choice'.*'<sup>43</sup> Meta claims that Article 5(2) of Regulation (EU) 2022/1925 does not contain a standalone condition of 'specific choice' but rather only one condition of 'consent' within the meaning of Regulation (EU) 2016/679. Meta holds that the reference to 'specific choice' in the wording of Article 5(2) of Regulation (EU) 2022/1925 refers to the condition of 'specific' consent, which is necessary for the consent to be valid under Regulation (EU) 2016/679.<sup>44</sup>
- (46) In support of this claim, Meta argues that recitals 36 and 37 of Regulation (EU) 2022/1925 concern, and reiterate, the standard of 'consent' as per Regulation (EU) 2016/679, and do not imply that 'specific choice' is a distinct notion of Regulation (EU) 2022/1925.
- (47) **Third**, Meta claims that the obligations set out in Article 5 of Regulation (EU) 2022/1925 are intended to be clear, and the conditions for compliance therewith should also be clear, without the need for further regulatory dialogue. In support of this claim, Meta notes the exclusion of Article 5 of Regulation (EU) 2022/1925 from the regulatory engagement process of Article 8(3) of that Regulation, as well as the exclusion of Article 5 of Regulation (EU) 2022/1925 from the specification procedure set out in Article 8(2) of that Regulation.<sup>45</sup>

### 3.3. The Commission's assessment of Meta's position

- (48) The Commission considers that Meta's arguments described in Section 3.2 of this Decision are not capable of putting into question the key legal principles described in Section 3.1 of this Decision.
- (49) **First**, the legislative history, as well as the *travaux préparatoires*, of Regulation (EU) 2022/1925 do not support Meta's claim that, despite the explicit mention of the

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<sup>41</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraph 58 [...].

<sup>42</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraph 60 [...].

<sup>43</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraph 59 [...].

<sup>44</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraph 51 [...].

<sup>45</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraph 28, [...].



notion of ‘specific choice’ in Article 5(2) of that Regulation, that provision should be read as containing a single condition of ‘consent’.

- (50) In fact, during the legislative negotiations of Regulation (EU) 2022/1925, the text of Article 5(2), first subparagraph, of that Regulation was altered from ‘*unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679*’ in the Commission’s proposal to ‘*unless the end user has been presented with the specific choice and **has given** consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679*’ in the final version of Regulation (EU) 2022/1925.<sup>46</sup>
- (51) The Commission holds that this amendment to its proposal demonstrates that the ‘specific choice’ condition and the ‘valid consent’ condition are two separate conditions of Article 5(2), first subparagraph, of Regulation (EU) 2022/1925. This is apparent from the retention of the two distinct verbs – ‘*to be presented with*’ and ‘*to give*’ – each pertaining to one of the two conditions of that provision: the end user must *have been presented with* a specific choice and the end user must *have given* consent.
- (52) In any case, the wording of the final version of Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 clearly identifies two separate conditions that must be fulfilled in order for the prohibition not to apply. The Commission therefore does not concur with Meta’s argumentation based on the legislative history. The textual interpretation of that provision clearly supports the Commission’s interpretation.
- (53) **Second**, contrary to Meta’s claims, the need for a ‘specific choice’ as a distinct condition under Article 5(2) of Regulation (EU) 2022/1925, and as additional to, the condition of valid consent under Regulation (EU) 2016/679 follows from the context in which that notion occurs and the objectives pursued by the legislation of which it forms a part.
- (54) *In the first place*, a textual interpretation of Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 as containing two cumulative conditions is in line with the objective of that Regulation. When considering the intention of the Union legislature, as reflected in the objective of Regulation (EU) 2022/1925 to ensure contestability and fairness in digital markets, that Regulation imposes conditions on large market players – gatekeepers – which go beyond the conditions that other market players face. Accordingly, gatekeepers have to comply with obligations which do not apply to other market players, such as the obligations laid down in Article 5(2) of Regulation (EU) 2022/1925.<sup>47</sup>
- (55) As such, the presence of two distinct conditions in Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 aligns with the intent of the legislature to set higher thresholds on gatekeepers, as a means of fostering fairness and contestability in digital markets, which go beyond the established norms to which all market players must adhere. For instance, controllers with no gatekeeper status retain the possibility to assess and select the most appropriate lawful ground for their processing operations under Article 6 of Regulation (EU) 2016/679 (which could be consent or another lawful ground, depending on the specific circumstances of the processing),

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<sup>46</sup> Emphasis added.

<sup>47</sup> Recital 11 of Regulation (EU) 2022/1925 notes that the objective of that Regulation is ‘*to ensure that markets where gatekeepers are present are and remain contestable and fair*’.

while gatekeepers do not have such possibility under Article 5(2) of Regulation (EU) 2022/1925, but are required to present end users who do not consent with the specific choice of an equivalent alternative that does not use the end users' personal data in a manner that is covered by that provision. As such, gatekeepers are prohibited from processing, combining, or cross-using end user personal data, within the meaning of Article 5(2), first subparagraph, points (a), (b), and (c), of Regulation (EU) 2022/1925, unless that end user is provided with the specific choice of a less personalised alternative and that end user has given valid consent for that data processing.

- (56) *In the second place*, recital 36 and recital 37 of Regulation (EU) 2022/1925, clarifying the rationale of the operative provisions of that Regulation, do not merely reiterate the standard of consent under Regulation (EU) 2016/679. The mention of the notion of 'specific choice' in the text of Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 necessarily entails a different meaning than the notion of 'specific' consent as a requirement for consent to be valid under Regulation (EU) 2016/679. Otherwise, the Union legislature would have only required valid consent as provided by Regulation (EU) 2019/679 as a condition for the exception to the prohibitions in Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 to apply. As explained in recital (36) of this Decision, recital 36 of Regulation (EU) 2022/1925 provides further guidance by specifying that gatekeepers should enable end users *'to freely choose to opt-in [...] by offering a less personalised but equivalent alternative.'* In turn, recital 37 makes clear that Regulation (EU) 2022/1925 should remain without prejudice to Regulation (EU) 2016/679, further clarifying that Article 5(2), first subparagraph, of Regulation (EU) 2022/1925, together with recital 36 and recital 37, go beyond the mere reiteration of the standard of consent under Regulation (EU) 2016/679. As such, the Commission considers that recital 36 and recital 37 of Regulation (EU) 2022/1925 are not a mere reiteration of Regulation (EU) 2016/679, as claimed by Meta, but rather a further contextualisation of, and guidance on, the interpretation of the plain text of Article 5(2) of Regulation (EU) 2022/1925.
- (57) *In the third place*, the presence of 'specific choice' is a distinct condition under Article 5(2) first subparagraph, of Regulation (EU) 2022/1925, since any other reading of that provision such that it would merely refer to a criterion of the 'consent' condition, as argued by Meta, would go against recital 37 of Regulation (EU) 2022/1925, which states that Regulation (EU) 2022/1925 shall be *'without prejudice to Regulation (EU) 2016/679, including its enforcement framework.'*
- (58) Indeed, if Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 were to be interpreted as setting out only one condition, *i.e.*, that of consent, as argued by Meta, that provision would, when requiring a 'specific choice', unjustifiably single out the criterion of 'specific' from all other criteria required to obtain consent. Given that, for consent to be valid under Regulation (EU) 2016/679, multiple criteria, as noted in recitals (40)-(42) of this Decision, must be met ('specific' being only one of them), singling out just one criterion would go against the enforcement framework of Regulation (EU) 2016/679. Contrary to the proper interpretation of Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 as containing two separate conditions for the exception to the prohibitions to apply, Meta's interpretation would go against the Union legislature's intent to prevent any prejudice to Regulation (EU) 2016/679.
- (59) *In the fourth place*, the Commission considers that the presence of 'specific choice' is a distinct condition under Article 5(2), first subparagraph, of Regulation (EU)

2022/1925, since that provision, read in conjunction with recital 36 of that Regulation, makes clear that ‘specific choice’ and ‘valid consent’ are centred around a real choice and purpose limitation respectively, the former being a notion from Regulation (EU) 2022/1925 and the latter a notion from Regulation (EU) 2016/679.

- (60) In this respect, the Commission draws attention to the difference of a ‘specific choice’ presented to the end user as provided by Regulation (EU) 2022/1925 and ‘specific consent’ given by the data subject as provided by Regulation (EU) 2016/679. What defines ‘specific consent’ under Regulation (EU) 2016/679 is elaborated upon in Article 6(1), point (a), of that Regulation, which notes that consent of the data subject must be given ‘to the processing of his or her personal data *for one or more specific purposes*’.<sup>48</sup> As further mentioned in the EDPB’s Guidelines 05/2020 on consent under Regulation (EU) 2016/679 (the ‘Guidelines 05/2020’), the notion of ‘specific consent’ under Regulation (EU) 2016/679 is centred around the principle of purpose limitation, together with granularity in consent requests, and a clear separation of information related to the obtaining of consent from information about other matters.<sup>49</sup>
- (61) In contrast, the notion of ‘specific choice’ in Regulation (EU) 2022/1925 is centred around obtaining a real choice. Recital 36 of Regulation (EU) 2022/1925 further specifies that gatekeepers should enable end users to ‘freely choose to opt-in’ by ‘offering a less personalised but equivalent alternative’. That is, the end user can obtain a (real) specific choice only if presented with a less personalised but equivalent alternative. In view of this, the condition of ‘specific choice’ is clearly separate from, and additional to, the condition of valid consent as provided by Regulation (EU) 2016/679.
- (62) In light of the above, the Commission considers, contrary to Meta’s claims, that the condition of a ‘specific choice’ is a distinct condition under Article 5(2), first subparagraph, of Regulation (EU) 2022/1925, which is separate from, and additional to, the condition of ‘valid consent’ under Regulation (EU) 2016/679.
- (63) **Third**, with regard to Article 5 of Regulation (EU) 2022/1925 being excluded from the scope of Article 8(2) and Article 8(3) of that Regulation, the Commission observes that Article 5(2) does not call for the Commission to specify measures to ensure compliance as per Article 8(2) of Regulation (EU) 2022/1925, nor for the optional accompanying engagement process outlined in Article 8(3) of that Regulation. The Commission maintains that the wording of Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 is clear and that the textual interpretation of that provision provides for two distinct cumulative conditions, both of which need to be met in order to allow for an exception to the prohibitions laid down in Articles 5(2), first subparagraph, points (a), (b) and (c) of that Regulation.

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<sup>48</sup> Emphasis added. See also EDPB’s Guidelines 05/2020 on consent under Regulation 2016/679. See also Judgement of 1 October 2019, *Planet49*, Case C-673/17, EU:C:2019:801, paragraph 58.

<sup>49</sup> EDPB’s Guidelines 05/2020 on consent under Regulation (EU) 2016/679, paragraphs 55-61.

#### 4. **META'S ADVERTISING-BASED MODEL RELEVANT FOR ASSESSING COMPLIANCE WITH ARTICLE 5(2) OF REGULATION (EU) 2022/1925 IN RELATION TO THE OAS CPS META ADS**

##### 4.1. **Meta's Non-Ads and Ads services**

- (64) Meta's primary **Non-Ads Services** are its OSN CPSs Facebook and Instagram. On those OSNs, Meta offers end users the possibility to post and consume personalised content (also called 'organic content').<sup>50</sup>
- (65) Meta has developed its OSN CPSs Facebook and Instagram as 'logged-in environments'. When a user registers for the Facebook or Instagram service, it is given a dedicated, unique user identifier (a 'Facebook ID' for Facebook or an 'Instagram ID' for Instagram) and all data tied to that user identifier is part of a unified user account for that environment, *i.e.*, the Facebook environment or the Instagram environment.<sup>51</sup>
- (66) Meta explains that it combines, [Confidential – contains business secret], the personal data it collects from that end user using the OSN CPS Facebook with the personal data it collects regarding that same user using various services within the Facebook environment, such as the OIS CPS Marketplace, the NIICS CPS Messenger, and the distinct services Gaming Play and Dating.<sup>52</sup> In essence, the same combination of personal data, [Confidential – contains business secret], applies to the collection of personal data from end users of the Instagram environment.
- (67) Meta also allows end users to 'link' their Facebook and Instagram accounts by adding them to the same 'Accounts Center'. Such linking does not happen by default or automatically; rather, the end user must actively 'link' his/her separate Facebook and Instagram accounts.<sup>53</sup> Linking such accounts provides users with access to certain functionalities across the Facebook and Instagram environments, including the cross-posting of content and the syncing of Facebook and Instagram profile photos, names, and avatars across both services.<sup>54</sup>
- (68) When end users link their Facebook and Instagram accounts by adding them to the same 'Accounts Center', this affects the amount of personal data available to, and used across, Meta's Facebook and Instagram environments. Furthermore, the linking of Facebook and Instagram accounts in the same 'Accounts Center' influences which advertisements are shown to end users in those respective environments.<sup>55</sup> This means, for example, that even if an end user maintains different identities on Facebook and Instagram environments respectively, Meta will still aggregate the end user's data for linked Facebook and Instagram accounts.

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<sup>50</sup> 'Organic data' [Confidential – contains business secret]; see Slide Deck '[Confidential – contains business secret]', presented during the meeting with the Commission on 26 April 2024, [...].

<sup>51</sup> Meta's Compliance Report of 6 March 2024, paragraphs 25-27 [...].

<sup>52</sup> Meta's Compliance Report of 6 March 2024, paragraphs 27-28 and 32-33 [...] and Meeting slides 'Article 5(2) technical discussion: Data combination' shared by Meta with the Commission for Meta's meeting with the Commission on 5 February 2024, slide 6 [...].

<sup>53</sup> Designation Decision, recital 55.

<sup>54</sup> Meta's Form GD, paragraph 90 [...].

<sup>55</sup> Oren Hod, 29 September 2020 (updated on November 18 2020), Meta Newsroom, 'An Easier Way to Manage Features That Work Across Our Apps', available at <https://about.fb.com/news/2020/09/privacy-matters-accounts-center/>, last accessed on 31 March 2025 [...].

- (69) The personal data profiles built by Meta may therefore combine personal data from one or more of the Non-Ads Services provided within the Facebook and Instagram environments.
- (70) Through its **Ads Service**, the OAS CPS Meta Ads, Meta displays personalised advertisements on behalf of its advertising customers that are tailored to the end user. Meta generates almost the entirety of its revenues from its OAS CPS Meta Ads.<sup>56</sup>
- (71) In order to display personalised advertisements, Meta combines all the personal data it collects from end users using Meta's Non-Ads Services with personal data it collects from end users interacting with its OAS CPS Meta Ads. Given the magnitude of the personal data collected and processed together through its various services, Meta is able to offer its advertising customers a wide range of personalised advertising. It is this data combination between Meta's Non-Ads Services with data from its OAS CPS Meta Ads that forms the subject-matter of this Decision.
- (72) When Meta presents advertisements to end users of its Facebook and Instagram environments, it only serves personalised advertisements.<sup>57</sup> The delivery of personalised advertisements consists of gathering the available advertisement inventory, which is the space available for new advertisements generated when consumers launch or refresh the Non-Ads Services, and the processing of signals<sup>58</sup> involving the following types of personal data:<sup>59</sup>
- (a) data collected by Meta from end users, across its Non-Ads Services, such as data from all user activity on the OSN CPSs Facebook and Instagram and on its other CPSs and distinct services,<sup>60</sup> including other user data such as: (i) 'Basic demographics';<sup>61</sup> (ii) 'User ad settings, preferences and interactions';<sup>62</sup> and (iii) 'Friends, followers and other connections', and through its OAS CPS Meta Ads, such as engagement with an advertisement or ad account (jointly referred to as 'first party data'); and
  - (b) data received from third parties ('third party data').<sup>63</sup> Third party data may include a user's activity on third party websites, software applications, and certain offline interactions<sup>64</sup>.<sup>65</sup>

<sup>56</sup> Meta's ads offering currently accounts for approximately 97.5% of its annual global revenues. See Meta's Form GD, paragraph 9 [...].

<sup>57</sup> Meta's reply to question 5 of RFI of 22 April 2024 [...].

<sup>58</sup> Meta's 'Audited description of consumer profiling techniques pursuant to Article 15 of Regulation (EU) 2022/1925', 6 March 2024, Section II 'Delivering advertisements', paragraph 24 [...].

<sup>59</sup> See Meta's response to question 1 of 'the Commission's DMA follow-up questions of 29 November 2022, Submission of 18 January 2023' [...].

<sup>60</sup> This includes other information about a user's engagement and interaction with Meta's services (for example groups a user has joined, or content a user has interacted with).

<sup>61</sup> This includes information provided by users upon registration to the ad-supported service such as the user's name, email address or phone number, gender and date of birth – which are required to join Meta's ad-supported services. It also includes (i) [Confidential – contains business secret] (ii) the user's inferred location, which is estimated based on a number of factors, including but not limited to the user's self-disclosed location, as well as app, browser and device information.

<sup>62</sup> This includes user-provided ads controls such as consents and topic controls, as well as information on the interactions the user has with ads such as ad clicks and impressions data, as well as additional signals such as dwell time and video ad view duration.

<sup>63</sup> Information from partners, vendors and third parties: subject to user consent, this includes websites a user visits and cookie data, apps or games a user interacts with, purchases and transactions a user makes, ads viewed or interacted with, or how a user uses Meta's partners' products and services.

- (73) Based on the available advertisement inventory and the processing of signals, Meta uses ‘Machine Learning Models’ to make predictions on the likelihood that the end user will find the advertisement relevant or engage with a particular advertisement and uses those predictions to calculate a relevancy score (also called ‘Relevance and quality component’ in Meta’s auction process described in recital (75) of this Decision) to select and then rank in a specific order which advertisement to show to the specific end user.<sup>66</sup>
- (74) In practical terms, when, for example, an end user signs up for an account on Facebook, it provides basic information, such as his or her name, email, and age. In addition, Meta also keeps track of the end user’s likes, comments, activity times, locations, and even extracts details from the images he/she uploads. ‘Like’ and ‘share’ buttons on third party websites can also serve as trackers, transmitting data on the end user’s behaviour back to Meta. All these data allow Meta to create a comprehensive profile of each user across the Non-Ads Services which constitute the ‘logged-in environment’ of Facebook or Instagram. This, allows Meta, after combination with data held by its OAS CPS Meta Ads, to offer its advertising customers options to serve advertisements that are highly personalised and therefore very effective and profitable for Meta’s advertising-based model.<sup>67</sup>
- (75) To determine the selection and ranking of advertisements displayed to end users on the Facebook and Instagram environments, Meta uses an advertising auction process as part of its OAS CPS Meta Ads. This auction process uses the first party data and third party data, as well as campaign information by advertisers, to show advertisements to users.<sup>68</sup> The auction process is triggered each time an end user is eligible to see an advertisement. Meta’s auction ranks each eligible advertisement by its ‘Total Value’ and the advertisement with the highest Total Value is meant to win the auction, resulting in its display to the end user. As described by Meta, the ‘Total Value’ is derived through a combination of three main components, namely, ‘Advertiser bid’,<sup>69</sup> ‘Estimated action rate’,<sup>70</sup> and an additional parameter which Meta calls ‘Relevance and quality component’.<sup>71</sup>

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<sup>64</sup> ‘Offline interactions’ refer to data relating to a physical event (store visit or promotional event) such as customer name, email address, phone number, timestamp and map location of user presence at event, purchases (items, value, order ids), interests, etc. See Meta’s Business Help Center, ‘Upload offline event data’, available at: <https://www.facebook.com/business/help/155437961572700?id=565900110447546>, last accessed on 31 March 2025 [...].

<sup>65</sup> Meta’s Compliance Report of 6 March 2024, paragraph 54, [...].

<sup>66</sup> Meta’s ‘Audited description of consumer profiling techniques pursuant to Article 15 of Regulation (EU) 2022/1925’, 6 March 2024, Section II. ‘Delivering advertisements’, paragraph 24 [...].

<sup>67</sup> For example, when users that indicate that they live in Spain signal by their behaviour that they like pages about gardening, this allows Meta to offer advertisers, via its OAS CPS Meta Ads, to target ads to the users of Meta’s online social networks based on such categories. Advertisers can choose among a long list of characteristics the targeted audience who should see a given ad. See Mark Zuckerberg, 24 January 2019, ‘Understanding Facebook’s Business Model’, available at: <https://about.fb.com/news/2019/01/understanding-facebooks-business-model/>, last accessed on 10 June 2024, [...].

<sup>68</sup> Meta typically uses its ad auction process to determine the selection and ranking of ads surfaced to users on Facebook and Instagram services.

<sup>69</sup> According to Meta: ‘[Confidential – contains business secret]’. See Meta’s Response to question 2 of the Commission’s DMA follow-up questions of 29 November 2022, Submission of 18 January 2023 [...].

- (76) The Commission considers that the data processing activities performed by Meta for the purpose of providing personalised advertising to the end users of its Non-Ads Services, as described in Section 4.1 of this Decision, include the data processing activities referred to in Article 5(2), first subparagraph, points (a), (b), and (c), of Regulation (EU) 2022/1925 and therefore fall within the scope of the requirements set out in Article 5(2), first subparagraph, of that Regulation. However, based on Meta's own description of its data processing activities for the purpose of personalised advertising, this Decision refers hereinafter to these data processing activities jointly as a 'combination' of personal data from Meta's Non-Ads Services with personal data from its OAS CPS Meta Ads for the purpose of personalised advertising. This reference to Meta's data processing activities as 'combination' does not call into question the Commission's conclusion that Meta's 'Consent or Pay' advertising model does not comply overall with Article 5(2), first subparagraph, points (a), (b), and (c), of Regulation (EU) 2022/1925.

#### 4.2. Meta's 'Consent or Pay' advertising model

- (77) Between 3 and 10 November 2023, Meta introduced a 'Consent or Pay' advertising model – labelled *Ads Choice* by Meta – for end users<sup>72</sup> of the Facebook and Instagram environments in the European Region to allegedly ensure, among others, compliance of its OAS CPS Meta Ads with the obligations laid down in Article 5(2), first subparagraph, of Regulation (EU) 2022/1925.<sup>73</sup> Meta's 'Consent or Pay' advertising model presents end users of the Facebook and Instagram environments with the following binary options if they wish to continue using the services offered as part of those environments:<sup>74</sup>
- (a) the With Ads option: whereby end users consent to the combination of their personal data from Meta's Non-Ads Services (first party data), as well as their personal data obtained from third parties (third party data), with data in the OAS CPS Meta Ads, for the purpose of personalised advertising. Where this option is selected, the Non-Ad Services provided as part of the Facebook and Instagram environments continue to display personalised advertising to end users as before, and end users are not required to pay any subscription fee for those services; and

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<sup>70</sup> In relation to the 'Estimated action rate', Meta explains that '[Confidential – contains business secret]'. See Meta's Response to Question 2 of the Commission's DMA follow-up questions of 29 November 2022, Submission of 18 January 2023 [...].

<sup>71</sup> In relation to the 'Relevance and quality component' Meta explains that '[Confidential – contains business secret]'. See Meta's response to question 2 of 'the Commission's DMA follow-up questions of 29 November 2022, Submission of 18 January 2023' [...].

<sup>72</sup> Meta's 'Consent or Pay' advertising model has been presented to new and existing adult end users of Facebook and Instagram environments. Adult end users are defined by Meta as users aged 18 and above. Meta currently does not use youths 'personal data aged between 13 and 17 for advertising purposes. See Meta's Compliance of 6 March 2024, paragraph 139 [...].

<sup>73</sup> Meta's Compliance Report of 6 March 2024, Part C – The Meta Ads OAS CPS, paragraphs 36-62 [...]. Meta also justifies the introduction of its 'Consent or Pay' advertising model with regard to recent Meta-specific findings of the EDPB, the IE DPC, the Norwegian Data Protection Authority (the NDPA) and the Court in the *Meta Platforms* judgment, which altogether would require Meta to enable its end users to use the Facebook and Instagram ad-supported OSN CPSs in a way that also enable them to withhold their consent to Meta using their personal information to deliver personalised advertising. See paragraph 2 of Meta's reply to question 1 of RFI of 23 November 2023, [...].

<sup>74</sup> Meta's Compliance Report of 6 March 2024, paragraph 138 [...].

- (b) the SNA option: whereby end users that do not consent to the combination of their personal data from Meta's Non-Ads Services with data from the OAS CPS Meta Ads for personalised advertising, are required to pay a monthly subscription fee to use an ad-free version of the Non-Ads Services of the Facebook and Instagram environments.
- (78) The options under the 'Consent or Pay' advertising model are presented to end users via '*a consent flow*', which consists of several steps through which end users are informed of the consequences of their choice and which provides them with the ability to select their preferred option between 'Subscribe' (*i.e.*, the SNA option) or 'Use for free' (*i.e.*, the With Ads option). Those options are presented to end users at an 'Accounts Center – level'<sup>75</sup>, through a single consent moment for each of the Facebook and Instagram environments<sup>76</sup>, when the end user first accesses these environments. In other words, end users are required to make their choice separately for the Facebook and the Instagram environments, if they use both, but not again for the different services they use within each of those environments. The consequence of these binary options is that end users who are unwilling to give their consent to the combination of their personal data for advertising purposes and who are unwilling to pay a subscription fee, can no longer access the Facebook and Instagram environments.
- (79) According to data compiled by Meta, as of 21 April 2024, of the [Confidential – contains business secret] monthly active end users ('MAUs') of the Facebook environment in the European Region that had been presented with the binary options of the 'Consent or Pay' advertising model, [Confidential – contains business secret] MAUs opted for the SNA option while [Confidential – contains business secret] MAUs opted for the With Ads option and [Confidential – contains business secret] MAUs abandoned the consent flow without making a choice.<sup>77</sup> The consequence for end users who abandon the consent flow is that they are unable to access the Facebook environment until they proceed with making a choice.<sup>78</sup>
- (80) According to data compiled by Meta, as of 21 April 2024, of the [Confidential – contains business secret] MAUs of the Instagram environment in the European Region that had been presented with the binary options of the 'Consent or Pay' advertising model, [Confidential – contains business secret] MAUs opted for the SNA option, while [Confidential – contains business secret] MAUs opted for the With Ads option, and [Confidential – contains business secret] MAUs abandoned the consent flow without making a choice.<sup>79</sup> Similarly, end users who abandon the

<sup>75</sup> Meta's Compliance Report of 6 March 2024, paragraph 164 [...].

<sup>76</sup> Meta's Compliance Report of 6 March 2024, paragraph 163 [...].

<sup>77</sup> Meta's reply to RFI of 22 April 2024, Table 3 [...]. In its reply to question 1(b), Meta explains that if Facebook counts [>45 million] end users and Instagram counts [>45 million] end users, [0-10%] of Facebook users and [0-10%] of Instagram users have not made a choice on Meta's 'Consent or Pay' advertising model. This may have occurred if, for example, the user has not been active on the services, did not make a choice by the time the 'Consent or Pay' choice flow was paused on 19 January 2024 and has not visited the services since 5 April 2024, or accesses the services using an older/unsupported version of the service or ancillary surface such as via the Instagram website rather than through the Instagram app. See also Meta's reply to question 1 of RFI of 29 November 2023 [...].

<sup>78</sup> Meta's Compliance Report of 6 March 2024, paragraphs 170-171 [...].

<sup>79</sup> Meta's reply to RFI of 22 April 2024, Table 3 [...].



consent flow are unable to access the Instagram environment until they proceed with making a choice.<sup>80</sup>

- (81) In other words, the proportion of MAUs of the Facebook and Instagram environments who opted to pay for the Non-Ads Services without advertisements (*i.e.*, the SNA option) represents approximately [ $<1\%$ ] of total MAUs who were presented with the binary options of the ‘Consent or Pay’ advertising model on each of those environments.
- (82) Meta does not contest the Commission’s description and understanding of Meta’s advertising-based model, including its description and understanding of the ‘Consent or Pay’ advertising model, as set out in the Preliminary Findings and described in this Section.

## **5. ASSESSMENT UNDER ARTICLE 29 OF REGULATION (EU) 2022/1925**

- (83) Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 prohibits gatekeepers from combining personal data from relevant CPSs with personal data from any further CPSs or from any other services provided by the gatekeeper or with personal data from third party services, unless (i) the end user has been presented with the specific choice of a less personalised, but equivalent alternative, and (ii) the end user has given consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679. Those two conditions are cumulative, so that the absence of any of these conditions is sufficient to demonstrate non-compliance with that provision.
- (84) The Commission takes the view that Meta’s ‘Consent or Pay’ advertising model does not comply with Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 in relation to Meta’s OAS CPS Meta Ads (i) because Meta fails to present end users with the specific choice to combine, or not, their personal data from its Non-Ads Services with personal data from its OAS CPS Meta Ads (Section 5.1 of this Decision) and (ii) because the consent given by end users to the With Ads option of the ‘Consent or Pay’ advertising model cannot be considered as a valid consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679 for the purpose of serving personalised advertisements to them on Meta’s Non-Ads Services, via Meta’s OAS CPS Meta Ads (Section 5.2 of this Decision).
- (85) This Decision concerns the compliance of Meta’s ‘Consent or Pay’ advertising model with Article 5(2) first subparagraph, of Regulation (EU) 2022/1925, in relation to the OAS CPS Meta Ads. In that regard, the Commission assesses whether the requirements of specific choice and valid consent are fulfilled in the context of the combination of personal data from Meta’s Non-Ads Services as defined in recital (3) of this Decision with personal data from its OAS CPS Meta Ads.
- (86) Nevertheless, from the perspective of end users, Meta’s ‘Consent or Pay’ advertising model is presented at the level of the Facebook and Instagram environments as defined in Section 4.2 of this Decision. Thus, the specific choice that the end users should have and the valid consent they must provide in this context necessarily occurs at the level of the Facebook and Instagram environments, and not at the level of each individual Meta’s Non-Ads Services. As a result, this Decision refers hereinafter to the ‘Facebook and Instagram environments’ whenever the end users’

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<sup>80</sup> Meta’s Compliance Report of 6 March 2024, paragraphs 170-171 [...].

perspective is relevant for the assessment of Meta's 'Consent or Pay' advertising model.

## **5.1. Lack of specific choice**

### *5.1.1. The Commission's position*

- (87) The first condition laid down in Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 is that end users must be presented with the specific choice to have their personal data combined for the purpose intended by the gatekeeper, *e.g.*, serving personalised advertisements to those end users. Recital (36) of that Regulation clarifies that such a specific choice should entail the gatekeeper offering its end users a less personalised, but equivalent, alternative service that does not rely on the combination of personal data. Recital 37 of Regulation (EU) 2022/1925 further clarifies that this less personalised alternative should not be different or of degraded quality compared to the service provided to the end users who provide consent to such personal data combination, unless the degradation of quality is a direct consequence of the gatekeeper not being able to process such personal data or signing in end users to a service.
- (88) The Commission finds that the SNA option in Meta's 'Consent or Pay' advertising model does not constitute such a less personalised but equivalent alternative to the With Ads option in which Meta's Non-Ads Services' end users' personal data are combined with data from the OAS CPS Meta Ads for the purpose of displaying personalised advertisements to them on the Facebook or Instagram environments. Consequently, the Commission considers that Meta has not provided end users of its Non-Ads Services with a specific choice between the options to have their personal data combined or not, as required by Article 5(2), first subparagraph, of Regulation (EU) 2022/1925, when they are targeted with personalised advertising via the OAS CPS Meta Ads. That view is supported by the following considerations.
- (89) **First**, the Commission considers that Meta's Non-Ads Services provided under the SNA option are not equivalent to those services provided under the With Ads option, since the former constitute different versions of those services as compared to the latter.
- (90) More precisely, the SNA option is different from the With Ads option beyond being less personalised to the extent that it is characterised by different conditions of access for end users. While end users can access the With Ads option free of charge, access to the SNA option is subject to the payment of a monthly fee in consideration for the services received. The means by which a service is remunerated constitutes an essential feature of the conditions by which a service is accessed. The Commission considers that the With Ads option and the SNA option exhibit different conditions of access to the Facebook and Instagram environments, since end users are presented with different means of remunerating Meta for such access.
- (91) Making a payment of a monetary monthly fee and providing consent to the processing of personal data for the purpose of serving personalised advertisements are two forms of consideration exhibiting very different characteristics. In particular, the option of giving consent only requires the end users to click on a button whereby they express their consent to the combination of their personal data for the personalisation of advertisements. By contrast, the payment of a monetary monthly fee requires the end users to have access to an online payment service (for example, a debit or credit card which can be used for online transactions or an online payment

system) and to enter the relevant payment information in Meta's system to complete the transaction. Moreover, the payment of a monetary monthly fee commits the end users to recurrent transactions over an extended, indefinite period of time, which involves the debit of a sum of money that the end users cannot thereafter spend on other items. By contrast, consideration in the form of consent does not entail an economic burden for end users, who retain the possibility to consent to the processing of their personal data to access additional services.

- (92) Therefore, the SNA option and the With Ads option are different because they exhibit different conditions of access.
- (93) In this context, the fact that end users of online social networking services have grown accustomed to using such services – often for years – without monetary payment should also be taken into account. This is especially the case for the Facebook and Instagram environments, which have largely influenced the 'freemium' business model adopted by many online social networking services. In this context, end users have not clearly identified the price value of the Facebook and Instagram environments. In addition, while end users do not consider personalised advertisement as necessarily inherent to such services, they have nonetheless grown accustomed to the display of advertisements as such. As a result, they tend not to perceive such advertisements as being as disruptive as for other digital services with a 'Consent or Pay' advertising model. In other words, the option of no advertisements for a fee does not appear as attractive to end users who want to access and experience the Facebook and Instagram environments as to end users of other digital services. In addition, Meta should have known, as is apparent from the empirical evidence provided in the academic studies which are cited in Meta's submissions, that end users of online services overall have a low willingness to pay for privacy, even when they would prefer a less personalised experience.<sup>81</sup>
- (94) Thus, Meta also could have reasonably expected that its 'Consent or Pay' advertising model would lead most of its end users to opt for continuing to access their Facebook and Instagram environments free of charge rather than to pay a fee, even when they are interested in the lesser processing of their personal data.
- (95) Indeed, this lack of equivalence of the SNA option, and hence Meta's failure to offer to end users the required specific choice, is clearly illustrated by the extremely low number of Meta's Non-Ads Services end users who opted for accessing the Facebook and Instagram environments with the SNA option. In the six months after its 'Consent or Pay' advertising model was launched, [ $<1\%$ ] of its total MAUs in the European Region who were presented with the binary options under that model chose the SNA option.<sup>82</sup>

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<sup>81</sup> See Muller-Tribbensee et al. (2024), '*Paying for Privacy: Pay-or-Tracking Walls*'. This article, cited in Meta's Study on Behavioural Advertising, explores the concept of pay-or-tracking walls, where users are given the choice to either pay for privacy or consent to being tracked, presents an empirical study about the implementation of this model by publishers. The study finds that '*[p]ublishers' traffic does not decline when implementing a pay-or-tracking wall; most users consent to being tracked and only a few users pay*', p.4. In addition, the study provides data which evidence that users are overwhelmingly opting for the tracking option while very few choose to pay: '*On the last observed day, one year and five months after the publisher introduced its pay-or-tracking wall, the tracking option accounted for 99.06% of unique users, 98.65% of visits, and 97.78% of page impressions. Conversely, the pay option accounted for 0.94% of unique users, 1.35% of visits, and 2.22% of page impressions.*', p.35 [...].

<sup>82</sup> Meta's reply to question 1 of RFI of 22 April 2024 [...].

- (96) In addition, Meta’s internal documents reveal that it was well aware that its ‘Consent or Pay’ advertising model would lead the overwhelming majority of end users of its Non-Ads Services to opt for the With Ads option of the Facebook and Instagram environments. Indeed, when preparing to roll-out the SNA option, Meta drafted internal memos considering pricing strategies for this option depending on several parameters, [Confidential – contains business secret]. These memos show that the pricing strategy for the SNA option built-in the expectation that end users would not exercise their specific choice – *i.e.*, that [Confidential – contains business secret]. One such memo, dating from April 2023, shows that [Confidential – contains business secret].<sup>83</sup> [Confidential – contains business secret].<sup>84</sup>
- (97) As Meta refined this analysis, another internal memo dating from July 2023 estimated that, [Confidential – contains business secret].<sup>85</sup> This analysis was further refined and, on 28 September 2023, less than two months before the launch of the actual SNA option, Meta’s [Confidential – contains business secret].<sup>86</sup> Meta’s own estimation prior to the launch of the SNA option was therefore very close to the actual take-up rate of [<1%] observed on 21 April 2024, about six months after the SNA option was launched. Meta’s own estimates demonstrate that it was aware that the SNA option would never be considered as an equivalent alternative to the With Ads option.
- (98) Therefore, it is evident that Meta not only should have known, but that it actually knew, that the different conditions of access to the Facebook and Instagram environments under the SNA option do not offer end users an equivalent alternative to the With Ads option and that launching the SNA option would deprive its Non-Ads Services end users from the specific choice to which they are entitled pursuant to Article 5(2), first subparagraph, of Regulation (EU) 2022/1925.
- (99) **Second**, the Commission takes the view that the judgment of the Court of Justice of the European Union (‘the Court’) in *Meta Platforms and Others*<sup>87</sup> (the ‘*Meta Platforms* judgment’) cannot serve as a justification for the binary options presented to end users under Meta’s ‘Consent or Pay’ advertising model.
- (100) In that judgment, the Court affirmed that, for consent to be validly given for the processing of personal data to provide personalised advertisements, as required by Article 4, point (11), of Regulation (EU) 2016/679, users of an online social network must be free to refuse individually, in the context of the contractual process, to give their consent to particular data processing operations that are not necessary for the performance of the contract, without being obliged to refrain entirely from using the service offered by the operator of the online social network. The Court further

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<sup>83</sup> Meta’s reply to questions 2a. to c., 3b., 4 and 7 to the RFI of 23 November 2023 (Tranche 3), Annex Q2c ‘[Confidential – contains business secret]’, p.1 [...].

<sup>84</sup> Meta’s reply to questions 2a. to c., 3b., 4 and 7 to the RFI of 23 November 2023 (Tranche 3), Annex Q2c ‘[Confidential – contains business secret]’, p.1 [...].

<sup>85</sup> Meta’s reply to questions 2a. to c., 3b., 4 and 7 to the RFI of 23 November 2023 (Tranche 3), Annex Q2c ‘[Confidential – contains business secret]’, Graph 1 [...].

<sup>86</sup> Meta’s reply to questions 2a. to c., 3b., 4 and 7 to the RFI of 23 November 2023 (Tranche 3), Annex Q2c ‘[Confidential – contains business secret]’, Table 1 [...].

<sup>87</sup> Judgment of 4 July 2023, *Meta Platforms and Others* (Conditions générales d'utilisation d'un réseau social), Case C-252/21, EU:C:2023:537.

considered that those users are to be offered, if necessary for an appropriate fee, an equivalent alternative not accompanied by such data processing operations.<sup>88</sup>

- (101) In the Commission's view, the *Meta Platforms* judgment cannot be understood to allow Meta to provide the 'less personalised but equivalent alternative' within the meaning of recital 36 of Regulation (EU) 2022/1925 against the payment of an appropriate fee.<sup>89</sup>
- (102) The Commission considers that the scope of that judgment is limited to the assessment of the validity of the condition of consent within the meaning of Article 4, point (11), of Regulation (EU) 2016/679, in the context of specific data processing operations performed by the operator of an online social network who holds a dominant position within the meaning of the competition rules. The Court did not rule on the interpretation of obligations applicable to gatekeepers as laid down in Article 5(2) of Regulation (EU) 2022/1925, which introduces a specific test based on the two conditions recalled in Section 3 of this Decision.
- (103) Those two conditions, which a gatekeeper must satisfy to lawfully combine personal data from the relevant CPS with personal data from any further CPSs or from any other services provided by the gatekeeper or with personal data from third party services, must be considered as distinct legal notions. In contrast to the second condition of 'consent', the first condition of 'specific choice' is an autonomous notion that does not refer to a definition found in Regulation (EU) 2016/679 or any other legal instrument.
- (104) Therefore, the notion of 'specific choice' within the meaning of Article 5(2) of Regulation (EU) 2022/1925 must be interpreted according to the general principles of legal interpretation and not by reference to the provisions of Regulation (EU) 2016/679 as interpreted by the Court in the *Meta Platforms* judgment, in which that concept does not feature. It follows that this judgment does not affect, the Commission's analysis that Meta's 'Consent or Pay' advertising model does not provide end users with the specific choice between equivalent alternatives.
- (105) In any event, Meta fails to demonstrate that the monthly fee which its end users choosing the SNA option must pay for access to the Facebook and Instagram environments is an appropriate fee or that it is necessary.
- (106) The words '*if necessary for an appropriate fee*' used in the *Meta Platforms* judgment do not mean that under Regulation (EU) 2016/679 data controllers are entitled to charge a fee to those end users who refuse to consent to the processing and combination of their personal data for the purpose of personalised advertising. Rather, the judgment clarifies that data controllers may receive, if necessary, another appropriate consideration for the online service they provide, including, but not limited to, in the form of a monetary fee. Thus, other appropriate forms of consideration cannot be excluded.
- (107) In that regard, the concept of 'fee', which is used by the Court in the English version of the judgment, can be defined more generally as a remuneration. This is confirmed by other linguistic versions of the judgment, in which the word 'remuneration' is clearly used. For instance, in the German version – the language of the case – the

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<sup>88</sup> Judgment of 4 July 2023, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)*, Case C-252/21, EU:C:2023:537, paragraph 150.

<sup>89</sup> Meta's Compliance Report of 6 March 2024, paragraph 176 [...].

Court uses the word ‘Entgelt’, which refers to the compensation or consideration given in exchange for goods, services, or labour. Furthermore, in the French version of the judgment, the Court uses the term ‘rémunération’ which bears the same meaning as the English word ‘remuneration’.

- (108) To the extent that Meta is entitled to consideration for the ‘less personalised, but equivalent alternative’ it provides, which has not been demonstrated by Meta, it accordingly does not necessarily follow that Meta is entitled to impose a monetary fee which has to be paid directly by the end user if Meta could be appropriately remunerated in a different manner.
- (109) In the light of the foregoing considerations, the Commission takes the view that the SNA option does not constitute an equivalent alternative to the With Ads option, and that Meta’s ‘Consent or Pay’ advertising model therefore fails to present end users of its Non-Ads Services with the specific choice to combine or not their personal data with data from the OAS CPS Meta Ads for the purpose of serving personalised advertisements to those end users on Meta’s Non-Ads Services, in violation of Article 5(2) first subparagraph, of Regulation (EU) 2022/1925.

#### 5.1.2. *Meta’s arguments*

- (110) As described in Section 3.2 of this Decision, Meta mainly claims that the Commission erroneously separates the notion of specific choice from the notion of consent within the meaning of Regulation (EU) 2016/679, and erroneously interprets the notion of specific choice by reference to the wording in recital 36 of that Regulation as requiring a less personalised but equivalent alternative to be offered to end users who do not consent. The Commission rejects this criticism for the reasons set out in Sections 3.1 and 3.3 of this Decision.
- (111) In addition, Meta further claims that even if it were to accept the legal framework as set out by the Commission, the Commission’s position described in Section 5.1.1 of this Decision has no basis.
- (112) **First**, Meta argues that the Commission’s position means that any alternative to the With Ads Option that is not fully equivalent or is in any way different would not comply with Article 5(2) of Regulation (EU) 2022/1925. According to Meta, the basic definition of the word ‘alternative’ implies that there is logically some difference to the original state and that, by that logic, nothing Meta could do to respond to the specific choice requirement would be compliant because any response with no, or less, data processing for behavioural advertising would necessarily be ‘different’.<sup>90</sup>
- (113) **Second**, Meta claims that the Commission’s reliance on a concept of ‘conditions of access’ to assess whether the SNA option is equivalent to the With Ads option finds no basis in Regulation (EU) 2022/1925 and is not relevant to the assessment of freely given consent under Regulation (EU) 2016/679<sup>91</sup> as established in the *Meta Platforms* judgment.<sup>92</sup> Meta considers that such a concept would have been included in the operative text of Regulation (EU) 2022/1925 if it were intended to be a relevant consideration.<sup>93</sup>

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<sup>90</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 71 [...].

<sup>91</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 74-76 [...].

<sup>92</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 84 [...].

<sup>93</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 78 [...].

- (114) Instead, Meta argues that the Commission should have ascertained whether the SNA option included a degradation in quality for users wishing to enjoy the service offering of Facebook and Instagram environments as it relates to the end user experience.<sup>94</sup> In that regard, Meta stresses that recital 37 of Regulation (EU) 2022/1925 explicitly refers to degradation in ‘quality’ of the less personalised alternative and expressly indicates that end users ought to be informed that their choice may lead to a less personalised offer, but that ‘*otherwise the core platform service will remain unchanged and that no functionalities will be suppressed*’.<sup>95</sup>
- (115) In light of the above, Meta asserts that the quality of the SNA option and the With Ads option of the Facebook and Instagram environments are wholly equivalent from the users’ perspective, and therefore in line with the purpose of the requirement to provide an equivalent alternative.<sup>96</sup>
- (116) **Third**, Meta further claims that the erroneous reliance on the concept of ‘conditions of access’ is compounded by the Commission’s baseless differentiation between the conditions to access the SNA option and the With Ads option by reference to the means of remunerating those services.<sup>97</sup>
- (117) Meta argues that the manner in which a user may have to ‘*go through the process*’ of paying for accessing the SNA option and the With Ads option does not have any bearing on the equivalence of these options, which is to be evaluated with respect to their quality and functions. Meta further considers that the Commission does not support its assertions according to which the payment of a fee through a standard online payment process which is widely used and accepted fundamentally undermines the user’s free choice.<sup>98</sup>
- (118) Finally, Meta underscores that following the Commission’s logic, it could charge all of its European users a fee, thus creating ‘equivalent’ conditions of access and therefore be compliant – even if the price for consenting users were significantly lower than the price of the less personalised alternative, with a greater price differential than in the current situation.<sup>99</sup>
- (119) **Fourth**, Meta claims that the Commission, by determining that the charging of a subscription fee for the use of an online service may only be acceptable if those services have not been ‘traditionally’ offered for free, seeks to impose on it a specific business model in violation of Meta’s freedom to conduct its business and respond to its regulatory obligations in the manner which it sees fit.<sup>100</sup>
- (120) *In the first place*, Meta argues that taking into account how an online service has been traditionally offered is not supported, either by Regulation (EU) 2022/1925 or by Regulation (EU) 2016/679.<sup>101</sup> Meta emphasizes that its ‘Consent or Pay’ advertising model was developed to comply with Article 5(2) of Regulation (EU) 2022/1925. Thus, Meta alleges that the Commission cannot rely on that provision to insist that Meta’s services be provided free of charge in line with Meta’s traditional

<sup>94</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 73 [...].

<sup>95</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 78 [...].

<sup>96</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 79 [...].

<sup>97</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 80 [...].

<sup>98</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 82-83 [...].

<sup>99</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 85 [...].

<sup>100</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 86 and 94 [...].

<sup>101</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 87 [...].

business model, while that same provision does not allow Meta to maintain this business model.<sup>102</sup> Meta considers it is discriminated for having opened the access to its services free of charge globally in comparison to other gatekeepers who have always sought to impose a fee on users to use their services.<sup>103</sup>

- (121) *In the second place*, Meta stresses that Article 5(2) of Regulation (EU) 2022/1925 does not mandate for gatekeepers to offer a free of charge option to non-consenting users where less data is processed, unlike in respect of other obligations, such as Articles 5(4), 5(9), (10), 6(7), 6(8), and 6(9) of that Regulation where the obligation to provide the service free of charge is explicitly stated. Meta argues that any suggestion to the contrary undermines the principle of legal certainty.<sup>104</sup>
- (122) *In the third place*, Meta argues that the requirement that it provides an alternative to end users that does not process personal data in its OAS CPS Meta Ads inevitably leads to the introduction of an alternative business model that is not predicated on an ad-supported service offered to users free of charge. In that regard, a subscription-based business model is a logical place to start while an entirely non-personalised ad-supported service offered to users free of charge – as unjustifiably suggested by the Commission – is not a viable business model.<sup>105</sup> Further, a service characterised by random advertisements which do not benefit from personalisation would be unequivocally ‘*different or of degraded quality compared to the service provided to end users who provide consent*’ and thus would not comply with the Commission’s own assessment of Article 5(2) of Regulation (EU) 2022/1925.<sup>106</sup>
- (123) **Fifth**, Meta contests that ‘Consent or Pay’ advertising model circumvents the application of Article 5(2) of Regulation (EU) 2022/1925.
- (124) *In the first place*, in addition to asserting that the Commission is not allowed to claim, in the same proceedings, that a gatekeeper has both failed to comply with an obligation and that it has designed its compliance in such a way as to circumvent effective compliance, as described in recitals (61)-(65) of the Preliminary Findings, Meta argues that the Commission misconstrues Article 13 of Regulation (EU) 2022/1925 and does not explain what it means when stating that its ‘Consent or Pay’ advertising model is ‘*unexpected*’ and ‘*pushes*’ the end user to choose the With Ads option.<sup>107</sup>
- (125) Meta contests that the end users of the With Ads option would be surprised by the nature of the SNA option when offered the choice to not provide consent for the combination of their personal data because it is a choice with which online users are extremely familiar given it is common among online services. In that regard, Meta cites as examples of the ‘myriad other popular online services offering similar choices’: YouTube Premium, X Premium, X+ Premium and Reddit Premium for social networking; Spotify Premium, Disney+, Netflix for streaming; and the Guardian, Le Monde and Bild for media publishing.<sup>108</sup>

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<sup>102</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 88 [...].

<sup>103</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 89 [...].

<sup>104</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 90 [...].

<sup>105</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 91-92 [...].

<sup>106</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 93 [...].

<sup>107</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 153-154 [...].

<sup>108</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 156 [...].



- (126) *In the second place*, Meta considers that the Commission fails to provide any empirical or even anecdotal evidence to support its claim that end users who have grown accustomed to accessing OSNs free of charge are most likely to continue accessing the service free of charge and therefore consenting to data processing for personalised advertisements, even when provided with the choice to pay a monetary fee instead of providing consent.<sup>109</sup>
- (127) In that regard, Meta further rejects the very low percentage of MAUs in the European Region that opted for the SNA option as relevant evidence of circumvention, as Regulation (EU) 2022/1925 is not an outcome-based regulation and it does not prescribe individual outcomes to be achieved by gatekeepers. In any event, Meta considers that the Commission does not justify the basis on which it concludes that the low user uptake of the SNA option is a result of the design of the ‘Consent or Pay’ advertising model, nor explore other plausible explanations such as users being content to carry on using a service with personalised advertisements.<sup>110</sup>
- (128) **Sixth**, Meta claims that the Commission cannot rely on the new notion of a distinct ‘specific choice’ to disregard the *Meta Platforms* judgment. In that regard, Meta restates that the Commission applies the wrong legal framework with regard to the requirements of Article 5(2) of Regulation (EU) 2022/1925 in order to circumvent the principle endorsed by the Court, and relevant to Article 5(2), that an equivalent alternative OSN without behavioural advertising – in other words, a less personalised alternative – can be offered in exchange for payment of an appropriate fee.<sup>111</sup>
- (129) In addition, Meta contests the Commission’s interpretation of the *Meta Platforms* judgment’s concept of remuneration since it would be self-evident from the context of paragraph 150 of that judgment ‘*that the Court envisaged the transfer of value being the provision of an equivalent alternative not accompanied by data processing – which in an Article 5(2) of Regulation (EU) 2022/1925 context would necessarily be a less personalised alternative – in return for the payment of a fee by the user*’.<sup>112</sup>

#### 5.1.3. *The Commission’s assessment of Meta’s arguments*

- (130) The Commission considers that none of Meta’s arguments described in Section 5.1.2 is capable of rebutting the Commission’s position as described in Section 5.1.1 of this Decision.
- (131) **First**, Meta misconstrues the Commission’s position regarding the difference between the SNA option and the With Ads option by claiming that nothing it could do to respond to the specific choice requirement would comply with Article 5(2) first subparagraph, of Regulation (EU) 2022/1925, because any response with no, or less, data processing for behavioural advertising would necessarily be ‘different’.
- (132) In that regard, the Commission does not assert that the less personalised but equivalent alternative service, which Meta must offer its end users to comply with the specific choice requirement, would be considered different from the service provided to the end users who provide consent to the combination of their personal data on the basis that it is characterized by no, or less, data processing for personalised advertising.

<sup>109</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 157-158 [...].

<sup>110</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 159-162 [...].

<sup>111</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 62-64 [...].

<sup>112</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 67 [...].

- (133) Instead, the Commission considers that such alternative must be characterized by no, or less, data processing, *i.e.*, by data processing that is not prohibited, pursuant to Article 5(2), first subparagraph, of Regulation (EU) 2022/1925, (in absence of a specific choice for and consent of end users) - otherwise it would not be a ‘less personalised’ alternative, as required by that provision and as clarified by recitals 36 and 37 of that Regulation. This is also the logical consequence of end users denying consent under Article 5(2), first subparagraph, of Regulation (EU) 2022/1925. The difference in data processing between the service provided to the end users who provide consent and the less personalised alternative service is not relevant to assess whether both services are (otherwise) equivalent. Indeed, the difference in data processing is exactly what Article 5(2) of Regulation (EU) 2022/1925 requires for that (equivalent) alternative.
- (134) This is corroborated by recital 37 of Regulation (EU) 2022/1925 which clarifies that the less personalised version (‘offer’) ‘*otherwise [...] will remain unchanged*’.<sup>113</sup> Recital 37 also clarifies that the less personalised alternative should not be different or of degraded quality compared to the service provided to the end users who provide consent, unless a degradation of quality is a direct consequence of the gatekeeper not being able to process such personal data or signing in end users to a service.<sup>114</sup> Thus, recital 37 of Regulation (EU) 2022/1925 explicitly accepts that the processing of personal data involved in the less personalised alternative may be different from the processing of personal data involved in the service provided to the end users who provide consent and that, even if such difference directly results in a degradation of quality of the less personalised alternative, it is still to be considered as otherwise equivalent as long as all other aspects remain unchanged.
- (135) Therefore, contrary to what Meta argues, the less personalised alternative referred to in recital 37 of Regulation (EU) 2022/1925 can be different from the service provided to the end users who provide consent – and constitute an (otherwise) equivalent ‘alternative’ – so long as such difference relates to a difference in the processing of personal data.
- (136) **Second**, as explained in recital (134) of this Decision, recital 37 of Regulation (EU) 2022/1925 clearly states that the less personalised alternative should not be, with the exception of the processing of personal data involved, different or of degraded quality.<sup>115</sup> The use of the conjunction ‘or’ stresses that there are two distinct circumstances in which the less personalised alternative would not be considered as equivalent, namely it is either ‘different’ or ‘of degraded quality’ as compared to the service provided to end users who provide consent.
- (137) Thus, contrary to Meta’s view, the Commission’s assessment of the less personalised alternative cannot be limited to ascertaining whether there is a degradation in quality for end users, but necessarily also includes ascertaining whether there are differences with the service provided to end users who provide consent.
- (138) In that regard, differences between a service and its less personalised alternative are likely to influence end users that are considering availing themselves of the specific choice laid down in Article 5(2) of Regulation (EU) 2022/1925. As a result,

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<sup>113</sup> Emphasis added.

<sup>114</sup> Emphasis added.

<sup>115</sup> Emphasis added.

gatekeepers can only be said to offer their end users a specific choice if the proposed less personalised alternative exhibits equivalent characteristics.

- (139) This approach is consistent with the clarifications provided in recital 37 of Regulation (EU) 2022/1925, which states that, at the time of giving consent, the end user should be informed that not giving consent can lead to a less personalised offer, but that otherwise the CPS will remain unchanged and that no functionalities will be suppressed.<sup>116</sup> This approach is further consistent with the objectives of Article 13(6) of Regulation (EU) 2022/1925, which are to prevent gatekeepers from degrading the conditions, as well as the quality, of any of the CPSs provided to end users who avail themselves of the rights or choices laid down in Articles 5 of that Regulation. By referring not only to the quality, but also the conditions of the CPS, Article 13(6) of Regulation (EU) 2022/1925 pursues the same objective as sought by the specific choice requirement under Article 5(2) of that Regulation that gatekeepers are not to impede their end users' choice to avail themselves of the right to access a CPS without providing consent to the combination of their personal data.
- (140) Meta further advances that the concept of 'conditions of access' has no legal basis in Regulation (EU) 2022/1925, and so the Commission erroneously relied on it to ascertain whether the SNA option was equivalent to the With Ads option. However, to the extent that the Commission has to ascertain whether there are any differences between these options, Meta does not explain why the conditions of access to these services would be irrelevant.
- (141) In that regard, the conditions of access to a service are a fundamental characteristic of such service since they directly influence the end users' choice to use the service or not.
- (142) **Third**, and in light of the Commission's position that it is relevant to consider whether the conditions of access of the SNA option and of the With Ads option are different, Meta does not provide any valid argument as to why end users' means of remunerating those options are irrelevant for that purpose.
- (143) Indeed, as explained in recitals (90)-(92) of this Decision, the SNA option is not an equivalent alternative to the With Ads option if, besides the differences in data processing, it exhibits different characteristics from the With Ads option, including the conditions of access to the services. The means of remunerating the services by the end user are relevant because they are a fundamental characteristic of such services which influence the end users' choice of whether to use them.
- (144) In addition, this approach would hold even in the situation where the standard online payment process for the SNA option's fee would allegedly be widely used and accepted, or that it is not more complex due to the filling in of payment details, *quod non*, because the fact that the proposed less personalised alternative features different conditions of access for end users is sufficient to establish that the SNA and the With Ads options are not equivalent.
- (145) In any event, even if, following Meta's logic, the Commission should only ascertain whether the SNA option is of degraded quality compared to the With Ads option, *quod non*, Meta offers no explanation why the conditions of access to the SNA option do not interfere with the quality of such option.

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<sup>116</sup> Emphasis added.

- (146) **Fourth**, Meta’s claim that the Commission seeks to impose on it a specific business model in violation of its freedom to conduct its business and to respond to its regulatory obligations in the manner which it sees fit is not substantiated.
- (147) *In the first place*, when assessing whether Meta’s ‘Consent or Pay’ advertising model complies with the obligation under Article 5(2) of Regulation (EU) 2022/1925 to offer end users a specific choice, the Commission must ensure that those end users can effectively opt for a less personalised but equivalent alternative to the With Ads option. In that context, the Commission may take into account whether the end users have been accustomed to access the Facebook and Instagram environments free of charge, to the extent that it is unlikely to expect them to pay a monetary fee to access those environments.
- (148) In that context, Meta remains free to choose its business model, among all the business models which comply with the requirements of Article 5(2) Regulation (EU) 2022/1925.
- (149) *In the second place*, the Commission does not deny that Article 5(2) of Regulation (EU) 2022/1925 does not, in principle, mandate gatekeepers to offer a less personalised alternative free of charge, unlike in respect of other obligations of that Regulation where the requirement to provide the service free of charge is explicitly stated.
- (150) However, Meta cannot, for this reason, be excused from complying with the requirement to provide a less personalised alternative which is equivalent – including as regards its conditions of access – to the service provided to end users who do not provide consent. Thus, if Meta decides, when exercising its freedom to conduct its business in a manner it sees fit, to offer the With Ads option free of monetary charge, then it is required to offer end users a less personalised alternative which is equivalently free of monetary charge.
- (151) *In the third place*, Meta does not support its assertion according to which the requirement that it provides an alternative to end users that does not process personal data in its OAS CPS Meta Ads inevitably leads to the introduction of an alternative business model that is not predicated on an advertising-supported service offered to users free of charge.
- (152) In that regard, Article 5(2) of Regulation (EU) 2022/1925 does not prohibit, in the absence of a specific choice and valid consent, all personal data processing activities. Instead, it requires that end users are offered the specific choice of a less personalised, but equivalent alternative of the service, and such alternative should not require the consent that the end users have not provided to the data processing activities referred to in Article 5(2), first subparagraph, of that Regulation but may involve other data processing activities.
- (153) Furthermore, Meta itself does not deny that it is possible to run non-personalised or less personalised advertisements on the Facebook and Instagram environments which would not require its end users to provide consent within the meaning of Article 5(2), first subparagraph, of Regulation (EU) 2022/1925. Rather, Meta claims, without substantiation, that it would not consider offering a free of charge less personalised alternative which is predicated on an advertising-supported service because it is not a viable business model.
- (154) However, in accordance with Article 1(1) of Regulation (EU) 2022/1925, the purpose of that Regulation is to ensure, for all businesses, contestable and fair

markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users. The achievement of those objectives through the implementation of specific obligations, including Article 5(2) of that Regulation, will inevitably impact the business models that gatekeepers choose for their designated CPSs. In that context, Regulation (EU) 2022/1925 does not safeguard such business models from any constraint it mandates, nor is complying with that Regulation conditional upon preserving the profits gatekeepers generated prior to its adoption.

- (155) This is further supported by the fact that the Union legislature has explicitly addressed viability considerations in Article 9(1) of Regulation (EU) 2022/1925. According to that provision, if the constraints imposed on gatekeepers by a specific obligation of that Regulation were to endanger, due to exceptional circumstances beyond the gatekeeper's control, the economic viability of its operation in the Union, the Commission may decide to exceptionally suspend, in whole or in part, the specific obligation.
- (156) In light of the above, if Meta considers that Article 5(2) of Regulation (EU) 2022/1925, as interpreted by the Commission, and the offering of a less personalised, but equivalent alternative, inevitably mandates a business model which is not viable, it should demonstrate this in a reasoned request pursuant to Article 9(1) of that Regulation. Absent such a demonstration, the consideration of whether the proposed less personalised alternatives can be viable cannot influence the assessment of Meta's compliance with Article 5(2) of that Regulation.
- (157) Finally, for the reasons explained in recitals (132)-(135) of this Decision, a less personalised alternative '*service characterised by random ads which do not benefit from personalisation*' would not necessarily be considered as '*unequivocally different or of degraded quality*'.<sup>117</sup> The fact that these advertisements do not benefit from personalisation – provided it is considered to be of degraded quality – would be a direct consequence of the gatekeeper not being able to combine personal data, and therefore a difference directly resulting from the end users exercising their choice under Article 5(2), first subparagraph, of Regulation (EU) 2022/1925. Such a difference would therefore not prevent the less personalised alternative service from being equivalent to the service provided to the end users who provide consent.
- (158) **Fifth**, following Meta's reply to the Preliminary Findings, the Commission does not pursue a finding of violation of Article 13(6) of Regulation (EU) 2022/1925. Meta's claim that the Commission misconstrues Article 13 of Regulation (EU) 2022/1925 is therefore moot.
- (159) Nevertheless, the Commission maintains that, as explained in recitals (93)-(98) of this Decision, in assessing the equivalence of the alternative offered by Meta for non-consenting users, it also has to be taken into account that end users of online social networking services have grown accustomed to using such services – often for years – without monetary payment.
- (160) *In the first place*, regarding Meta's claim that the Commission cannot rely on the way its Non-Ads Services have traditionally been offered, the Commission reaffirms that it is pertinent to consider the end users' most likely behaviour in light of their experience with the Facebook and Instagram environments.

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<sup>117</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraph 93 [...].

- (161) In that regard, when considering the end users' specific choice laid down in Article 5(2) of Regulation (EU) 2022/1925, the starting point is to identify how the CPS has traditionally been offered to them and to check whether, in comparison, the design of the less personalised alternative service – including its conditions of access – has the potential to shift end users' habits in relation to that CPS.
- (162) In the specific case of the Facebook and Instagram environments, as explained in recitals (93)-(94) of this Decision, the fact that end users have accessed those environments without paying a monetary fee since the beginning and for two decades is relevant to assess whether Meta, through the design of its 'Consent or Pay' advertising model, truly offers a specific choice with an equivalent alternative. The Commission's position as expressed in recital (93) of this Decision is not to say that the design of the 'Consent or Pay' advertising model does not provide for a specific choice because the alternative option is unexpected or surprising for end users. Rather, in light of the fact that end users of the Facebook and Instagram environments have traditionally accessed those services free of charge, Meta could not reasonably expect that end users would be willing to pay a monetary fee to access these services so long as a free of charge option remains available. In addition, as explained in recitals (96)-(98) of this Decision, Meta's internal documents reveal that it was well aware that its 'Consent or Pay' advertising model would lead the overwhelming majority of end users of its Non-Ads Services to opt for the With Ads option of the Facebook and Instagram environments. Thus, Meta designed its 'Consent or Pay' advertising model knowing that its end users would be unlikely to choose the SNA option.
- (163) *In the second place*, contrary to what Meta alleges, the fact that other online services exist, such as video streaming platforms or media publishing services, which offer a paid version to their users as an alternative to an advertising-based version does not in itself demonstrate that Meta's own end users would be familiar with such offering in the specific context of the Facebook and Instagram environments.
- (164) In any event, Meta has not substantiated that end users of its own Non-Ads Services specifically are familiar with such an offering against payment. Meta fails to explore the obvious differences between its Non-Ads Services and the streaming and media publishing services it cites, which explains why its end users are not necessarily familiar with the 'Consent or Pay' offering in the context of the Facebook and Instagram environments.
- (165) Moreover, none of the services invoked by Meta, except YouTube, are provided by gatekeepers or are designated CPSs under Regulation (EU) 2022/1925. Their providers are therefore not subject to the same obligations as Meta with regard to its OAS CPS Meta Ads and its Non-Ads Services, in particular Article 5(2) of that Regulation. Regarding YouTube Premium, besides the fact that it is not an OSN CPS, it is not alleged by Alphabet to be the less personalised alternative of YouTube. On the contrary, end users can access YouTube free of charge irrespective of whether they provide consent to the combination of their personal data for the purpose of serving personalised advertisements to them, unlike what is the case for the Facebook and Instagram environments.
- (166) By contrast, unlike the Facebook and Instagram environments, some of the services cited by Meta have traditionally been offered against a monetary fee (for example, Disney +, Netflix) or reserved important content or functionalities to Premium's subscribers (for example, Spotify, the Guardian, Le Monde, Bild, YouTube

Premium). Furthermore, Meta omits to mention that most of the cited examples are not online social networking services that intermediate organic content, but online services which give access to licensed content protected by intellectual property rights. End users of those online services are generally aware that such licensed content has a price outside of the online platform (e.g., one has to buy a copy of the newspaper to read an article or a ticket to watch a movie at the theatre), which explains why end users tend to assign a monetary value to these online services. This is different from online social networking services, and especially Facebook and Instagram to which end users never really assigned a monetary value because the third party organic content that they host is shared for free and does not have a price outside of the platform.

- (167) *In the third place*, contrary to what Meta alleges, the Commission provides adequate empirical evidence to support its position.
- (168) In that regard, the Commission relies on the extremely low user uptake mentioned in Section 4.2 of this Decision, which corroborates the Commission's position that end users are unlikely to pay a monetary fee to access the Facebook and Instagram environments. Meta has not provided any data which demonstrates that the extremely low user uptake was explained by other considerations.
- (169) In any event, Meta was clearly aware that end users of its Non-Ads Services would most likely not exercise their specific choice to refuse consent to access the Facebook and Instagram environments in return for paying a monthly subscription fee. This is evidenced by internal documents from Meta dating prior to the launch of the SNA option and provided in response to the RFI of 23 November, as referenced in recitals (96)-(98) of this Decision.<sup>118</sup>
- (170) **Sixth**, Meta's claim that the Commission erroneously disregarded the *Meta Platforms* judgment is unfounded. As already explained in Sections 3 and 5.1.1 of this Decision, the notion of 'specific choice' within the meaning of Article 5(2) of Regulation (EU) 2022/1925 is an autonomous legal requirement under Article 5(2), which is distinct from the notion of 'valid consent' under Article 4, point (11), and Article 7 of Regulation (EU) 2016/679.
- (171) In this context, the Commission observes that Meta does not deny that the *Meta Platforms* judgment solely contains considerations pertaining to the standard of 'valid consent' under Regulation (EU) 2016/679 and does not refer to Article 5(2) of Regulation (EU) 2022/1925.
- (172) In addition, Meta does not substantiate its claim that the *Meta Platforms* judgment envisaged the concept of 'appropriate remuneration' as a '*transfer of value being the provision of an equivalent alternative not accompanied by data processing [...] in return for the payment of a fee by the user*', beyond stating that its interpretation is '*self-evident*' and alleging '*clear guidance*' from the Court.
- (173) Therefore, Meta fails to substantiate that the Commission erroneously disregarded the *Meta Platforms* judgment when interpreting Article 5(2) of Regulation (EU) 2022/1925.
- (174) In light of the above, the Commission concludes that Meta has not complied with Article 5(2) of Regulation (EU) 2022/1925 because it does not present end users of

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<sup>118</sup> Commission's RFI of 23 November 2023.

Meta's Non-Ads Services, with the specific choice to combine, or not, their personal data from its Non-Ads Services with personal data from its OAS CPS Meta Ads.

## 5.2. Lack of valid consent

(175) As explained in recital (38) of this Decision, Article 5(2) of Regulation (EU) 2022/1925 refers to Article 4, point (11), and Article 7 of Regulation (EU) 2016/679 to define the consent that the end user must give the gatekeeper to process, combine, or cross-use his or her personal data across the gatekeeper's CPSs and distinct services. Therefore, in view of the Commission's duty of sincere cooperation with the supervisory authorities responsible for monitoring the application of Regulation (EU) 2016/679<sup>119</sup>, the analysis of the condition of 'consent' in this decision takes into account the EDPB Guidelines 05/2020 on Consent, as well as the EDPB's Opinion 08/2024.

### 5.2.1. *The Commission's position*

(176) While the finding that Meta does not fulfil the 'specific choice' condition laid down in Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 is sufficient to conclude that Meta's 'Consent or Pay' advertising model does not comply with that provision, the Commission will also assess whether the configuration of that model fulfils the second condition laid down in that provision.

(177) This second condition is that end users have given valid consent to the combination of their personal data for the purpose of serving personalised advertisements to them. That provision defines the notion of 'valid consent' by reference to Article 4, point (11), and Article 7 of Regulation (EU) 2016/679.

(178) Pursuant to Article 4, point (11), of Regulation (EU) 2016/679, valid consent is 'any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her'. As regards the requirement that consent is 'freely given', recital 42 of Regulation (EU) 2016/679 clarifies that '[c]onsent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment'. Recital 43 further clarifies that '[i]n order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance of power between the data subject and the controller, in particular where the controller is a public authority [...]'. Moreover, the EDPB, in its Guidelines 05/2020, sets out several criteria that should be considered when assessing whether consent is freely given: (i) whether there is an imbalance of power between the data subject and the data controller; (ii) whether consent is required to access goods or services, even though the processing of personal data is not necessary for the fulfilment of the contract (conditionality); (iii) whether the data subject suffers a detriment by not consenting or withdrawing consent; and (iv) whether the data subject is able to consent to different processing operations (granularity).<sup>120</sup> In its Opinion 08/2024, the EDPB provides further guidance on these criteria to assess, on a case-by-case basis, whether consent can be deemed freely given in a context where a 'Consent or Pay' model is envisaged.

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<sup>119</sup> Judgment of 4 July 2023, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)*, Case C-252/21, EU:C:2023:537, paragraphs 52-63.

<sup>120</sup> EDPB's Guidelines 05/2020 on consent under Regulation 2016/679, paragraphs 8-13.



While Opinion 08/2024 has not been yet applied in any concrete case, the Commission considers that Opinion, along with the Guidelines 05/2020, to constitute useful guidance to assess the elements of a freely given consent in the present case.<sup>121</sup>

- (179) As set out in more detail below, the Commission finds that the configuration of Meta's 'Consent or Pay' advertising model does not ensure that end users give valid consent (in particular, they are not enabled to 'freely' give their consent) to the combination of their personal data for the purpose of personalised advertising.
- (180) **First**, as regards the criterion of 'imbalance of power,' the Commission considers that, in relation to Meta's 'Consent or Pay' advertising model, a clear imbalance of power exists between Meta, as a data controller within the meaning of Article 4, point (7), of Regulation (EU) 2016/679 and a designated gatekeeper under Regulation (EU) 2022/1925, and the end users of its Non-Ads Services forming part of the Facebook and Instagram environments, as data subjects within the meaning of Regulation (EU) 2016/679. Because of that imbalance, an end user cannot negotiate with Meta any other option than the two options offered to all end users. Moreover, the end users may feel compelled to opt for the With Ads option and provide consent to continue benefitting from those services.
- (181) In that regard, it is necessary to consider the position of the data controller and the power it has in relation to the data subject to ensure that the latter does not feel compelled to take a decision that it otherwise would not have taken.<sup>122</sup>
- (182) According to the EDPB, gatekeepers as defined under Regulation (EU) 2022/1925 may be covered by the notion of 'large online platforms' under Opinion 08/2024 and the existence of a situation of imbalance of power may be verified through a case-by-case evaluation of several factors, such as the position of the data controller in the market, the reliability of the data subject on the service provided by the controller, or even the target or predominant audience of the controller's platform.<sup>123</sup>
- (183) *In the first place*, the designation of an undertaking as a gatekeeper pursuant to Regulation (EU) 2022/1925 is a strong indication of the data controller's power to impinge on the freedom of choice of the data subject. In that respect, recital 4 of Regulation (EU) 2022/1925 underscores that the combination of features offered by a gatekeeper is likely to lead, in many cases, to a serious imbalance in bargaining power and, consequently, to unfair practices and conditions for end users of CPSs provided by gatekeepers, to the detriment of choice.
- (184) Meta's designation as a gatekeeper in relation to several CPSs forming part of its Non-Ad Services is therefore a strong indication of the position Meta holds with regard to the end users of those services and how that position may lead to a serious imbalance in bargaining power with those end users. In addition, the existence of network and lock-in effects across Meta's Non-Ad Services, as described in recitals (242)-(247) of this Decision, may make it harder or unrealistic for those end users to choose alternative services.

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<sup>121</sup> See EDPB's Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, 17 April 2024, Section 4.2.1 '*Freely Given consent*'.

<sup>122</sup> As also acknowledged in the EDPB's Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, 17 April 2024, paragraph 97.

<sup>123</sup> EDPB's Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, 17 April 2024, paragraphs 99-113.

- (185) *In the second place*, Meta has built up a large user base for its Non-Ads Services by previously offering those services entirely for free. As a result, Meta’s Non-Ads Services benefit from network effects locking in end users. These lock-in effects, in turn, are another indication of an imbalance of power between Meta and its end users (the data subjects).
- (186) The EDPB has also highlighted this as a significant point of attention. Thus, services may have attracted many users that do not have the willingness or the ability to pay a fee, and who availed themselves of the service in the belief that their reliance would not have a financial impact on them. In this regard, it is worth noting that the slogan ‘*It’s Free and Always Will Be*’ was presented by Meta to end users on the Facebook’s registration page in Europe until 2019.<sup>124</sup>
- (187) Such users may, over time, increase their reliance on the service due to among other things network effects and lock-in effects. If the provider of such a service subsequently offers users binary options between continuing to access the service for free, provided consent is given for the processing of their personal data for the purpose of serving personalised advertisements to them, and paying a fee for an advertising-free version of the service, this could be seen as giving those users an illusory choice.<sup>125</sup>
- (188) In that respect, the SNA option in Meta’s ‘Consent or Pay’ advertising model is presented to end users of the Facebook and Instagram environments in a context where Meta has built a large user base, over two decades, which has come to rely on the provision of Meta’s Non-Ads Services being provided free of charge. Consequently, with its ‘Consent or Pay’ advertising model, Meta could be said to leverage a clear power imbalance in relation to those end users who are therefore unable to exercise the free choice to not consent to the processing of their personal data.
- (189) **Second**, the Commission finds that Meta’s ‘Consent or Pay’ advertising model does not allow end users of the Facebook and Instagram environments to refuse consent to the combination of their personal data from Non-Ads Services with the OAS CPS Meta Ads without suffering a detriment.
- (190) That detriment consists in having to pay a monthly fee, or to leave the Facebook and Instagram environments altogether and is evidenced by the fact that Meta has offered those environments for free to end users for two decades, by the strong lock-in and network effects those environments exhibit, and the fact that those environments are an integral part of the daily lives of over [>45 million] MAUs in the European Region. This makes it harder for end users presented with Meta’s ‘Consent or Pay’ advertising model to make a genuine or free choice and, in particular, to refuse consent without suffering negative consequences.<sup>126</sup>
- (191) *In the first place*, the Facebook and Instagram environments have been offered free of charge for two decades, which make it more likely to deter end users of the

<sup>124</sup> ‘Facebook quietly ditched the “It’s Free and Always Will Be” slogan from its homepage’, Business Insider, 27 August 2019, available at [Facebook No Longer Says 'It's Free and Always Will Be' on Its Homepage - Business Insider](#), last accessed on 31 March 2025. [...]

<sup>125</sup> EDPB’s Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, 17 April 2024, paragraph 109.

<sup>126</sup> See EDPB’s Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, 17 April 2024, paragraphs 90-95.

Facebook and Instagram environments from withholding consent to the processing of their personal data for purposes of serving personalised advertising to them, since Meta did not adopt a ‘Consent or Pay’ advertising model for those environments from the outset.<sup>127</sup>

- (192) As already mentioned in recitals (185)-(188) of this Decision, the SNA option in Meta’s ‘Consent or Pay’ advertising model is presented to end users of the Facebook and Instagram environments in a context where Meta has built a large user base, over two decades, which has come to rely on the provision of Meta’s Non-Ads Services being provided free of charge.
- (193) The subsequent introduction of a ‘Consent or Pay’ advertising model therefore makes it harder for end users to make a genuine or free choice and to withhold consent to the processing of their personal data for purposes of serving personalised advertising to them without suffering the negative consequences of having to pay a monthly fee or to leave the Facebook and Instagram environments.
- (194) *In the second place*, the Facebook and Instagram environments exhibit strong lock-in and network effects which, according to EDPB’s Opinion 08/2024, makes it more likely for end users to suffer the detriment of having to pay a monthly fee or to leave the Facebook and Instagram environments altogether.<sup>128</sup>
- (195) This is supported by the fact that the Designation Decision expressly provides that the OSN CPSs Facebook and Instagram, the NIICS CPS Messenger and the OIS CPS Marketplace individually constitute important gateways for business users to reach end users, while according to recital 2 of Regulation (EU) 2022/1925, CPSs feature a number of characteristics that can be exploited by the undertakings providing them, such as, for example, very strong network effects and lock-in effects.
- (196) In any event, because Meta seeks to obtain the data subject’s consent at the level of the Facebook environment (which includes the OSN CPS Facebook, the NIICS CPS Messenger, the OIS CPS Marketplace, and other services) or of the Instagram environment (which includes the OSN CPS Instagram), instead of at the level of each individual CPS and distinct service, it is enough to characterise the lock-in and network effects at the environment level for the purpose of assessing the detriment criteria. In this context, the lock-in and network effects which characterise the OSN CPS Facebook, the OSN CPS Instagram, the NIICS CPS Messenger and the OIS CPS Marketplace, are compounded by the bundling of those CPSs and other distinct services inside the Facebook or Instagram environments.
- (197) *In the third place*, and in addition to the above, the Facebook and Instagram environments are an integral part of the daily lives of many data subjects in the Union, which indicates further risks of detriment.<sup>129</sup>
- (198) In that regard, the use of online social networking services has become an integral part of the daily lives of many Union citizens, who use them, among others, to communicate with family and friends, as well as to build personal and professional

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<sup>127</sup> EDPB’s Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, 17 April 2024, paragraph 90.

<sup>128</sup> See EDPB’s Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, 17 April 2024, paragraph 90.

<sup>129</sup> See EDPB’s Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, 17 April 2024, paragraphs 87-88.

connections, contribute to public discussions and access information,<sup>130</sup> to the extent that many people do not conceive of a ‘life without social media use’.<sup>131</sup> Digital platforms themselves assert their role in constructing a social infrastructure and becoming indispensable in people's everyday lives.<sup>132</sup>

- (199) This is clearly the case for the Facebook and Instagram environments, which have become ubiquitous in the Union. According to the data set out in recitals (79)-(80) of this Decision, both of those environments have over [>45 million] MAUs in the European region.
- (200) In this regard, it is worth noting that the EDPB, in the context of assessing whether the processing of personal data for the performance of a contract is a suitable legal basis for behavioural advertising, already observed that, should users decline the terms and conditions of Facebook, they would be excluded from a widely used communication platform, while being left with few realistic alternatives.<sup>133</sup> The EDPB further noted that such exclusion can have a negative effect on the users’ freedom of expression and information.
- (201) **Third**, in the absence of any further free of charge alternative option without behavioural advertising as referred to in the EDPB’s Opinion 08/2024, the Commission observes that Meta’s ‘Consent or Pay’ advertising model is, by virtue of its binary nature, incapable of removing, reducing or mitigating the detriment that may arise for non-consenting users described in recitals (190)-(196) of this Decision.

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<sup>130</sup> See EDPB’s Guidelines 8/2020 on the targeting of social media users, Version 2.0 (13 April 2021), page 4, paragraph 1. See also Julia Brailovskaia, Holger Schillack and Jürgen Margraf (2020), ‘Tell me why are you using social media (SM)! Relationship between reasons for use of SM, SM flow, daily stress, depression, anxiety, and addictive SM use – An exploratory investigation of young adults in Germany’, 113 Computers in Human Behaviour, available at <https://www.sciencedirect.com/science/article/pii/S0747563220302636>, last accessed on 31 March 2025 [...].

<sup>131</sup> Julia Brailovskaia, Holger Schillack and Jürgen Margraf (2020), ‘Tell me why are you using social media (SM)! Relationship between reasons for use of SM, SM flow, daily stress, depression, anxiety, and addictive SM use – An exploratory investigation of young adults in Germany’, 113 Computers in Human Behaviour, available at <https://www.sciencedirect.com/science/article/pii/S0747563220302636>, last accessed on 31 March 2025, p. 1 [...].

<sup>132</sup> Jo Pierson (2021), ‘Digital platforms as entangled infrastructures’, European Journal of Communication 36(4), available at [https://cris.vub.be/ws/portalfiles/portal/76278288/EJC21\\_Pierson\\_Digital\\_platforms\\_as\\_entangled\\_infrastructures\\_Addressing\\_public\\_values\\_and\\_trust\\_in\\_messaging\\_apps.pdf](https://cris.vub.be/ws/portalfiles/portal/76278288/EJC21_Pierson_Digital_platforms_as_entangled_infrastructures_Addressing_public_values_and_trust_in_messaging_apps.pdf), last accessed on 31 March 2025, p. 351 [...].

<sup>133</sup> EDPB’s Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR), 5 December 2022, paragraph 130 (see also paragraph 127 for reference to the lack of alternative services). In the context of the dispute, the Datatilsynet (the Norwegian Data Protection Authority) submitted that data subjects are confronted with the dilemma of either consenting to contractual terms that may entail detrimental processing practices, or facing exclusion from services upon which they are effectively reliant, considering the lack of the absence of realistic alternatives - paragraph 55, page 17 of the Binding Decision 3/2022.

<sup>134</sup> EDPB’s Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, 17 April 2024, paragraphs 77-78. In paragraph 75 of the same Opinion 08/2024, the EDPB indicates that such alternative must entail no processing of personal data for behavioural advertising purposes and may for example, be a version of the service with a different form of advertising involving the processing of less (or no) personal data, for example contextual or general advertising or advertising based on topics the data subject selected from a list of topics or interests.

- (202) In the light of the foregoing considerations, the Commission concludes that Meta does not meet at least one of the cumulative requirements – that the consent must be *freely* given – to demonstrate that end users of its Facebook and Instagram environments have given valid consent to the combination of their personal data with data from its OAS CPS Meta Ads as part of the With Ads option. Meta’s ‘Consent or Pay’ advertising model, therefore, also does not comply with the second condition of Article 5(2), first subparagraph, of Regulation (EU) 2022/1925, namely to obtain from its end users’ valid consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679 to the combination of their personal data for the purpose of serving personalised advertisements to them.

#### 5.2.2. *Meta’s arguments*

- (203) **First**, Meta reiterates that the ‘Consent or Pay’ advertising model ensures that end users provide valid consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679. More specifically, Meta considers that this consent is: (i) freely given; (ii) specific; (iii) informed; (iv) an unambiguous indication of their wishes; (v) clearly distinguishable from other matters; (vi) can be withdrawn at any time; and (vii) demonstrable (as specified by the Regulation (EU) 2022/1925).<sup>135</sup>
- (204) Meta further claims that the ‘Consent or Pay’ advertising model complies with the requirement of a freely given consent and is consistent with the directly relevant guidance found in the *Meta Platforms* judgment<sup>136</sup> which, according to Meta, makes explicit that the notion of consent in Regulation (EU) 2016/679 permits ‘Consent or Pay’ models as a viable model for obtaining consent.<sup>137</sup>
- (205) **Second**, Meta claims that Opinion 08/2024 is irrelevant for the Commission’s assessment of whether its ‘Consent or Pay’ advertising model complies with Article 5(2) of Regulation (EU) 2022/1925. More specifically, Meta argues that the Commission cannot lawfully rely on the Opinion 08/2024 to assess whether that advertising model complies with that provision because that Opinion would be: (i) unlawful;<sup>138</sup> (ii) highly contested;<sup>139</sup> and (iii) would in any event not be relevant to an assessment of compliance with Regulation (EU) 2022/1925, since it was adopted after the initial deadline for compliance with Article 5(2) of that Regulation.<sup>140</sup>

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<sup>135</sup> Meta’s Compliance Report of 6 March 2024, paragraph 156 [...] and Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 36 [...].

<sup>136</sup> Judgement of 4 July 2023, *Meta Platforms and Others (Conditions générales d’utilisation d’un réseau social)*, Case C-252/21, EU:C:2023:537, paragraph 150.

<sup>137</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 38-40 [...].

<sup>138</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 98-106 [...]. In essence Meta argues that: i) the EDPB has acted beyond the powers conferred to it under Article 64(2) of Regulation (EU) 2016/679 by engaging in far-reaching market design and regulation; ii) the requirement for an additional alternative free of charge sought to be imposed by the EDPB’s Opinion would be inconsistent with the *Meta Platforms* judgment ; iii) the EDPB’s Opinion would fail to strike a balance between end users’ right to the protection of personal data under Article 8 of the Charter and Meta’s freedom to conduct its business under Article 16 of the Charter; iv) the EDPB’s Opinion would violate Meta’s right to equal treatment under Article 20 of the Charter by unjustifiably singling out ‘large online platforms’; v) the EDPB’s Opinion would violate Article 52(1) and the principle of legal certainty by imposing restrictions not provided under Regulation (EU) 2016/679; vi) the issuing of the EDPB’s Opinion without affording Meta the right to be heard would violate Meta’s right to fair procedures under Article 41(2)(a) of the Charter.

<sup>139</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 107-109 [...].

<sup>140</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 119-120 [...].

- (206) **Third**, Meta claims that if Opinion 08/2024 were considered cogent guidance to assess whether Meta’s ‘Consent or Pay’ advertising model complies with Article 5(2) of Regulation (EU) 2022/1925, the Commission’s interpretation of Opinion 08/2024 would, in the case at hand, be fundamentally flawed. Indeed, Meta considers that there is no imbalance of power between Meta and its end users such that the latter could not freely give their consent.<sup>141</sup>
- (207) On the one hand, Meta argues that the Commission adopts an expansive view of what constitutes an imbalance of power by erroneously lowering the applicable threshold and by ignoring the fact that an imbalance of power does not preclude the obtaining of valid consent.<sup>142</sup> Meta argues specifically that it would be absurd to conclude that the mere designation of a gatekeeper would, by virtue of indicating that there exists an imbalance of power, invalidate end users’ consent.<sup>143</sup>
- (208) On the other hand, Meta argues that the Commission provides no concrete evidence, beyond vague and unsubstantiated assertions about the existence of network and lock-in effects. According to Meta, it is clear that no imbalance of power exists between itself and its end users which would prevent end users from freely giving consent since: (i) Facebook and Instagram are not public utilities or ‘essential’ services (such as retail banks, utilities companies or government agencies) and are therefore not irreplaceable nor indispensable; and (ii) end users can use multiple alternative services, which limit any power that Facebook and Instagram may have.<sup>144</sup>
- (209) **Fourth**, Meta further claims that the application of Opinion 08/2024 by the Commission to Meta’s ‘Consent or Pay’ advertising model would be fundamentally flawed since end users would suffer no detriment as a result of that model.<sup>145</sup>
- (210) In essence, Meta argues that end users’ ability to refuse consent to personalised advertising by either choosing the SNA option or, alternatively, choosing to leave the Facebook and Instagram environments would not be impaired in view of: (i) the wide range of alternative services and the evidence that these alternatives are economic substitutes for Facebook and Instagram; (ii) the fact that end users of Facebook and Instagram do not face any significant switching barriers; and (iii) the fact that those end users can and do multi-home, which would be evidenced by the six ‘social media’ accounts used by an average individual in the EEA.
- (211) To support this claim, Meta submitted a study entitled ‘*Independent Economic Assessment on Freely Given Consent*’ (‘Meta’s Study on Consent’).
- (212) According to Meta, ‘[t]he central concern expressed in the Opinion which appears to underpin the EDPB’s view on detriment, is that certain online services have “a prominent role”, or are “decisive for the data subjects’ participation in social life”.’<sup>146</sup> Meta’s Study on Consent aims to evidence that Facebook and Instagram operate in a highly competitive environment where equivalent benefits for users are offered by a variety of other services.<sup>147</sup>

<sup>141</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 132-139 [...].

<sup>142</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 132-136 [...].

<sup>143</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 137 [...].

<sup>144</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 138 [...].

<sup>145</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 124-131 [...].

<sup>146</sup> Meta’s Submission to the IE DPC in Respect of Opinion 08/2024, p. 20 [...].

<sup>147</sup> Meta’s Study on Consent, p. 12 [...].

- (213) According to that study, [Confidential – contains business secret].<sup>148</sup>
- (214) *In the first place*, Meta claims that end users have multiple alternative options available when they do not consent, or withdraw consent, to the combination of their personal data.<sup>149</sup>
- (215) Such options include services which compete for end users ‘time and attention including [other diverse online social services] as well as private messaging apps (e.g. [Confidential – contains business secret]), online streaming services (e.g. [Confidential – contains business secret]), gaming services (e.g. [Confidential – contains business secret]), and media publishers (e.g. [Confidential – contains business secret])’. This assessment considers that the different options available to consumers for switching to another service is evidenced by:
- (a) public statements, industry reports and press reports showing the possibility for users to switch between Facebook and Instagram and these alternatives;
  - (b) switching occurs between Facebook/Instagram and other attention services. In particular, the assessment estimates that a ban of [Confidential – contains business secret] in [non-EU country] led to an increase in time spent on Facebook in [non-EU country] (compared to other comparator countries) by [10-20%] after one week, and [90-100%] after 24 months;
  - (c) Facebook and Instagram provide similar features/functionalities and address similar user needs as other rival attention services. Such features include short-form video (‘Reels’) and direct messages services; and
  - (d) cross-use of content across platforms by content creators.
- (216) *In the second place*, Meta argues that users of Facebook and Instagram face low switching costs between the different attention services available to them, and engage with multiple such services in parallel<sup>150</sup>. Therefore, according to Meta, there is ‘*no or little risk of the negative effects described in the Opinion, and indeed no evidence to support any suggestion of “very substantial and potentially irreparable loss for the user” from being unable to access the content created on [Meta’s services]*’.<sup>151</sup> Meta explains that:
- (a) there are no monetary, time, or effort costs for users to switch between these services;
  - (b) users do multi-home between a wide range of attention services. The assessment finds that the average end user in the EEA uses [Confidential – contains business secret] social media accounts, and that users of Facebook and Instagram also use a wide range of alternative services;
  - (c) the use of Facebook and Instagram for social interactions does not create switching costs. In particular, the assessment found that content created by ‘Friends’ on Facebook accounted for only [10-20%] of views on Facebook;

<sup>148</sup> Meta’s Study on Consent, p. 12 [...].

<sup>149</sup> Meta’s Study on Consent, pp. 2-3 [...].

<sup>150</sup> Meta’s Study on Consent, pp. 4-5 [...].

<sup>151</sup> Meta’s Submission to the IE DPC in Respect of Opinion 08/2024, p. 23 [...].

- (d) network effects do not impose switching costs on Facebook and Instagram users because multi-homing is high, [Confidential – contains business secret], and there are multiple alternatives available; and
  - (e) Facebook and Instagram are not unique in their features/functionalities, use cases or types of content.
- (217) **Fifth**, Meta further claims that the Commission and the EDPB’s Opinion 08/2024 fail to engage with the specific data processing activities conducted by Meta for the delivery of personalised advertisements and the countervailing benefits for users for such advertising.<sup>152</sup>
- (218) Meta considers that ‘[t]he Opinion describes behavioural advertising in a pejorative and one-sided manner, disregarding the fact that many users benefit from behavioural advertising’.<sup>153</sup>
- (219) To support this claim, Meta submitted a study entitled ‘*Independent Economic Assessment on Value of Behavioural Advertising*’ (‘Meta’s Study on Behavioural Advertising’).
- (220) That study aims to provide evidence on the economic value of behavioural advertising for Facebook and Instagram users.<sup>154</sup> That study considers that:<sup>155</sup>
- (a) negative effects that may exist in relation to Meta’s behavioural advertising, are expected to be small. According to the study, this is because Meta’s behavioural advertising aims to [Confidential – contains business secret]. Moreover, Meta argues that its own guidelines ensure that there is no discrimination on its platforms;
  - (b) Meta’s behavioural advertising reduces end users search costs to gather information about new products, thereby increasing competition and new entry; and
  - (c) Meta’s behavioural advertising enables users to access Meta’s services for free.
- (221) According to Meta, ‘not taking into account this evidence and those net benefits risks biasing assessments against behavioural advertising and ultimately harming EU users (and businesses) if the user benefits associated with behavioural advertising cannot be realized’.<sup>156</sup>
- (222) **Sixth**, Meta argues that the Commission effectively pre-empts the IE DPC’s substantive assessment of Meta’s ‘Consent or Pay’ advertising model by adopting the assertions of the Opinion 08/2024 as if they are binding law without making any attempt to ascertain the views of the IE DPC on the application of the Opinion to the case at hand.<sup>157</sup> In support of this claim, Meta refers *inter alia* to the Commission’s letter of 17 July stating that the Preliminary Findings ‘*exclusively reflect the*

<sup>152</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 115-118 [...].

<sup>153</sup> Meta’s Submission to the IE DPC in Respect of Opinion 08/2024, p. 24 [...].

<sup>154</sup> Meta’s Submission to the IE DPC in Respect of Opinion 08/2024, p. 24 [...].

<sup>155</sup> Meta’s Study in Behavioural Advertising, pp. 2-5 [...].

<sup>156</sup> Meta’s Study in Behavioural Advertising, pp. 5-6 [...].

<sup>157</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 110-114 [...].



*Commission's own preliminary views, and do not contain any joint evaluation with the IE DPC*.<sup>158</sup>

5.2.3. *The Commission's assessment of Meta's arguments*

- (223) The Commission considers that none of Meta's arguments described in Section 5.2.2 are well founded.
- (224) **First**, Meta's position that its 'Consent or Pay' advertising model ensures that end users provide valid consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679, is already extensively addressed in Section (175) of this Decision.
- (225) Indeed, in recitals (176)-(202) of this Decision, the Commission finds that the configuration of Meta's 'Consent or Pay' advertising model does not enable end users to freely consent to the combination of their personal data from Meta's Non-Ads Services with data from the OAS CPS Meta Ads within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679 because of the clear imbalance of power between Meta and its end users and because end users who refuse consent to the processing of their personal data cannot do so without suffering a detriment.
- (226) **Second**, the Commission rejects Meta's claim that the guidance provided in Opinion 08/2024 is not relevant to assess whether Meta's 'Consent or Pay' advertising model complies with Article 5(2) of Regulation (EU) 2022/1925 on the grounds that Opinion 08/2024 would be unlawful, highly contested, and post-dates the initial deadline for compliance with Article 5(2) of that Regulation. The Commission considers that Opinion 08/2024 is relevant and that the Commission has lawfully relied on it as guidance to assess whether freely given consent is provided for by Meta in the case at hand.
- (227) *In the first place*, the Commission finds no reason to question the lawfulness of Opinion 08/2024, which was adopted under Article 64(2) of Regulation (EU) 2016/679.
- (228) For context, the Commission recalls that the EDPB, similarly to national supervisory authorities responsible for monitoring the application of Regulation (EU) 2016/679, enjoys independence in the performance of its tasks in line with Article 69 of that Regulation. The Commission further notes that Article 70 of Regulation (EU) 2016/679 entrusts the EDPB with broad powers to ensure the consistent application of that Regulation, including in particular the tasks to monitor and ensure the correct application of that Regulation in the cases provided for in Articles 64 and 65, without prejudice to the tasks of national supervisory authorities,<sup>159</sup> and to examine, on its own initiative or on request of one of its members, any question covering the application of that Regulation and to issue guidelines, recommendations and best practices in order to encourage consistent application of that Regulation.<sup>160</sup>
- (229) The subject-matter of Opinion 08/2024 covers the application of Regulation (EU) 2016/679, namely the question under which circumstances and conditions 'Consent or Pay' models relating to behavioural advertising can be implemented by large

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<sup>158</sup> Commission's reply to Meta's request of 8 July 2024 under Article 8(5) of Implementing Regulation (EU) 2023/814 relating to the access of file, paragraph 32.

<sup>159</sup> Article 70(1), point (a), of Regulation (EU) 2016/679.

<sup>160</sup> Article 70(1), point (e), of Regulation (EU) 2016/679.

online platforms in a way that constitutes valid, and in particular freely given, consent, also taking into account the *Meta Platforms* judgment.<sup>161</sup> The Commission further notes that Opinion 08/2024 was issued upon the request of three supervisory authorities under Article 64(2) of Regulation (EU) 2016/679, which was deemed admissible by the EDPB,<sup>162</sup> and was adopted within the procedure, deadline and voting conditions (*i.e.*, simple majority of the members of the Board) provided in Article 64(3) of that Regulation.

- (230) Against that background, and in the absence of a ruling from the Court establishing that the Opinion 08/2024 is unlawful or suspending it as a measure of interim relief,<sup>163</sup> the Commission finds no compelling reasons to disregard that Opinion, or to question its legality.
- (231) *In the second place*, the Commission considers that Meta's claim that Opinion 08/2024 would be highly contested amounts to a denial of the voting conditions established by the Union legislature in Article 64(3) of Regulation (EU) 2016/679. That provision, purposefully, does not require the adoption of EDPB's opinions under Article 64(2) by consensus, but requires only a simple majority vote of the members of the Board. The fact that Opinion 08/2024, or parts of it, had been contested by a minority of the EDPB's members cannot deprive that Opinion of its legality or relevance in ensuring a consistent application of Regulation (EU) 2016/679. Once adopted, Opinion 08/2024 reflects the position of the EDPB as a Union body. The fact that some members of the Board voted differently or expressed reservations about the Opinion 08/2024 does not diminish the value of that Opinion, in the same way that the Court's judgments produce their effects irrespective of whether they were decided by majority or unanimously.
- (232) *In the third place*, Meta's claim that Opinion 08/2024 is irrelevant to the Commission's assessment in the case at hand, on the ground that this Opinion post-dates the initial deadline for compliance with Article 5(2) of Regulation (EU) 2022/1925, must also be rejected.
- (233) When the Commission opened its investigation on 25 March 2024, it had concerns regarding compliance of Meta's 'Consent or Pay' advertising model with both the condition of 'specific choice' and the condition of 'valid consent' enshrined in Article 5(2) of Regulation (EU) 2022/1925.
- (234) As recalled in Section 3.1 of this Decision, Article 5(2) of Regulation (EU) 2022/1925 refers to Article 4, point (11), and Article 7 of Regulation (EU) 2016/679 to define the consent that the end user must give in order to enable the gatekeeper to process, combine, or cross-use that end user's personal data across the gatekeeper's CPSs and distinct services. Accordingly, for the application of Article 5(2) of Regulation (EU) 2022/1925, it is necessary to have recourse to the interpretation of the notion of consent within the meaning of the aforementioned provisions of Regulation (EU) 2016/679.
- (235) An assessment, at a given point in time, of compliance with the second condition of 'valid consent' requires considering all available case law from the Court and

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<sup>161</sup> EDPB's Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, 17 April 2024, paragraphs 3-5.

<sup>162</sup> EDPB's Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, 17 April 2024, Section 1.3 'Admissibility of the request', paragraphs 7-13.

<sup>163</sup> Action brought on 27 June 2024 by Meta Platforms Ireland v EDPB, T-319/24.

relevant guidance from the EDPB, as the competent body tasked to ensure the consistent application of Regulation (EU) 2016/679 pertaining to that notion. The fact that Opinion 08/2024 was adopted after the compliance deadline with Regulation (EU) 2022/1925 therefore cannot justify discarding it in the context of the Commission's own assessment. Furthermore, the EDPB's opinions do not create new legal rules, but merely interpret the existing Union law on the protection of personal data.

- (236) Following Meta's reasoning would lead to the untenable outcome of discarding any new relevant guidance from the EDPB or case law of the Court pertaining to the notion of consent that would post-date the initial compliance deadline of 7 March 2024. Quite the contrary: in order to perform a diligent investigation, the Commission is under the duty to take into account such developments, which took place in the course of its investigation and prior to the adoption of its final decision on the investigation. Furthermore, the Commission has to take into account Opinion 08/2024 in view of its duty of sincere cooperation with the supervisory authorities responsible for monitoring the application of Regulation (EU) 2016/679.<sup>164</sup>
- (237) In light of the above, the Commission concludes that Opinion 08/2024 constitutes relevant guidance and that it has lawfully relied on it to assess whether Meta's 'Consent or Pay' advertising model complies with the condition of a freely given consent.
- (238) **Third**, Meta's claim that the application of Opinion 08/2024 by the Commission to its 'Consent or Pay' advertising model would, in the case at hand, be fundamentally flawed, since there would be no imbalance of power between Meta and the end users of its Non-Ads Services forming part of the Facebook and Instagram environments such that end users cannot freely give consent, must be rejected.
- (239) *In the first place*, contrary to Meta's claim, recital 43 of Regulation (EU) 2016/679 does not limit situations of imbalance of power to 'very limited circumstances', such as where the controller is a public authority. In this regard, the EDPB's Guidelines 05/2020 unambiguously indicate that imbalances of power are not limited to public authorities and employers, as they may also occur in other situations.<sup>165</sup>
- (240) In addition, the Commission does not argue that the clear imbalance of power between Meta and the end users of its Non-Ads Services forming part of the Facebook and Instagram environments precluded, in itself, the obtaining of freely given consent. Instead, the Commission relies, in line with the EDPB's Guidelines 05/2020, on the existence of an imbalance of power together with the detriment that end users of Meta's Non-Ads Services may suffer as a result of 'Consent or Pay' advertising model.
- (241) It follows that the Commission has neither lowered nor misunderstood the threshold of what constitutes an imbalance of power, which combined with detriment, can found the conclusion that the consent is not freely given.
- (242) *In the second place*, contrary to Meta's claim that the Commission provides no concrete evidence, beyond vague and unsubstantiated assertions about the existence of network and lock-in effects, the Commission has, in view of Opinion 08/2024,

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<sup>164</sup> Judgment of 4 July 2023, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)*, Case C-252/21, EU:C:2023:537, paragraphs 52-63.

<sup>165</sup> EDPB's Guidelines 05/2020 on consent under Regulation (EU) 2016/679, paragraph 24.

taken into consideration the position of Meta on the market and end users' reliance on Meta's Non-Ads Services forming part of the Facebook and Instagram environments.

- (243) As Meta's Study on Consent notes, '*[n]etwork effects occur when the value of a service depends on whether other people are using the same service*',<sup>166</sup> and therefore the larger the user base of a service, the stronger network effects. As far as Meta's position on the market is concerned, the Commission established that Meta built up a large user base for its Non-Ads Service during the designation process and in the Designation Decision. Indeed, Meta provided figures showing that, as of 2022, when only the free option was available, Facebook and Instagram had respectively [ $>45$  million] and [ $>45$  million] monthly active users.<sup>167</sup> This user base is approximately [significantly more than] that of TikTok,<sup>168</sup> the most cross-visited online social networking service by Facebook and Instagram end users.
- (244) It follows that the Commission's reliance on Meta's designation as a gatekeeper in relation to several CPSs forming part of Facebook and Instagram environments, far from being 'absurd', as qualified by Meta, constitutes, a strong indicator that an imbalance of power exists between Meta and its end users. This is so because of the very high numbers of MAUs for the OSN CPS Facebook, the OSN CPS Instagram, the OIS CPS Marketplace and the NIICS CPS Messenger referred in the Designation Decision, which exceed [Confidential – contains business secret] the threshold foreseen in Article 3(2), subparagraph b) of Regulation (EU) 2022/1925, as well as the lock-in and network effects which characterize the Facebook and Instagram environments described in recitals (194)-(196). However, contrary to Meta's claim, the Commission has nowhere implied that Meta's designation as a gatekeeper, alone, would invalidate end user consent.<sup>169</sup>
- (245) While Meta's Non-Ads Services are not a public utility or 'essential facility' such as, for example, certain government agencies, these services, which are part of the Facebook and Instagram environments to which Meta's 'Consent or Pay' advertising model applies, are nevertheless an integral part of the daily lives of many Union citizens. Indeed, as the Commission's analysis on detriment highlights in recital (197) of this Decision, many people do not conceive of a '*life without social media use*'.<sup>170</sup> This reliance on Meta's Non-Ads Services forming part of the Facebook and Instagram environments by end users is further compounded, as explained in in recitals (185)-(196) of this Decision, by the nature of network effects. Indeed, in the context of network effects, the larger the user base, the higher the value of the network to end users. Therefore, end users rely on Meta's Facebook and Instagram

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<sup>166</sup> Meta's Study on Consent, paragraph 27 [...].

<sup>167</sup> Designation Decision, Table 2 and Table 3.

<sup>168</sup> Commission Decision C(2023)6102 of 5 September 2023 designating ByteDance as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

<sup>169</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraph 137 [...].

<sup>170</sup> See EDPB's Guidelines 8/2020 on the targeting of social media users, Version 2.0 (13 April 2021), page 4, paragraph 1; Julia Brailovskaia, Holger Schillack and Jürgen Margraf (2020), 'Tell me why are you using social media (SM)! Relationship between reasons for use of SM, SM flow, daily stress, depression, anxiety, and addictive SM use – An exploratory investigation of young adults in Germany', 113 Computers in Human Behaviour, available at <https://www.sciencedirect.com/science/article/pii/S0747563220302636>, last accessed on 31 March 2025, [...].

environments to connect to other end users because Facebook and Instagram have the broadest user base among online social networks available in the Union and some of their connections may not be available on alternative online social networking services.

- (246) The Commission further observes that end users' reliance on Meta's Non-Ads Services forming part of Facebook and Instagram environments is exacerbated by the wide range of services and features offered to end users by those services compared to other online social networking services. Indeed, Meta's Study on Consent considered [Confidential – contains business secret] features and functionalities of various 'attention services' and identified that [Confidential – contains business secret] Facebook can [Confidential – contains business secret] Instagram can [Confidential – contains business secret]. Other social networks lack such breadth of offering. For instance, the Study identified that [Confidential – contains business secret] and [Confidential – contains business secret] could not offer [Confidential – contains business secret].<sup>171</sup>
- (247) Moreover, Meta's own Study on Consent relies on a study for the Observatory for the Online Platform Economy, which observes that Facebook and Instagram operate in markets where *'[t]he market concentration of these online platforms is strengthened by high entry barriers, network effects, high switching costs, data advantage, limited interoperability with other social media platforms.[...] Due to its scale and data advantage, Facebook offers advertisers the possibility to access and target very narrow groups of population; in this respect it has an advantage unmatched by any other competitor. While this is considered useful and advantageous by many advertisers, this also gives Facebook significant market power, makes it an unavoidable business partner for many businesses and limits scope for multi-homing.'*<sup>172</sup>
- (248) **Fourth**, Meta's claim that end users would suffer no detriment as a result of its 'Consent or Pay' advertising model, fails to convince.
- (249) The economic framework set out in Meta's Study on Consent rests on an evaluation of alternative services available to users, the quality of those alternative services, and the ability of users to take advantage of those alternative services.
- (250) *In the first place*, the Commission notes that in defining these alternatives, Meta's Study on Consent takes a broad view and considered any activity that attracts end users' time and attention as a potential substitute to Meta's services. This would include, for instance, traditional media (such as [Confidential – contains business secret]), and gaming services (such as [Confidential – contains business secret]).<sup>173</sup> Such broad inclusion of alternative services outside of digital markets or online social networking services and considering them as of equal value for the end users of Facebook and Instagram is not supported in Meta's Study on Consent by any evidence beyond theoretical academic papers focussed on the United States.
- (251) In contrast, there is evidence that end users do not consider these alternatives similar even when they offer similar services. For instance, in a 2017 survey, 42% percent of respondents from Germany above 50 years old declared they never get news online,

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<sup>171</sup> Meta's Study on Consent, Figure 4, [...].

<sup>172</sup> Study on 'Support to the Observatory for the Online Platform Economy', Analytical paper #7 'Multi-homing: obstacles, opportunities, facilitating factors', p. 32.

<sup>173</sup> Meta's Study on Consent, paragraph 42, [...].

while 24% of those aged 18 to 29 in France say they never get news from television, and 40% of those aged 18 to 29 in Spain stated they never get news from the radio.<sup>174</sup>

- (252) *In the second place*, the Commission notes that the evidence presented in the Study in relation to some of these alternative services shows that these services are, in fact, differentiated compared to Meta's services since they do not fulfil the same purposes and do not have the same functionalities as Meta's Non-Ads Services. As such, they cannot be considered as sufficiently similar by end users.
- (253) For instance, while Meta's Study on Consent found that [Confidential – contains business secret] of Facebook users also use YouTube, the Commission considers that a video-sharing platform does not offer all features that an online social networking service does. In this regard, the Commission recalls that YouTube was designated as a video-sharing platform within the meaning of Article 2, point (8), of Regulation (EU) 2022/1925<sup>175</sup> and that the Commission considers, as indicated in its Decision designating ByteDance as a gatekeeper pursuant to Article 3(4) of Regulation (EU) 2022/1925, that online social networking services' *'features and functionalities go beyond the provision of a video-sharing platform service, i.e., they are not limited to providing user-generated videos to the general public in order to inform, entertain or educate'*.<sup>176</sup>
- (254) Similarly, and as an example, Meta's Study on Consent found that, in 2022, only [Confidential – contains business secret] of Facebook users in the EEA also use [Confidential – contains business secret]. In other words, [Confidential – contains business secret] of Facebook users do not use [Confidential – contains business secret], which illustrates that end users do not consider [Confidential – contains business secret] as an alternative service to Facebook, but rather as a different service.<sup>177</sup>
- (255) At the same time, Meta's Study on Consent also alleges that end users face low switching costs between the different attention services available to them and engage with multiple of such services in parallel. However, and as mentioned in recital (254), the data contained in the Study is at odds with this statement. Indeed, the study finds that a large share of end users of Facebook and Instagram do not use alternative online social networks. For instance, in 2022 respectively [Confidential – contains business secret] of Facebook users were active users of [Confidential – contains business secret]. Similarly, over the same period, respectively [Confidential – contains business secret] of Instagram users were active users of [Confidential – contains business secret].<sup>178</sup>

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<sup>174</sup> Pew Research Centre (2018), 'Western Europeans Under 30 View News Media Less Positively, Rely More on Digital Platforms Than Older Adults', Appendix C. Available at <https://www.pewresearch.org/journalism/2018/10/30/europe-media-age-appendix-c/>, last accessed 31 March 2025.

<sup>175</sup> Commission Decision C(2023) 6101 of 5 September 2023 designating Alphabet as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

<sup>176</sup> Commission Decision C(2023) 6102 of 5 September 2023 designating Bytedance as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, paragraph 49.

<sup>177</sup> [Confidential – contains business secret]

<sup>178</sup> Meta's Study on Consent, Tables 4 and 5 [...].

- (256) Moreover, while low switching costs to end users may, to a certain extent, counteract the importance of network effects, it does not mean that such network effects are inexistent. Indeed, network effects arise when a product or service is more valuable to a user as more users adopt the same product or service. As explained in recital (255), given that a large share of Facebook and Instagram end users do not use alternative online social networking services, the value of these alternatives will necessarily be lower to Facebook and Instagram end users as they will not be able to connect with end users who do not cross-use other services. The strength of network effects on Facebook and Instagram is compounded by the fact that these services have large user bases, with approximately [>45 million] MAUs each, about [significantly more than] TikTok, the most important other online social network, as mentioned in recital (243) of this Decision.<sup>179</sup>
- (257) It follows that since Meta's Non-Ads Services, which form part of the Facebook and Instagram environments, differ, in particular regarding their features, from the alternative services mentioned by Meta, Meta's Study on Consent fails to demonstrate that any of these alternative services prevent end users from suffering any detriment when refusing consent to the processing and combination of their personal data in the context of Meta's 'Consent or Pay' advertising model.
- (258) *In the third place*, even for those end users who cross-use Facebook and Instagram and other online social networking services, the evidence on switching between Meta's services and [Confidential – contains business secret] provided in Meta's Study on Consent is inconclusive for the Union.
- (259) Indeed, part of this assessment is conducted on [non-EU country] users and not users in the Union. Even though [Confidential – contains business secret] and Meta's services offer similar features in the two locations, Meta's Study on Consent itself acknowledges that '[Non-EU country's] population has some different characteristics compared to the EEA population'.<sup>180</sup> Meta does not demonstrate why the findings in this Study regarding the experience in [non-EU country] would fully apply to Union users.
- (260) The allegation of switching between Meta's services and potential alternatives further rests on anecdotal evidence on the effect of a global outage of Facebook, Instagram and WhatsApp on 4 October 2021. During this outage, [Confidential – contains business secret] announced that its engagement increased by 14 % and [Confidential – contains business secret] stated that the increase in its usage caused technical issues.<sup>181</sup> The Commission considers that this analysis is inconclusive as: (i) [Confidential – contains business secret] is a subscription based video streaming service that has different features when compared to an online social networking service; (ii) the analysis does not provide evidence specifically in relation to users in the Union as it relates to a worldwide outage; (iii) the outage also affected WhatsApp, and if any substitution from Facebook and Instagram to other services could be inferred, it would be impossible to disentangle it from the substitution from WhatsApp to these other services.

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<sup>179</sup> Commission Decision C(2023)6102 of 5 September 2023 designating ByteDance as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, paragraph 141.

<sup>180</sup> Meta's Study on Consent, paragraph 64 [...].

<sup>181</sup> Meta's Study on Consent, paragraphs 67-68 [...].

- (261) In light of the above, the Commission considers that Meta's claims, as well as Meta's Study on Consent, fail to demonstrate that the alleged alternative services identified by Meta prevent end users from suffering detriment when refusing consent to Meta's 'Consent or Pay' advertising model on the Facebook and Instagram environments.
- (262) **Fifth**, the Commission rejects Meta's claim that the Commission failed to consider the countervailing benefits from personalised advertisements for end users. Whereas the Commission does not deny that behavioural advertising may create value to some end users and businesses under certain circumstances, it does not mean that end users who refuse consent to the combination of their personal data for the purpose of serving personalised advertisements to them may not suffer detriment. In any event, the detriment suffered by end users who do not consent can only be offset – potentially – by any benefits accruing to those same end users. In that respect, benefits accruing to different end users, *i.e.*, those who consent through targeted advertising, are not relevant.
- (263) **Sixth**, Meta's claim that the Commission is effectively pre-empting the IE DPC's substantive assessment of Meta's 'Consent or Pay' advertising model, by relying on Opinion 08/2024 of the EDPB as if it is binding in law without making any attempt to ascertain the views of the IE DPC in this respect, is unfounded.
- (264) As already mentioned in recitals (226)-(230) of this Decision, the Commission considers that Opinion 08/2024 is relevant and that the Commission can lawfully rely on it as relevant guidance to assess whether Meta's 'Consent or Pay' advertising model enables end users to freely give consent.
- (265) In addition, the Commission considers that it has appropriately and sufficiently cooperated with the IE DPC by organising several meetings on 19 January 2024, 13 June 2024, 21 June 2024, 28 June 2024, 28 August 2024, 25 October 2024, 21 January 2025 and 19 March 2025 to ensure a coherent application of Regulation (EU) 2022/1925 with Regulation (EU) 2016/679.
- (266) In that respect, the Commission considers that the statement in the Commission's letter to Meta of 17 July 2024 that its Preliminary Findings '*exclusively reflect the Commission's own preliminary views, and do not contain any joint evaluation with the IE DPC*' cannot be understood as meaning that the Commission had not exchanged views with the IE DPC concerning the relevance and application of Opinion 08/2024 to Meta's 'Consent or Pay' advertising model. The fact that the Commission did not engage in a joint evaluation with the IE DPC does not mean that the Commission and the IE DPC have not appropriately informed each other on their respective '*enforcement strategies and/or content, progress, direction and timelines*'<sup>182</sup> of their respective investigations, including by informing each other of their respective preliminary views on Meta's 'Consent or Pay' advertising model in the light of Opinion 08/2024 prior to the adoption of the Commission's Preliminary Findings.
- (267) The fact that the Commission did not engage in a joint evaluation with the IE DPC is inherent in the separate decision-making procedures that these two authorities follow, *i.e.*, the Commission's investigation of Meta's conduct based on Regulation (EU) 2022/1925 and the IE DPC's investigation of Meta's conduct based on Regulation

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<sup>182</sup> Commission's reply to Meta's request of 8 July 2024 under Article 8(5) of Implementing Regulation (EU) 2023/814 relating to the access of file, paragraph 37.



(EU) 2016/679. Meta's argumentation confuses joint evaluation (which did not and should not happen under the applicable legal framework) with close cooperation for the coherent application of Regulation (EU) 2022/1925 and Regulation (EU) 2016/679, which indeed took place.

- (268) The Commission notes that also after the adoption of the Preliminary Findings, it continued to cooperate closely with the IE DPC by organizing several meetings on 28 August 2024, 25 October 2024, and 21 January and 19 March 2025 to discuss their respective investigations, until the adoption of this Decision, in order to fulfil its obligation of sincere cooperation in view of ensuring a coherent application of Regulation (EU) 2022/1925 with Regulation (EU) 2016/679.
- (269) Therefore, the Commission considers that it has appropriately and sufficiently cooperated with the IE DPC, enabling it to ensure a coherent application of Regulation (EU) 2022/1925 with Regulation (EU) 2016/679.
- (270) Accordingly, the Commission finds that the configuration of Meta's 'Consent or Pay' advertising model does not ensure that end users can freely give consent to the combination of their personal data from Meta's Non-Ads Services with personal data from the OAS CPS Meta Ads for the purpose of personalisation of advertisements on Facebook and Instagram environments.

### **5.3. Conclusion**

- (271) In light of the above, the Commission concludes that Meta has not complied with Article 5(2), first subparagraph, of Regulation (EU) 2022/1925, to the extent: (i) that it does not present end users of Meta's Non-Ads Services with the specific choice of a less personalised but equivalent alternative to its Non-Ads Services; and (ii) that the configuration of its 'Consent or Pay' advertising model does not enable end users to freely give consent to the combination of their personal data from Meta's Non-Ads Services with personal data from the OAS CPS Meta Ads, within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679.

## **6. META'S ALLEGATIONS OF PROCEDURAL SHORTCOMINGS**

### **6.1. Meta's arguments**

- (272) In its response to the Preliminary Findings, Meta raised two alleged procedural shortcomings, namely: (i) lack of access to the minutes of Commission's meetings with the IE DPC and the EDPB;<sup>183</sup> and (ii) the fact that access to documents not mentioned in the Preliminary Findings was provided only to Meta's external advisers through a physical data room on the basis of Article 8(2) and (3), point e) of Implementing Regulation (EU) 2023/814,<sup>184</sup> or in other words that Meta was not provided access to non-confidential versions of documents in the Commission's file in Case DMA.100055 that were not quoted in the Preliminary Findings.
- (273) Meta submitted the same procedural claims in its letters of, respectively, 8 July 2024 (to which the Commission replied by letter of 17 July 2024) and 1 August 2024 (to which the Commission replied by email of 30 August 2024). The Commission rejects Meta's claims for the reasons set out in Section 6.2 of this Decision.

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<sup>183</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraph 169(a) [...].

<sup>184</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraph 169(b) [...].

## 6.2. The Commission's assessment of Meta's arguments

(274) In the following sections, after having presented the relevant legal framework concerning access to file under Regulation (EU) 2022/1925 (Section 6.2.1), the Commission states the reasons why it rejects Meta's alleged procedural shortcomings in access to file and why it considers that Meta's right to be heard and effective exercise of its procedural rights have been fully respected (Sections 6.2.2 and 6.2.3).

### 6.2.1. Relevant legal framework and access to file in this case

(275) Regulation (EU) 2022/1925 and its Implementing Regulation (EU) 2023/814 establish a procedural framework tailored to its specific objectives, aiming for a rapid and effective investigatory and enforcement process, while protecting the gatekeeper's right to be heard.<sup>185</sup>

(276) Regulation (EU) 2022/1925 provides for a gatekeeper's access to the file based on two core principles.

(277) **First**, according to Article 8(2) of Implementing Regulation (EU) 2023/814, gatekeepers have the right to obtain from the Commission the non-confidential versions of all documents mentioned in the Preliminary Findings.

(278) **Second**, Article 8(3) of Implementing Regulation (EU) 2023/814 mandates the Commission to provide access to all documents on its file, without any redactions,<sup>186</sup> under terms of disclosure to be set out in a Commission decision. Article 8(3)(a) further provides that access to such documents shall only be granted to a limited number of specified external advisors. Article 8(3)(e) states that the Commission shall specify the technical means of the disclosure and its duration, providing that this '*disclosure may be made by electronic means or (for some or all documents) physically at the Commission's premises*', i.e., in a data room.<sup>187</sup> Accordingly, the specified external advisors get full access to all documents on the file<sup>188</sup> and are able to report back to the gatekeeper by way of a non-confidential data room report. The details of the data room procedure are specified by the Commission in a decision containing the terms of disclosure. The external advisors need to sign a non-disclosure agreement which is annexed to the terms of disclosure decision before entering the data room.

(279) Implementing Regulation (EU) 2023/814 contains certain exceptions:

- Article 8(4) of Regulation (EU) 2023/814 provides that, in exceptional circumstances, the Commission may decide not to grant the addressee of the preliminary findings access to certain documents or to grant access to partly redacted documents if it determines that the harm which the party that submitted the documents in question would likely suffer from disclosure would, on balance, outweigh the importance of the disclosure of the full document for the exercise of the addressee's right to be heard. The Commission may for the same reason decide not to disclose or partly disclose

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<sup>185</sup> Implementing Regulation (EU) 2023/814, recital 3 and Article 8.

<sup>186</sup> Unless the exceptions under Article 8(4) of the Implementing Regulation (EU) 2023/814 apply.

<sup>187</sup> In the present case, the Data Room Decision, C(2024) 4780 final (see recital (20) of this Decision).

<sup>188</sup> Pursuant to Article 34(4), third and fourth sentence, of Regulation (EU) 2022/1925, no access is to be granted to confidential information and internal documents of the Commission or the competent authorities of the Member States, including correspondence between the Commission and the competent authorities of the Member States.

correspondence between the Commission and public authorities of the Member States or of third countries and other types of sensitive documents;

- Article 8(5) of Regulation (EU) 2023/814 provides that the specified external advisors may, within one week of receiving access, make a reasoned request for access to the non-confidential version of any document on the Commission's file not mentioned in the preliminary findings, which can then be made available to the addressee.<sup>189</sup> Such additional access may only be granted 'exceptionally' by the Commission, and provided that it is shown to be 'indispensable' for the proper exercise of the addressee's right to be heard; and
- Article 8(9) of Regulation (EU) 2023/814 provides that *'[a]t any time during the procedure, the Commission may instead of or in combination with the method of granting access to the file [via a data room], give access to some or all redacted documents to avoid a disproportionate delay or administrative burden'*.

(280) In the present case, on 2 July 2024 the Commission provided Meta (and its external advisors) with access to the non-confidential version of the documents mentioned in the Preliminary Findings as required by Article 8(2), with the exception of all correspondence between the Commission and the IE DPC (consisting of the minutes of meetings of 19 January 2024, 13 June 2024, 21 June 2024 and 28 June 2024)<sup>190</sup> which were referred to in Section 2 of the Preliminary Findings.<sup>191</sup>

(281) As set out, in the Terms of Disclosures laid down in the Data Room Decision, the Commission provided access to the rest of the documents in the Commission's file – with the exception of the minutes mentioned in recital (11) of this Decision – to the Specified External Advisers appointed by Meta in a data room at the Commission's premises. Such access took place pursuant to Article 34(4) of Regulation (EU) 2022/1925 and Article 8 of Regulation (EU) 2023/814 and as described in Section 2 of this Decision. The Commission therefore followed the procedure of access to the file as mandated in the Implementing Regulation (EU) 2023/814.

#### 6.2.2. *Lack of access to the Commission's meeting with IE DPC and the EDPB*

##### 6.2.2.1. Lack of access to the minutes of the Commission's meeting with IE DPC

(282) In response to the Preliminary Findings, Meta submitted that the Commission did not grant neither Meta nor its external advisers, access to the minutes of the meetings

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<sup>189</sup> For completeness, they can also ask for an extension of the number of specified external advisers under the same procedural conditions.

<sup>190</sup> For completeness, on 2 July 2024 the Commission also did not provide Meta (and its external advisors) with access to the meetings of the High-Level Working Group for the Digital Markets Act and its sub-group on Digital Markets Act data related obligations of 5 February 2024, 30 April 2024, and 22 May 2024 (see Section 2, recital (12), footnote 29, as well as Section 6.2.2.2 of this Decision) which were also referred to in Section 2 of the Preliminary Findings only to establish that these meetings took place, likewise to the meetings with the IE DPC. As explained in Section 6.2.2.2, the Commission provided Meta (and its specified external advisors) access to these minutes significantly prior to Meta's response to the Preliminary Findings, as soon as they were published without redactions in the Commission's Expert Group Register.

<sup>191</sup> As indicated in the Data Room Decision as well as in the Commission's letter of 17 July 2024 the meetings with the IE DPC were referred to only once in the Section 2 of the Preliminary Findings to establish that these meetings with the IE DPC took place. All the relevant considerations, facts and evidence for the Commission's preliminary assessment are comprehensively laid out in Section 3 onwards in the Preliminary Findings, and no reference to these minutes is made in those sections.

that took place between the Commission and the IE DPC on 19 January 2024, 13 June 2024, 21 June 2024 and 28 June 2024, which were referenced in recital (4) of the Preliminary Findings (and to which Meta requested access in Meta's letter of 8 July 2024).

- (283) According to Article 8(4) of the Implementing Regulation (EU) 2023/81, in exceptional circumstances the Commission may decide not to grant access to certain documents if it determines that the harm that the party that submitted the documents in question would likely suffer from disclosure under those terms would, on balance, outweigh the importance of the disclosure of the full document for the exercise of the right to be heard. The Commission may for the same reason decide not to disclose correspondence between the Commission and public authorities of the Member States (Section 6.2.1).
- (284) In accordance with the Terms of Disclosure laid down in the Data Room Decision, and as explained in its letter of 17 July 2024 in reply to Meta's letter of 8 July 2024, the Commission did not give access to these documents on the basis of Article 8(4) Implementing Regulation (EU) 2023/814. The Commission reiterates that the content of the minutes of its meetings with the IE DPC were not the basis for its preliminary assessment of Meta's compliance with Article 5(2) of Regulation (EU) 2022/1925. The meetings with the IE DPC were held to adhere to the principles of good administration and sincere cooperation, but the Preliminary Findings reflected the Commission's own views, and not a joint evaluation with the IE DPC. Similarly, this Decision, is not based on any information contained in the minutes of those meetings.<sup>192</sup>
- (285) According to Meta, the Commission's justification for not disclosing the minutes is inadequate. Notably, Meta argues that the Commission has a duty to respect its rights of defence '*at all times*'.<sup>193</sup>
- (286) First of all, according to settled case-law of the Court, the general principle of Union law of respect of the rights of the defence, while fundamental, may be restricted, provided that any restrictions correspond to objectives of public interest pursued by the measure in question and do not constitute, in the light of the objectives pursued, a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed.<sup>194</sup>
- (287) In particular, under Article 8(4), first sentence, of Implementing Regulation (EU) 2023/814, the Commission must strike a balance between upholding Meta's individual rights on the one hand and safeguarding the public interests in the

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<sup>192</sup> For the avoidance of doubt, this Decision, is also not based on any information contained in the minutes of meetings with the IE DPC which took place after access to file was granted to Meta, namely, meetings of 28 August 2024, 25 October 2024, 21 January 2025, and 19 March 2025. These meetings were held to adhere to the principles of good administration and sincere cooperation, but this Decision reflects the Commission's own views, and not a joint evaluation with the IE DPC. These minutes are referred to only once in Section 2 of this Decision, to inform Meta that additional meetings with the IE DPC took place after the adoption of the Preliminary Findings. All the relevant considerations, facts and evidence for the Commission's assessment in this decision are comprehensively laid out in Sections 4 and 5 of this Decision, and no reference to these minutes is made in these sections.

<sup>193</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraph 169(a) [...].

<sup>194</sup> Judgments of 26 September 2013, *Texdata Software*, C-418/11, EU:C:2013:588, paragraph 84, and of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 42.

effective enforcement of Regulation (EU) 2022/1925 and Regulation (EU) 2016/679 by the Commission and the IE DPC on the other hand.

- (288) In deciding to strike the balance against disclosure, the Commission considered<sup>195</sup> that providing access to the minutes concerned would hinder the effective enforcement of Regulation (EU) 2022/1925 and Regulation (EU) 2016/679. In particular, disclosure would reveal the IE DPC's and the Commission's respective enforcement strategies and priorities, which could also undermine sincere cooperation between the two authorities, as well as erode trust between them.
- (289) Concerning the possibility of partial disclosure, as also explained in the Commission's letter of 17 July 2024, after a concrete and individual examination of each set of minutes, the Commission concludes that their entire content deals with the IE DPC's and the Commission's respective enforcement strategies and their primary objectives. It is therefore not possible to meaningfully redact certain information without the risk of endangering the enforcement strategies and priorities of the Commission and of the IE DPC. For the same reasons, it was not possible for the Commission to ensure confidentiality by meaningfully summarising the content of such minutes. Therefore, the Commission considers that any partial access to those minutes would not only risk of seriously undermining the legitimate protection of the IE DPC's and Commission's respective enforcement strategies, but also the effective cooperation between the IE DPC and the Commission which is required by Union law and the case-law of the Court as indicated in recital (11) of this Decision. In light of this, the Commission confirmed that Meta should not be granted access, not even in a redacted form, to the correspondence between the Commission and the IE DPC, consisting of the minutes of the meetings of 19 January 2024, 13 June 2024, 21 June 2024, and 28 June 2024.
- (290) In addition, the minutes in question do not contain evidence that was used by the Commission against Meta in its Preliminary Findings nor do they contain evidence that could be used by Meta when responding to the Preliminary Findings. Therefore, the Commission considered that the public interest recalled above outweighed the very limited added value of the disclosure of the documents in question for the purpose of allowing Meta to properly exercise its rights of defence.
- (291) Meta argues that 'it is evident from the clear requirements of Article 5(2) that consent must meet GDPR standards and from the Commission's attempts in the Preliminary Findings to assess the Ads Choice against that requirement, that the discussions with the IE IDPC (and/or the EDPB) must have unavoidably influenced the Commission's position as expressed in the Preliminary Findings'.<sup>196</sup> The IE DPC's views, however, do not form part of the evidentiary basis on which the Commission is enforcing Article 5(2) of Regulation (EU) 2022/1925 and neither does Meta claim that the discussions with the IE DPC were likely to have contained information that would have been favourable to Meta or allowed it to better ensure its right to be heard. As explained in the Terms of Disclosure laid down in the Data Room Decision and also reiterated in the above mentioned follow up exchanges with Meta they were mentioned in the Section 2 on 'Procedure' of the Preliminary

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<sup>195</sup> Data Room Decision C(2024)4780 final, paragraphs 24-25.

<sup>196</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraph 169(a) [...]. Emphasis added.

Findings in application of the Commission's and the IE DPC's respective obligations of sincere cooperation.<sup>197</sup>

- (292) The Commission notes that it is fully competent to interpret and apply Article 5(2) of Regulation (EU) 2022/1925, including where it refers to Regulation (EU) 2016/679 in relation to the notion of consent. Pursuant to the duty of sincere cooperation, the Commission and the IE DPC are required to endeavour to find a common understanding of this notion with the aim to ensure consistency.<sup>198</sup> However, this does not imply any subordinate position on the part of the Commission vis-à-vis the IE DPC (or vice versa), as suggested by Meta's arguments. The interpretation of a provision of Regulation (EU) 2016/679 in the context of a finding of a breach of another instrument of Union law (*in casu* Regulation (EU) 2022/1925) 'does not replace the supervisory authorities' of Regulation (EU) 2016/679, as the Court made clear in the *Meta Platforms* judgment.<sup>199</sup>
- (293) Consequently, the Commission considers that the protection of the public interests regarding the enforcement strategies and priorities of the Commission and the IE DPC outweighs Meta's right to access to such minutes, also considering that, contrary to Meta's contention, the assessment in the Preliminary Findings and this Decision is not based on any information contained in the minutes of the meetings between the Commission and the IE DPC.

#### 6.2.2.2. Alleged lack of access to the minutes of Commission's meeting with the EDPB

- (294) In response to the Preliminary Findings, Meta complains that, pursuant to the Data Room Decision, the Commission did not grant access, to either Meta or its external advisers, to the minutes of the meetings that took place between the Commission and the EDPB. According to Meta, those meetings were explicitly referenced in the Preliminary Findings. Meta requested access to the minutes concerned in its letter of 8 July 2024.<sup>200</sup>
- (295) The Commission understands that Meta means to refer to the meetings of the High-Level Working Group for the Digital Markets Act and its Digital Markets Act data related obligations sub-group of 5 February 2024, 30 April 2024, and 22 May 2024 (see recital (12) of this Decision). For the avoidance of doubt, the Commission never discussed bilaterally<sup>201</sup> with the EDPB its investigation on Meta's 'Consent or Pay' advertising model. The sole discussions on this subject matter took place within the framework of the High-Level Working Group for data related obligations sub-group, with the goal of fostering a consistent regulatory approach across Regulation (EU) 2022/1925 and Regulation (EU) 2016/679.
- (296) **First**, the minutes in question do not contain any evidence that was used by the Commission against Meta in its Preliminary Findings nor do they contain any evidence that could be used by Meta when responding to the Preliminary Findings.

<sup>197</sup> See Judgment of 4 July 2023, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)*, Case C-252/21, EU:C:2023:537, paragraph 52.

<sup>198</sup> See recital 12 of Regulation (EU) 2022/1925 providing that Regulation (EU) 2022/1925 applies without prejudice to the rules resulting from other acts of Union law, in particular Regulation (EU) 2016/679.

<sup>199</sup> Judgment of 4 July 2023, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)*, Case C-252/21, EU:C:2023:537, paragraph 49. See also to that effect the Judgment of 4 October 2024, *Lindenapotheker*, Case C-21/23, EU:C:2024:846, paragraphs 55-56 and 59-60.

<sup>200</sup> Meta's letter of 8 July 2024, paragraph 29(a).

<sup>201</sup> For the avoidance of doubt, the Commission also never discussed the subject matter in trilateral meetings with the EDPB and the IE DPC.

The Commission did not rely on those minutes in its Preliminary Findings nor does it rely on them in the present Decision.<sup>202</sup>

- (297) **Second**, and in any event, while the Commission acknowledges that those minutes were not uploaded to the data room, the Commission indicated in its letter of 17 July 2024 (*i.e.*, prior to Meta's response to the Preliminary Findings) that the minutes of the meetings of the High-Level Working Group and its data-related obligations sub-group which are mentioned in recital (5) of the Commission's Preliminary Findings were published without redactions in the Commission's Expert Group Register and are therefore fully accessible online for Meta and its Specified External Advisers.<sup>203</sup>
- (298) Consistent with settled case-law of the Court, respect for the rights of defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its decision establishing non-compliance.<sup>204</sup> This was the case for Meta. Should the Commission have used such minutes as evidence (*quod non*), the initial omission of these documents from the data room did not prevent Meta from fully exercising its rights of defence given that such minutes were made publicly available well ahead of the deadline for Meta to submit its response to the Preliminary Findings. Therefore, and in any event, Meta was able to effectively respond to the Commission's allegations in its response to the Preliminary Findings.
- (299) In this context, Meta's attempt to use the EDPB's letter of 18 July 2024<sup>205</sup> against the Commission is flawed. The letter, addressed to respectively the Director-General of the Directorate-General for Competition (DG COMP) and the Director-General of the Directorate-General for Communications Networks, Content and Technology (DG CNECT) discusses the potential development of guidelines on the interplay between Regulation (EU) 2022/1925 and Regulation (EU) 2016/679. Notably, the EDPB indicates its openness to collaborating with the Commission on joint guidance, aiming to ensure legal certainty and cross-regulatory consistency, while respecting the distinct roles and independence of both bodies.
- (300) Therefore, the references to '*the constructive exchanges in the context of the DMA High Level Group*' that have been 'instrumental' in promoting regulatory consistency across Regulation (EU) 2022/1925 and Regulation (EU) 2016/679 only serve to confirm the importance of sincere cooperation between the Commission and the EDPB and is not related to the present case.

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<sup>202</sup> For the avoidance of doubt, this Decision is also not based on any information contained in the minutes of meetings within the High-Level Working Group for the Digital Markets Act and its data related obligations sub-group which took place after access to file was granted to Meta, namely, meetings of 20 September 2024, 18 November 2024 and 7 March 2025.

<sup>203</sup> The minutes are available to the following link: <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupId=3904&fromMeetings=true&meetingId=50560>.

<sup>204</sup> Judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, paragraphs 66- 67.

<sup>205</sup> EDPB's Letter of 18 July 2024 to the European Commission concerning Guidelines on the Interplay between Digital markets act (DMA) and GDPR, available at [https://www.edpb.europa.eu/our-work-tools/our-documents/letters/edpbs-letter-european-commission-concerning-guidelines\\_hr](https://www.edpb.europa.eu/our-work-tools/our-documents/letters/edpbs-letter-european-commission-concerning-guidelines_hr), last accessed on 31 March 2025.

6.2.3. *Meta's lack of access to the non-confidential versions of the documents in the Commission's file.*

- (301) According to Meta, most of the documents contained in the Commission's file were not confidential in nature and, therefore, there was no justification for withholding this allegedly non-confidential information from Meta through the organisation of a data room procedure.
- (302) At the outset, the Commission observes that the Implementing Regulation (EU) 2023/814 stresses in its recital 3 that the 'specificities' of Regulation (EU) 2022/1925 call for a procedural framework which ensures a '*rapid and effective [...] enforcement process*', while respecting the rights to be heard. This requires the access to file process to be based on '*clear and proportionate rules*' on the exercise of the gatekeepers' rights to be heard.
- (303) In addition, Meta has not provided to the Commission, either in its letters of 8 July and 1 August 2024 nor in its response to the Preliminary Findings, any evidence demonstrating how the procedure employed by the Commission impaired its right to be heard or how Meta would be able to defend itself better if it had access itself to non-confidential versions of the documents and therefore the criteria laid down in Article 8(5) of the Implementing Regulation (EU) 2023/814 (recital (279), second bullet point, of this Decision) are not met.
- (304) The Commission also observes that Meta cannot rely on Article 8(9) of Implementing Regulation (EU) 2023/814 to have access to the non-confidential versions of the documents in the Commission's file which are not quoted in the Preliminary Findings. The exception under Article 8(9) of the Implementing Regulation (EU) 2023/814 (recital (279), third bullet point, of this Decision) is reserved to the Commission, who can apply it at its discretion for the purposes of administrative efficiency only and on the basis of a case-by-case assessment.
- (305) Finally, contrary to what Meta claims, and as noted in recital (278) of this Decision, the system for providing access to file under the Implementing Regulation (EU) 2023/814 allows for (maximum) disclosure of unredacted information in the Commission's file enabling the specified external advisors to obtain a full and complete overview and understanding of the entire case file while avoiding the need for time-consuming discussions with information providers on the confidentiality of information they submit. The specified external advisors can then communicate their findings and conclusions on documents relevant to Meta's defence rights by means of a non-confidential data room report. This data room report may include data, information or documents from the data room in a summarised, paraphrased and aggregated form.<sup>206</sup> As such, the non-confidential data room report allows Meta to exercise its right to be heard.
- (306) As also noted in the Commission's letter of 17 July 2024, the non-technical nature of the documents in the Commission's file, would have enabled the specified external advisors to summarise each document in a meaningful manner during their access to the Data Room. In this context, the specified external advisors did not claim that the duration of the data room access was insufficient for that purpose, since they did not make use of the full five days available for access, nor did they request additional time to access the data room. Moreover, they extensively reported various statements

<sup>206</sup>

See Section 3 of Annex C, to the Data Room Decision C(2024) 4780 final.



from documents deemed of relevance in the data room report which was subsequently shared with Meta.

- (307) As a result, this system fully respects the gatekeepers' right to be heard, while allowing for the access to file process to be conducted in an expedient manner.

## **7. DURATION OF META'S NON-COMPLIANCE**

- (308) The Commission finds that Meta's non-compliance with Article 5(2) of Regulation (EU) 2022/1925 commenced on the date when that provision became applicable to it, that is on 7 March 2024, which is six months after the OSN CPS Facebook, the OSN CPS Instagram, the OAS CPS Meta Ads, the NIICS CPS Messenger, and the OIS CPS Marketplace were listed in the Designation Decision. The non-compliance lasted at least until 11 November 2024, the day before Meta supplemented its 'Consent or Pay' advertising model with the Additional Ads option. Therefore, the duration of Meta's non-compliance, as established in this Decision, is approximately 8 months.
- (309) The determination of the duration of Meta's non-compliance for the purposes of this Decision is without prejudice to the Commission's assessment as to whether the Additional Ads option, introduced by Meta on 12 November 2024, complies with Article 5(2) of Regulation (EU) 2022/1925.

## **8. ADDRESSEES**

- (310) The Commission concludes that the non-compliance with Article 5(2) of Regulation (EU) 2022/1925 should be imputed to Meta Platforms, Inc., since (i) it was the addressee of the decision designating Meta undertaking as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925, (ii) the legal entity which – for the entire period of the infringement – formulated and rolled out the 'Consent or Pay' advertising model and (iii) the legal entity which (directly or indirectly) wholly owned and continues to fully own Meta Platforms Ireland Ltd, which is the legal entity that operates the CPSs and services concerned by this Decision in the Union.<sup>207</sup>

## **9. FINES**

### **9.1. Principles**

- (311) Under Article 30(1)(a) of Regulation (EU) 2022/1925, the Commission may by decision impose fines on gatekeepers where it finds that the gatekeeper, intentionally or negligently, fails to comply with any of the obligations laid down in Articles 5, 6, and 7, of that Regulation. Fines under Regulation (EU) 2022/1925 are ultimately aimed at ensuring effective compliance by the gatekeepers with their obligations under applicable laws and prevention of non-compliant conduct that could undermine the objectives of applicable law (*i.e.*, in the present case Regulation (EU) 2022/1925).
- (312) According to Article 30(4) of Regulation (EU) 2022/1925, in fixing the amount of a fine, the Commission shall take into account the gravity, duration, and recurrence of

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<sup>207</sup> Form GD, Structure Chart, Annex 1.1 where Meta Platforms Ireland Limited, incorporated in Ireland, is listed among the subsidiaries of Meta Platforms, Inc. [...].

the non-compliance. In general, fines shall be effective, proportionate, and dissuasive.<sup>208</sup> The Commission must ensure that any aggravating or mitigating circumstances are also reflected in the fines imposed. In doing so, the Commission must set the fines at a level sufficient to ensure deterrence.

- (313) Any fine imposed by the Commission shall not exceed 10 % of the gatekeeper's total worldwide turnover in the preceding financial year. Additionally, the Commission must ensure, that its fines are compatible with the principles of equal treatment and proportionality,<sup>209</sup> while having, at the same time, the necessary deterrent effect.<sup>210</sup>

## **9.2. Intent or negligence**

- (314) As mentioned in recital (311) of this Decision, a fine may be imposed on gatekeepers that 'intentionally or negligently' fail to comply with any of the obligations laid down in Articles 5, 6 and 7 of Regulation (EU) 2022/1925.

### *9.2.1. The Commission's position*

- (315) In the present case, the Commission finds that Meta has acted at the very least negligently. In particular, the Commission discussed Meta's compliance solution for Article 5(2) of Regulation (EU) 2022/1925 with Meta on numerous occasions since the SNA option was announced to the Commission in September 2023 (e.g., 27 October 2023, 30 November 2023, 5 February 2024, workshop of 19 March 2024, and state of play meeting of 16 April 2024). Therefore, Meta could or should have known, both at the time the SNA option was announced to the Commission in September 2023 and throughout the period leading up to and following the 7 March 2024 compliance deadline, that the measures outlined in Section 4 of this Decision do not comply with Article 5(2) of Regulation (EU) 2022/1925. Despite these communications, Meta maintained the 'Consent or Pay' advertising model until 11 November 2024 and the non-compliance identified and assessed in this Decision, as described in Section 5, persisted at least until that date.
- (316) Moreover, on 6 March 2024, that is, one day before the obligations of Regulation (EU) 2022/1925 started to apply to Meta, Meta submitted a briefing paper in reply to the Commission's concerns surrounding its 'Consent or Pay' advertising model that contained a proposal for an alternative less-personalised advertisement offering. This proposal, as indicated in Section 2 of this Decision, was based [Confidential – contains business secret].<sup>211</sup> Meta was therefore aware early on what steps it would have to take to comply with Article 5(2) of Regulation (EU) 2022/1925, although it never implemented that less-personalised offering. Meta again made reference to that proposal in its response to the Preliminary Findings.<sup>212</sup> Finally, as explained in

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<sup>208</sup> Judgment of 8 July 2020, *VQ v European Central Bank*, Case T 203/18, EU:T:2020:313, Judgment of 8 July 2020, *CA Consumer Finance v European Central Bank*, Case T-578/18, , EU:T:2020:306 and Judgment of 8 July 2020, *Crédit Agricole v European Central Bank*, Case T-576/18, EU:T:2020:304.

<sup>209</sup> See, for instance and by analogy, Judgment of 9 September 2015, Case T-92/13, *Philips v Commission*, EU:T:2015:605, paragraph 194 and the case-law cited therein.

<sup>210</sup> See, for instance and by analogy, Judgment of 13 July 2011, Case T-59/07, *Polimeri Europa v Commission*, EU:T:2011:361, paragraph 243 and the case-law cited therein.

<sup>211</sup> This proposal of 6 March 2024 was never rolled out. It was a different proposal compared to the Additional Ads option which conversely has been implemented. This proposal is mentioned solely to demonstrate that Meta was aware, or should have been aware, that the 'Consent or Pay' advertising model did not comply with the requirements of Article 5(2) of Regulation (EU) 2022/1925.

<sup>212</sup> In response to the Preliminary Findings, Meta indicated '*that despite Meta's continued belief that the Ads Choice is fully compliant with Article 5(2), Meta has gone as far as to indicate to the Commission*

Section 2 of this Decision, on 12 November 2024 Meta added the Additional Ads option to its ‘Consent or Pay’ advertising model, indicating its awareness of the Commission's concerns regarding the compliance of the ‘Consent or Pay’ advertising model with Article 5(2) of Regulation (EU) 2022/1925.<sup>213</sup>

(317) In addition, as explained in recitals (93)-(94) of this Decision, Meta should have known that, because end users of online services overall have a low willingness to pay for privacy even when they would prefer a less personalised alternative, its ‘Consent or Pay’ advertising model did not allow end users of its Non-Ads Services to make a specific choice for a less personalised but equivalent alternative to those services and to validly consent to the use of their personal data within the meaning of Article 5(2) of Regulation (EU) 2022/1925. In fact, as indicated in recitals (95)-(97) of this Decision, Meta’s internal documents reveal that it was well aware that its ‘Consent or Pay’ advertising model would lead the overwhelming majority of end users of its Non-Ads Services to opt for the With Ads option.

(318) It results from the above that the ‘Consent or Pay’ advertising model rolled out by Meta in September 2023 was never intended to comply with the obligation under Article 5(2) of Regulation (EU) 2022/1925.

#### 9.2.2. *Meta’s arguments*

(319) Meta contests that it could or should have known that its ‘Consent or Pay’ advertising model would be considered non-compliant with Article 5(2) of Regulation (EU) 2022/1925.

(320) **First**, Meta claims that the Commission assessed that model against a new legal framework which had never been clearly articulated before the Preliminary Findings.<sup>214</sup>

(321) **Second**, Meta alleges that that model is in line with Regulation (EU) 2016/679, the *Meta Platforms* judgment, and the findings of numerous supervisory authorities responsible for the application of Regulation (EU) 2016/679, on which Meta was legitimately and reasonably entitled to rely when designing its ‘Consent or Pay’ advertising model.<sup>215</sup>

(322) **Third**, Meta argues that there is inherent uncertainty as to the interpretation of key terms in Article 5(2) of Regulation (EU) 2022/1925 – such as ‘specific choice’, ‘data combination’, and ‘cross-use’ – which *‘is confounded by the confluence of rules under Regulation (EU) 2022/1925 and Regulation (EU) 2016/679’*.<sup>216</sup> In this respect, Meta refers to the EDPB letter of 24 July 2024 (see recital (299) of this Decision) in which, according to Meta, the EDPB acknowledged the challenges in reconciling the obligations under Regulation (EU) 2022/1925 and Regulation (EU) 2016/679.

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*as early as 6 March 2024 – in advance of Meta’s deadline for compliance – that it would be willing to consider an alternative compliance solution that addressed the Commission’s concerns, and to commit substantial resources to ensure that such a solution is launched on a significantly expedited timetable’*, Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 193 [...].

<sup>213</sup> This Decision does not assess the compliance of the Additional Ads option in the form rolled out by Meta as of 12 November 2024, with Article 5(2) of Regulation (EU) 2022/1925 and is without prejudice to the Commission’s ability to investigate the Additional Ads option, or any further changes, and to assess their compliance with Regulation (EU) 2022/1925 at a later stage.

<sup>214</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 177-179 [...].

<sup>215</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraphs 180-183 [...].

<sup>216</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 186 [...].

According to Meta, in this letter, the EDPB acknowledged the Commission's suggestion to discuss guidance on the intersection of the two regulations. In Meta's view, '*if the Commission is seeking regulatory cooperation on the intersection of the GDPR and the DMA*'<sup>217</sup> the relationship between the two is not clear-cut and, therefore, it is unreasonable to expect companies like Meta to understand what is required without guidance. Therefore, according to Meta, the Commission's pursuit of a joint project with the EDPB to provide guidance on this issue contradicts its allegation that Meta should have known how to comply with both regulations. In Meta's view, in the absence of clear guidance, Meta could not know or should not have known that the Commission would consider the 'Consent or Pay' advertising model not to comply with Article 5(2) of Regulation (EU) 2022/1925. This would be particularly so given that Meta dedicated significant time and resources to design a comprehensive solution and to present that solution to the Commission in detail prior to the deadline for compliance.<sup>218</sup>

### 9.2.3. *The Commission's assessment of Meta's arguments*

- (323) The Commission finds that Meta has acted at the very least negligently, as it could not have been unaware<sup>219</sup> that its 'Consent or Pay' advertising model did not comply with Article 5(2) of Regulation (EU) 2022/1925.
- (324) **First**, concerning Meta's argument that the Commission assessed the compliance of its 'Consent or Pay' advertising model against a new legal framework, the Commission observes that the two conditions to ensure compliance with Article 5(2) of Regulation (EU) 2022/1925 are clearly set out in that provision and its accompanying recitals. As regards the first condition, that is 'specific choice', the Commission reiterates its position, explained in 9.2.1 of this Decision, that Meta could not have been unaware that the SNA option of its 'Consent or Pay' advertising model did not present end users of its Non-Ads Services with a specific choice for a less-personalised but equivalent alternative to those services and that it was in fact well aware that that model would lead the overwhelming majority of those end users to opt for the With Ads option. As indicated in recital (317) of this Decision, Meta's 'Consent or Pay' model, was never meant to offer real change or a clear choice to end users, despite the obligation under Article 5(2) of Regulation (EU) 2022/1925. As regards the second condition, that is 'valid consent', Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 cross-refers to well-established notions of Union data protection law.
- (325) **Second**, concerning Meta's argument that its 'Consent or Pay' advertising model is in line with the *Meta Platforms* judgment and the findings of numerous supervisory authorities responsible for the application of Regulation (EU) 2016/679, the Commission observes that Meta failed to identify those supervisory authorities or provide further details about their findings. Furthermore, the Commission points to recitals (99)-(108) of this Decision, which outline why Meta's interpretation of that judgment is not correct.
- (326) Regarding Meta's argument that '*the EDPB Opinion relied upon by the Commission in the PFs was issued almost six weeks after Meta's DMA compliance deadline*', the

<sup>217</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraph 187 [...].

<sup>218</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraphs 184-189 [...].

<sup>219</sup> See e.g., Judgment of 5 December 2023, Case C-807/21, *Deutsche Wohnen SE v Staatsanwaltschaft Berlin*, EU:C:2023:950, paragraph 76 and the case-law cited therein.

Commission notes that Meta was not prevented in any way from bringing its advertising model into compliance with Article 5(2) of Regulation (EU) 2022/1925 after the compliance deadline. In any event, Opinion 08/2024 is only pertinent to the extent that the Commission assessed whether Meta obtained valid consent from end users of its Non-Ads Services whose personal data is processed and combined in the OAS CPS Meta Ads. It has no relevance as regards Meta's failure to comply with the condition that it must offer those end users a less-personalised but equivalent alternative to those services.

- (327) **Third**, the alleged inherent uncertainty of key terms such as 'specific choice', 'data combination' and 'cross-use' does not undermine the Commission's finding that Meta acted at the very least negligently in the present case. As explained in Section 3 of this Decision, the condition of 'specific choice' is clearly distinct from that of 'consent' in Article 5(2), first subparagraph, of Regulation (EU) 2022/1925. As explained in Section (175) of this Decision, the notion of 'specific choice' results in offering a less personalised but (otherwise) equivalent alternative to a service that relies on data combination to service personalised advertising. As regards the notions of 'data combination' and 'cross-use', the Commission observes that they are straightforward notions which are in any event clarified in the recitals of Regulation (EU) 2022/1925. Moreover, as explained in recital (315) of this Decision, Meta took numerous opportunities to clarify its understanding of those notions in light of the consistent exchanges with and recurrent feedback from the Commission. The Commission also points out that Meta has not contested the fact that (at least) a combination of personal data, as defined in Article 5(2) of Regulation (EU) 2022/1925, from Meta's Non-Ads Services with personal data from Meta OAS CPS Meta Ads occurs. Had this not been the case, Meta would not be required to take any compliance measures, including obtaining consent or making payments, pursuant to Article 5(2), first subparagraph, of that Regulation.
- (328) Notwithstanding the Commission's recurrent feedback to Meta indicating that the 'Consent or Pay' advertising model did not appear to comply with Article 5(2) of Regulation (EU) 2022/1925, Meta did not undertake any meaningful changes to that model. The Commission therefore rejects Meta's claims that *'in the absence of clear guidance as to the meaning of terms that are fundamental to the interpretation of Article 5(2), it became evident to Meta that the simplicity and effectiveness of the Ads Choice was the only viable compliant solution open to Meta'*<sup>220</sup>.
- (329) Nor can Meta invoke the potential interplay between Regulation (EU) 2022/1925 and Regulation (EU) 2016/679 in this respect. Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 clearly articulates the relationship between those two instruments: Regulation (EU) 2016/679 is only relevant for interpreting the notion of consent, which is one of the two conditions for the exception from the prohibitions laid down in that subparagraph.
- (330) For the same reason, the Commission rejects Meta's claim of an alleged inconsistency between the fact that the EDPB, in its letter of 24 July 2024 (recital (297)), called on the Commission to work together to provide *'coherent guidance on the intersection of the DMA and the GDPR'* and the Commission's expectation that

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<sup>220</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraph 188 [...]. Emphasis added.

Meta ‘*already navigated the intersection without such guidance*’.<sup>221</sup> In line with its duty of sincere cooperation, the Commission has cooperated with the competent data protection authorities and given due regard to the guidance that they have published which is relevant for the analysis of the condition of ‘consent’ in this Decision.

- (331) Finally, the fact that Meta has dedicated significant time and resources to designing a comprehensive solution and presenting that solution to the Commission in detail prior to the deadline for compliance does not undermine the finding that Meta acted at the very least negligently.<sup>222</sup> As explained in recital (314) of this Decision, the Commission informed Meta early on and repeatedly that its ‘Consent or Pay’ advertising model did not appear to comply with Article 5(2) of Regulation (EU) 2022/1925. Moreover, as explained in recitals (96)-(97) of this Decision, Meta’s internal documents reveal that it was well aware that its ‘Consent or Pay’ advertising model would lead to the overwhelming majority of the end users of its Non-Ads Services within the Facebook and Instagram environments to opt for the With Ads option.
- (332) It follows that Meta could not have been unaware that its ‘Consent or Pay’ advertising model did not comply with Article 5(2) of Regulation (EU) 2022/1925.

### 9.3. Calculation of the fine

#### 9.3.1. Determination of the fine

##### 9.3.1.1. Gravity of the non-compliance

##### 9.3.1.1.1. The Commission’s position

- (333) Regulation (EU) 2022/1925 lists the gravity of the non-compliance as one of the key criteria for determining the level of the fine for non-compliance with its obligations. In the present case, the Commission concludes that several factors are relevant to assess the gravity of Meta’s non-compliance with Article 5(2) of Regulation (EU) 2022/1925 in relation to its ‘Consent or Pay’ advertising model:
- (334) **First**, Meta’s non-compliance with Article 5(2) of Regulation (EU) 2022/1925 covered the whole of the Union, since the ‘Consent or Pay’ advertising model was rolled out at the same time across the entire European Region.
- (335) **Second**, Meta’s non-compliance with Article 5(2) of Regulation (EU) 2022/1925 affects a very significant number of end users. As explained in recital (74) of this Decision, Meta reported on 21 April 2024 a total of approximately [>45 million] adult MAUs registered for the Facebook environment and a total of approximately [>45 million] adult MAUs registered for the Instagram environment.<sup>223</sup> Virtually all<sup>224</sup> those end users were presented with the ‘Consent or Pay’ advertising model as from 3 November 2023 (Section 2) and, therefore, they were not given a specific choice of a less personalised but equivalent alternative to Meta’s Non-Ads Services, nor were they able to validly consent to the combination of their personal data from those service with personal data from Meta’s OAS CPS Meta Ads.<sup>225</sup> Even those end

<sup>221</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 187 [...].

<sup>222</sup> Meta’s Response to the Commission’s Preliminary Findings, 5 August 2024, paragraph 188 [...].

<sup>223</sup> Meta’s reply to question 1(a) of RFI 22 April 2024 [...].

<sup>224</sup> A *de minimis* number of end users may possibly not have been prompted with the ‘Consent or Pay’ model due to compatibility issues with their outdated mobile versions, which are incapable of supporting updates introduced by Meta.

<sup>225</sup> Meta’s reply to question 1(a) of RFI 22 April 2024 [...].

users that were not presented with the ‘Consent or Pay’ advertising model, if any, were also affected by the lack of a specific choice, since only a version of the Non-Ads Service with personalised advertising was available to them during the period of non-compliance. Regardless of whether there are overlaps between end users of the Facebook and Instagram environments,<sup>226</sup> it can be concluded that Meta’s non-compliance with Article 5(2) of Regulation (EU) 2022/1925 affected a very significant number of end users, since each environment on its own has user numbers exceeding [>45 million].

- (336) When assessing the gravity of Meta’s non-compliance with Article 5(2) of Regulation (EU) 2022/1925, the Commission must ensure that fines have a sufficiently deterrent effect in relation to Meta, but also in relation to other designated gatekeepers to avoid future breaches of Regulation (EU) 2022/1925. In that regard, the link between, on the one hand, the undertaking’s size and global resources and, on the other, the need to ensure that a fine has a deterrent effect cannot be denied. Accordingly, when the Commission calculates the amount of the fine it may take into consideration, *inter alia*, the size and the economic power of the undertaking concerned.<sup>227</sup>
- (337) Meta is one of the largest technology companies in the world by turnover: in the financial year 2024 its total worldwide turnover amounted to USD 164.5 billion<sup>228</sup> (approximately EUR 152.0 billion).<sup>229</sup> As of the end of December 2024, Meta had an estimated market capitalisation of USD 1 480 billion (approximately EUR 1 425 billion),<sup>230</sup> making it the world’s seventh most valuable company by market capitalisation.<sup>231</sup> As a result, Meta can be regarded as a very large company with significant economic power.
- (338) In light of the above, the gravity of Meta’s non-compliance with Article 5(2) of Regulation (EU) 2022/1925 should be considered as serious.

#### 9.3.1.1.2. Meta’s arguments

- (339) In its response to the Preliminary Findings, Meta indicated that the gravity of the alleged non-compliance should not be determined by the (perceived) importance of the objectives of the legislation in question and must vary between instances of non-compliance.

<sup>226</sup> While the Commission is aware of possible double counting in relation to end users (*i.e.*, a single user might be counted as a monthly active user on both Facebook and Instagram) the figures above show that, even assuming, unrealistically, a full overlap between the MAUs of Instagram and Facebook, Meta’s non-compliance with Article 5(2) of Regulation (EU) 2022/1925 would still affect a very significant number of end users.

<sup>227</sup> See, by way of analogy, Judgment of 12 December 2012, *Electrabel v Commission*, Case T-332/09, EU:T:2012:672, paragraph 282.

<sup>228</sup> Meta’s Form 10-K Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934 for the fiscal year ended 31 December 2024, pages 59 and 60, accessible at: <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/a8eb8302-b52c-4db5-964f-a2d796c05f4b.pdf> (last accessed on 31 March 2025) [...]. European Central Bank (‘ECB’) exchange rate for 2024 was on average USD 1 = EUR 0.9239 [...].

<sup>229</sup> ECB exchange rate of 31 December 2024 was USD 1 = 0.9626 [...].

<sup>230</sup> Yahoo Finance, Statistics, accessible at <https://finance.yahoo.com/quote/META/key-statistics/>, last accessed 31 March 2025 [...]. ECB exchange rate of 7 November 2024 is USD 1 = EUR 0.9272 [...].

<sup>231</sup> Companies Market Cap, ‘Market Cap’, accessible at: <https://companiesmarketcap.com/meta-platforms/marketcap/>, last accessed on 31 March 2025 [...].

- (340) Furthermore, Meta contests that the assessment of the gravity of the non-compliance should not take into account the SNA option's user uptake figures because Regulation (EU) 2022/1925 does not impose obligations of results, nor does it require that a particular compliance solution is taken up by an arbitrary and unspecified minimum number of users.<sup>232</sup>

9.3.1.1.3. The Commission's assessment of Meta's arguments

- (341) The explanation provided in Section 9.3.1.1.1 of this Decision to assess the gravity of Meta's non-compliance in the present case does not consider the (perceived) importance of the legislative objectives. Meta's argument on this point is therefore moot.
- (342) As regards Meta's claim regarding the very low uptake of the SNA option, as indicated in recitals (95)-(97) and (317) of this Decision, the Commission considers that the total number of users exposed to Meta's non-compliant conduct is the relevant benchmark to take into consideration to assess the gravity of Meta's non-compliance, regardless of those users' actual behaviour when confronted with that conduct.

9.3.1.2. Duration

- (343) The Commission finds that Meta's non-compliance with Article 5(2) of Regulation (EU) 2022/1925 in relation to its 'Consent or Pay' advertising model, as established by this Decision, commenced on 7 March 2024, when the obligations of that Regulation, including those pursuant to Article 5(2) thereof, began to apply to Meta. Meta's non-compliance lasted at least until 11 November 2024, the day before Meta supplemented its 'Consent or Pay' advertising model with the Additional Ads option. Therefore, the duration of Meta's non-compliance, as established in this Decision, is approximately 8 months.
- (344) The Commission therefore considers that Meta's non-compliance is of medium duration.

9.3.1.3. Recurrence

- (345) The recurrence factor is not relevant in the present case, since this is the first decision addressed to Meta under Article 29(3) of Regulation (EU) 2022/1925. To date, no other decision pursuant to Articles 29 or 30 of that Regulation has been adopted in relation to Meta.

9.3.1.4. Other relevant factors for the amount of the fine

9.3.1.4.1. Aggravating circumstances

- (346) The Commission considers that there are no aggravating circumstances in this case.

9.3.1.4.2. Mitigating Circumstances

9.3.1.4.2.1. The Commission's position

- (347) The Commission considers that the following mitigating circumstances apply in this case:

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<sup>232</sup> Meta's Response to the Commission's Preliminary Findings, 5 August 2024, paragraphs 191-192 [...].



- (348) **First**, Regulation (EU) 2022/1925 has established a new framework governing the designation of gatekeepers and the obligations applicable to them.<sup>233</sup> This Decision is also among the very first non-compliance decisions adopted under Regulation (EU) 2022/1925, and specifically Article 5(2) thereof. The Commission considers that this should be taken into account when assessing Meta's compliance with Article 5(2) of Regulation (EU) 2022/1925 at this point in time. The Commission therefore takes this factor into account when fixing the level of the fine.
- (349) **Second**, the Commission acknowledges that, in addition to ensuring compliance with the obligation set out in Article 5(2) of Regulation (EU) 2022/1925, Meta also had to ensure compliance with Regulation (EU) 2016/679.
- (350) In particular, Meta is subject, since 31 December 2022, to two orders made by the IE DPC, following a binding decision from the EDPB of 5 December 2022<sup>234</sup>, requiring Meta to take any necessary action to address the EDPB's finding that Facebook and Instagram are not entitled to carry out the processing of personal data for the purposes of behavioural advertising on the basis of Article 6(1)(b) of Regulation (EU) 2016/679 (*i.e.*, 'performance of a contract' basis).<sup>235</sup>
- (351) In addition, following the *Meta Platforms* judgment in July 2023, such processing of personal data in principle cannot be justified on the basis of Article 6(1)(f) of Regulation (EU) 2016/679 (*i.e.*, 'legitimate interests' basis),<sup>236</sup> which led the EDPB to issue Urgent binding decision 1/2023 for the ordering of final measures regarding Meta Platforms Ireland.<sup>237</sup> Therefore, in addition to offering the end users of the Facebook and Instagram environments the specific choice to access those services with or without the processing and combination of their personal data for the purpose of personalising advertisements, Meta had to bring any such processing into compliance with Regulation (EU) 2016/679.
- (352) In this specific context, Article 5(2) of Regulation (EU) 2022/1925 and Regulation (EU) 2016/679 require Meta to devise a nuanced compliance strategy. While, as mentioned in recital (316) of this Decision, Meta was or should have been aware that its 'Consent or Pay' advertising model did not comply with Article 5(2) of Regulation (EU) 2022/1925, the Commission acknowledges that the interplay between Regulation (EU) 2022/1925 and Regulation (EU) 2016/679 created a multifaceted regulatory environment and added complexity for Meta to design its advertising model in a manner compliant with both regulations. Accordingly, the Commission will take this element into account when fixing the level of the fine.

#### 9.3.1.4.2.2. Meta's arguments

- (353) In response to the Preliminary Findings, Meta considers that, as regards mitigating circumstances, the Commission should take at the very least into consideration the following elements:
- (a) Meta approached the Commission proactively to brief it on its 'Consent or Pay' advertising model (*i.e.*, *Ads Choice*) proposal as early as 7 September 2023, as

<sup>233</sup> Judgment of 17 July 2024, *Bytedance v Commission*, Case T-1077/23, EU:T:2024:478, paragraph 233.

<sup>234</sup> Binding Decision 4/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Instagram service (Art. 65 GDPR).

<sup>235</sup> Decision of the IE DPC dated the 31<sup>st</sup> December 2022, inquiries (IN-18-5-5) and (IN-18-5-7).

<sup>236</sup> See paragraph 126 of the *Meta Platforms* judgment.

<sup>237</sup> Urgent Binding Decision 01/2023 requested by the Norwegian SA for the ordering of final measures regarding Meta Platforms Ireland Limited (Art. 66(2) GDPR) of 27 October 2023.

soon as it became apparent that Meta would have to launch that solution in light of the requirements of Regulation (EU) 2016/679, pointing out that Meta received no feedback from the Commission for over two months; and

- (b) despite Meta's continued belief that the 'Consent or Pay' advertising model is fully compliant with Article 5(2) of Regulation (EU) 2022/1925, Meta has gone as far as to indicate to the Commission as early as 6 March 2024 – in advance of Meta's deadline for compliance – that it would be willing to consider an alternative compliance solution that addressed the Commission's concerns, and to commit substantial resources to ensure that such a solution is launched on an expedited timetable. According to Meta, based on these elements *'taken together, it is clear that it would be manifestly ill-founded to impose upon Meta the maximum possible fine in the event of a non-compliance decision'*.<sup>238</sup>

#### 9.3.1.4.2.3. The Commission's assessment of Meta's arguments

- (354) The Commission notes, first of all, that, as indicated in Section 9.4 of this Decision, it has decided not to impose the maximum possible fine allowed under Article 30(1) of Regulation (EU) 2022/1925.
- (355) Beyond that, the Commission does not consider that Meta's interactions with the Commission amount to a mitigating factor in the present case that should lead to a further reduction of the fine. Meta's interactions with the Commission correspond to good faith interactions with the Commission as the regulator enforcing Regulation (EU) 2022/1925 and did not go beyond its obligation stemming from the duty to cooperate in a non-compliance investigation. Additionally, the Commission notes that Meta unilaterally rolled out the Additional Ads option while it was still discussing the matter with the Commission.
- (356) As regards Meta's claim that it briefed the Commission on its 'Consent or Pay' advertising model as a compliance solution on 7 September 2023, but did not receive feedback for over two months,<sup>239</sup> the Commission notes that in the meeting of 7 September 2023 in which Meta announced that it would implement the SNA option as from November 2023, the Commission took note of Meta's proposal and informed Meta that the proposal would need to be assessed under Article 5(2), first subparagraph, of Regulation (EU) 2022/1925 and discussed at a subsequent meeting.
- (357) In a follow up meeting on 27 October 2023, *i.e.*, prior to Meta implementing the SNA option, the Commission expressed doubts about the compatibility of Meta's compliance proposal with Article 5(2), first subparagraph, of Regulation (EU) 2022/1925.
- (358) Additionally, after Meta had publicly announced the roll out of the SNA option on 30 October 2023, the Commission sent Meta the first request for information on 23 November 2023 to seek a number of clarifications on such option,<sup>240</sup> and followed up with a meeting on 30 November 2023, in which the Commission reiterated its doubts about the compliance with Article 5(2) of the SNA option. The Commission

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<sup>238</sup> Emphasis added.

<sup>239</sup> Meta did not provide in response to the Preliminary Findings any indication on when in their view the Commission provided first feedback on the 'Consent or Pay' model.

<sup>240</sup> The Commission followed up to this RFI with a meeting with Meta which took place on 30 November 2023 during which the 'Consent or Pay' advertising model was discussed.

therefore reacted to Meta's brief on its 'Consent or Pay' advertising model swiftly, before its implementation and well before the compliance deadline of 7 March 2024. Meta did not adjust its compliance solution despite this feedback.

- (359) In any event, Meta does not substantiate that the alleged two-month period would have constituted an exceptional delay that negatively impacted on Meta's ability to comply with its obligations under Article 5(2) of Regulation 2022/1925 in time by 7 March 2024.<sup>241</sup>

#### 9.3.1.5. Conclusion

- (360) In view of the above, the Commission considers that Meta has, at the very least negligently, not complied with Article 5(2) of Regulation (EU) 2022/1925. Meta's non-compliance with that provision is serious as it covered the entirety of the Union and affected a significant number of end users in the Union. Meta's non-compliance is of medium duration. Furthermore, Meta is a large undertaking, with substantial resources, including legal resources. Finally, the Commission has taken into account the mitigating circumstances that this Decision is among the very first non-compliance decisions adopted under Regulation (EU) 2022/1925 and that Meta had to design its compliance solution in a complex multifaceted regulatory environment.

#### 9.4. Amount of the fine

- (361) In view of the criteria described in recitals (315)-(360) of this Decision, the Commission considers it appropriate to impose a fine under Article 30(1) of Regulation (EU) 2022/1925 representing EUR 200 000 000.
- (362) Meta's turnover in the business year ending 31 December 2024 was USD 164.5 billion (approximately EUR 152.0 billion).<sup>242</sup> The final amount of the fine set is thus below 10 % of that figure which is the maximum fine that could be imposed pursuant to Article 30(1) of Regulation (EU) 2022/1925.

#### 10. CEASE AND DESIST

- (363) Pursuant to Article 29(5) of Regulation (EU) 2022/1925, in the non-compliance decision, the Commission shall order the gatekeeper to cease and desist with the non-compliance within an appropriate deadline and to provide explanations on how it plans to comply with that decision.
- (364) In Section 7 of this Decision, the Commission established that Meta's non-compliance with Article 5(2) of Regulation (EU) 2022/1925 commenced on 7 March 2024 and lasted until 11 November 2024 the day before Meta supplemented its 'Consent or Pay' advertising model with the Additional Ads option. This Additional Ads option is not covered by this Decision and the Commission therefore has not assessed whether it results in the termination of Meta's non-compliance with Article 5(2) of Regulation (EU) 2022/1925. Moreover, Meta itself in the 2025 Compliance Report insists that in their view 'Consent or Pay' is the way to comply with Article

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<sup>241</sup> See, by way of analogy, Judgment of 17 December 1998, *Baustahlgewebe v Commission*, Case C-185/95 P, EU:C:1998:608, paragraph 29 and Judgment of 1 July 2008, *Compagnie maritime belge SA v Commission of the European Communities*, Case T-276/04, EU:T:2008:237, paragraph 220.

<sup>242</sup> Source: Meta's Annual Report on Form 10-K, as filed with the US Securities and Exchange Commission, available at <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/a8eb8302-b52c-4db5-964f-a2d796c05f4b.pdf> (last accessed on 31 March 2025) [...].

5(2) of Regulation (EU) 2022/1925.<sup>243</sup> Accordingly, the Commission considers that it is possible that Meta's non-compliance is ongoing.

- (365) On that basis, to the extent that Meta has not done so, it is necessary to order Meta to bring its non-compliance described in this Decision effectively to an end within 60 calendar days from the date of the notification of this Decision (the 'Cease and Desist Order').
- (366) In addition, it is necessary to ensure that Meta shall refrain from repeating any conduct constituting non-compliance with Article 5(2) of Regulation (EU) 2022/1925, as well as from any conduct having the same or equivalent object or effect.
- (367) To comply with the Cease and Desist Order, in line with the principles mentioned in the Preliminary Findings communicated to Meta on 1 July 2024, Meta should offer end users of its Facebook and Instagram environments, whose personal data obtained by Meta via its Non-Ads Services is combined with personal data obtained via its OAS CPS Meta Ads, with a less personalised, but equivalent alternative to the With Ads option, displaying the following characteristics:
- (a) any such alternative should be presented in a neutral manner and choice flows should allow end users to freely choose to opt-in to that alternative;
  - (b) to the extent that the alternative involves the serving of advertisements to end users of the Facebook and Instagram environments, it may not involve the processing of personal data which is subject to the requirements of specific choice and end user consent under Article 5(2) of Regulation (EU) 2022/1925; and
  - (c) that alternative should be equivalent to the service for consenting users, except as regards the amount of personal data used but including, for example, in terms of performance, experience and conditions of access, and therefore should not be provided against a fee so long as the service for consenting users is not provided against a fee.

## 11. PERIODIC PENALTY PAYMENTS

- (368) While maintaining its position that its 'Consent or Pay' advertising model complies with Article 5(2), first subparagraph, of Regulation (EU) 2022/1925, Meta has, as of 6 March 2024, initiated a dialogue with the Commission and provided the Commission with a number of presentations and spontaneous submissions describing a new model providing for an Additional Ads option that could be added to the binary options of the 'Consent or Pay' advertising model (*i.e.*, the SNA Option and the With Ads Option), and which aims at addressing the Commission's concerns as regards the 'Consent or Pay' advertising model.<sup>244</sup>

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<sup>243</sup> Meta's 2025 Compliance Report, pp. 3 and 14 [...].

<sup>244</sup> On 4 March, Meta submitted a 'Briefing Paper: Proposal for a less personalised Ads offerings', [...]. On 14 May 2024, Meta submitted a slide deck, [Confidential – contains business secret] [...]. On 5 June, Meta submitted a 'Briefing Paper on its "Less Personalised Ads" Proposal', [...]. On 10 June 2024, Meta submitted a "Note on why Meta's Less Personalised Ads Proposal satisfies the requirements of GDPR and the guidance set out in the EDPB Opinion", [...]. On 29 August 2024, Meta has come with further proposed changes to their 'Less personalised ads' proposal, [...]. On 25 September 2024, the Commission sent written questions to Meta on the Additional Ads option, [...]. On 3 October 2024,

- (369) The initial proposal on 6 March 2024 presented to the Commission by Meta has, throughout Meta's various submissions, evolved substantially in both architecture and scope following discussions with the Commission. In that regard, in November 2024, as noted in recitals (25)-(26) of this Decision, a version of the Additional Ads option was launched for Meta's end users who choose to use Facebook and Instagram for free with advertisements.<sup>245</sup> As recalled, Meta claims that this option uses less personal data for the purpose of serving advertisements. The new option also introduces 'ad breaks', that is to say that end users who select the Additional Ads option may be shown advertisements in the form of unskippable interruptions while using Meta's Facebook or Instagram OSN CPSs and other integrated Non-Ads Services.
- (370) This Decision does not assess the compliance of the Additional Ads option in the form rolled out by Meta as of 12 November 2024 with Article 5(2) of Regulation (EU) 2022/1925. However, and without prejudice to any further assessment of that new option, the Commission notes that the Additional Ads option is an attempt by Meta to respond to the Commission's concerns regarding the absence of a specific choice including a less personalised but equivalent alternative service as required by Article 5(2) of Regulation (EU) 2022/1925.
- (371) Meta presents the Additional Ads option to end users in a choice flow which consists of two broad steps:
- (a) First, and following an initial prompt informing end users that they are about to enter a review of their advertising experience, end users can select between the SNA option and the With Ads option (while being informed of the possibility to select the Additional Ads option at a later step). If the end users select the With Ads option, they are required to click on a 'Agree' button before being directed to the second step; and
  - (b) Second, after choosing the With Ads option, end users are invited to manage their advertising experience. If they do not dismiss the invitation, they may choose between staying with the With Ads option (and see personalised advertisements) or switching to the Additional Ads option (and see less personalised advertisements).
- (372) In the second step of this choice flow, the Commission notes that on the window where end users may switch from the With Ads option to the Additional Ads option, Meta pre-selects by default the With Ads option and that end users can dismiss the window by simply clicking on a button on the upper corner instead of clicking on a 'Confirm' button.<sup>246</sup> This pre-selection could fall short of complying with the requirements to ensure end users are presented with a specific choice and provide valid consent to the combination of their personal data from Meta's Non-Ads

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Meta submitted an additional briefing paper on Meta's revised Less Personalized Ads Proposal. On 29 October 2024, the Commission sent written questions to Meta on the 'Additional Ads option [...]'. On 15 November 2024, Meta submitted a [Confidential – contains business secret], [...]. On 9 December 2024, the Commission sent to Meta a request for information regarding the data usage, User ID, Ad breaks, testing and roll-out of the Additional Ads option (Post-opening RFI 3), [...]. On 13 February 2025, the Commission sent to Meta a request for information regarding the functioning and the roll-out of the Additional Ads option (Post-opening RFI 4), [...].

<sup>245</sup> Likewise to the 'Consent or Pay' advertising model, the Additional Ads option was released to users residing in the European Region.

<sup>246</sup> Meta's reply to the RFI of 9 December 2024 tranche 1, Figures 1 to 4 [...].

Services with personal data of OAS CPS Meta Ads for the purpose of personalisation of advertisements.

- (373) For these reasons alone, it cannot be excluded that Meta's Additional Ads option does not comply with this Decision. Moreover, as recalled in Section 10 of this Decision, in their 2025 Compliance Report, Meta insists that despite offering the Additional Ads option, in their view 'Consent or Pay' is the sufficient way to comply with Article 5(2) of Regulation (EU) 2022/1925.<sup>247</sup> Based on this position, in the view of Meta any modifications to or the repeal of the Additional Ads option would not affect their compliance with Article 5(2) of that Regulation, which puts into question the stability of the Additional Ads option supplementing Consent or Pay.
- (374) Accordingly, the Commission cannot exclude, at this point in time, that Meta's non-compliance with Article 5(2) of Regulation (EU) 2022/1925 is on-going. Therefore, it is necessary to impose periodic penalty payments pursuant to Article 31(1), point (h), of Regulation (EU) 2022/1925 should the Additional Ads option fail to comply with Article 5(2) of Regulation (EU) 2022/1925 and should Meta fail to implement measures that bring its infringement of that provision effectively to an end within 60 calendar days from the date of notification of this Decision.
- (375) Any periodic penalty payments that may be definitely set should be sufficient to ensure compliance by Meta with this Decision and may take account of Meta's significant financial resources (see recitals (336)-(337) of this Decision).

HAS ADOPTED THIS DECISION:

#### *Article 1*

Meta Platforms, Inc., has not complied with Article 5(2) of Regulation (EU) 2022/1925 from 7 March 2024 until 11 November 2024.

#### *Article 2*

For the non-compliance referred to in Article 1, a fine of EUR 200 000 000 is imposed on Meta Platforms, Inc.

The fine shall be credited, in euros, within three months of the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE CENTRALE DU Luxembourg  
2, Boulevard Royal  
L-2983 Luxembourg

IBAN: LU27 9990 0001 1400 100E  
BIC: BCLXLULL  
Ref.: EC/BUFI/DMA.100055

After the expiry of that period set out in the second paragraph, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

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<sup>247</sup> Meta's 2025 Compliance Report, pp. 3 and 14 [...].

Where an action pursuant to Article 263 of the Treaty on the Functioning of the European Union is brought before the Court of Justice of the European Union against this Decision, the fine shall be covered by its due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council.<sup>248</sup>

### *Article 3*

Meta Platforms, Inc., shall within 60 days of notification of this Decision, bring effectively to an end the non-compliance of Article 5(2) of Regulation (EU) 2022/1925 referred to in Article 1.

Meta Platforms, Inc., shall provide the Commission with explanations on how they plan to comply with this Decision within 60 calendar days from the date of the notification of this Decision.

Meta Platforms, Inc shall refrain from repeating any conduct described in Article 1, and from any conduct having the same or equivalent object or effect.

### *Article 4*

If Meta Platforms, Inc., fails to comply with Article 3 within 60 calendar days from the date of notification of this Decision, it shall incur a periodic penalty payment not exceeding the limit stipulated in Article 31(1) of Regulation (EU) 2022/1925, from the date on which it is required to bring the non-compliance effectively to an end pursuant to Article 3, until the date on which it complies with the Decision.

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<sup>248</sup> Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (OJ L, 2024/2509, 26.9.2024, ELI: <http://data.europa.eu/eli/reg/2024/2509/oj>).

*Article 5*

This Decision is addressed to Meta Platforms, Inc., 1601 Willow Road, Menlo Park, California, 94025, United States of America.

Done at Brussels, 23.4.2025

*For the Commission*

*Signed*  
*Henna VIRKKUNEN*  
*Executive Vice-President*